POLICY ROUNDTABLES

Concessions

2006

Introduction

The OECD Competition Committee debated concessions in February 2006. This document includes an executive summary and the documents from the meeting: an analytical note by Ms. Sally van Siclen of the OECD, written submissions from Brazil, the Czech Republic, France, Indonesia, Mexico, the Netherlands, Romania, Russia, Tunisia, Turkey, and the United States, as well as a paper from Mr. Alberto Heimler. An aide-memoire of the discussion is also included.

Overview

Governments have long been engaged in providing goods or services to their citizens that could, in some form, be provided by the private sector. The trend over the past few decades, however, has been to transfer these functions, and the state-owned assets used to provide them, to private hands. The most common method, and the one usually preferred, is privatisation, or outright sale or transfer of ownership of the relevant assets to one or more private parties. Another method is concessions.

Concessions are often viewed as a substitute for privatisation when the latter is not feasible for political or legal reasons. Concessions are not substitutes for regulation. Where there is a need for regulation, as in a situation of natural monopoly, a regulatory regime may be created along with the concession.

Related Topics

Competition Policy and Concessions (2007)
Competition in Bidding Markets (2006)
Competition Policy and Procurement Markets (1998)

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CONCESSIONS

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FOREWORD

This document comprises proceedings in the original language of a Roundtable on Concessions which was held at the Global Forum on Competition in February 2006.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled " Competition Policy roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue originale dans laquelle elle a été soumise, relative à une table ronde sur les concessions, qui s'est tenue lors du Forum Mondial sur la Concurrence en février 2006.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegates' written submissions and the Secretariat's background paper, several key points emerge:

*(1) A concession is an alternative to privatisation as a means of transferring the responsibility for operating state-owned assets to private hands. It is often employed in a natural monopoly or infrastructure setting, where competition **in** the market is difficult or impossible. It is a form of providing competition **for** the market, which provides many of the same benefits for consumers.*

An accepted definition of a concession is: a grant to a private firm of the right to operate a defined infrastructure service and to receive revenues deriving from it. A concession could be granted to operate an airport, for example, or to provide water to a municipality. There could be many parameters to the concession, including specification of tariffs, of investment, of levels of service or of fees to be paid to the government. The agreement is of limited duration, typically from 5 to 30 years. Usually, a concessionaire pays a fee to the concession-granting authority and then makes investments and collects payments from users over time.

Governments enter into concession agreements for various reasons, among them to raise revenue and to achieve efficiencies by placing operation of the assets in private hands. Concessions are not a substitute for regulation, however, and they may be accompanied by the creation of an appropriate regulatory regime. Finally, in certain situations privatisation or concessioning may not be preferable to continued public provision. This may exist where the assets are natural monopolies, when the opportunity for cost reduction stemming from reductions in quality is high and there is no way to reward quality improvements.

(2) The design of a concession is a critical first stage in the process. It should be done in a way that maximises the opportunity for competition.

Designing a concession is a highly complex undertaking, possibly involving many considerations. One of the most important is to ensure that post-award there is as much competition in the market as possible. This may require, for example, a vertical split – separating the operation of any natural monopoly component from other parts of the sector where competition is possible. It may require a horizontal split – creating more than one entity to operate in competitive segments of a market. Here there may exist tension between the goal of providing for competition post-award and the government's goal of realising maximum revenue from the concession. The preference should be for competition in these situations.

Another factor in the design is the length in time of a concession contract. A longer period – say, 30 years – would encourage the concessionaire to make necessary investments in the infrastructure at the beginning of the period, but that incentive diminishes near the end of the period. There has been some experimentation with shorter periods, especially in situations where there is considerable uncertainty about future market developments. A shorter period places the burden of that uncertainty on the government in the short run, but it will increase certainty in the competition for the subsequent concession.

Concessioning may take place in the context of a broader market reform, including the creation of a new sector regulator. It is important that the regulator, if there is to be one, be created before the concession is awarded, again to reduce uncertainty.

*(3) The second stage in the process is the award of the concession. Again, it is a highly critical one. It is at this stage that competition **for** the market occurs.*

Economic literature points strongly toward auctions as the most effective means of awarding concessions. Designing the auction is critical, however. A faulty auction design will negate the potential benefits of the process. One important factor in this regard, of course, is to minimise the opportunity for collusion among bidders. Opportunities for signaling among bidders should be reduced, and the benefits of cheating against a cartel should be enhanced. Measures should also be taken to encourage entry, that is, to encourage the participation of as many bidders as possible. This can include wider advertisement of the auction, reducing the cost of bid preparation and reducing informational advantages of incumbents.

Other means of awarding concessions are negotiation, either with more than one applicant simultaneously or sequentially, and a "beauty contest," or evaluation of competitors on the basis of pre-defined criteria, such as technical expertise, financial viability and network coverage. Experience has shown in some countries that government negotiators are sometimes disadvantaged as against their private sector counterparts, perhaps both because they lack important industry expertise and because their goals are more diffuse than those of the private sector, which focuses solely on maximising profits. Further, corruption is a distinct possibility in some countries. It should be frustrated as much as possible by, for example, a formal, transparent award process and vigorous enforcement of anti-corruption laws.

The award should minimise as much as possible the opportunity for renegotiation post-award by the winning bidder. Such renegotiations can negate the benefits of the competition at the award stage. The concessionaire may be in position to "hold up" the government in renegotiation if re-opening the award process is not feasible. Of course, since concession contracts are incomplete, that is, not all terms of the arrangement can be known at the time of the award, renegotiation may be inevitable to some extent.

(4) The competition agency should be involved in the concessioning process, preferably as early as possible through competition advocacy in the design and award stages.

The competition agency has important expertise that can be applied early in the concessioning process. It can assist the concessioning agency in designing the structure of the concession to maximise post-award competition. It can advise on the award process, particularly in the selection of the most efficient means of award and on minimising the opportunities for collusion. If the process includes the creation of a regulatory regime, the agency can provide input there as well, for example on the most efficient type of price regulation. Its cadre of expert micro economists may be unmatched elsewhere in government. It will not be sufficient for the agency merely to say, "Competition is good," however. It must strive to acquire some technical expertise in the sector involved, both to give the agency credibility and to enhance the usefulness of its advice.

(5) Finally, the competition agency must vigorously enforce the competition law throughout the process.

There should be no exemptions or exclusions from the competition law in sectors where there are concessions – the competition law should apply fully to them. The competition agency should of course be alert to the possibility for collusion at the award stage as well as post-award, in those parts of the sector where competition exists. Where the concessionaire is a monopolist the agency may have occasion to apply the abuse of dominance provisions of the competition law to its conduct, particularly where the conduct is exclusionary. Finally, the merger control law may apply, either to horizontal mergers between competing concessionaires or to vertical acquisitions by monopolist concessionaires that could have harmful effects in competitive markets.

SYNTHÈSE

par le Secrétariat

À la lumière des débats ayant eu lieu au cours de la table ronde, des contributions écrites soumises par les délégués et du document de référence présenté par le Secrétariat, plusieurs points essentiels ont pu être mis en évidence :

(1) *Une concession est une autre méthode que la privatisation de transférer au secteur privé la responsabilité d'exploiter des actifs appartenant à l'État. Elle est souvent employée en situation de monopole naturel ou dans les secteurs d'infrastructure, où il est difficile, voire impossible, d'instaurer des conditions de concurrence* ***sur*** *le marché. La concession permet alors de faire jouer la concurrence* ***pour*** *le marché, ce qui offre nombre d'avantages identiques pour les consommateurs.*

Selon une définition communément admise, une concession consiste à accorder à une entreprise privée le droit de gérer un service d'infrastructure et de percevoir les recettes qui en découlent. Une concession peut être octroyée pour l'exploitation d'un aéroport, par exemple, ou pour l'approvisionnement en eau d'une commune. Elle peut faire intervenir de nombreux paramètres, notamment en spécifiant des tarifs, des investissements, des niveaux de service ou le niveau des redevances devant être versées à l'État. Le contrat conclu est d'une durée limitée, allant généralement de 5 à 30 ans. Le plus souvent, le concessionnaire acquitte une redevance à l'autorité concédante, puis réalise des investissements et se rémunère au fil du temps en facturant la prestation du service considéré aux usagers.

Les pouvoirs publics concluent des contrats de concession pour diverses raisons, notamment pour engranger des recettes et réaliser des gains d'efficience en confiant l'exploitation des actifs considérés au secteur privé. Les concessions ne représentent cependant pas un substitut à la réglementation, et elles peuvent s'accompagner de la mise en place d'un cadre réglementaire adéquat. Enfin, dans certaines circonstances, il peut être préférable que les pouvoirs publics continuent d'assurer eux-mêmes la prestation du service considéré, et qu'ils s'abstiennent de toute concession ou privatisation. Tel peut être le cas lorsque les actifs concernés correspondent à des monopoles naturels, lorsque les possibilités de réductions de coûts découlant de baisses de la qualité sont importantes, et lorsqu'il n'existe aucun moyen de rentabiliser les progrès réalisés sur le plan qualitatif.

(2) *La conception d'un contrat de concession constitue une première étape essentielle du processus. Elle doit permettre de maximiser le jeu de la concurrence.*

La conception d'un contrat de concession est une entreprise extrêmement complexe, qui peut exiger la prise en compte de nombreux éléments. Un des points les plus importants est de veiller à ce qu'après l'octroi de la concession, la concurrence soit aussi forte que possible sur le marché considéré. Cela peut exiger, par exemple, une séparation verticale – consistant à dissocier l'exploitation de tout monopole naturel des autres composantes du secteur où la concurrence est possible – ou une séparation horizontale – consistant à créer plusieurs entités sur les segments

concurrentiels du marché considéré. Les pouvoirs publics peuvent alors être amenés à arbitrer entre deux objectifs : assurer le jeu de la concurrence après l'attribution de la concession et maximiser les recettes qu'en retirera par l'État. Dans ce cas de figure, la priorité doit être accordée à la concurrence.

Un des autres éléments de la conception d'un contrat de concession réside dans sa durée. Une période prolongée – disons 30 ans – encourage le concessionnaire à réaliser les investissements d'infrastructure nécessaires au début de l'exécution du contrat, mais cette incitation diminue vers la fin de la période considérée. Un certain nombre de contrats de durée plus brève ont été conclus, en particulier dans des situations d'incertitude considérable concernant l'évolution future du marché concerné. La brièveté du contrat fait porter la charge de cette incertitude sur les pouvoirs publics à court terme, mais elle rend plus sûr le jeu de la concurrence dans le cadre de la concession suivante.

L'octroi d'une concession peut s'inscrire dans le contexte d'une réforme plus générale du marché considéré, marquée notamment par la création d'une nouvelle autorité de régulation sectorielle. Il est important que cette autorité de régulation – s'il doit en exister une – soit créée avant l'attribution de la concession, là encore pour réduire l'incertitude.

(3) La deuxième étape du processus réside dans l'octroi de la concession, qui revêt, elle aussi, un caractère crucial. C'est à ce stade qu'intervient la concurrence pour le marché.

Les travaux économiques publiés sur la question tendent fortement à indiquer que les enchères constituent la procédure la plus efficace d'octroi des concessions. La conception de la procédure d'enchères est cependant d'une importance fondamentale, car toute déficience en la matière peut réduire à néant les avantages potentiels du processus de concession. Un des éléments clés à cet égard consiste naturellement à minimiser les possibilités de collusion entre soumissionnaires. Les possibilités d'envoi de signaux entre soumissionnaires doivent être réduites, et il convient d'accroître les avantages découlant de toute « tricherie » (non-respect de l'accord conclu) dans le cadre d'une entente. Des mesures doivent également être prises pour favoriser l'entrée de soumissionnaires, c'est-à-dire la participation du plus grand nombre possible de candidats. Pour ce faire, les autorités peuvent donner une plus large publicité aux enchères, réduire le coût de préparation des offres, et atténuer les avantages informationnels dont bénéficient les entreprises en place (c'est-à-dire titulaires de contrats de concession à renouveler).

Une autre méthode d'octroi des concessions consiste à organiser des négociations, simultanément ou successivement, avec plus d'un candidat, ou un « concours de beauté » – consistant à évaluer les concurrents sur la base de critères prédéfinis, tels que les compétences techniques, la viabilité financière et l'étendue du réseau. Dans certains pays, l'expérience a montré que les négociateurs publics sont parfois désavantagés par rapport à leurs homologues privés, peut-être à la fois parce qu'il leur manque une connaissance approfondie du secteur considéré, dont l'importance est essentielle, et parce que leurs objectifs sont plus flous que ceux du secteur privé, qui est exclusivement axé sur la maximisation des bénéfices. En outre, la corruption constitue clairement une option dans certains pays. Il convient de barrer cette voie autant que possible, notamment en organisant des procédures transparentes d'attribution en bonne et due forme, et en appliquant avec détermination les dispositions législatives de lutte contre la corruption.

La procédure d'attribution de la concession doit minimiser autant que faire se peut les possibilités de renégociation ultérieure du contrat par le soumissionnaire retenu. Ces renégociations peuvent en effet réduire à néant les avantages de la mise en concurrence ayant eu lieu au stade de l'octroi. Le concessionnaire peut se trouver en position de « prendre en otage » l'État et de le contraindre

à renégocier, s'il est impossible de rouvrir la procédure d'attribution de la concession. Naturellement, étant donné l'incomplétude des contrats de concession, c'est-à-dire le fait que tous les termes de l'accord conclu ne peuvent être connus au moment de l'octroi de la concession, leur renégociation est sans doute dans une certaine mesure inévitable.

(4) L'autorité de la concurrence doit intervenir dans le processus d'attribution d'une concession, de préférence en jouant aussitôt que possible un rôle de promotion de la concurrence aux stades de la conception du contrat et de l'octroi de la concession.

L'autorité de la concurrence dispose de compétences précieuses qui peuvent être mises à profit dès le début du processus d'attribution d'une concession. Elle peut aider l'autorité concédante à définir la structure de la concession de manière à maximiser la concurrence après son octroi. Elle peut fournir des avis sur la procédure d'octroi, en particulier pour sélectionner les modalités d'attribution les plus efficaces et minimiser les possibilités de collusion. Si ce processus passe par la création d'un cadre réglementaire, l'autorité de la concurrence peut également y contribuer, par exemple en indiquant quelle serait la forme la plus efficace de réglementation des prix. Ses experts en microéconomie peuvent d'ailleurs constituer un réservoir de compétences sans équivalent au sein des administrations publiques. Néanmoins, l'autorité de la concurrence ne doit pas se contenter de souligner dans l'absolu le caractère bénéfique de la concurrence. Elle doit s'employer à acquérir une connaissance technique du secteur considéré, à la fois pour asseoir sa crédibilité et pour renforcer la pertinence de ses avis.

(5) Enfin, l'autorité de la concurrence doit veiller avec détermination au respect du droit de la concurrence tout au long du processus.

Les secteurs où sont octroyées des concessions ne doivent faire l'objet d'aucune dérogation au droit de la concurrence, qui doit leur être pleinement appliqué. L'autorité de la concurrence doit naturellement être vigilante quant aux possibilités de collusion, tant au stade de l'octroi de la concession que par la suite, dans les segments du secteur considéré où joue la concurrence. Lorsque le concessionnaire est en situation de monopole, l'autorité de la concurrence peut être amenée à lui appliquer les dispositions relatives aux abus de position dominante prévues par le droit de la concurrence, en particulier lorsque ce concessionnaire se livre à des pratiques d'exclusion. Enfin, les dispositions juridiques relatives au contrôle des fusions peuvent s'appliquer, soit aux fusions horizontales entre concessionnaires concurrents, soit aux acquisitions verticales par des concessionnaires en situation de monopole pouvant avoir des effets préjudiciables sur des marchés concurrentiels.

BACKGROUND NOTE

by the Secretariat

1. Introduction

Over the past decades, governments have increasingly turned towards concessions as a way to raise funds and to improve services by applying private-sector expertise to investment, management and operation of infrastructure. Concessions have been extensively used in both developed and developing economies for infrastructure to provide socially significant services such as water, transport, telecommunications and electricity.

Citizen-consumers do not always perceive benefits from concessions. Particularly when the change is accompanied by reduced subsidy or correction of underinvestment, tariffs have sometimes increased after the introduction of a concession. Discontent with such tariff increases has been further fuelled when foreign multinationals are the concessionaire.

While concessions are not always capable of achieving stated government policy goals, increased focus on competitive conditions can improve the performance of the process. The purpose of this note is to discuss the main elements for the design of the concession allocation process and identify the competition problems that may arise during the term of a concession.[1] Improved focus on competition is one step towards better design.

The design and oversight of concession contracts is particularly complex. Reasons for this complexity include:

- Concession contracts necessarily do not cover all contingencies. They are "incomplete" in economics terms. Uncertainty about costs and revenues cannot be entirely resolved in advance. The uncertainty opens the contracts for renegotiation with its attendant negative consequences.

- Both concessionaires and governments can find it difficult to respect concession contracts over the term of the contract. Concessions typically involve large sunk investments that must be recovered over long periods, on the one hand, and governments are under pressure to maintain or improve services, on the other hand. Thus, there is a risk that governments behave opportunistically after concessionaires sink their costs and there is a risk that concessionaires behave opportunistically when governments have no immediate alternatives.

- Concession contracts often involve the creation of a privately operated monopoly which may, in itself, create competition problems. These may be reduced through a change in the structure of the concession or through ongoing price regulation. Introducing a regulatory structure before a concession auction can reduce uncertainty among bidders.

[1] This note limits the focus to concessions for infrastructure and leaves aside the significant topic of concessions for the exploitation of natural resources.

- The success or failure of competitive auctions to award a concession to the most efficient operator can depend on subtle variations in design. Transactions costs—the lemons problem, in which buyers cannot assess the value of the object for sale so the market does not exist—impede selling on a concession to a more efficient operator after a faulty auction awards it to an inefficient operator.

The award of a concession should take place within a broader regulatory reform of a sector. Such a reform should include clarifying the service objectives and revenue sources, thereby uncovering cross subsidies that must be addressed in the concession design. Reform also often should included addressing how the sector will be governed during the long period after the concession has been awarded: where competition would be feasible and desirable, what sector-specific laws and regulatory institutions need to be established, and the application of competition law.

Competition authorities take an interest in concessions because, through advocacy, authorities may promote the use of a more competitive allocation process which in turn may increase economic efficiency, one of the standard objectives of competition authorities. Authorities may also be able to influence auction design in a way that reduces the possibility of collusion. Competition authorities may also promote better concession design which in turn might reduce subsequent harm to the competitive process such as through denial of access to essential facilities. Further, concessions are used where market entry is not free (otherwise numbers would not be limited). Hence, a market in which a concession is used has already passed through an important screen for attracting competition authorities' interest.

A number of key points emerge. These include:

- The design of a concession or concessions is constrained by the regulatory regime that will apply to the concession, the potential for renegotiation of the concession contract, and the feasible way of awarding the concession or concessions.

- The key objectives in auction design are attracting bidders, preventing collusion, and ensuring the integrity of the auction. Auction theory shows that attracting an additional bidder makes the auction more competitive. Theory also shows that an auction with N+1 bidders will always provide a higher price than any negotiation and any feasible auction with N bidders. In other words, if just one more bidder can be attracted to an auction than can be attracted to a negotiation for the same object, then the auction is more competitive. Therefore, auctions are in general preferred over negotiations and beauty contests.

- Designing a successful auction that identifies the most efficient operator is difficult and requires expertise. The examples of successes and failures of auctions can offer some warnings, but are not a substitute for analysis of the actual situation.

- Renegotiation, whether due to contact incompleteness[2] or opportunism, can eliminate the benefits of a competitive allocation mechanism; essentially, the winner of an auction will be the best negotiator not necessarily the best infrastructure operator. In particular, renegotiation means that agreements made by competitive award are superseded by the terms agreed in bilateral, non-public negotiations between concessionaire and government. Strenuous efforts should be made to restrict renegotiation to situations where renegotiation is not opportunistic, that is, to situations where unexpected events, outside the control of the parties, have occurred.

[2] Contracts are incomplete when they are complex or do not specify what happens under all contingencies. Of course, all contracts are to some degree incomplete; courts and other means of arbitration are meant to "fill-in the gaps."

- In sum, both an efficient allocation mechanism, such as a well-designed auction, and credible commitment to the resulting contract are necessary.

- Concessioning is not a substitute for regulation. Where a concessionaire will have substantial market power, then a regulatory structure is likely needed. In any case, competition law should apply to concessionaires as well as to any auction to award a concession.

This note begins with a review of the **key economics literature** and a **review of empirical experience** with concessions. The remainder covers the main steps in putting a concession into place:

- **Award of the concession**--the design of the mechanism by which the concession is awarded, with an emphasis on competitive award mechanisms.

- **Performance of the concession**—the problem of renegotiation and an overview of the standard competition issues that might arise in concessioned sectors.

- **Design of the concession**—the main contract elements that are constrained by the award and performance of the concession.

2. Concessions: What they are and what is the experience

2.1 The economics literature

Two classic economic theory papers on concessions (also called "franchises" in the literature) are by Harold Demsetz in 1968 and Oliver E. Williamson in 1976. Demsetz pointed out that when competition in a market is infeasible, such as for a natural monopoly, it may be feasible to have competition for the right to supply a market. (In the background is a desire to move away from the inefficiencies engendered by regulation by substituting competition.) It might be possible to organise such competition for the market if inputs to supply the market were available to bidders at competitively determined prices and if there were no collusion so that the outcome of the competition was indeed competitive. If there is a single product, uniform pricing, all bidders have access to the same technology and can produce efficiently, and the number of bidders is sufficiently high, then the bidders would compete away any excess profits and the winning bid will be the minimum price that allows the firm to break even, i.e., earn normal profits. This is a good outcome in the sense of choosing an efficient supplier who will supply at average cost. However, there may be substantial welfare losses by not pricing at marginal cost. If there is more than one product then there is no best way to choose the winning bid. And, as will be explored later in this note, the winner of the competition may try to cheat on the quality provided and attempt to renegotiate the contract.

Williamson's 1976 paper was a reaction to Demsetz. He explored further the idea that bidding for a concession or franchise could be a substitute for regulation.[3] He identified difficulties that were glossed over by Demsetz, namely equipment durability and uncertainty, as the core issues for franchise bidding. Regarding incomplete long-term contracts (the type of greatest interest for concessions), Williamson made three main points. First, he felt that the initial award criterion would be artificial or obscure. Once there is more than one dimension to a bid, e.g., price and quality, or peak- off-peak prices and quality, the criterion

[3] Williamson's seven factors that should be considered when deciding between franchising and regulation of a natural monopoly were: "(1) the costs of ascertaining and aggregating consumer preferences through direct solicitation; (2) the efficacy of scalar bidding; (3) the degree to which technology is well-developed; (4) demand uncertainty; (5) the degree to which incumbent suppliers acquire idiosyncratic skills; (6) the degree to which specialized, long-lived equipment is used; and (7) the susceptibility of the political process to opportunistic representations and the differential proclivity, among modes, to make them" [p. 75].

by which a winner is chosen is arbitrary. Second, he felt that the steps needed to overcome contract execution problems—adjusting prices to reflect changing costs, specifying quality of service, stipulating monitoring and accounting procedures—converged franchise bidding toward regulation. Other contract execution concerns were that franchising agencies were unlikely to allow a winning bidder to fail. Quoting Eckstein, "publicly accountable decision makers 'acquire political and psychological stakes in their own decisions and develop a justificatory rather than a critical attitude towards them.'" (1956, p. 223) Third, for there to be meaningful competition when the contract is re-bid, the incumbent—the winner the first time—must not gain substantial advantages. But this may be unlikely in practice as his study of CATV showed. Williamson summarises thus, "The upshot is that franchise bidding for incomplete long-term contracts is a much more dubious undertaking than Demsetz' discussion suggests."

Riordian and Sappington (1987) is of less direct interest to policy-makers as they abstract from the complications that Williamson pointed out to be empirically relevant. That is, they assume that consumer preferences are known, quality is not an issue, bidding is not repeated, government and concessionaire can costly commit to the contract, and there is no cost of writing complex contracts. That being said, they find that, under conditions of risk-neutral bidders with private information about production costs, the optimal franchise bidding scheme is for the government to offer a menu of contracts. Each contract defines maximum prices and net transfer payments (production subsidy less franchise fee) as functions of the firm's reported marginal product cost. The winner is the bidder who bids the highest ranked contract. The winner will have the lowest expected costs but prices will exceed marginal cost. Having more bidders increases the franchise fee and reduces the winner's profits.

The empirical tradition is somewhat longer. Edwin Chadwick, a reformer in early 19th century Britain, proposed franchising the funeral industry. In 1907 the following comment was made about contract incompleteness and renegotiation in concessions:

> "Regulation does not end with the formulation and adoption of a satisfactory contract, in itself a considerable task….It is a current fallacy and the common practice in American public life to assume that a constitution or a statute or a charter, once properly drawn up by intelligent citizens and adopted by an awakened public, is self-executing and that the duty of good citizens ends with the successful enactment of some such well matured plan. But repeated experience has demonstrated—what should have been always apparent—the absolute futility of such a course, and the disastrous consequences of reliance upon a written document for the purposes of living administration. As with a constitution, a statute, or a charter, so with a franchise. It has been found that such an agreement is not self-enforcing….[Moreover, the] administration may ignore or fail to enforce compliance with those essential parts of a contract entrusted to its executive authority; and legal proceedings…are frequency unavoidable long before the time of the franchise has expired." (Fisher, 1907, pp. 39-40 quoted in Williamson 1976 p. 91)

Governments introduce concessions to increase the efficiency of infrastructure by applying private sector expertise in investment, management and operation, as well as to raise cash. Concessions may change who—government, concessionaire, users—bears risk and uncertainty and may provide incentives for efficiency. But concessions are incomplete contracts (i.e., not all contingencies are provided for in the contract) and it is difficult for governments and private companies to commit to those contracts (renegotiation is relatively common). Concessions are a source of popular discontent in developing countries as citizen-consumers have felt abused by foreign multinationals. "The failure of users to benefit from a significant share of those efficiency gains [from private as compared with government enterprises] has been, to a large extent, the source of their discontent with the infrastructure reform programs in developing countries [citations omitted]" [Guasch, p. 1]

2.2 What is a concession?

"A concession grants a private firm the right to operate a defined infrastructure service and to receive revenues deriving from it," in the words of one expert. It might be the right to operate a water system or a cable television system in a municipality, or to use a part of the electromagnetic spectrum. Concessions vary according to their risk allocations and incentives, investment and service responsibilities, and how tariffs are set. Usually, a concessionaire pays a fee to the concession-granting authority, and then incurs investment expenditures and collects payments directly from users over time. At the end of the concession period, there could be compensation for investments that have not been fully amortised. There could be provisions regarding early termination and non-compliance with the agreed terms.

Concessions differ from privatisation in three main respects. First, the physical assets remain owned by the state, even though the use of the assets and the operation of the enterprise are transferred to the concessionaire. Second, concession contracts are of limited duration, typically 15-30 years. Third, the government typically retains closer oversight of concessions.

Box 1. Types of Concessions

Concessions can take a number of basic forms, but in practice form a continuum.

-- Lease and-operate (or *affermage*), "under which the private contractor is responsible at its own risk for provision of the service, including operating and maintaining the infrastructure, typically against payment of a lease fee."
-- concession *stricto sensu*, "the private contractor is also responsible for building and financing new investments. At the end of the concession term, the sector assets are returned to the state (or municipality).

The term BOT (build-operate-transfer) is often used to refer to greenfield concessions, and ROT is sometimes used to describe concessions in which investments entail primarily rehabilitation (hence the "R") rather than construction. BOO (build-own-operate) is a similar scheme, but does not involve transfer of the assets.

-- Divestiture, "the transfer to the private sector of the ownership of existing assets and the responsibility for future expansion and upkeep."

Source: Pierre Guislain and Michel Kerf (1995), "Concessions – The Way to privatise Infrastructure Sector Monopolies," Note no. 59, Public Policy for the Private Sector, World Bank

2.3 Why use concessions? What is the experience?

Concessions are often viewed as a substitute for privatisation when it is not feasible for political or legal reasons. Concessions are generally followed by regulation but, under certain circumstances, substitute for regulation. There is empirical support for substantial efficiency gains from concessioning, but the experience has been marred by substantial renegotiation which can dissipate the gains. These issues are reviewed briefly below.

Arguments for concessioning over state provision are that (1) if awarded via a competitive process then the more efficient operator will be chosen, (2) the process facilitates regulatory oversight by revealing some potential providers' private information, (3) the regulation that becomes feasible because of the concessioning and auctioning process can increase cost efficiency over time. Regarding efficient choice of operator, it can be difficult to design an appropriate concession and a competitive process—the topic of a section of this note. Regarding information revelation, an auction provides companies an incentive to apply their experience gained elsewhere and in other activities, to determine what profits they could extract from an activity, and to bid accordingly. The bids reveal information about what the bidder thinks is feasible. Further, during the consultations as part of the process of designing the concession, information can be exchanged to help design the subsequent regulation. The third point refers to the difficulty of imposing a hard budget and quality constraint on government or government-owned companies—which implies that

efficiency is not promoted—in contrast with the efficiency-promoting application of, e.g., price-cap regulation, combined with the hard budget constraint of a privately owned company.

Arguments for continued state provision are that (1) concessions require complex design and monitoring systems, (2) it is difficult to enforce contracts and to limit contract renegotiation—a notion that includes both lower-than-contracted service quality and higher-than-contracted tariff increases— and (3) there are insufficient incentives to invest or perform maintenance near the end of the contract. Regarding the first point, a specific concern arises where there are significant externalities or universal service requirements, and these cannot be effectively monitored by a regulator. Then state control may be necessary because a concessionaire will have incentives not to provide costly but unmonitored services. The second and third points are addressed later in this note.

One formulation, by Shleifer (1998), for choosing between public and private provision is: Public provision is superior to private provision only when: (1) the opportunity for cost reduction stemming from decreasing quality—in a way that cannot be proven to an arbitrator—is high; (2) the probability of product or process innovation is limited; (3) gaining a reputation as an efficient service provider is unimportant; and (4) competition is weak and consumer choice is ineffective.

Concessions can also be substitutes for regulation. Demsetz and others had the idea that concessions could displace on-going, inefficiency-provoking, cumbersome rate-of-return regulation of natural monopolies with the market discipline of a competitive auction for a concession. Williamson's critiques and subsequent experience cast doubt on that idea, at least in many circumstances. However, some short-term concessions in use do have the flavour of Demsetz competition. (See e.g. the box on Norwegian regional air transport.) Nevertheless, much of the debate now focuses on state provision versus concession versus privatisation, with acknowledgement that on-going regulation may be needed.

Increased efficiency is a fundamental reason for concessioning. For example, in Latin America and the Caribbean, which have had twenty years experience with concessions, This experience has been studied.[4] There, efficiency gains of concessioned firms show significant *annual* gains, ranging from 1–9 percent.

Studies of the Latin American efficiency gains from concessions are summarised in Estache, Guasch, and Trujillo (2003). In electricity, the rate of productivity change is 1 per cent per annum across 39 firms in a dozen countries. For railways, average annual total factor productivity growth has been 5.3% (freight) and 9.8% (passengers) in Argentina. In Brazil, the average annual TFP growth has been 8.4% for the first two years of a concession in Brazil (the 8.4% rate contrasts with the 5.5% rate before the sectoral reform). For ports, between 1996-9 Mexican ports improved efficiency by 2.8 to 3.3% per year. For water, Argentina had TFP efficiency gains of 3.7% to 6.1% per year, depending on the province. Regrettably, there does not appear to be a broader study of post-concessioning efficiency gains. Against these efficiency gains must be set the one-time transactions costs. Transaction costs for concession-type projects—for development activity, negotiations, and the like—are estimated to range from 3 to 5 percent of total project value where concession arrangements are reasonably well understood, but exceed 10 percent of project cost where the concept is new. (Klein, So and Shin 1996)

The intent of the regulatory reforms and the concessions was to give concessionaires incentives to make these efficiency gains and then to require some of these gains to be shared with users in the form of lower tariffs. However, the "weak or absent correlation between these efficiency gains and lower tariffs

[4] While Latin America constitutes only a fraction of the experience with concessions, experience with concessions began early there and the region has been the subject of a unique, comprehensive study by an economist at the World Bank.

and the perceived profitability of the private operators, often secured through the additional benefits captured through renegotiation, have been at the core of the increasing dissatisfaction among users." A late 2001 Latinobarometro survey found that 63% of people in 17 Latin American and Caribbean countries believed that the privatisation of state companies had not been beneficial. (Guasch, pp 11-12, citations omitted). And, on the other side, profitability was also not very high. One study of 34 concessions in nine Latin American countries found that concessionaires, on average, made losses. The authors warn that the figures may not be reliable due to possible errors of official revenue figures and possible biasing of intra-firm transactions. (Sirtaine, Pinglo, Guasch and Foster 2005)

Despite over three-quarters of concessions between the mid-1980s and 2000 in Latin America being awarded by competitive auctions, about 30% were renegotiated (with much higher incidences in some sectors) an average of just over two years after the concessions were awarded. On average, users lost and concessionaires gained in these renegotiations.

Moving beyond the Latin American data on concessions, a remarkably candid assessment of concessions in Thailand (Nikomborirak 2004) highlights other problematical aspects of poor design of concessions. First, designing a concession specifically to circumvent domestic law suggests an absence of broad, durable political support. Second, there appeared to be a lack of commitment to the concession contract by both concessionaire and government. According to the report, the concessionaire did not truthfully share profits per the agreement and the government sold a second telecommunications concession in violation of the contract with the first concessionaire. Third, a non-competitive allocation process yields a worse outcome than a competitive process: the negotiated telecommunications concession provides for a concession payment of 16% to 21% of line revenue whereas the contract that was the outcome of a bidding process provides for the payment of 43.1% to 44.5% of line revenue. Finally, there is a need for a predictable regulatory regime.

Box 2. Example of Concession of Zambian Railways

Zambian Railways is state-owned and has no rail-based competitors. A restructuring project began in 1992, followed in 1997 by a management contract with a foreign rail company. It was concessioned in 2004 to a consortium including Spoornet, the South African railway. At least one observer found the process to be a resounding success:

"Years of state mismanagement, neglect and regional conflict ran the railroad off its rods. From 1975–1998, freight traffic decreased from 6 million tonnes annually to a mere 1.4 million tonnes. At the end of that period, the railroad was losing $12 million a year and needed an estimated $45 million for rehabilitation…Since 1998, when the transition process began, freight traffic has increased by 64%. The ending of wars in neighbouring states also means that the railroad is poised to regain its coveted links with Angola and Namibia….[F]reight traffic on the line has increased by 500,000 tonnes this year [2003] to 2.3 million tonnes — and there's every indication that such growth will continue."

But in November 2005, the Parliament resolved unanimously that the agreement for the concession of the railway be revised. MPs complained about loopholes, ignoring maintenance obligations, slower service, unemployment of former employees of the railway, and more. One was quoted as saying, "It is vital that we re-negotiate this agreement by terminating it."

Sources: 10 October 2003, Issue 3, SADC Barometer, "Privatising Zambia's Railway." Published by the South African Institute of International Affairs; 24 November 2005 "Revision of Zambia Railways Concession" Times of Zambia (www.times.co.zm)

This introduction has served to highlight the main competition issues raised by concessions. The first set of issues centre on the allocation and agreement of a concession contract. These are discussed in the next section on auctions, allocation by negotiations, and the problems of renegotiation. The second set of

issues centre on competition during the term of the concession. These issues are not fundamentally different due to the presence of a concessionaire. They include exclusion of rivals by denying access to facilities and abusive pricing. They are discussed in section four.

3. Allocating concessions

3.1 Auctions

Auctions are used to choose who shall operate a concession because they can identify the most efficient operator. The idea is that the highest bidder will be the person/company who places the highest value on the concession, and that will, on average, be the person who can operate it most efficiently. (In this paragraph and many that follow, we abstract away from the complication that bidders might already own substitutes or complements.) But poor auction design can thwart this line of reasoning, and sometimes the auctioneer does not desire the most efficient operator. Also, where the objective is to provide the best mix of coverage or other aspects of "quality" and price, then it may be difficult to identify which bid was "highest." That is, the choice among a number of weighting systems to incorporate multiple dimensions—e.g., coverage, quality and price—is arbitrary where economic efficiency is the objective of the auction.

The extensive auction theory literature provides insights into auction design, but the focus has not been on features of the real world, e.g., collusion and bidding costs, that have important effects on the participation, competitiveness, and outcomes of auctions. For policymakers, auction theory provides two main lessons:

- The best kind of auction for selling an object or a concession depends on the specific circumstances. (Examples of circumstances that matter include bidders' risk aversion and whether the private information other bidders have about an object is relevant for how much a bidder values it—in the extreme, whether they would all value the object the same if they all had the same information. A key feature of auctions is asymmetric information—different bidders have different information and some may have better—more accurate—information than others.) This is described in more detail just below.

- Extrapolation from the better-analysed single good auction case to the multiple goods auction is difficult and error-prone. (The 3-G mobile phone licenses in European countries were examples of multiple good auctions. Arguably, a series of auctions with the same participants has features of multiple goods auctions.)

In practice, the effects of collusion and entry—i.e., attracting more independent bidders—are more important for designing auctions than details of risk aversion, the relationship of one bidder's value of the contract to other bidders' values, and the asymmetry of bidders' information about the value of the contract. Collusion and entry are discussed below.

Box 3. Definitions: The Four Standard Types of Auctions

There are four standard types of auctions which are commonly used and well-studied:

1) **ascending-bid auction** (also called the open, oral or English auction) in which the price is raised until only one bidder is left, and that bidder wins at the final price
2) **descending-bid auction** in which the auctioneer begins with a very high price which is lowered until a bidder announces that he accepts the price, and that bidder wins at that price.
3) **first-price sealed-bid auction** in which each bidder submits a single bid, no bidder sees what the others bid, and the object is sold to the highest bidder at the price he has bid.
4) **second-price sealed bid auction** (also called a Vickery auction after its inventor) which works like the first-price sealed bid auction but the winner pays not what he bid but instead the amount of the second highest bid.

The value of winning the contract may depend only on the bidder's characteristics, like their own costs. This is called a **private value auction**.

Alternatively, the value of winning the contract may depend on factors affecting all bidders, such as consumers' willingness to pay and regulators' future behaviour. This is called a **common value auction**.

The four standard types have a surprising feature; they yield the same expected revenue under certain conditions. This is called the **revenue equivalence theorem**.[5]

The various types of auctions have advantages and disadvantages.

Collusion is easier in an open auction since bidders can immediately detect cheating on a cartel agreement and punish it. On the other hand, whether the auctions are open or sealed-bid, if the same bidders face each other often, then detection of cheating can be done when the bids are opened and punishment can be meted out with a delay at the next auction. Collusion of another kind, when auctioneers are corrupt and share sealed-bid information with other bidders, transforms the sealed-bid auction into an open auction as bidders can learn about others' bids and change their own.

Entry by weaker bidders is promoted by sealed-bid auctions as compared with an open auction. Described in greater detail below, the intuition is that weaker bidders will drop out of an open auction, therefore realise they may as well not enter at all, but that they have a chance of winning a sealed-bid auction, so enter.

Second-price sealed bid auctions have the advantage of duplicating the outcome of an ascending bid auction[6] but without the cost of assembling bidders. They have the advantage, as compared with a first-

5 Assume there is one unit of an indivisible good. Assume each of a given number of risk-neutral potential buyers of the object has a privately known signal that is drawn independently from a common, strictly increasing, atomless distribution. Then any auction mechanism in which (1) the good always goes to the buyer with the highest signal and (2) any bidder with the lowest feasible signal expects zero surplus, yields the same expected revenue. (Klemperer, p. 17, who also notes that this is not the most general statement of the theorem) In a private value model, a bidder's value depends only on his own signal. In a pure common-value model, the actual value is the same for everybody but bidders have different private information, i.e., different signals.

Violating these conditions, e.g., risk-aversion on the part of bidders or information that is not independent, means that the different auctions no longer provide the same expected revenues.

6 The logic is as follows. An ascending bid auction ends when the bidder with the second-highest value drops out. He drops out when the bid is just higher than his valuation. So, the winner pays the second-highest valuation plus a little. If everyone bids their valuation in a second-price sealed bid auction, then the winner pays the second-highest valuation (by definition). But will a bidders bid his valuation? He will not

price sealed bid auction, of allowing a simpler calculation since the rational bid is the bidder's own value and does not require any estimate of the number of other bidders and their values. But second-price sealed bid auctions can also give rise to political difficulties. In particular, they make public how much money was left on the table (the difference between the highest and second-highest bid). The extreme outcome occurred during New Zealand's radio spectrum auction, where the first bid was NZ$100,000 and the second only NZ$6. (McMillan 1994). There was political fallout when taxpayers saw that the state got only NZ$6 when someone was willing to pay NZ$100,000. First-price sealed bid auctions and open auctions are better in this regard, since the first price wins in the a first-price sealed bid and the first price is unknown in the second case (the bidder who wins pays the amount of the standing highest bid when the second-highest bidder drops out of the bidding, so taxpayers do not see what they missed by not selling the license at the highest bidder's valuation).

An important question is, In awarding a concession, what should the auction be about? Should bidders bid tariffs or a concession fee? (The problem of multiple criteria is addressed later in the section on non-auction award procedures.) Demsetz promoted bidding on tariffs, but experience since then has shown that this is a poor choice. Tariffs are difficult for both government and concessionaire to commit to because they need to change in response to changes in the environment, and the negotiations with the regulator during this process eliminates the efficiency effect of competitive auction. Therefore, the usual practice is to award on the basis of concession fee, when an auction is used.

Both theory and practice show that auction design does matter. Some argue that it does not, claiming that the winner of the auction can sell to more efficient owners to eliminate any inefficiencies in the allocation from the auction. That argument is incorrect because, in the case of licenses or concessions, there are substantial transactions costs. The existence of these costs violates a key assumption of the Coase Theorem on which that argument rests.[7] *Inter alia,* since the value of the license or concession is not known to the buyers and sellers, some sales that increase efficiency will not take place and those which do take place will be delayed. Empirical evidence supports this theory: While there is demand for nationwide wireless telephone networks in the United States, the fragmented licenses that were initially sold were not quickly consolidated into national networks. (Milgrom, p. 20.) Further, today three of the four carriers who operated airmail routes in the United States in 1930 have hubs in cities they served then. (The fourth has gone bankrupt. See the box on U.S. airmail routes.) In Norway, the incumbent continues to win auctions for regional air services at the fourth set of contracts (See the box on Norwegian air services). So, getting it right the first time matters.

Box 4. Key Elements in Auction Design

"My own experience in auction consulting teaches that clever new designs are only very occasionally among the main keys to an auction's success. Much more often, the keys are to keep the costs of bidding low, encourage the right bidders to participate, ensure the integrity of the process, and take care that the winning bidder is someone who will pay or deliver as promised." *Milgrom 2004, p. xii.*

"What really matters in practical auction design is robustness against collusion and attractiveness of entry—just as in ordinary industrial markets." *Klemperer, p.131.*

bid more, of course. If he bids less, this lowers his likelihood of winning and does not lower the price he would pay if he won. If he loses to a bidder who bid less than his valuation, then he regrets his bid—if he had known, then he could have costlessly bid more, up to his valuation.

7 The Coase Theorem (1960) "asserts that an optimal allocation of resources can always be achieved through market forces, irrespective of the legal liability assignment, if information is perfect and transactions are costless." (Tirole 1989) However, other authors have the view that the initial assignment of property rights does indeed constrain the feasible allocations achievable by bargaining. (Varian 1987)

3.1.1 Preventing bidder collusion

The three direct strategies for preventing bidder collusion are aimed at interrupting signalling (to impede bidders reaching an understanding), helping cheaters on a cartel to avoid detection, and helping cheaters to defer the cartel's punishment. In addition, promoting entry—the subject of the next subsection—also discourages collusion both by increasing numbers and by obscuring identities—we all know the incumbents, but who might enter? Finally, collusion can be deterred by the credible threat of significant penalties. Sealed bid auctions are better than ascending bid auctions in this respect, since bidders cannot use their bids for signalling and cartelists cannot immediately detect a cheater and punish him.

The design of the auction affects signalling. Signalling allows bidders to identify what they wish to win, to threaten what they will do if thwarted, and thereby to reach an understanding of who will win what. Signalling can be done in a number of ways. For example, signalling can take place in the newspapers ("I'll be satisfied with just two of the 12 blocks of frequency on offer," "If the [five other bidders] behaved similarly it should be possible to get the frequencies on sensible terms," but "[I] would bid for a third frequency block if one of [my] rivals did"). (Klemperer, p. 136 citing Crossland 2000) In the instance from which the quotations were taken, six firms won two licenses each at low cost. Moving toward a sealed-bid auction, so the retaliation could not be taken immediately, may have reduced the effectiveness of this signal.

Signalling can also be done in various ways during the bidding. Signals can even be contained in the bids, e.g., using the last digits in a bid amount to identify a lot in which the bidder is particularly interested. This actually occurred in some of the telecommunications license auctions in the United States. This form of signalling can be prevented by prohibiting bids not in round numbers or by the auctioneer specifying the bid increment. Another form of signalling used in the FCC auctions was withdrawing a bid after it had been made. I.e., a company would enter a high bid, then withdraw its bid. Where two bidders are bidding against each other in several markets, they can use withdrawals to propose a split. Rule changes limited withdrawals to two rounds.

Collusion may be interfered with if bidders' identities are not revealed. If bidders know others' identities, then they can retaliate and cooperate across auctions. Further, bidders can intimidate others. One study found that small bidders avoided bidding against large bidders in the FCC's DEF auction in 1996-1977, and posited that they did this to avoid retaliation. If small bidders avoid large bidders, then it makes any collusion among large bidders easier to reach and more effective. (Cramton and Schwartz 2000)

Joint bidding arranged close to the auction date reduces competition without allowing potential entrants time to respond and compete against the cooperating bidders, thus has an economic effect like open collusion. This problem can be addressed by prohibiting joint bidding arrangements announced close to the auction date. (For those joint bidders who could not bid individually, joint bidding does not reduce competition. But it may be administratively difficult to quickly identify and separate these cases from anticompetitive joint bidders.)

Reserve prices can affect collusion. A high reserve price changes the calculation of a potential cartelist: With a low reserve price the choice is between colluding to end the bidding early at a low price and bidding longer and higher. With a high reserve price, the first alternative—collusion—is relatively less attractive because the lowest collusive price—the reserve price—is higher. In the extreme, if there are valid suspicions of collusion or not enough bidders show up, it may be reasonable to cancel an auction. Such a policy would need to be pre-announced to limit strategic conduct.

In addition to the direct methods for making collusion more difficult—interrupting signalling, prohibiting joint bidding arrangements near the auction date and increasing reserve prices—effective competition law may deter collusion. Indeed, it may be possible that larger penalties can be available in concessioning when there is a requirement that the bidder affirm to the government that he has not participated in any collusion in the bidding process. If the same firms may also bid in future procurement or other concessions tenders, the threat of debarment from future government contracts may be effective deterrence. (OECD 2005)

3.1.2 Promoting entry by bidders

More bidders is better. More precisely, in private-value auctions generally and in many common-value auctions, an ascending auction with no reserve price and N+1 symmetric bidders is more profitable than "any auction that can realistically be run" with N bidders. "So it is typically worthwhile for a seller to devote more resources to expanding the market than to collecting the information and performing the calculations required to figure out the best mechanism." (Klemperer p 27, citing result from Bulow and Klemperer 1996; see also the box on U.S. airmail below)

Promoting entry by bidders is aimed at encouraging weaker bidders—i.e., those less likely to win the auction—to participate actively. (Presumably those who feel they are likely to win do not need encouragement.) Sealed bid auctions are better than ascending auctions in this regard. The intuition goes as follows: Consider the ascending auction. Near the end of the bidding, only the strongest bidders will remain. The weaker bidders know this. If they are going to drop out of the bidding late, then they do better to not incur the bid preparation costs and not bid at all. By contrast, with a sealed-bid auction, weaker bidders may win at a price that the stronger bidder could have beaten, but did not because he traded-off the increased probability of losing against paying more. In a sealed-bid auction, the stronger bidder cannot change his bid once he sees the weaker bidders' bids, as he can do in an open auction. A second line of intuition is based on bidding strategies in a sealed bid auction being less straightforward than in an open auction, and the conjecture that in practice bidders are not likely to have a common view on the distribution of the true value of a contract. This results in a weaker player being more likely to win in a sealed bid auction. (Klemperer p. 133)

Box 5: Example of Entry in 3G Telecommunications Auctions

The Netherlands had five incumbent mobile-phone operators and sold five 3G licenses by ascending auction. Bidders were permitted to win at most one license each in order to promote competition in the 3G market. "Recognising their weak positions, the strongest potential new entrants made deals with incumbents, and Netherlands competition policy was as dysfunctional as its auction design, allowing firms such as Deutsche Telekom, DoCoMo, and Hutchinson, who were all strong established players in other markets than the Netherlands, to partner with the local incumbents." In the end, only one potential entrant bid and it withdrew after receiving a threatening letter from an incumbent. The five incumbents won the five licenses, paying about €3 bn, far below the equivalent in the United Kingdom.

By contrast, Denmark's auction was considered to be a success. Denmark had four incumbent mobile-phone operators and sold four 3G licenses by auction. Having watched the earlier 3G auctions, the decision was made to use a sealed bid in order to attract weaker bidders, promote new entrants and scare incumbents into bidding high. The government kept secret the number of actual bidders, as well as all bids other than the fourth highest. All winners paid the fourth highest bid, worth about € 95 per capita. Among the winners was one new entrant. (Klemperer pp. 155-6, 163-4)

More generally, auctions with lower bid preparation costs will attract more bidders. This can be accomplished by standardising auction procedures, including across time and jurisdictions. For some but not all aspects of auctions, this may involve a certain trade-off with designing auctions specific to their

circumstances. This may also be accomplished by packaging auctions. The Tunisian Competition Authority, for example, plays a role of reducing barriers and requirements so that they do not cause prices to rise or deter bidders. (See Sixth Global Forum on Competition, Tunisia DAF/COMP/GF/WD(2006)13.)

Also, bids can be encouraged by reducing the cost of providing the service, for example, by setting performance criteria that can be met by various means rather than specifying a particular technical solution. (See box 17 on Norwegian regional air services.).

It may be possible to "strengthen" weaker bidders. If the object is worth about the same to all bidders ("common value" in the literature), then a bidder with better information—such as the incumbent—can bid more aggressively than the others. The other bidders recognise that they will only win if they overestimate the value of the object by more than usual (the "winner's curse"), so they bid unusually cautiously. The result is that the incumbent wins more frequently and at a lower price. Providing better information to all bidders may reduce the informational asymmetry and improve the outcome of the auction. Other methods of encouraging entry that are supported by economic theory are set-asides—allowing only e.g., small enterprises to bid on certain licenses and of course restricting re-sale—and bidding credits—requiring e.g. small enterprises to actually pay only a specified fraction of their bids. (Klemperer pp. 234-239) An example of a set-aside, though perhaps aimed more at restricting market power later, is prohibiting incumbents from bidding.

Box 6. Example of Excluding Incumbents: Los Angeles versus Chicago

In the 1995 auction for mobile phone broadband licenses in the United States, licenses were for specified regions. The value of the licenses was probably about the same for all bidders. The licenses were sold by an ascending "English" auction. Fixed-line operators in the same region as the licenses were advantaged over others because they had a database of potential customers, a well-known brand name, and familiarity with doing business locally. Los Angeles has a higher household income, higher growth rate and a less dispersed population. In Los Angeles, the incumbent was allowed to bid and the auction yielded $26 per capita. In Chicago the incumbent was prohibited to bid and the auction yielded $31 per capita, even though the characteristics of the population would have led one to think that the LA license would be worth more than the Chicago license. (Klemperer 2004, p. 107)

3.1.3 Repeated auctions

Repeated auctions, such as when a concession has come to the end of its term and is re-auctioned, present special problems because of the incumbent's advantages over the other bidders. If each bidder thinks he values the concession about the same as the other bidders do, but that they each have different information about the true value of the concession, then they will all know that the incumbent has better information and will either not bid or will bid a low price. Requiring information to be provided by the incumbent to all bidders is unlikely to solve the information asymmetry problem, and in any case the incumbent may have reputational advantages that cause outside bidders to shy away from bidding aggressively.

There is an obvious trade-off between duration of concession contracts and the repetition of auctions.

Repeated auctions can be part of an ingenious design to shift uncertainty. That is, they can be a way for government to bear more uncertainty and thus receive higher concession fees, on average. A recent Dutch railway concession does this.

Box 7. Example of Designing around Uncertainty in the Dutch Betuweroute Concession

The Dutch state granted a short-term rather than a long-term concession for the Betuweroute in order to bear itself the current significant uncertainty about market developments. (The state bears the uncertainty in the sense that the price of the long-term concession which will be auctioned at the end of the short-term concession will reflect what actually happens in the short-term.)

In particular, the concession of the Betuweroute from the harbour of Rotterdam to the German border, which is designated for freight transport, will be granted for the period of 2007-2009/2010, to a consortium. During this period, the uncertainty about the volume of freight is expected to be reduced. Later, a longer concession will be allocated by competitive auction. The price the Dutch government will get for the concession will reflect the expectations held in 2009/2010 about future e.g., freight demand and maintenance costs, and these expectations will be more precise because of the experience of operating the concession during 2007 to 2009. Conceivably, though this is not mentioned in the Dutch discussion, the members of the consortium, since they will have information advantages gained by being incumbents, could be required to bid separately for the second concession.

Source: Submission by the Netherlands to the Sixth Global Forum on Competition 2006.

Williamson (1976) argued that using recurrent short-term contracting allowed the expense of calculating contingencies to be avoided. Adaptations could be introduced at the contract renewals in response to what events had actually occurred. The Dutch Betuweroute concession seems to be an example of Williamson's theory put into practice.

3.1.4 Other auction issues

3.1.4.1 Auctions for multiple goods

The auction theory literature provides less guidance when there are auctions for multiple goods, or multiple auctions involving essentially the same players. While the practice is to extrapolate from the better analysed single good case to the multiple good case, that extrapolation is difficult and prone to error. Multi-unit auctions have been used to sell radio spectrum, electric power, Treasury bills and other objects. When the objects can be either substitutes or complements, auctions do not perform well. While for single-object auctions the objectives of higher revenue and allocation to the more efficient owner are aligned, for multi-unit auctions these objectives must be traded-off. The two examples below give a flavour of the considerations in multiple goods auctions.

Box 8. Description of the US Radio Spectrum Auctions

The design of the 1994 Federal Communications Commission auctions to sell spectrum licenses for PCS[8] has inspired a number of subsequent multi-unit auctions. This box describes the first of those auctions.

There was no off-the-shelf design for auctions of multiple objects with potentially highly interdependent values. (The value of one license depended on whether one already owned a substitute or a complementary license.) Among the difficulties was the fact that some potential bidders wanted nationwide licenses whereas others wanted regional licenses.

The basic design chosen was a simultaneous ascending auction. Ten licenses were offered in total, with the country being divided into several large regions. There was an auction for each license. At each round, each bidder would place bids. Bidders did not bid in every auction. At the end of each round, everybody could see each bid that had been made. Bidding increments were set by the FCC at each round. The idea was that bidders could put together their own optimal basket of licenses, taking into account the cost of the various licenses. Thus, at each round, each bidder could re-design its basket of licenses after surveying the current high bid for each license.

The rule for ending the auction, the closing rule, was that the bidding on all licenses ended when there was a round in which there were no bids on any license. The alternative rule that had been discussed was to close the bidding on each license when there had been a round in which there had been no bidding on that license. This alternative rule was not chosen because it meant that a bidder who thought he had won a particular license, but was outbid at the last moment, could not then bid for a substitute license if the bidder there had already closed. To keep the auction from going on for too long, there was a rule that serious bidders either had to have a high bid or place an acceptable new bid in each round. For the same reason, there was also a rule that bidders had to "be active" on a minimum percentage of the auctions for which they were eligible to bid. (Incumbent cellular licensees were barred from holding a PCS license in the same area.)

The auction closed after 47 rounds over 5 days. Fears that the process would be never-ending and too complex for the bidders proved to be unfounded.

Subsequent multi-unit licenses have been larger. From this small auction through March 1998, the FCC has held a total of 5,893 auctions. The rules have been changed as both bidders and the government have identified weaknesses. The FCC says, "Prior to [the 1993 law that gave the FCC authority to use competitive bidding], the Commission mainly relied upon comparative hearings and lotteries to select a single licensee from a pool of mutually exclusive applicants for a license. The Commission has found that spectrum auctions more effectively assign licenses than either comparative hearings or lotteries."

Sources: Milgrom 2004, Cramton and Schwartz 2000, and FCC website fcc.gov/auctions

[8] PCS, Personal Communication Service, is the name for the 1900 MHz radio bank used for digital mobile phone services in Canada and the United States.

Box 9. Example of New Zealand Television Licenses

New Zealand sold licenses to deliver television broadcasts using simultaneous second-price sealed bid auctions. (Recall that in these auctions, the winner is the higher bidder but he pays the amount of the second-highest bid.) This kind of auction would work well only when the licenses are neither substitutes nor complements. But in the event, the licenses could be substitutes or complements, so bidders ran a risk of winning too few or too many licenses.[9] The actual outcome suggests that the auction was inefficient because the bids show little connection between the demands expressed by bidders, the number of licenses they won or the prices they paid. Also, bidders could not guess each other's values. For example, it appears that neither Sky—who bid much higher than the others—nor Totalisator—who bid NZ$401,000 for six licenses—made accurate guesses about their competitors' bidding strategies.

Table 1 Winning Bids on Nationwide UHF Lots: 8 MHz License Rights

Lot	Winning Bidder	High Bid (NZ$)	Second Bid (NZ$)
1	Sky Network TV	2,371,000	401,000
2	Sky Network TV	2,273,000	401,000
3	Sky Network TV	2,273,000	401,000
4	BCL	255,124	200,000
5	Sky Network TV	1,121,000	401,000
6	Totalisator Agency Board	401,000	100,000
7	United Christian Broadcast	685,200	401,000

Source: Hazlett (1998) cited in Milgrom, p. 12.

The auction could have been improved by having several rounds. The winner would be allowed the number of licenses desired (up to a limit set by antitrust concerns) at its winning bid, the second round would sell the right to choose next, and so on. Or the auction might have bids consisting of prices and quantities where the highest bidder got to fill its bid, then the second until all licenses were gone.

As this small sample has shown, auctions for multiple goods are difficult to design well. The tradeoffs are difficult to identify and much of the design work requires sophisticated modelling.

3.1.4.2 The problem of multiple criteria

Where there are multiple criteria, such as an objective to provide the best mix of coverage, quality and price, it may be difficult to identify which bid was "highest." There can be a pre-announced formula that inputs all the bid variables and comes out with a single number, but such formulae—and any scoring to convert quality variables into values—are bound to be arbitrary in an economic welfare sense. It may be better to apply a filter of basic requirements and identify the winner on the basis of the bid among those companies whose bids fulfil those requirements. (See the box on the Swedish Beauty Contest for an example of filtering followed by an auction.) On the other hand, there is an intuitive argument—not yet fully explored in economic theory—that where bidders have different characteristics then multidimensional "scoring" can both increase bidders' profits and the government's value. (Klemperer p. 247)

The need to take into account multiple criteria is often cited as a reason to use a non-auction allocation mechanism. Government might want, for example, a combination of coverage commitment, price formula, and concession fee. But these multiple criteria must ultimately be translated into a single ranking, and then the highest ranking bidder wins the concession. In other words, there must be a formula which translated the different characteristics into a single ranking.

[9] This is not paradoxical. Assume three licenses are being sold and a bidder needs two of them to enter a market. If the bidder already has one licence, the remaining two are substitutes. If he does not yet have a license, two of them are complements.

With complex concessions, it is reasonable for the concession designer to need to educate himself about the relevant characteristics, various technologies and tradeoffs. This can be accomplished during a public consultation period before any bidding takes place.

The issue is when that formula is arrived at. If it is arrived at *before* the bids are submitted, then one must ask why the formula cannot be publicly announced in advance and an auction be held on the basis of, say, the concession fee. Announcement in advance can also facilitate entry. A variation would be to publicly announce minima for the various dimensions and reject all bids not meeting those minima, then choose on the basis of concessions fees bid. Such an auction would seem to be as feasible as a beauty contest and would have the advantage of increased transparency to ensure that only relevant criteria go into the ranking.

If the formula is arrived at *after* the bids are submitted, it runs the risk of appearing to be arbitrary or to favour particular applicants, and of being prone to corruption.

Beyond the concern over corruption, the risk of collusion with the auctioneer would be lessened if the government advertised its objective requirements and the criteria by which bids or proposals would be evaluated since this should attract more bidders. But the risk of collusion by way of leaks from the evaluator would remain.

Even with the best of intentions, when comparisons among bids are very complex then the problem of dealing with multiple criteria may be unavoidable. And when bids are evaluated according to criteria that are either unclear or not pre-announced, even competitive auctions can take on some of the characteristics of negotiation.

Competition from incumbents

When companies are already present in a sector, there allocation of concessions can either strengthen or weaken competition. It may be advisable to disallow bidding from certain companies in order to promote competition from new entrants who enter via auctions or, alternatively, to prevent problems of discrimination by vertically integrated companies. These issues are discussed later under promoting entry by bidders and coverage of the competition law.

Collusion between the auctioneer and bidders

The common practice of public announcement of all bids received is aimed at uncovering collusion between auctioneer and bidders. This practice is intended to assure bidders that the auctioneer did not unfairly exclude their bid. Unfortunately, it also helps members of cartels to detect cheating.

Box 10. Example of Enhancing Transparency in Procurement in France

In discussion over revision of the French public procurement code (Code des Marchés Publics) an idea was put forward to increase the transparency of auctions. Rather than publicly announcing only the winning bid, all bids received for each public tender would be made public under this proposal. The idea was that stakeholders would be better able to monitor the process and ensure that it was fair. Most of the business community supported the idea, but the competition authority (Conseil de la Concurrence) had strong reservations. They argued that the transparency would discourage would-be cheaters on cartels from making competitive bids since they would be afraid of being found out and punished in a later tender. The competition authority further argued that, since the same firms bid time and time again in procurement auctions, having access to the losing bids as well would help the firms build up knowledge about how their competitors bid. The knowledge gained would facilitate tacit collusion.

Source: Jenny 2005

Unfortunately, the use of transparency in the bidding process to reveal unfairness and corruption conflicts with the aim of preventing collusion; transparency makes it easier for a bid-rigging conspiracy to detect and punish cheaters. Solutions are needed which advance both aims. For example, an inspector general or ombudsman could oversee the auctioneer and investigate complaints without necessarily revealing who bid what. Though how would concerns about capture or corruption at that level be satisfied? The optimal level of transparency would also depend on the relative effectiveness of deterrence through penalties for cartelisation and for corruption (more transparency would be in order if corruption is a larger problem than cartelisation).

Further, the auctioneer should be sufficiently independent to operate in the public interest. *Inter alia*, its incentives should be aligned with that of the public purse, it should have sufficient independent knowledge, and it should have the necessary controls to maintain confidentiality of bids.

3.1.5 Conclusion on auctions

A few examples of actual auctions can give a flavour of how design can be improved.

- Switzerland auctioned off four 3-G mobile licenses in 2000. Weaker bidders dropped out, at least one because of the ascending-bidding rules. The government allowed last-minute joint bidding. In the last week before the auction, the number of bidders shrank from nine to four. The licenses were sold at their reserve price, one-thirtieth of the per capita revenues raised in the British and German auctions for similar licenses. [Klemperer 2004, p. 109] Setting a higher reserve price, forbidding last-minute joint bids, and perhaps switching to a sealed bid auction are likely to have improved outcomes for the treasury.

- Turkey auctioned off two telecom licenses sequentially, declaring the reserve price for the second licence would equal the selling price of the first license. One company bid far more than the first license was worth if it would face competition from a second licensee. No one bid for the second license. [Ibid, p. 110]

- The US auctioned off spectrum in 1996-7 using simultaneous ascending auctions for a large number of lots. Most bids were in round thousands of dollars. Two companies were competing heatedly for lot number 378. One company over-bid the other, with bids of $313,378 and $62,378, for lots where the second company had seemed to be the undisputed high bidder. The second company quit bidding for lot 378. [Ibid. p 105 citing Cramton and Schwartz 2002] The obvious inference to make is that one company was signalling that he would punish the other in

other auctions by bidding high prices if the second company would not drop out of the bidding for lot 378. Specifying sufficiently large bid increments can avoid this type of signalling.

Both experience and theory supports a few more rules of thumb to help authorities to anticipate and avoid some errors in how they design auctions.

Box 11. Rules of Thumb for Auctions

- Aim to interrupt signalling, help cheaters on a cartel to avoid detection, and help cheaters to defer the cartel's punishment. This can include using sealed bids, prohibiting bids not in round numbers, prohibiting joint bidding arrangements that are not announced sufficiently in advance of the auction date, and having a sufficiently high reserve price. Enforce the competition law effectively.
- Aim to increase participation. This can include wider advertisement of the auction, reducing the cost of bid preparation, and maybe reducing informational advantages of incumbents.
- Where the goods or concessions are complements or substitutes, design the auctions to takes these interactions into account. To take a simple example, simultaneous English auctions (where bidders can continuously assess their likelihood of winning the various goods and continuously adjust their bids) can do that, whereas separate sealed bid auctions do not. Once a seal bid is made, a bidder cannot revise it when it finds it has won or lost the auction for a complement or a substitute.
- Include in the design rules for reassessing the design if there are too few bidders. For example, if three licenses to offer mobile telephony services are offered and only three bidders show up, then the auction will yield much lower revenues than if four or more bidders show up. If the pre-announced rules state that the auction will be postponed until steps are taken to increase participation, then the auction should attract more interest and avoid disappointing outcomes.
- Where the bidders have the same expected value for the object, then if one bidder has a small advantage over the others such as valuing the object slightly more or having slightly better information then this can radically change the revenue that can be raised by the auction. Under these conditions, a sealed bid auction will raise more revenues than an open auction. [Klemperer, p. 12-13 or 236-7] This can be relevant, for example, when a concession is being re-auctioned and the incumbent has advantages over the other bidders, such as having made sunk investments or knowing more about the actual conditions of the concession.
- Auctions need to take account of the environment in which they are held. Experiences elsewhere are informative, but they are not a substitute for analysis and for simulations. The services of an experienced auction designer may substantially improve the likelihood of a successful outcome and would help avoid mistakes.

3.2 Other allocation mechanisms

Three allocation mechanisms that do not involve auctions are simultaneous negotiations, negotiation with a single provider, and beauty contests. These are addressed after a short discussion on multiple criteria.

3.2.1 Negotiations

In a **simultaneous negotiation** procedure, also called competitive negotiation, several potential bidders are contacted by the government and invited to enter negotiations. During the negotiations, they develop alternatives that would meet the concession requirements. Then the bidders submit their final offers on the basis of the solutions identified during the negotiations. After the government selects the winner, further negotiations finalise the contract terms. This mechanism is permitted in, for example, Romania. This approach might be considered appropriate when project design is complex so that the buyer can use the information exchanged during negotiation with the potential sellers to better design the desired project. (Bajari et al 2004) *Inter alia* this approach allows various bidders' technical solutions to be

incorporated into the final contract. On the other hand, it is not clear why learning about alternative technical solutions could not take place earlier and be reflected in the request for bids.

Where there are no agency concerns with respect to the auctioneer, simultaneous negotiation is analogous to an open, or English, auction. An open auction is particularly prone to collusion when there are few bidders and every bidder knows who else is bidding. Further, since competitive negotiation is not open to public scrutiny and involves discretion on the part of the government, it may be more prone to corruption.

Box 12. Example of Tendering Before Negotiating: French Water

There is evidence that preceding the negotiation stage with a public auction can improve outcomes. Open, publicly announced tenders for water concessions in France were relatively rare before 1993. Rather, the same concessionaire almost universally remained as manager of a local water company from one contract to another. In France, three large multinational companies, Vivendi Water, Suez-Ondéo and SAUR-Bouygues, have the largest market shares. They total about 90 %. Corruption scandals and unhappiness at the price of water led to the *loi Sapin* which, since 1993, has required an open tendering process for water management contracts before a second negotiation stage, and limited the length of contracts. A study of several hundred contract renegotiations found that the average length of contracts fell from 17 to 11 years, prices fell by 10%, despite the incumbent operator winning in 80-90% of cases.

Source: OECD Competition and Regulation in the Water Sector DAFFE/COMP(2004)20 citations omitted and Saussier (2005).

Negotiating with only a single potential provider at a time is worse than negotiating simultaneously with several providers. When the government must decide whether to accept the single negotiator's "best and final offer," the choice is not between this and the other negotiators' offers, as it is for competitive negotiation, but rather incurring the costs and delay of new negotiations with a new partner whose "best and final offer" is still unknown. The weaker bargaining position yields a worse outcome.

In comparison with negotiations, auctions do well. Auction theory shows that, under relatively innocuous assumptions, an auction with N+1 bidders will always provide a higher price than any negotiation with N bidders.[10] In other words, if just one more bidder can be attracted to an auction than can be attracted to a negotiation for the same object, then the auction is more competitive.[11]

In sum, negotiating simultaneously with several potential suppliers rather than using a competitive auction can strain anti-corruption and anti-discrimination systems. Auction theory shows that, under certain relatively innocuous conditions an auction raises more funds than simultaneous negotiations. However, where bid evaluation is complex, even auctions can take on some of the characteristics of competitive negotiation. See the Box on Oakland cable television franchising for an illustration.

[10] One assumption, that bidders are symmetric, is less innocuous. With asymmetric bidders, optimal negotiation can yield a higher expected revenue than an auction with an extra bidder. Bulow and Klemperer (1996) have shown that, under certain assumptions, an auction with N+1 bidders will provide a higher price than any negotiation with N bidders. They also show that if a seller could negotiate with N bidders while reserving the right to hold an ascending auction with an additional bidder and without a reserve price, then the seller would always do better to skip the negotiations and go directly to the auction. The conditions are: bidders are risk-neutral, their value functions are symmetric, and their signals are independent, bidders' lowest possible valuations exceed the seller's cost of supply, and bidders with higher signals have higher valuations.

[11] One empirical study on refuse collection estimates that competitive auctions yield cost savings of 20% as compared with negotiation. (Dornberger, Meadowcroft and Thompson 1986, "Competitive Tendering and Efficiency: The Case of Refuse Collection." *Fiscal Studies* 7: 69–87, cited in Guasch)

Box 13. Example of Multiple Criteria and Renegotiation in Oakland Cable Television Franchising 1969

In June 1969 the City Council of the city of Oakland, California, adopted an ordinance setting out the main features for allocating a cable television franchise. City staff began discussions with prospective franchisees and community groups to gather information on costs, demand characteristics, and technical capabilities inter alia to define a standardised "basic service" so that bids would be comparable.
In April 1970, the five applicants were invited to bid. To summarise, the franchise winner should provide two systems, a basic system A with specified channels and a system B with unspecified special programming and unspecified other services. A subscriber would get access to system A by paying a connection fee and a monthly charge of amount "x." Franchise duration was 15 years. The annual franchise fee to be paid to the city was specified. The connection charges were specified. Minimum technical specifications were stipulated. Minimum service quality was described generally. Minimum coverage of the city and schedule was specified. (All areas of the city were to be served after three years.) Proposals to increase the rates to subscribers could be made annually, but the city ordinance did not specify any indexing or other criteria. The basic bid was an amount x that would be charged subscribers each month for the first outlet that would enable them to receive the basic system A.

Bids received were $1.70 from Focus Cable, $3.48 from Cablecom-General and $5.95 from TelePrompTer Corporation. Focus informed the city at the time of its bid that a partner vital to its qualification as a bidder had withdrawn. Focus had submitted the lowest bid, was the only local bidder, and represented an ethnic minority, so the City was reluctant to reject the bid. Two weeks later, TelePrompTer proposed to enter into a joint venture with Focus in which TelePrompTer would end up with 80% of the capital. The City awarded the franchise to Focus in November 1970. Focus asked for and was granted a rate of $4.45 per month for system B.
Focus then asked for the contract to be modified. After negotiation, the main changes were: lowering of technical capacity, increase of annual franchise fee, reduction of penalty for late construction by a factor of 20 or more, slower construction schedule, and a five-fold increase in monthly subscriber fee for additional connections.
In November 1974, 11 131 subscribers were connected. 10 361 had the extended service B and only 770 had the basic service A.

The Oakland experience leads to the following observations:

-- The lack of consumer appeal of basic service A meant that the focus on the monthly fee for basic service A in the award process "resulted in a strained and perhaps bogus competition."
-- The actual relationship between cost and price is not clear. First, the bids for service A raise the question of whether there was an economically meaningful competition. Second, the price of service B was negotiated and not determined by a competitive mechanism. Third, vertical integration (TelePrompTer supplied much of the equipment) and the city staff's lack of auditing capability obscure true cost levels.
-- An inference that Focus' initial bid was only meant to get its foot in the door is supported by the low initial bid, timing and nature of Focus' reorganisation, importance of its local bidder status, and its success in the contract renegotiation.
-- The City was not in fact in a position to take over if the franchisee withdrew. There was no inexpensive way to value the assets, nor a plan to prevent service interruptions.

Source: Williamson 1976

3.2.2 Beauty contests

Beauty contests, like their namesake, are rather difficult to define. In one definition, it is a "procedure where criteria of evaluation include technical expertise, financial viability, network coverage, roll-out speed, etc. Such processes are not transparent, and are often prone to intense lobbying and political intervention." (Jehiel and Moldovanu 2003). In another, it is a procedure in which "there are measurable indicators set out against which applicants can be judged" and the concession fee does not vary (it is often zero but it can be any value). Proponents of beauty contests argue that they allow a focus on critical performance characteristics, such as coverage and speed of provision of that coverage, which encourages

applicants to "excel" in those areas. Of course, commitments made in the beauty contest have the same difficulties of follow-up as commitment as those made in an auction.

Box 14. Example of Swedish Beauty Contest for UMTS Licenses

Sweden provides an example of a beauty contest for allocating UMTS licenses. The selection process had two steps. First, applicants were scrutinised on the basis of financial capability, technical capability, commercial feasibility and appropriate expertise and experience. Second, those who passed the first screen were judged on commitment concerning coverage and development rate.

The number of licenses was initially five, reduced to four. Two were reserved for new entrants and permitted them to also build GSM infrastructure.

Ten applications were received. Four applicants were screened out at the first stage. Among them was Telia, the largest and oldest of the established Swedish mobile operators, who was screened out because the selecting agency believed its proposal was technically infeasible.

One licensee—Orange—dropped out of the market in December 2002. At the end of 2003, the deadline for full coverage, coverage by the remaining three was in fact 67.5%, 74% and 66% respectively. (Bjuggren 2004, including cite to *Svenska Dagbladet* 28 March 2004) Clearly, renegotiation has been a problem, raising the question of the effectiveness of the screening and allocation process.

Proponents of beauty contests argue that charging a low or zero concession fee promotes lower priced services later. This argument confuses sunk costs with fixed costs and assumes there will be no price regulation later. Regarding sunk costs, once the concession fee has been paid, it does not affect the price of services. (The cost of capital may increase if paying the fee significantly increases the likelihood of bankruptcy, this can in turn affect prices.) Sunk costs do affect the decision to enter a market, but it would be a foolish company indeed to bid a concession fee that it expects will result in losses. Second, if there were a concern that prices would be too high later, then regulation—with details announced before the auction so bidders can take the future rules into consideration in formulating their bids—can be introduced or perhaps the number of licenses could be increased.

3.3 Commitment and renegotiation

Opportunistic renegotiation[12] eliminates the benefits of competitive auctions. If concessions are renegotiated soon after their award, then the initial auction becomes a bilateral negotiation between the auction winner and the government. The competitive benefits from the auction are lost. Governments often cannot reject renegotiation due to fear of political backlash and additional transactions costs of re-designing the concession, holding a new auction, and choosing a new concessionaire.

[12] Renegotiation refers here to a significant change in the original contract and financial impact. I.e., stipulated tariff adjustments for inflation do not count, nor do stipulated periodic tariff reviews or other adjustments due to contingencies such as devaluation contained in the contract count as renegotiation.

Box 15: Example of a Renegotiation: Lima Airport

"In early 2001 Lima's airport was concessioned to a consortium, led by Frankfurt Airport operator, Bechtel, and a local partner, that submitted the highest bid. The criterion was the percentage of gross revenue that the operator would commit to turn over to the state. The winning bid offered the state 47 percent of gross revenue in addition to a commitment to invest more than US$1 billion and construct a second landing strip by the 11th year of the 30-year concession.

"Although that appears to be a very attractive bid from the government's perspective and as such was lauded, it also appears financially questionable. It means that from the residual 53 percent of gross revenue, the operator will be able to cover operating costs, amortise investments, and earn a fair rate of return on investments. Shortly after the award, the winning consortium began asking to renegotiate the contract. The operator has been delaying agreed upon investments, and the bickering from both sides has been a constant. The concession contract was renegotiated at the end of 2003, adjusting investment obligations and the percentage of the gross revenues to be given to the state each year."

Source: Guasch (2004), p. 47

A study by Guasch (2004) of about 1,000 concession contracts awarded in Latin America and the Caribbean between the mid-1980s and 2000 provides the best empirical study of concession renegotiation. The results provide useful guidance about how to improve concession design to reduce the incidence of renegotiation. The contracts in the study include 17 countries and were fairly evenly distributed among four infrastructure sectors: telecommunications, energy, transport, and water and sanitation. The most important results are listed below.

- Renegotiation occurred in 30% of all concessions. Renegotiation occurred in 55% of transport concessions and 74% of water and sanitation concessions.

- The average time between award and renegotiation was 2.2 years for concessions that were supposed to run 15-30 years.

- Renegotiation was more common when the concession was awarded through competitive bidding (46%) than awarded noncompetitively (8%), excluding telecoms concessions.

- 61% of renegotiations were initiated by the concessionaire whereas 26% were initiated by the government. However, the type of regulatory regime has a significant effect on these proportions. Under price-caps, the concessionaire initiates renegotiation 83% of the time, whereas under rate-of-return, the concessionaire initiates 26% and the government 34% of the time. (Figures do not total to 100% since sometimes both initiated the renegotiation.)

- Renegotiation was more likely when the contract was awarded on the basis of lowest proposed tariff (60%) rather than highest transfer fee (11%).

- Renegotiation was more likely when the contract had investment requirements (70%) rather than performance indicators (18%).

- Renegotiation was more likely under price-cap regulation (42%) than under rate-of-return regulation (13%), and when a regulatory agency was not in place (61%) than when one was in place (17%).

- Renegotiation was more likely when the regulatory framework was in the contract (40%) than in a decree (28%) or a law (17%).

Guasch also performed a probit analysis[13] to estimate the effect of the various variables on the likelihood of renegotiation. That is, he looked at features like "the existence of regulatory body" and found that "the existence of regulatory body" had a large effect on whether contracts were renegotiated. He found that if there were a regulatory body then it greatly reduced the likelihood of renegotiation. He speculated that this was a proxy for better enforcement and that better enforcement would reduce claims for renegotiation. He found that the award criteria mattered; awarding tariffs on the basis of lowest tariff rather than highest fee significantly increased the likelihood of renegotiation. The type of regulation—price-cap versus rate-of-return—mattered a lot, with price-cap regulation leading to more renegotiation. The autonomy of a regulatory body was not robust to the specifications tested, i.e., these results should not be relied upon by policy makers. Investment obligations were seen as more likely to lead to renegotiation. Domestic concessionaires were seen as more likely to renegotiate. Macroeconomic shocks favoured renegotiation. Renegotiation was slightly more common after a change of government. Finally, an award process without competition, e.g., bilateral negotiation, led to fewer renegotiations. These findings are summarised in his table 6.15 reproduced below:

Table 6.15 Marginal Effects of Significant Variables on the Probability of Renegotiation

Significant variables affecting the probability of renegotiation	**Marginal effect on probability of renegotiation**
Existence of regulatory body	20–40 percent
Award criteria	20–30 percent
Type of regulation	20–30 percent
Autonomy of regulatory body	10–30 percent
Investment obligations	10–20 percent
Nationality of concessionaire	10–20 percent
Extent of competition in award process	10–20 percent
Macroeconomic shocks (devaluations)	10–15 percent
Electoral cycles	3–5 percent
Award process	10–20 percent

Source: Guasch (2004).

The main outcomes of the renegotiations were to "increase tariffs (62%), delays and decreases in investment obligations (69%), increases in the number of cost components with an automatic pass-through to tariffs (59 percent), and decreases in the annual fee paid by the operator to the government (31%). A small number of renegotiations, however, led to tariff decreases (19%), increases in the annual fee paid by the operator to the government (17%), and unfavourable changes for the operator of the asset base (22%)." (Guasch, p. 18)

[13] The term "probit" means "probability unit." A probit analysis is used to analyse data where the dependent variable can have only two possible values. Here, either there was or there was not renegotiation. A probit analysis will discover which independent variables, e.g., the existence of a regulatory body, are most important in influencing the dependent variable, e.g., renegotiation. The traditional linear regression model explains the dependent variable y in terms of the independent variables x in this way, $y=\alpha + \beta x + \varepsilon$. But the probit model explains the probability distribution of the variable y in this way: prob(y=1)=f(x) where y can take the value 0 or 1. See Kennedy 2003.

Concessionaires' arguments for starting renegotiation were mainly that there was an imbalance in the financial equilibrium of the concession contract, i.e., they were not getting a fair rate of return on their investments. Governments' main arguments were "changes in government priorities in the sector, political concerns (often linked to the electoral cycle), dissatisfaction with the level and speed of sector development, and non-compliance by operator with agreed-upon terms." (Guasch p. 18)

Analysing these results can help to design future concessions that discourage renegotiation.

- The relatively low incidence of renegotiation in telecommunications and energy was attributed in part to these sectors being more competitive, thus providing the government with more alternative service providers and therefore reducing the bargaining power of the concessionaires. Low renegotiation in telecommunications was also attributed to more outright privatisation rather than concessions.

- The relatively low incidence of renegotiation of non-competitively awarded concessions was attributed to the surplus having already been extracted in the initial negotiations.

- The effect of different regulatory regimes on renegotiation was attributed to their different risk characteristics. Under price-cap, the concessionaire bears more risk than under rate-of-return.[14] Also, the nature of the renegotiation was typically to change the treatment of cost components so that more were subject to automatic pass-through, thus reducing the concessionaire's risks.

- Using either a criterion that is likely to be modified soon, such as tariffs, or that is subject to manipulation and arbitrary decisions, such as technical proposals, to award a concession eliminates the effect of competitive auctioning. (The logic is as follows. The modification or arbitrariness means that promises made at the auction do not have to be kept in the future. Therefore, there is no cost to making promises which, if kept, would be costly. Hence, these promises cannot be used to identify the least cost provider. Hence, a competitive auction using these promises will not identify the least cost provider.)

Further lessons:

- If winners can default cheaply, they have effectively bid for an option to be a concessionaire. (After the winners had been declared in an Australian auction for satellite television licenses, two bidders defaulted on those bids they no longer wished to have. The government did not impose penalties for default. Example cited in Klemperer p. 110 reference deleted)

- If bankruptcy provides a way out of the commitment, then auctions favour bidders who are underfinanced over better-financed bidders who cannot default. Requiring bonds and penalising defaults may help.

- Another source of pressure to renegotiate is the failure to deliver affordable services to the poor. If subsidies, cross-subsidies and user charges do not provide the necessary revenues to cover costs, then either the concessionaire cannot deliver what has been promised or cannot do so sustainably. Then government is pressured by consumers who insist on better service to renegotiate or to change concessionaire, or the concessionaire is pressured to renegotiate or terminate the contract.

[14] Under rate-of-return regulation, the concessionaire can pass through to consumers changes in costs, though often with a lag or smoothing. By contrast, under price-cap regulation, the concessionaire cannot in general adjust its prices to reflect cost changes.

- Where multiple criteria were used to choose the concessionaire, each criterion is open to renegotiation. Parties are likely to choose to renegotiate on the criterion where they are advantaged in the negotiation.

Box 16. Example of Renegotiation in U.S. Airmail Routes

A study of the allocation by competitive bidding of concessions to provide airmail services in the 1920s and 30s in the United States found that routes with more competition had lower prices, the bidding gave concessionaires incentives to expand demand for the service, but that incumbents gained advantages over other bidders even without franchise-specific investments.

Thirty-two routes were auctioned between 1925 and 1930. The Post Office specified a reserve price and quality standards and bidders bid the amount they would need to be compensated. Contracts were for four years. There was evidence of collusion in at least one auction and it was re-tendered. A series of rule changes, beginning in 1928, had the effect of not subjecting the winners in the initial auctions to further competition. Also, there was a practice of physically extending old routes rather than putting the extensions out to bid. Two routes were put out to bid after 1930. The contracts were awarded after the so-called "Spoils Conference" among the Postmaster General and the four major carriers. In reaction to the Spoils Conference, Congress began investigating the competitive bidding procedure. In February 1934, the new Postmaster General cancelled all route contracts. In May 1934, partly different routes were put out to bid with temporary, 3-month contracts. (The government forbade the participants in the Spoils Conference from participating in this second round of auctions. They therefore changed their names to some which are familiar today, and did participate.) These contracts were extended several times and the same contractors were in place in 1938 when the regulatory regime changed with the establishment of the Civil Aeronautics Board.

The study of these auctions found that more bidders participating in the auction lowered the price. By one measure, doubling the number of bidders lowered price by 30 percent.

The study also found that incumbents had advantages over entrants. In the second set of auctions, 11 routes had no incumbent and 21 had incumbents. In the 12 routes won by incumbents, they faced considerably less competition and the routes were considerably longer (perhaps reflecting that prior operating experience was more valuable on longer routes—in those days, navigation was visual and contractors had to establish their own emergency landing areas). Incumbents won at considerably higher prices. This plus other data suggests that incumbents had an advantage over entrants which was mainly that they could dissuade competitors from entering particular auctions.

As anecdotal support to the argument that subsequent trading will not overcome inefficient auction allocations, it is interesting to note that, "By the end of 1930 American Airlines had the southern transcontinental mail route with flights through Dallas, TWA had a mid-continent route with flights through St. Louis and United had a northern route with flights through Chicago. All three airlines have had hubs in those cities at the end of the 20th century." (Eastern was the fourth re-named member of the Spoils Conference.)

Source: Wolfram 2004

Renegotiation is not always opportunistic. The inherent incompleteness of concession contracts[15] means that sometimes renegotiation is necessary. For a concession contract to be credible, renegotiation should be according to clear, pre-established criteria agreed by all parties to the contract. "A renegotiation rule should expose what changed unexpectedly….The public policy criteria for testing whether revision is needed must be pre-established and clearly defined. And any change to the contract that is warranted should be limited to the issue at hand: the entire contract should not be renegotiated." (Crampes and Estache 1996)

Formal provision for renegotiation and bailout may encourage opportunistic renegotiation. Formal limitation on the use of renegotiation and bailout might help, but the credibility of these limitations relies on the credibility of the government. To the extent that international institutions or even governments of other countries are more credible, one strategy would be to use them to enforce renegotiation and bailout policies. Trade agreements between countries can address contract negotiation breakdowns involving foreign investors. Also, loans involving the World Bank or IMF may be backed by sovereign guarantees.

(Jamison et al 2005)

Box 17. Example of Entry and Renegotiation: Norwegian Regional Air Transport

This example involves concessions in a market with well-known technology, relatively low entry costs, and fairly straightforward technical and economic regulation. It involves a government administration with a reputation for honesty and competence. And yet, the concessions have not resulted in much entry or much cost savings, and there remain issues of how to improve the contract design with respect to renegotiation and duration.

Service on certain regional air routes are a public service in Norway. Originally provided by a monopoly licensee, Widerøe, a SAS-owned subsidiary, it has been auctioned since 1996. Bids are the required subsidy for each route. The service must comply with pre-announced standards on frequency, seating capacity, aircraft category and maximum fares. Regional airports require short take-off and landing aircraft. Widerøe, who also operated regional air services on a commercial basis, procured the required aircraft meeting the seat capacity requirements, which are no longer in production, on the basis of the monopoly license. It is the only Scandinavian company with a fleet of these aircraft.

Auctioning of the PSO for three-year periods was introduced to conform with EU regulations (Council Regulation (EEC) No 2408/92 Article 4, on access for Community Air Carriers to intra-Community air services). The auctions are simultaneous sealed-bid. I.e., a bid states the amount of subsidy required for each route the bidder wishes to serve. For each route, the winner is the lowest subsidy. In the first auction, held in 1996 for the period 1997-2000, Widerøe won all the concessions. The service standards were amended to encourage more competition. At Widerøe's request, three routes were removed from the PSO and Widerøe began to operate them commercially. (Widerøe 2000) In the second auction, Widerøe won most concessions, apart from some coastal routes won by Coast Air. In the third auction, Widerøe won nine of the 15 routes against six other bidders. In the fourth auction, Widerøe won 11 routes,

[15] Concessions are incomplete contracts. For example, neither party knows, at the time of signing, precisely the cost of providing the promised service, the amount of the service that will be demanded at agreed tariffs, nor some of the other variables that affect the profitability of the contract. Further, it is costly to write all the contingencies into a contract. Third, it is costly to monitor and it may not be possible for an adjudicator such as a court to verify the actions and the contingencies contained in a contract. The result is that government and concessionaire may need to negotiate to take into account the contract's incompleteness.

Problems arise when the negotiations go far beyond the bounds of incorporating resolved uncertainty into the contract. Having made sunk investments (ranging from literally digging holes in the ground to preparing voter-consumers to expect the delivery of specific services), the negotiating strengths of the parties will have changed.

Coast Air won three and two others won one route each. The first auction significantly reduced the level of subsidies from the level under the single licensee system. The second auction substantially increased subsidies. The "headline" amounts of the subsidy over the contract periods were 1.0 bn NOK, 1.1 bn NOK, and 965 million NOK in the second, third, and fourth auctions respectively, but details—like the increase of 40 million NOK mentioned next and changing requirements on capacity—limit the comparability across auctions. In sum, auctioning has resulted in some entry and possibly lower subsidy.

The contract rules trade off risk-sharing and renegotiation. A carrier can cancel the contract with one year's notice. This shares risk between the concessionaire and the government, which reduces the overall cost of providing the air service. But it facilitates the following strategy: Bid low to win the contract. Gain experience in operating the route, so as to be better informed than rivals. Withdraw from the contract. Bid in the second auction against rivals with neither the specific operating experience nor the necessary aircraft, that is to say, bid high. Indeed, in July 2003 Widerøe announced a withdrawal from two routes. In the auction that followed, Widerøe won against two competitors. In the initial contract for 01.04.03 to 31.03.06, the subsidy for these two routes was 204 million NOK for the three years. In the replacement contract for the shorter period 07.07.04 to 31.03.07, the subsidy totals 246 million NOK.

Longer and staggered contracts may encourage entry. Three years may be too short for an entrant to recoup sunk costs. This problem is exacerbated by interim tenders for yet shorter terms that are held when a carrier cancels the contract. The Norwegian Competition Authority thinks that longer contracts may increase entry and thus increase competition, but notes that this would require a change in the relevant Council Regulation. The Authority also notes that staggering contracts may promote entry by easing the burden on small bidders to meet requirements to show a capacity to serve all routes on which they are bidding.

The auctions are simultaneous first-priced sealed bid. About half of the auctions are to serve city-pairs, many are city-triplets, and four auctions are larger sets—up to eight—of cities. Bids may be conditional, e.g., a bid could state a price for (1) Narvik-Bodø and a bid for (2) Narvik-Bodø if the bidder also won Røst-Bodø. The concessions seem to be designed to try to capture some of the value of serving related towns. One question is whether simultaneous open auctions would enable the auctioneer to capture more of the value of serving complementary routes, second, whether the additional organisational cost would outweigh any gains, and third, whether the switch from sealed to open bidding would discourage entry by weaker bidders or facilitate collusion. The net effect is unclear.

Sources:
OECD (2003), "Regulatory Reform in Norway: Marketisation of Government Services– State-Owned Enterprises"; various Invitations to Tender, Ministry of Transport and Communications (7 July 2005, 10 April 2002, 1 April 2000) and various press releases (Nr.: 135/05 date 02.11.05 "Regionale flyruter: Tildeling av einerett for drift av 16 ruteområde [Regional air routes: Award of sole right to operate on 16 route areas]" Nr.: 20/04 date 05.03.04 "Flyruter i Finnmark og Nord-Troms: Widerøe tildelt kontraktar," Nr. 96/99 Dato: 20.09.99 "Drift av regionale flyruter: Utvida og betre transporttilbod!", Nr.: 97/2002 date 28.08.02 "Ny tildeling av regionale flyruter: Eit godt tilbod for passasjerar og næringsliv i heile landet") on website odin.dep.no/sd; OECD 2004 Non-Commercial Service Obligations and Liberalisation DAFFE/COMP(2004)19

The standard remedy to reduce opportunistic behaviour is to place it in a repeated context. The thinking goes that if a party recognises that it will be punished for opportunistic behaviour in the future, it will not engage in it today.[16] However, the evidence from the Latin American study shows that concessions

16 Following the logical argument forwards in time, opportunistic behaviour can be eliminated. The theory rests on there being no "final" concession or year (or on no given period being sufficiently likely to be the "final" one), on the opportunities for strategic behaviour occurring fairly soon after each other (or the interest rate by which future profits are discounted is fairly low), and the returns from persistent opportunistic behaviour being not too large relative to playing by the rules.

To provide a simple, imaginary example, assume that a widget company "W" often bids to be the operator of municipal widget concessions. Assume that the hundreds of municipalities share their experiences and that the concessions always last for, say, ten years. In 2005, "W" might consider opportunistically renegotiating its contract with municipality "M." But if "W" does that, then the other municipalities will learn about it. They will suspect that "W" will try the same thing with them, so they will be inclined to disqualify "W" from future auctions. If a sufficiently large number of municipalities do so, then the loss to

cannot always be put in a repeated context. When government is likely to change, e.g., by losing an election, then the government can behave opportunistically.[17]

Performance bonds and step-in rights can reduce incentives to renegotiate. **Performance bonds** (bank guarantees that indemnify the public party if the private operator fails to fulfil its obligations) are one way to prevent private partners from walking away from a contract, and they limit the bargaining options after the award. In a water concession in Latin America several partners in a consortium walked away from the concession when a dispute with the conceding authorities became unbearable. But key players stayed and tried to make the concession work, not least because of the risk that a large performance bond would be called. (Klein 1998b). The concession was abandoned in 1999. (Guasch p. 63) Nevertheless, Guasch recommends requiring a performance bond of not be less than (a) 2 percent of the total value of the contract and (b) 20 percent of the estimated annual revenue of the concession in its first year. (Guasch, p. 143)

Step-in rights allow government to take over the operation of a concession when the concessionaire is not performing according to specified standards. These provisions typically identify the breaches of contracts that justify direct intervention by the authorities; they require that the authorities give notice to the private operator; they provide for a cure period, during which the concessionaire is allowed to take remedial actions; and they specify the maximum duration of the authorities' intervention, as well as the type of measures they can adopt. If, at the end of the intervention, the concessionaire is not in a position to resume its activities, the contract can be terminated with cause by the public party. The Côte d'Ivoire–Burkina Faso rail concession has step-in right provisions. It states that if the concessionaire does not maintain adequate safety standards for the maintenance of rail infrastructure, the state holding companies, after having organised a hearing for the concessionaire, can force the concessionaire to adopt necessary measures. If such measures are not adopted, notice must be given to the concessionaire. Fifteen days later, if the concessionaire has remained inactive, the state holding companies can complete the necessary works with risks and expenses borne by the concessionaire.

A concession contract can include an **obligation to continue providing service** until a new concessionaire has been chosen**.** This helps governments overcome their reluctance to terminate a concessionaire due to concerns that basic services, such as water supply, may be interrupted. In Colombia this obligation is imposed by a general law governing concessions. (Klein 1998b)

3.4 Conclusion on allocating concessions

To conclude, the allocation of a concession is vital; misallocation is costly and not correctable by selling on the concession. Competitive auctions can identify the most efficient operator. The idea is that the

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"W" from no longer having those concessions that it could be expected to have won is larger than any gains "W" makes from its renegotiation with "M."

However, if we now assume that there are few competitors to "W" then the argument above breaks down. If disqualifying "W" meant that only two serious competitors remained, the other municipalities might not disqualify "W." Then "W" will find it profitable to engage in opportunistic renegotiation as just one additional way to exercise its market power.

17 Concern about renegotiation has led to the development of the "least present value of revenues" criterion by Engel, Fischer, and Galetovic (2001). This criterion is renegotiation-proof. Under this regime, the government sets maximum tariffs and a discount rate (fixed or variable). Bidders bid the present value of total revenue to be received, and the lowest bidder wins. Any revenue reduction is automatically compensated by extending the length of the concession. Once the winning LPVR is received, the concession ends. This approach is better used where service quality does not affect the level of demand. The uncertain duration can raise the cost of capital. This model has not been widely adopted.

highest bidder will be the person/company who places the highest value on the concession, and that will, on average, be the person who can operate it most efficiently. But poor auction design can thwart this line of reasoning, and sometimes the auctioneer does not desire the most efficient operator. Also, where there are multiple criteria, it may be difficult to identify which bid was "highest." Auctions can be designed to discourage collusion and encourage more bidders, which are important issues in practice.

Alternatives to auctions include simultaneous negotiations, sequential negotiations and beauty contests. Auctions will provide a better outcome than simultaneous negotiations, according to economic theory. Negotiations and beauty contests raise issues of perceptions of corruption, arbitrary scoring, and favouritism. But complex contracts necessarily entail some negotiations.

Contract renegotiation—beyond that necessary to respond to contingencies in the contract—can eliminate the advantages of competitive auctions. Essentially, the outcome is a bilateral negotiation between the concessionaire and the government. More concessionaires, a contract where the government bears more risk, raising the cost of opening renegotiations and provision for step-in rights or obligation to continue service can discourage the practice, but renegotiation is common.

4. Addressing competition problems arising during the term of concessions

Concessionaires usually have significant market power. The coverage and enforcement of the competition law and other, perhaps sector-specific, laws determines the extent to which they may exercise such market power. In addition, the concession contract or the more general concession law may also have specific competition provisions.

4.1 Coverage by the competition law

Coverage by a competition law enforced by an independent competition authority helps government commit to not renegotiate certain aspects of the concession. For example, if the competition law has provisions regarding access to essential facilities, the concessionaire needs access to a facility qualifying as "essential," and an independent competition authority actively enforces the competition law, then this helps to commit the government not to extract profits by mandating high access fees and provides a mechanism for relief if it nevertheless does so. Similarly, if the concession contract does not mention the access fees that a concessionaire may charge, an actively enforced competition law may place a cap on access fees. For example, an electricity generating concessionaire might be "held up" by high electricity transmission fees. The abuse of dominance provision in the competition law might limit the hold up.

But rather than rely on *ex post* law enforcement alone, it may be better also to reduce the incentives or ability of the concessionaire to engage in anticompetitive behaviour.

One important set of circumstances are when the same company operates both an "essential facility" and competes against rivals who need access to that essential facility. For example, a company may both operate a port and use that port, along with its rivals, to compete in the shipping market. Such a firm has the ability and usually has an incentive to discriminate against its un-integrated rivals in a way that reduces consumer welfare and damages competition. In these circumstances, the OECD Recommendation of the Council concerning Structural Separation in Regulated Industries (2001) recommends that its Member countries "should carefully balance the benefits and costs of structural measures against the benefits and costs of behavioural measures." The Recommendation goes on to say that, "This balancing should occur especially in the context of privatisation, liberalisation or regulatory reform." Applied in the case of concessions, this would mean considering, during the design of the concession, the costs and benefits of prohibiting a concessionaire for a non-competitive activity from engaging in a complementary competitive activity.

Another important set of circumstances are when the same company already owns or operates a substitute for the concession, and controlling both would allow it to engage in anticompetitive behaviour. Concessionaires may be able to cumulate concessions in a way to create market power. For example, if there are only a few ports along the same coastline, winning several operating concessions—or even just those for two adjacent ports—could enable a company to raise price or lower output or quality. This reduced competition can be countered by considering, during the design phase, the costs and benefits of prohibiting a concessionaire from holding competing concessions. Against the lost benefits from competition may be weighed economies of scale or scope, to the extent they can be predicted. (The need to design concessions and auctions to allow the exploitation of complementarities was discussed above.)

Box 18. Example of a Competition Authority Screening Bidders, and Application to Telecommunications: Mexico

In Mexico, the concessioning authority is empowered to allocate concessions and oversee their operation. The competition authority (CFC) has powers to issue opinions on the competition aspects of concessions and even auctions. However, such opinions are non-biding.

Further, the regulatory schemes established for the telecommunications sector and for rail transportation contemplate the need for a favourable opinion from the CFC on prospective concession holders, previous to the award of concessions or to authorise the transmission of concession-related rights. In assessing prospective auction participants, the CFC considers the implications of supply conditions and the participants' market power.

In 2001, an affiliate of Telmex asked permission to offer long distance cellular service. The CFC, noting its previous determination that Telmex held a dominant position in the market for long distance services, concluded that permitting the affiliate to expand into that market could only worsen the situation. In the end, the telecoms regulator, COFETEL, decided to recommend approval of the application, but imposed conditions.

Sources: Submission by Mexico to Sixth Global Forum on Competition 2006 and OECD 2004

One issue that can arise is the interaction of the competition law with laws more specific to concessions or with the concession contract. For example, care must be taken to ensure that there is no inadvertent weakening of competition law coverage. From an economic point of view, the allocation of a legal monopoly, such as a concession, by the government does not imply that anticompetitive conduct is less harmful. Indeed, legal entry barriers mean that such conduct can be more effective. The 2005 OECD Guiding Principles for Regulatory Quality and Performance says, in particular, "Eliminate sectoral gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways. Competition law enforcement and sector regulation to promote competition and trade liberalisation should be co-ordinated to ensure consistency." This issue was raised in the Zambian port concession, mentioned below. There, the concessionaire claimed exemption from the competition law on the basis that section 3(f) of the Competition and Fair Trading Act exempts all matters to which the government is a party from the application of the law, and that the government was party to the concession agreement. A Supreme Court ruling appeared to imply that the competition law is applicable to the concessionaire. (Sources: Fifth Global Forum on Competition, Zambia DAF/COMP/GF/WD(2005)21 and An Ex-Parte Application for the Grant of Leave to Apply for an Order of Mandamus Directed to the Zambia Privatisation Agency and the Zambia Competition Commission and the Minister of Finance available at http://www.zamlii.ac.zm.)

Box 19: Example of Merger of Concessionaires: Port Terminals in Argentina

In 1994, auctions for long-term concessions (18-25 years) were held for the six terminals at one of the ports of Buenos Aires, Puerto Nuevo. The government imposed conditions on the auctions to create a market structure that could sustain competition: bidders were allowed to bid for more than one terminal, but they had to express a preference and could be awarded only one. But this condition was not complied with. A bidder who bid highest for terminal 2 and second highest for terminal 1 appealed the award of terminal 1 to a rival bidder. To avoid delay as the case wended its way through the court system, the government agreed to allow the bidders to merge and then jointly awarded terminals 1 and 2.

In 2001 the Argentine Antitrust Commission approved the acquisition of terminal 4 by Maersk Sea Land, one of the world's largest shipping companies. The Antitrust Commission found that Maersk would not be able to foreclose the market because terminal 4 had only a small share (8 percent) of the total capacity in Puerto Nuevo and there was a substitute port.

Source: Trujillo, Lourdes and Tomás Serebrisky (2003), "Market Power Ports: A Case Study of Postprivatisation Mergers," Note no. 260 Public Policy for the Private Sector, World Bank, March.

Competition law enforcement plays an important role to ensure that the legal monopoly (or, in some cases, oligopoly) conferred by a concession does indeed fulfil its intended role of increasing efficiency for the benefit, at least in part, of users.

4.2 Regulation

Concessionaires are often subject to price regulation as a means to curb exploitation of significant market power. Exceptions to this general rule—concessioning unregulated monopolies—occur when raising revenue or protecting national champions takes precedence over economic efficiency or consumer welfare, or when regulation is not feasible. Concessionaires may also be subject to access regulation, i.e., to providing access to essential facilities to unintegrated rivals at regulated terms. The regulatory may also include a detailed description of any public service obligations such as the service to be provided, the obligation to supply, equal treatment of users, continuity of service, and so on.

Sector-specific laws and the institutions that enforce them can play an important positive or negative role. Regulators can be a faster, less expensive way to resolve access disputes and set tariffs than under the competition law. But of course they need to have positive attributes including professional capabilities, adequate resources, transparency of decision-making, have an appeals process, and independence from those they are regulating. (See the 2005 OECD Guiding Principles for Regulatory Quality and Performance.) For example, if a regulator also has commercial interests—as when one company is a regulator of a sector in which it is commercially active—its decisions will not reflect broader public policy interests.

Two types of regulation that are commonly applied are rate-of-return regulation and price-cap regulation. In the first type, the regulator assigns a value to certain assets necessary to perform the regulated services, sets a rate-of-return on those assets—often the market-determined rate-of-return on assets with similar risk characteristics—and sets prices that will allow sufficient revenue to cover both return on capital as well as costs that the regulator allows the concessionaire to pass through. In the second type, price-cap regulation, the regulator sets maximum prices on the services, often with automatic adjustments to account for changes in costs outside the control of the concessionaire and to account for expected feasible improvements in efficiency within the control of the concessionaire, and a pre-set review date. (Variations include setting a maximum price for a basket of services while possibly requiring certain

relationship among individual prices, e.g., that the retail price for a service be at least a specified amount more expensive than wholesale access to facilities to provide the same service.) Rate of return regulation is seen as less risky, for the concessionaire, than price-cap regulation since, under the former type of regulation, the regulator should adjust prices to reflect cost changes and it does not under the latter type.[18]

Access regulation can be necessary when the concessionaire is permitted to also supply a vertically related market. In particular, the concessionaire may try to evade regulation of the natural monopoly by discriminating in favour of its own vertically integrated business, capturing unregulated profits in the vertically related market. Prohibiting vertical integration might be a solution, but at a potential cost of economies of scope. Further, the most efficient bidder may be a long established operator in the vertically related market—a mine with respect to a railway or a shipper with respect to a port, for example— who has particular insight into potential improvements in quality and efficiency, and excluding such a bidder would reduce overall efficiency. Further, where there are successive monopolists, such as a port and the sole railway to that port, it may be more efficient to put the two activities into the same concession. This raises barriers to entry, since now an entrant would need to enter both levels simultaneously, but this may have no practical impact—if entry were likely there would be no need for concessioning—and the vertical integration should reduce hold-up and inefficiencies from uncoordinated investments, schedules, and the like.

Box 20. Example of Abuse of Dominance in Access: Mpulungu Harbour

A 25-year concession to operate Mpulungu Harbour and Port in Zambia was granted by the Zambian cabinet in 1997. The concession agreement provides for review every 5 years, but anti-competitive conduct was not a ground under which it may be terminated.

In addition to being the port operator, the concessionaire is also the largest of seven shipping companies that use the port. Based on tonnage, its share is about 50% of the total. There are no feasible transport alternatives.

The Concession Agreement provides that the concessionaire has complete pricing freedom, but must provide access on the same terms as it does provides access to itself. While in principle the port is regulated by a ministry, the Supreme Court found that, "There has been no coherent exercise of supervisory power" by the ministry.

Investigations carried out by the Zambia Competition Commission revealed that the concessionaire was abusing his position as Port Operator by engaging in various conduct that harmed its rivals in the shipping market. The concessionaire was found to be unfairly allocating shipping space on the vessels using the port, unfairly dictating the type of cargo to be loaded—which has the effect of eliminating competition in lucrative markets for products in high demand—reserving port storage for his exclusive use, and engaging in other conduct. Also, two weeks after taking over the Port, the concessionaire increased tariffs by 46% without consultations and without notice.

The ZCC pursued voluntary compliance with the competition law.

Source: Fifth Global Forum on Competition, Zambia DAF/COMP/GF/WD(2005)21

[18] But the two main types of regulation may not be as different as they appear at first glance. A well-known observation is that the expected return on capital under the two regimes should differ by a risk premium. The return on capital under price-cap regulation is influenced by two mechanisms. First, investments under price-cap regulation need to earn at least a market rate to attract future investment. Second, governments face political questions when regulated firms earn much more than a market rate. These two influences mean that the return on capital under a price-cap regulation approaches that under a rate-of-return regime, plus a risk premium. As more cost elements are moved into a cost-pass through category under a price-cap regime, it approaches a rate-of-return regime. Similarly, as the review periods under a price-cap regime become shorter, it approaches a rate-of-return regime.

5. Design of concessions

The design of a concession is constrained by the elements that have been discussed in connection with the award of the concession and the competition problems that can arise during the concession. This section will highlight some of the features that can be identified in advance and in general.

However, no checklist can be complete. A difficulty of concessioning is that each situation is different. The idiosyncratic physical, historical or political constraints must be taken into account. Vast underinvestment may mean continued substantial subsidies if tariffs are not to rise too rapidly for users' budgetary comfort and it can mean an embarrassingly low "headline" concession fee. Political commitment to preserve jobs can mean that the concession must include provisions to that effect even if it makes the award process inefficient. A second political difficulty can be pressure to design a concession to get a large concession fee, sometimes by unwarranted exclusivity or duration, or by an overly-generous regulatory regime. With these caveats in mind, the following points should be considered in the design of a concession.

- **Number.** Where competition is feasible, as in some telecommunications markets, in general more concessions will promote competition. True, more concessions will mean lower "headline" concession fees, and it can be difficult to explain that a lower fee today but lower tariffs tomorrow benefits consumer-taxpayers. If the number of likely bidders seems unusually low, then a re-examination of the auction rules and the concession design may be in order; efficient potential operators may be discouraged by poor design.

- **Exclusivity**. There are trade-offs involved in granting a unique concessionaire protection from entry by competitors. Non-exclusivity can allow competitive pressure from entrants, especially if the market were incorrectly labelled a natural monopoly or ceases to be one due to technological change. But exclusivity can be necessary if e.g., public service obligations are paid by cross-subsidy rather than from other sources. Exclusivity can also decrease the riskiness of a concession, with a follow-on effect on renegotiation and cost of capital.

- **Duration.** There is a trade-off when determining the duration of a concession. Long concessions create appropriate incentives for the concessionaire to make long-term investments including to invest in maintenance near the beginning of the concession. Short concessions exacerbate the problem of insufficient incentives to make investments near the end of a concession, as well as the problem of incumbents gaining advantages over other bidders in successive concessions. However, short concession allow for more frequent competitive tendering, which can facilitate entry and ensure that any benefits of increased competition are reflected more promptly. Short concessions also allow for uncertainty to be borne by the government rather than the concessionaires, which in general reduces the subsidies or increases the fees gained.

- **Horizontal scope.** Where a concession may have various breadths—one license or several to provide the same service, one port or several along the same coastline—and they are substitutes, then it would promote competition <u>in</u> the market to have different concessionaires in charge of substitute facilities. And having different concessionaires would promote competition <u>for</u> the markets if it reduced the cost of bidding. This may need to be traded off against economies of scale or scope, however. Where a concession could be broken in to parts that may be complements, such as telecommunications licences in over adjacent regions, then consideration should be given to whether fiat—the government defining the scope of the concessions—or market—auctions that allow bidders to price the complements—is likely to yield the more efficient outcome.

- **Vertical scope.** If competition up- or downstream is feasible, economies of scope are small, and effective access regulation is difficult, it may be more efficient to prohibit the concessionaire to also operate in the vertically related market. But this must be weighed against the effect this has on bidders for the concession, since the most efficient bidder may well be a company that has long operated in a vertically related market and has particular insight into potential improvements in quality and efficiency.

- Further, where there are **economies of scope** between activities where competition is not feasible, e.g., a port and the sole railway to that port, it may be more efficient to put the two activities into the same concession. This should reduce hold-up and inefficiencies from uncoordinated investments, schedules, and the like.

- **Competition Law.** The competition law should apply to the concession award process and to the concessionaire, as it does throughout an economy.

- **Regulatory structure**. An appropriate regulatory structure and agency should be in place in advance of the concession award in order to reduce uncertainty faced by potential concessionaires. Elements that can affect profitability such as universal service requirements, restrictions on increases in user tariffs, special "social" tariffs need to be specified, or the objective formula for their calculation, should be specified in advance so that potential concessionaires can calculate any bid or negotiation strategy. The agency should have sufficient autonomy and implementation capacity to ensure high-quality enforcement and to deter political opportunism. In addition, the tradeoffs between price-cap and rate-of-return regulation, including their different allocation of risk, should be considered.

- **Allocation mechanism.** The concession design must also take into account the allocation mechanism. For example, if an auction is to be used to award the concession, then all the dimensions over which competition will not take place must be specified or otherwise prepared for, in order to reduce the scope for renegotiation. If an auction is not to be used, then the pre-design stage is even more important to avoid the appearance of favouritism or corruption in the choice of concessionaire. If the exclusion of a potential bidder is permissible, weigh carefully the consequences of such exclusion, bearing in mind the effect on subsequent market power and on the competitiveness of the auction—both directly and on the decision of weaker bidders whether to bid.

- **Disputes**[19]. Contracts should avoid ambiguity as much as possible. They should define the treatment of assets, evaluation of investments, outcome indicators, procedures and guidelines to adjust and review tariffs. They should include criteria and penalties for early termination, procedures for resolution of conflicts, and well-defined triggers for renegotiation. Consider imposing a significant fee for any renegotiation request, reimbursed if the renegotiation is decided in the operator's favour. Renegotiation should be as transparent as possible, perhaps using external, professional panels to assist regulators and governments in their analysis and decision-making, and with a timely, full public explanation of adjustments.

- Proper **regulatory accounting** of all assets and liabilities should be in place in order to reduce ambiguity about the regulatory treatment and allocation of cost, investments, asset base, revenues, transactions with related parties, management fees, and operational and financial variables.

[19] Much of the material in this and the following bullet points is from Guasch, pp. 19-21.

- **Changes**. Bidders should be held to their submitted bids. The first tariffs review should be held only after a significant period, like five years, unless contract contingencies are triggered. Concession contracts should provide for significant compensation, including penalties, to concessionaires if government unilaterally changes the contract.

6. Conclusions

Competition authorities have important roles to play at a number of stages in concessioning.

- First, concessions are often awarded in the context of a broader regulatory reform of a sector. Such a reform often includes clarifying the service objectives and revenue sources, thereby uncovering cross subsidies that must be addressed in the concession design. Reform also often includes addressing how the sector will be governed during the long period after the concession has been awarded: where competition would be feasible and desirable, what sector-specific laws and regulatory institutions need to be established, and the application of competition law. Competition authorities can advocate for pro-efficiency and pro-competition regulatory reform at this stage.

- Second, competition authorities can advocate for more competitive design of the concession contract. They can identify provisions to encourage weaker bidders or discourage renegotiation, for example.

- Third, they can advocate for better design of the allocation mechanism. If concessions are allocated by auction, they can identify provisions to encourage more bidders and to discourage collusion. If not allocated by auction, they can promote a mechanism that would tend toward identifying the more efficient applicant.

- Fourth and fifth, during the auction and afterwards, during the term of the concession, they have a role to play as competition law enforcers to deter or prosecute collusion during auctions and to ensure that concessionaires do not abuse their dominance. During the allocation process, they should have a role to exclude from bidding those companies who would gain significant market power if they were awarded the concession.

Competitive auctions are more likely to yield the most efficient provider and raise the most funds, all other things equal, under many conditions. But poor design undermines their effectiveness, and renegotiation eliminates their advantages.

Renegotiation may have its origins in the incompleteness of concession contracts or in opportunism. Concession contracts are necessarily incomplete because uncertainty about costs and revenues over decades cannot be entirely resolved in advance. Concessions present commitment problems since large sunk investments must be recovered over long periods, on the one hand, and governments are under pressure to maintain or improve services, on the other hand. However, renegotiation, whether due to contract incompleteness or opportunism, can eliminate the benefits of competitive bidding for concessions; essentially, with renegotiation, the winner of an auction will be the best negotiator, not the best infrastructure operator. In sum, both an efficient allocation mechanism—such as a well-designed auction—and institutional arrangements to ensure credible commitment to the resulting contract are necessary.

The competition issues that may arise during the term of a concession are not fundamentally different due to the presence of a concessionaire rather than an asset owner. They may include exclusion of rivals by denying access to facilities and abusive pricing. Effective enforcement of the competition law promotes concessions that fulfil their objectives both as regards efficiency and the tariffs users must pay.

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NOTE DE RÉFÉRENCE

par le Secrétariat

1. Introduction

Depuis de nombreuses années, les États recourent de plus en plus aux concessions pour lever des fonds et améliorer la qualité des services, en appliquant l'expertise du secteur privé aux investissements en infrastructures ainsi qu'à la gestion de celles-ci. Les concessions portant sur des infrastructures sont utilisées couramment pour assurer des services socialement importants comme la fourniture d'eau, les transports, les télécommunications et l'électricité.

Les citoyens consommateurs ne sont pas toujours conscients des avantages des concessions. Lorsque le passage à ce système va de pair avec une réduction des subventions ou avec la correction d'un sous investissement, les tarifs sont quelquefois relevés dans la foulée. Le mécontentement qui en résulte s'exacerbe quand le concessionnaire est une entreprise multinationale étrangère.

S'il est vrai que les concessions ne parviennent pas toujours à réaliser les objectifs fixés par les pouvoirs publics, on peut les rendre plus performantes en mettant davantage l'accent sur la concurrence. La présente note a pour objectif d'évoquer les principaux aspects de la conception des procédures de mise en concession et d'exposer les problèmes de concurrence susceptibles de se poser pendant la durée d'une concession.[1] Le renforcement de la concurrence va dans le sens d'une amélioration du système.

La mise au point et le suivi des contrats de concession sont particulièrement complexes pour les raisons suivantes :

- Les contrats de concession ne peuvent prévoir tous les impondérables. Ils sont « incomplets » au sens économique du terme. Il n'est pas possible de résoudre entièrement à l'avance les incertitudes relatives aux coûts et aux recettes. Ces incertitudes donnent lieu à la renégociation des contrats avec les conséquences négatives qui s'ensuivent.

- Tant les concessionnaires que les États peuvent avoir des difficultés à respecter les termes des contrats de concession sur toute leur durée. Les concessions impliquent généralement d'importants investissements inévitables qui ne peuvent être amortis qu'en longue période, alors même que les États subissent des pressions pour maintenir ou améliorer la qualité des services. Il existe donc un double risque : d'abord, que les États aient un comportement opportuniste une fois que les concessionnaires auront investi définitivement ; ensuite, que les concessionnaires fassent de même lorsque les États n'ont pas de solution de remplacement immédiate.

- Les contrats de concession entraînent fréquemment la création d'un monopole privé, ce qui est de nature à susciter des problèmes de concurrence. Ce risque peut être atténué en modifiant le

[1] Cette note porte sur les concessions en matière d'infrastructures et ne traite pas l'important sujet des concessions pour l'exploitation de ressources naturelles.

dispositif de concession ou en pratiquant une régulation permanente des prix. La fixation de règles avant l'adjudication peut donner une meilleure lisibilité aux soumissionnaires.

- Le fait que les enchères compétitives réussissent ou non à octroyer la concession à l'opérateur le plus efficient peut dépendre de subtiles variations de leur conception. Les coûts de transaction empêchent la revente de la concession à une entreprise plus efficace après qu'une adjudication défectueuse l'aura octroyée à un opérateur improductif ; c'est le problème de la sélection négative: comme les acheteurs ne peuvent apprécier la valeur de l'objet mis en vente, le marché n'existe pas.

Il est souhaitable que l'attribution d'une concession s'inscrive dans le cadre d'une plus vaste réforme de la réglementation d'un secteur, comprenant une clarification des objectifs du service et des sources de revenus ; cela permet de mettre à jour les subventions croisées dont doit tenir compte la conception du contrat de concession. En outre, il sera souvent nécessaire que la réforme fixe les modalités de gestion du secteur pendant la longue période qui suivra la mise en concession: où est-il possible et souhaitable de faire jouer la concurrence? Quelles lois visant spécifiquement le secteur et quelles institutions régulatrices faut-il établir? Comment appliquer le droit de la concurrence?

Les autorités de concurrence s'intéressent aux concessions, parce qu'elles peuvent, par des actions de sensibilisation, favoriser la mise en oeuvre d'une procédure d'attribution plus concurrentielle et accroître du même coup l'efficacité économique, qui est l'un de leurs principaux objectifs. Il arrive qu'elles soient en mesure d'influer sur l'organisation des enchères de manière à réduire les possibilités de collusion. Elles peuvent aussi parfois favoriser une amélioration de la conception des concessions, qui permettra peut-être ensuite d'atténuer les atteintes à la concurrence, telles que le refus de donner accès à des équipements essentiels. Enfin, on a recours aux concessions en l'absence de liberté d'entrée sur le marché (dans le cas contraire, le nombre des licenciés ne serait pas limité). C'est pourquoi un marché qui fait l'objet d'une concession a déjà passé un test important de nature à susciter l'intérêt des autorités de concurrence.

Plusieurs idées essentielles se dégagent :

- Le régime d'une concession ou des concessions en général doit tenir compte du système réglementaire qui s'y applique, des possibilités de renégociation du contrat et des modalités pratiques d'octroi de la ou des concessions.

- Les principaux objectifs de l'organisation des enchères sont d'attirer des soumissionnaires, d'empêcher la collusion et d'assurer l'intégrité du processus. La théorie des enchères démontre que le fait d'attirer un candidat supplémentaire renforce le caractère concurrentiel de l'opération. Elle montre aussi que des enchères réunissant N+1 postulants se traduiront toujours par un prix plus élevé que toute négociation et enchère praticables impliquant N participants. En d'autres termes, si l'on peut obtenir un soumissionnaire de plus dans une enchère que dans une autre portant sur le même objet, la première est plus concurrentielle. Les enchères sont donc généralement préférées aux négociations et aux concours de beauté.

- Concevoir une procédure d'adjudication efficace, qui permette de distinguer le meilleur opérateur, est difficile et exige de l'expertise. Les exemples de succès et d'échecs comportent certains enseignements, mais ne peuvent se substituer à l'analyse de la situation concrète.

- La renégociation, qu'elle soit due au caractère incomplet du contrat[2] ou à l'opportunisme, risque d'éliminer les avantages d'un mécanisme d'attribution concurrentiel ; il faut bien voir que le gagnant de l'adjudication sera le négociateur le plus accompli et pas forcément le meilleur gestionnaire des infrastructures. La renégociation signifie notamment que les accords résultant d'une procédure compétitive d'attribution sont remplacés par les conditions fixées dans le cadre de négociations bilatérales, à caractère non public, entre le concessionnaire et l'État. On doit s'efforcer de limiter la renégociation aux situations où elle est dénuée d'opportunisme, c'est-à-dire quand des évènements inattendus et échappant au contrôle des parties se sont produits.

- En résumé, on a besoin à la fois d'un mécanisme d'attribution efficient, comme une procédure d'enchères bien conçue, et d'engagements crédibles à l'égard du contrat qui en résulte.

- La mise en concession ne peut se substituer à la réglementation. Là où le concessionnaire dispose d'un pouvoir de marché substantiel, une instance réglementaire est probablement nécessaire. En tout état de cause, la législation sur la concurrence doit s'appliquer aux concessionnaires et à toutes les procédures d'adjudication employées pour attribuer une concession.

Cette note commence par un rappel des **principales études économiques** sur le sujet et par un **examen de l'expérience** en matière de concessions. On s'intéresse ensuite aux grandes étapes de la mise en place d'une concession :

- **L'octroi de la concession** – la conception du mécanisme qui aboutit à l'octroi de la concession ; on mettra l'accent sur les procédures concurrentielles.

- **Les résultats de la concession** — on évoque le problème de la renégociation et on donne un aperçu des problèmes typiques de concurrence susceptibles de survenir dans les secteurs mis en concession.

- **La conception de la concession** — les principales dispositions du contrat qui sont dictées par l'octroi et les résultats de la concession.

2. La nature des concessions et l'expérience en ce domaine

2.1 Les études économiques

Les deux études théoriques de référence sur les concessions (également qualifiées de « franchises » par les auteurs) sont celles d'Harold Demsetz (1968) et d'Oliver E. Williamson (1976). Selon Demsetz, quand il ne peut y avoir de concurrence sur un marché, comme dans le cas d'un monopole naturel, il est éventuellement possible de faire jouer la concurrence pour le droit d'être le fournisseur sur ce marché (à l'origine de cette idée, on trouve le souci de remplacer la réglementation, source d'inefficacité, par la concurrence). Il est concevable de mettre en concurrence le marché si les candidats peuvent se procurer les intrants y afférents à des prix déterminés de façon compétitive et en l'absence de collusion, de sorte que les résultats de la compétition soient vraiment le fruit de la concurrence. S'il y a un seul produit, si les prix sont les mêmes, si tous les candidats ont accès à la même technologie et peuvent produire efficacement, et si enfin leur nombre est suffisamment élevé, la concurrence s'exerçant entre eux éliminera les bénéfices excessifs et l'adjudication sera remportée au prix minimum qui permette à l'entreprise d'opérer à l'équilibre, c'est-à-dire d'avoir une rentabilité normale. Ce résultat est bon, dans la mesure où l'on choisit

[2] Les contrats sont incomplets quand ils sont complexes ou ne prévoient pas précisément les solutions de tous les impondérables. Il va de soi que tous sont dans une certaine mesure incomplets ; les lacunes trouvent leur solution devant les tribunaux ou par d'autres moyens d'arbitrage.

un opérateur efficace qui fournira ses services au coût moyen. Toutefois, le fait de ne pas tarifer au coût marginal risque d'entraîner des pertes substantielles de bien-être. Dans le cas d'une pluralité de produits, il n'existe pas de moyen optimal pour sélectionner l'offre gagnante. En outre, comme on le verra plus loin, le vainqueur de la compétition peut essayer de tricher sur la qualité fournie et tenter de renégocier le contrat.

Le travail effectué en 1976 par Williamson était une réaction contre celui de Demsetz. L'auteur a creusé l'idée selon laquelle lancer un appel d'offres pour une concession ou une franchise pourrait se substituer à la réglementation.[3] Il a relevé des difficultés ignorées par Demsetz, à savoir la durabilité des équipements et l'incertitude, qui sont à ses yeux les problèmes fondamentaux de l'adjudication des concessions. En ce qui concerne les contrats à long terme incomplets (catégorie la plus intéressante pour les concessions), Williamson avance trois arguments principaux. En premier lieu, il estime le critère principal d'attribution artificiel ou obscur. Une fois que l'offre porte sur plusieurs éléments, par exemple le prix et la qualité, ou les prix en et hors période de pointe ainsi que la qualité, le critère de choix du gagnant est arbitraire. En deuxième lieu, il pense que les mesures nécessaires pour résoudre les problèmes d'exécution du contrat – les modifications de prix pour tenir compte de l'évolution des coûts, la spécification de la qualité du service, la stipulation des procédures de suivi et de comptabilité – rapprochent les concessions de la réglementation. A propos du respect des contrats, il craint aussi que les administrations responsables d'une concession ne laissent pas celui qui parvient à l'obtenir faire faillite. Il cite Eckstein : « les décideurs publiquement responsables sont politiquement et psychologiquement tenus par leurs propres décisions ; ils se montrent généralement plus soucieux de les justifier que de les remettre en question ». (1956, page 223). En troisième lieu, pour que la concurrence joue véritablement lors de la remise en adjudication du contrat, le concessionnaire existant – vainqueur la première fois – ne doit pas être sensiblement avantagé. Mais c'est en réalité improbable, comme l'a démontré son étude de la télévision par câble. Conclusion de Williamson: "le résultat de la mise en adjudication des franchises sous forme de contrats à long terme incomplets est beaucoup plus douteux que les argument de Demsetz ne le laissent penser ».

L'étude de Riordian et Sappington (1987) intéresse moins directement les décideurs, car elle ignore les complications dont Williamson soulignait le caractère empiriquement pertinent. En effet, les auteurs partent d'un certain nombre d'hypothèses: les préférences des consommateurs sont connues, la qualité ne pose pas problème, l'adjudication n'est pas renouvelée, l'État et le concessionnaire peuvent s'engager sans frais à respecter le contrat et la rédaction de contrats complexes ne coûte rien. Sous cette réserve, ils concluent que, en présence de candidats neutres à l'égard du risque et disposant d'informations privées sur les coûts de production, le dispositif optimal d'adjudication est l'offre par l'État d'un « menu » de contrats. Chaque contrat fixe des maximums pour les prix et les transferts nets reçus (subventions à la production moins redevance de concession), qui sont des fonctions du coût de production marginal indiqué par l'entreprise. Le gagnant est le soumissionnaire qui demande le contrat le mieux classé: il a les coût anticipés les plus bas, mais les prix seront supérieurs au coût marginal. Plus il y a de soumissionnaires, plus la redevance de concession augmente et plus les bénéfices du gagnant se réduisent.

La tradition empirique est nettement plus ancienne, Edwin Chadwick, un réformateur britannique du 19ème siècle, proposait de franchiser les pompes funèbres. En 1907, le caractère incomplet des contrats de concession et leur renégociation faisaient l'objet des remarques suivantes :

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[3] Selon Williamson, il faut tenir compte de sept facteurs avant de décider de mettre en concession ou de réglementer un monopole naturel. Ce sont : « (1) les coûts d'appréciation et d'agrégation des préférences du consommateur par voie de sollicitation directe ; (2) l'efficacité des enchères par échelonnement; (3) le degré de développement technologique ; (4) l'incertitude à propos de la demande ; (5) le degré auquel les fournisseurs déjà en place acquièrent des compétences idiosyncratiques ; (6) la mesure dans laquelle on utilise des équipements spécialisés et à longue durée de vie ; (7) la sensibilité du processus politique aux représentations opportunistes et la prédisposition différentielle, parmi les modes d'action, à s'y livrer. »

> "La réglementation ne se limite pas à la formulation d'un contrat satisfaisant, ce qui représente en soi une très lourde tâche…c'est une erreur fréquente, correspondant à une pratique en vigueur dans la vie publique aux États-Unis, que de croire qu'un décret, une loi ou une charte, une fois rédigé par des citoyens intelligents et adopté par une population informée s'applique spontanément et que les obligations des bons citoyens prennent fin lors de la promulgation d'un projet si bien conçu. Or, l'expérience a montré à de nombreuses reprises – ce que l'on aurait toujours dû percevoir – la vanité absolue de l'exercice et les effets désastreux du recours à un document écrit pour une administration qui est de nature vivante. Ce qui est vrai pour un décret, une loi ou une charte l'est aussi pour une concession. On s'est aperçu que ce système ne s'appliquait pas de lui-même…[en outre] l'administration risque d'ignorer ou de ne pas faire respecter les aspects essentiels du contrat qui relèvent de son autorité ; et des actions contentieuses…sont souvent inévitables bien avant la date d'expiration de la concession (Fisher, 1907, pages 39-40, cité par Williamson 1976 page 91)

Les États recourent aux concessions pour améliorer l'efficacité des infrastructures en appliquant l'expertise du secteur privé aux investissements et à la gestion, tout en se procurant des capitaux. Les concessions ont parfois pour effet de modifier l'identité de celui qui assume les risques et l'incertitude – État, concessionnaire ou usagers – et de créer des incitations à l'efficience. Mais il s'agit de contrats incomplets (ils ne prévoient pas tous les impondérables) et il est difficile aux États et aux sociétés privées de s'engager à les respecter (ils sont assez souvent renégociés). Dans les pays en développement, les concessions sont une source de mécontentement populaire, car les citoyens consommateurs ont l'impression d'avoir été abusés par les entreprises multinationales étrangères. « Le fait que les usagers n'aient pas bénéficié d'une part significative des gains d'efficience [résultant de l'intervention d'entreprises privées plutôt que publiques] explique, dans une large mesure, leurs griefs à l'égard des plans de réforme des infrastructures dans les pays en développement [citations omises] » [Guasch, page 1]

2.2 Qu'est-ce qu'une concession?

Selon les termes employés par un expert, « une concession donne à une entreprise privée le droit de gérer un service d'infrastructures et de percevoir les recettes correspondantes ». Ce peut être le droit de gérer un système de distribution d'eau ou un réseau de télévision par câble dans une collectivité locale ou encore d'utiliser une partie du spectre électromagnétique. Les concessions varient en fonction de la répartition des risques, des incitations, des responsabilités en matière d'investissement et de services ainsi que des modalités de fixation des tarifs. En général, le concessionnaire règle une redevance à l'autorité qui attribue la concession, puis il engage des dépenses en capital et opère directement des prélèvements sur les usagers. Quand la concession expire, les investissements non intégralement amortis peuvent donner lieu à un dédommagement. Le contrat peut prévoir des dispositions relatives à une résiliation anticipée et à la non conformité aux conditions agréées.

Les concessions se distinguent des privatisations principalement sur trois points. D'abord, les actifs physiques restent la propriété de l'État, bien que leur utilisation et la marche de l'entreprise soient déléguées au concessionnaire. Ensuite, les contrats de concession ont une durée limitée, qui va normalement de 15 à 30 ans. Enfin, l'État suit généralement de très près le fonctionnement des concessions.

Encadré 1. Les différents types de concessions

Il y a plusieurs grandes catégories de concessions, mais en pratique, on observe une gradation.

-- l'affermage, « dans le cadre duquel le contractant privé est responsable à ses risques et périls de la fourniture du service, y compris la gestion et l'entretien de l'infrastructure, généralement contre paiement d'une commission ».
-- la concession au sens strict, « dans laquelle le contractant privé est également responsable du lancement et du financement de nouveaux investissements ». A l'expiration de la concession, les actifs reviennent à l'État (ou à la collectivité locale).

On emploie souvent le terme BOT (build-operate-transfer) en référence aux concessions portant sur de nouvelles activités ; ROT est quelquefois utilisé pour décrire des concessions dans lesquelles les investissements consistent surtout en une réfection (d'où le "R"), plutôt qu'en une édification. BOO (build-own-operate) est un dispositif similaire, mais qui n'implique pas de transfert d'actifs.

-- le désinvestissement est « le transfert au secteur privé de la propriété d'actifs existants ainsi que de la responsabilité de leur expansion et de leur entretien futurs ».

Source: Pierre Guislain et Michel Kerf (1995), "Concessions—The Way to Privatize Infrastructure Sector Monopolies," Note no. 59, Public Policy for the Private Sector, Banque Mondiale

Source: Pierre Guislain et Michel Kerf (1995), "Concessions—The Way to Privatize Infrastructure Sector Monopolies," Note no. 59, Public Policy for the Private Sector, Banque Mondiale

2.3 Pourquoi utiliser les concessions? Quelles sont les leçons de l'expérience?

Les concessions sont souvent considérées comme un substitut à la privatisation, quand celle-ci n'est pas possible pour des raisons politiques ou juridiques. La mise en concession est généralement suivie de la fraction de règles, mais il arrive qu'elle les remplace. L'observation des faits révèle que le système des concessions est une source de progrès substantiel sur le plan de l'efficacité ; néanmoins, l'expérience est ternie par une propension à renégocier qui peut annuler les avantages. Ces points sont brièvement examinés ci-dessous.

Les arguments pour donner la préférence aux concessions sur la gestion publique sont les suivants : (1) si la concession est octroyée au moyen d'une procédure concurrentielle, on choisira l'opérateur le plus efficace, (2) le système facilite la supervision réglementaire en divulguant les informations privées de certains fournisseurs potentiels, (3) la réglementation qui devient possible grâce au mécanisme de la concession et des enchères permet d'augmenter progressivement le rapport coût/efficacité. En ce qui concerne l'efficience du choix de l'opérateur, il peut s'avérer malaisé de concevoir un système de concession approprié et compétitif – ce point fait l'objet d'une partie de cette note. S'agissant de la révélation d'informations, des enchères donnent aux sociétés une incitation à appliquer l'expérience acquise ailleurs et dans d'autres secteurs, à déterminer la rentabilité éventuelle d'une activité, et à formuler une offre sur cette base. Les offres permettent de savoir ce que le soumissionnaire considère comme faisable. Par ailleurs, au cours des consultations dans le cadre du processus d'organisation de la concession, on échange parfois des renseignements qui aident à concevoir la réglementation subséquente. Le troisième point est relatif à la difficulté d'imposer strictement un budget et des contraintes qualitatives à un État ou à des entreprises publiques – ce qui empêche de promouvoir l'efficacité ; cela contraste avec l'application d'une règle de plafonnement des prix, par exemple, qui est favorable à l'efficacité, et se conjugue avec la contrainte de rigueur budgétaire propre à une entreprise privée.

Les arguments en faveur d'une poursuite de la fourniture de services par l'État sont les suivants : (1) les concessions exigent la mise en place de systèmes complexes pour leur conception et leur suivi, (2) il est difficile de faire respecter les contrats et de limiter leur renégociation, cette dernière entraînant à la fois une qualité de service inférieure aux stipulations du contrat et des relèvements de tarifs supérieurs, (3) à

l'approche de la fin du contrat, le concessionnaire n'est pas suffisamment incité à investir ou à assurer l'entretien. Sur le premier point, un problème spécifique se pose en présence d'externalités significatives ou d'obligations de service universel, qui ne peuvent faire l'objet de la surveillance efficace d'un régulateur. Un contrôle de l'État peut alors s'imposer, puisque le concessionnaire sera incité à ne pas fournir des services coûteux si aucune surveillance ne s'exerce. Les deuxième et troisième points seront abordés plus loin.

Shleifer (1998) propose une formule pour choisir entre l'offre de services par le public et le privé: l'intervention publique n'est supérieure à l'action privée que dans quatre cas : (1) il existe de fortes possibilités de réduction des coûts par diminution de la qualité – selon des modalités indémontrables devant un arbitre ; (2) la probabilité d'innovation en matière de produits ou d'organisation est limitée ; (3) acquérir une réputation de prestataire de services efficace importe peu ; (4) la concurrence est faible et les consommateurs n'ont pas vraiment le choix.

Les concessions peuvent aussi se substituer à la réglementation. Demsetz et d'autres auteurs pensaient que la discipline de marché imposée par un appel d'offres pour obtenir une concession pouvait remplacer une régulation permanente du taux de rendement des monopoles naturels, à la fois source d'inefficacité et compliquée. Les critiques de Williamson et l'expérience postérieure ont fait douter du bien fondé de cette idée, au moins dans de nombreux cas. Pourtant, on trouve effectivement dans certaines concessions de courte durée, actuellement en vigueur, le type de concurrence évoquée par Demsetz (cf. par exemple l'encadré sur le transport aérien régional en Norvège). Actuellement, le débat porte essentiellement sur les mérites comparés du service public, des concessions et des privatisations, sachant que la régulation est peut-être une nécessité permanente.

La raison fondamentale d'une mise en concession est la recherche d'une efficience supérieure. C'est dans cet esprit que l'on a étudié, par exemple, les vingt ans d'expérience de ce système en Amérique latine et aux Caraïbes[4]. Dans cette région, les entreprises titulaires de concessions ont réalisé des progrès de productivité *annuels* significatifs, allant de 1% à 9%.

Estache, Guasch, et Trujillo (2003) présentent un résumé des études sur les gains d'efficience obtenus par les concessions en Amérique latine. Dans le domaine de l'électricité, le taux de croissance de la productivité a augmenté de 1% par an dans 39 entreprises d'une douzaine de pays. Dans les chemins de fer, la productivité totale des facteurs a augmenté en moyenne de 5.3% par an (fret) et de 9.8% (voyageurs) en Argentine. Au Brésil, la progression a été de 8.4% pour les deux premières années d'une concession (alors qu'elle était de 5.5% avant la réforme du secteur). Les gains de productivité annuels des ports mexicains sont passés de 2.8% à 3.3% de 1996 à 1999. Dans le domaine de l'eau, la PTF s'est accrue à un taux de 3.7% à 6.1% en Argentine selon les provinces. Il est regrettable qu'aucune recherche d'ensemble n'existe sur les gains d'efficacité qui ont suivi les mises en concession. Mais il faut mentionner les coûts de transaction ponctuels qui sont la contrepartie de ces gains. Les coûts de transaction liés aux projets de concession sont dus aux travaux de mise au point, aux négociations etc ; on estime qu'ils représentent de 3 à 5% de la valeur totale du projet quand les mécanismes de concession sont assez bien assimilés, mais dépassent 10% lorsqu'il s'agit d'un nouveau concept (Klein, So et Shin 1996)

L'objectif des réformes réglementaires et des concessions était d'inciter les concessionnaires à réaliser ces gains de productivité et ensuite à les contraindre à les partager avec les usagers en abaissant les tarifs. Mais « les progrès de productivité n'ont pas ou peu donné lieu à une réduction des tarifs, alors que les opérateurs privés ont la réputation de faire des bénéfices, résultant souvent d'avantages supplémentaires

4 Il est vrai que l'Amérique latine ne représente qu'une partie de l'expérience en matière de concessions ; mais celle-ci y a commencé tôt et la région a fait l'objet d'une étude exhaustive et sans équivalent, effectuée par un économiste de la Banque mondiale.

obtenus par renégociation ; c'est la cause essentielle du mécontentement croissant des usagers ». Selon une enquête effectuée fin 2001 (Latinobarometro), 63% de la population de 17 pays d'Amérique latine et des Caraïbes estimaient que la privatisation des entreprises publiques n'avait pas été bénéfique (Guasch, pages 11 et 12, citations omises). Pourtant, la rentabilité n'était pas non plus très élevée. Une étude de 34 concessions dans neuf pays latino-américains a conclu que les concessionnaires faisaient en moyenne des pertes. Les auteurs ont toutefois émis une réserve : les chiffres risquent de ne pas être fiables, en raison de l'éventualité d'erreurs dans les statistiques officielles de recettes et de manipulations des transactions effectuées au sein des firmes (Sirtaine, Pinglo, Guasch et Foster 2005)

Certes, du milieu des années 1980 jusqu'à 2000, plus des trois quarts des concessions octroyées en Amérique latine l'ont été par voie d'enchères ; mais 30% environ ont été renégociées (et nettement plus dans certains secteurs), un peu plus de deux ans en moyenne après leur attribution. En général, les négociations ont bénéficié aux concessionnaires au détriment des usagers.

Outre les données sur les concessions en Amérique latine, on dispose d'une évaluation remarquablement sincère des concessions en Thaïlande (Nikomborirak 2004), qui souligne d'autres difficultés découlant d'une conception inadéquate. En premier lieu, si l'objectif spécifique d'une concession est de tourner la législation interne, c'est le signe de l'absence d'un soutien politique important et durable. En deuxième lieu, les engagements pris dans le contrat de concession par le concessionnaire et l'État n'ont pas été respectés. Selon le rapport, le concessionnaire n'a pas partagé les bénéfices conformément à l'accord, tandis que l'État a mis en vente une deuxième concession de télécommunications en violation des termes du contrat passé avec le premier concessionnaire. En troisième lieu, une procédure d'attribution à caractère non compétitif donne de moins bons résultats qu'une mise en concurrence : la concession de télécommunications négociée prévoit des obligations de paiement représentant de 16% à 21% des recettes du réseau, alors que le contrat résultant d'un appel d'offres les fixe dans une marge de 43.1% à 44.5%. Enfin, il est nécessaire d'utiliser un mode de réglementation prévisible.

Encadré 2. L'exemple de la concession des chemins de fer zambiens

La société des chemins de fer de Zambie appartient à l'État et n'a pas de concurrents. Un projet de restructuration a été lancé en 1992, suivi en 1997 de la passation d'un contrat d'exploitation avec une entreprise étrangère. Une concession a été attribuée en 2004 à un consortium auquel participe Spoornet, la société de chemins de fer sud-africaine. Un observateur au moins a vu dans cette opération un succès remarquable:

« Des années de mauvaise gestion publique, de négligence et de conflits régionaux avaient désorganisé les chemins de fer. De 1975 à 1998, le transport de fret était tombé de 6 millions de tonnes par an à 1.4 million. A la fin de cette période, la société perdait 12 millions de dollars par an et on estimait qu'il lui fallait 45 millions de dollars pour se relancer. Depuis 1998, date du début de la transition, le fret a augmenté de 64%. De plus, la fin des conflits dans les États voisins doit permettre à la société de renouer, comme elle le souhaite, ses relations avec l'Angola et la Namibie…Le fret a augmenté de 500 000 tonnes cette année [2003] pour atteindre 2.3 millions de tonnes — et tout indique que cette expansion va se poursuivre ».

Mais, en novembre 2005, le parlement s'est prononcé à l'unanimité en faveur d'une révision de la concession. Les députés ont critiqué les lacunes du contrat, le non respect des obligations d'entretien, la lenteur accrue du service, les suppressions d'emplois, etc. L'un d'entre eux aurait déclaré : « il est indispensable de résilier ce contrat pour le renégocier ».

Sources: 10 octobre 2003, Issue 3, SADC Barometer, "Privatising Zambia's Railway." Publié par l'Institut sud-africain des affaires internationales ; 24 novembre 2005 "Revision of Zambia Railways Concession" article du « Times of Zambia » (www.times.co.zm)

Cette introduction a permis de mettre en lumière les principaux problèmes de concurrence que posent les concessions. Une première série de problèmes concerne l'attribution et l'acceptation d'un contrat de concession. Il est évoqué dans la partie suivante qui est consacrée aux enchères, à l'octroi de concessions négociées et aux questions de renégociation. Une deuxième porte sur la concurrence pendant la durée de la concession. Tous ces sujets ne sont pas fondamentalement modifiés par la présence d'un concessionnaire. On ne traite ni l'exclusion des concurrents en les empêchant d'accéder aux équipements, ni les pratiques abusives en matière de prix. Ces points sont évoqués dans la quatrième partie.

3. L'attribution des concessions

3.1 Les ventes aux enchères

Si l'on utilise les enchères pour choisir l'entreprise qui gérera les concessions, c'est parce qu'elles permettent de distinguer l'opérateur le plus efficace. On part de l'idée que le soumissionnaire offrant le prix le plus élevé sera la personne/la société qui accorde le plus de valeur à la concession et sera donc, en moyenne, l'opérateur capable d'être le plus efficient (dans ce paragraphe et dans beaucoup de ceux qui suivent, nous ignorons la possibilité – facteur de complication – que les soumissionnaires possèdent déjà des substituts ou des compléments). Toutefois, une conception inadéquate de la concession peut invalider ce raisonnement, tandis que le délégataire ne souhaitera pas toujours retenir l'opérateur le plus efficace. En outre, quand l'objectif est d'obtenir le dosage optimal de couverture et/ou d'autres aspects « qualitatifs » et relatifs aux prix, il peut s'avérer difficile de déterminer quelle offre est « la plus élevée ». Autrement dit, effectuer un choix parmi un certain nombre de systèmes de pondération pour intégrer des caractéristiques multiples – par exemple la couverture, la qualité et le prix – est arbitraire lorsque l'adjudication vise l'efficience économique.

Si les nombreuses études théoriques des enchères donnent un éclairage sur la conception de ce mécanisme, elles ne sont pas centrées sur les caractéristiques du monde réel, comme la collusion et le coût des soumissions, qui ont des effets importants sur la participation aux enchères, leur caractère concurrentiel et leurs résultats. Les décideurs peuvent tirer deux leçons essentielles des travaux théoriques:

- La forme d'appel d'offres la plus appropriée pour vendre un objet ou octroyer une concession dépend des particularités du contexte. (Parmi les facteurs qui importent, on peut citer l'aversion aux risques des soumissionnaires et la question de savoir si les renseignements privés dont disposent les autres à propos d'un objet contribuent à l'évaluation qu'un soumissionnaire fait de cet objet – dans une hypothèse extrême valoriseraient-ils tous l'objet de la même manière s'ils avaient des renseignements identiques? L'un des principaux aspects des enchères est l'asymétrie de l'information: les divers candidats ont des informations différentes, certains en ayant de meilleures – de plus exactes – que les autres). On donne davantage de précisions ci-dessous.

- Le fait d'extrapoler du cas de la bonne enchère à bien unique la mieux analysée à une enchère multi produits est un exercice délicat et propice à l'erreur (l'attribution des licences de téléphonie mobile de la troisième génération dans les pays européens a donné des exemples d'adjudications de biens multiples. On peut soutenir qu'une série d'enchères effectuées avec les mêmes participants présente certains points communs avec les enchères multi produits).

En pratique, les effets de la collusion et des modalités d'entrée – c'est-à-dire le fait d'attirer davantage de soumissionnaires indépendants – sont plus importants pour l'organisation des enchères que les détails de l'aversion au risque, les valorisations relatives des contrats par les soumissionnaires respectifs et l'asymétrie de leurs informations en la matière. La collusion et les modalités d'entrée sont traitées plus loin.

Encadré 3. Définitions : les quatre catégories standard d'enchères

Les quatre catégories standard d'enchères communément utilisées et bien étudiées sont:

1) **Les enchères par offres ascendantes** (également appelées enchères ouvertes, orales ou anglaises) dans lesquelles le prix est successivement augmenté jusqu'à ce qu'il ne reste plus qu'un seul enchérisseur, celui-ci l'emportant au dernier prix.
2) **Les enchères par offres décroissantes,** dans lesquelles l'adjudicateur part d'un prix très élevé, puis l'abaisse jusqu'à ce qu'un enchérisseur annonce qu'il l'accepte, cet enchérisseur l'emportant à ce prix.
3) **Les enchères par offres cachetées au mieux disant**, dans lesquelles chaque enchérisseur soumet une seule offre, aucun d'entre eux ne voit les offres des autres et l'objet est vendu au mieux disant au prix qu'il a offert.
4) **Les enchères par offres cachetées au deuxième mieux disant** (également appelées enchères Vickery du nom de leur inventeur) ; elles fonctionnent comme les précédentes, sauf que le gagnant ne règle pas le prix qu'il a offert, mais celui correspondant à la deuxième offre la plus élevée.

La valeur d'obtention du contrat peut ne dépendre que des caractéristiques du soumissionnaire, par exemple ses propres coûts. On parle alors d'**enchères sur la base de valeurs privées**.

La valeur d'obtention du contrat peut également être fonction de facteurs qui influent sur tous les soumissionnaires, comme la volonté de payer des consommateurs et le comportement futur des régulateurs. On parle alors d'**enchères sur la base de valeurs communes**.

Les quatre catégories d'enchères standard ont une caractéristique surprenante : elles ont, sous certaines conditions, le même rendement anticipé. C'est ce que l'on appelle le **théorème d'équivalence des recettes**[5].

Les divers types d'enchères ont des avantages et des inconvénients.

La collusion est facilitée par des enchères ouvertes, car les enchérisseurs peuvent immédiatement s'apercevoir que l'un des membres de l'entente triche et le sanctionner. En revanche, si les mêmes enchérisseurs sont souvent confrontés, la tricherie peut être décelée – avec des enchères à offres cachetées – quand les plis sont décachetés, et la sanction sera infligée plus tard, lors de l'adjudication suivante. Une autre forme de collusion se manifeste lorsque les adjudicateurs sont corrompus et communiquent à des enchérisseurs le contenu des offres cachetées : cela transforme les enchères à plis fermés en enchères ouvertes, puisque les enchérisseurs peuvent connaître les offres des autres et modifier les leurs.

Comparativement à une enchère ouverte, les enchères à offres cachetées favorisent les enchérisseurs moins solides. L'idée sera précisée plus loin: on a l'intuition que les soumissionnaires de moindre poids se retireront d'enchères ouvertes, comprenant qu'il ne vaut même pas la peine de participer ; mais ils pensent avoir une chance de l'emporter dans des enchères à offres cachetées et décident donc d'y participer.

5 Supposons qu'il existe une unité d'un bien indivisible. Supposons aussi que chacun d'un nombre donné d'acheteurs potentiels de l'objet, ayant un comportement neutre vis-à-vis du risque, tire un signal d'ordre privé dans une distribution commune – non atomique et strictement croissante. Dans ces conditions, tout mécanisme d'enchère dans lequel – (1) le bien revient toujours à l'acheteur ayant le signal le plus élevé et (2) tout participant ayant le signal le plus bas possible anticipe un excédent nul – produit le même revenu anticipé. (Klemperer, page 17, qui note aussi que ce n'est pas l'expression la plus générale du théorème). Dans un modèle basé sur les valeurs privées, l'évaluation effectuée par un candidat à l'achat dépend seulement de son propre signal. Dans un modèle purement basé sur les valeurs communes, la valeur effective est la même pour tous, mais les participants ont des informations privées différentes, c'est-à-dire des signaux différents.

La non réalisation de ces conditions, par exemple, l'aversion au risque des participants ou de l'information qui n'est pas indépendante, signifie que les différentes enchères ne génèreront plus les mêmes revenus.

Les enchères par offres cachetées au deuxième mieux-disant ont l'avantage de dupliquer le résultat d'une enchère par offres ascendantes[6], mais sans supporter le coût du rassemblement des enchérisseurs. En comparaison des enchères par offres cachetées au premier mieux disant, elles simplifient les calculs, puisque l'offre rationnelle correspond à l'évaluation propre de l'enchérisseur, ce qui dispense d'estimer le nombre des autres enchérisseurs et leur évaluation. Mais ces offres peuvent aussi susciter des difficultés d'ordre politique. Elles font en particulier savoir au public le montant auquel on a renoncé (c'est-à-dire la différence entre les deux offres les plus élevées). Le résultat le plus extrême s'est produit au cours de l'adjudication du spectre radio en Nouvelle-Zélande, l'offre la plus élevée étant ressortie à 100 000 NZ$ et la deuxième à seulement 6 NZ$ (McMillan 1994). Il y a eu des répercussions politiques quand les contribuables ont constaté que l'État n'avait reçu que 6 NZ$, alors que quelqu'un était prêt à régler 100 000 NZ$. Les enchères par offres cachetées au mieux-disant et les enchères ouvertes sont meilleures à cet égard, car le prix le plus élevé l'emporte dans le premier cas et n'est pas connu dans le deuxième (l'enchérisseur gagnant verse le montant de l'offre existante la plus élevée, lorsque le deuxième mieux-disant se retire, de sorte que les contribuables ignorent ce qu'ils ont manqué en ne vendant pas la licence au prix correspondant à la plus forte évaluation faite par le gagnant).

Une importante question se pose : quand on attribue une concession, sur quoi doit porter l'appel d'offres ? Faut-il que les soumissionnaires fassent des offres sur les tarifs ou sur une redevance de concession? (La question de la multiplicité des critères est abordée plus loin, dans le cadre de la partie consacrée aux procédures d'attribution autres que les enchères). Demsetz préconisait de mettre les tarifs aux enchères, mais l'expérience a montré depuis lors que ce n'était pas un bon choix. Il est difficile à l'État et au concessionnaire de s'engager sur les tarifs pour deux raisons: d'abord, il faut les modifier selon l'évolution du contexte ; ensuite, les négociations avec le régulateur sur ce point font disparaître les gains d'efficience imputables aux enchères. C'est pourquoi, quand on recourt à celles-ci, la pratique habituelle consiste à octroyer la concession sur la base de la redevance.

Tant la théorie que la pratique montrent que le mode d'organisation des enchères est vraiment important. Certains soutiennent le contraire, en faisant valoir que celui qui l'emporte peut vendre à des propriétaires plus efficaces, ce qui élimine toute inefficience éventuelle de l'attribution résultant des enchères. L'argument ne tient pas à cause des coûts de transaction substantiels occasionnés par les licences ou les concessions. Leur existence invalide une hypothèse clé du théorème de Coase sur lequel repose cet argument[7]. L'une des raisons est que, la valeur de la licence ou de la concession n'étant pas connue des acheteurs et des vendeurs, certaines ventes de nature à augmenter l'efficience n'auront pas lieu et celles qui se produisent seront retardées. Les données de l'expérience viennent à l'appui de cette théorie: bien qu'il existe une demande pour les réseaux de téléphonie sans fil à l'échelle de l'ensemble des États-Unis, les licences, d'abord vendues séparément, n'ont pas été concentrées à bref délai en réseaux nationaux

6 La logique est la suivante: des enchères à offres ascendantes prennent fin quand le candidat faisant la deuxième meilleure offre se retire. Il le fait quand se présente une offre qui dépasse tout juste son évaluation. C'est pourquoi le gagnant règle le montant de la deuxième meilleure offre et un léger supplément. Si, dans des enchères à offres cachetées au deuxième mieux-disant, chacun offre la valeur qu'il estime, le gagnant règle le montant de la deuxième meilleure offre (par définition). Mais un candidat fait-il une offre correspondant à son évaluation? Il ne proposera évidemment pas plus. S'il propose moins, cela réduit ses chances de l'emporter et n'abaisse pas le prix qu'il acquitterait dans ce cas. S'il perd contre un candidat qui propose moins que sa propre évaluation, il regrette alors le montant de l'offre qu'il a faite – s'il avait su, il aurait pu faire une offre supérieure, allant jusqu'au montant de son évaluation.

7 Selon le théorème de Coase (1960) « les forces du marché permettent toujours de réaliser une répartition optimale des ressources, quelles que soient les modalités d'assignation de la responsabilité juridique, si l'information est parfaite et les transactions gratuites » (Tirole 1989). Cependant, d'autres auteurs pensent que l'assignation initiale des droits de propriété restreint bel et bien les possibilités de répartition des ressources par le marchandage. (Varian 1987).

(Milgrom, p. 20.). De plus, trois opérateurs actuels sur les quatre qui assuraient l'acheminement postal aérien aux États-Unis dans les années 1930 sont centrés dans les villes qu'ils desservaient à cette époque (le quatrième a fait faillite. Voir l'encadré sur le transport postal aérien aux États-Unis). En Norvège, le concessionnaire existant a encore emporté les enchères pour le quatrième contrat relatif au service de transport aérien régional (voir l'encadré sur le transport aérien en Norvège). On voit bien qu'il est important d'être choisi la première fois.

Encadré 4. Éléments essentiels de la conception des enchères

« Ma propre expérience de consultant en matière de vente aux enchères m'a montré que de nouvelles méthodes sophistiquées ne jouaient que très rarement un rôle de premier plan dans le succès de l'opération. Les clés de la réussite consistent beaucoup plus souvent à maîtriser le coût des soumissions, à encourager les bons candidats à participer, à garantir l'intégrité de la procédure et à s'assurer que l'enchérisseur qui l'emporte soit en mesure de payer ou de gérer conformément à ses engagements » *Milgrom 2004, page xii.*

« En matière d'organisation pratique des enchères, les aspects vraiment importants sont de s'opposer à la collusion et d'encourager la participation – exactement comme sur les marchés industriels ordinaires ». *Klemperer, p.131.*

3.1.1 Comment empêcher la collusion entre soumissionnaires

Les trois stratégies directes employées pour s'opposer à la collusion entre soumissionnaires ont pour but d'arrêter l'envoi de "signaux" (on empêche ainsi les soumissionnaires de conclure un accord), d'aider les membres d'une entente qui trichent à éviter d'être découverts et de leur permettre de différer les sanctions de l'entente à leur encontre. En outre, le fait de favoriser l'entrée de soumissionnaires – ce qui fait l'objet de la prochaine sous partie – décourage aussi la collusion, en augmentant le nombre d'offres et en rendant les identités moins visibles: tout le monde connaît les concessionnaires actuels, mais qui pourrait entrer sur ce marché? Finalement, la menace crédible de sanctions assez sévères peut dissuader la collusion. Sur ce plan, les enchères par offres cachetées donnent de meilleurs résultats que les enchères par offres ascendantes ; en effet, les enchérisseurs ne peuvent utiliser leurs offres comme signaux, tandis que les membres d'une entente ne sont pas immédiatement en mesure de déceler un tricheur et de le punir.

La conception des enchères influe sur l'émission de signaux. Ces derniers permettent aux soumissionnaires de faire connaître ce qu'ils souhaitent gagner, ainsi que les menaces qu'ils mettront à exécution en cas d'échec, et donc de s'accorder sur une répartition. Les signaux peuvent prendre de nombreuses formes. Il arrive par exemple qu'ils soient publiés dans les journaux (« je me contenterai de deux des 12 blocs de fréquences offerts »). « Si les [cinq autres candidats] se comportent de façon similaire, il devrait être possible d'obtenir les fréquences dans des conditions raisonnables », mais « [je] ferai une offre pour un troisième bloc de fréquences si l'un de [mes] rivaux fait de même »). (Klemperer, p. 136 citant Crossland 2000). Dans l'exemple d'où les citations sont tirées, six entreprises ont obtenu deux licences, chacune à un coût modéré. Si l'on était passé à des enchères à offres cachetées, empêchant ainsi des représailles immédiates, on aurait peut-être rendu ce signal moins efficace.

Pendant les enchères, l'émission de signaux peut prendre diverses formes. On peut même en trouver dans les offres, quand, par exemple, un participant utilise les derniers chiffres du montant de l'offre pour indiquer le lot qui l'intéresse particulièrement. Cela s'est produit dans certaines ventes aux enchères de licences de télécommunication aux États-Unis. On peut déjouer cette manœuvre en interdisant les offres qui ne sont pas formulées en chiffres ronds ou si les adjudicateurs spécifient l'échelle des enchérissements autorisés. Une autre forme de signaux employée dans les adjudications de la Commission fédérale américaine des communications (FCC) consistait à faire une offre et à la retirer ensuite: ainsi une société enchérit puis se désiste. Quand deux soumissionnaires enchérissent l'un contre l'autre sur plusieurs marchés, ils peuvent recourir à cette technique pour proposer un partage. Les règles ont été modifiées pour limiter à deux le nombre des retraits.

Il est possible de rendre la collusion plus difficile en ne révélant pas l'identité des participants. Si ces derniers les connaissent, ils peuvent alors exercer des représailles et se concerter au cours des enchères. En outre, ils sont en mesure d'intimider les autres. Une étude a montré que les petits soumissionnaires s'étaient gardés d'enchérir contre des entreprises plus puissantes dans le cadre de l'adjudication des DEF par la FCC en 1996-1997 ; les auteurs ont estimé que ce comportement avait pour but d'éviter une riposte. Si les petits soumissionnaires évitent de participer aux offres où sont présents les poids lourds de la profession, la collusion entre ces derniers devient plus facile et plus efficace (Cramton et Schwartz 2000).

Les offres en groupement décidées peu avant la date de mise aux enchères limitent la concurrence, car les entrants potentiels n'ont pas le temps de réagir et de concurrencer les participants à l'offre conjointe ; celle-ci a donc une incidence économique analogue à la collusion ouverte. Le problème peut être résolu par l'interdiction des offres en groupement annoncées à une date proche de l'adjudication. (Pour les participants à ces offres qui ne pourraient pas soumissionner individuellement, cette technique ne réduit pas la concurrence. Mais, sur le plan administratif, il risque d'être difficile de les dissocier rapidement et de les séparer des auteurs d'offres conjointes anticoncurrentielles).

Les prix de réserve peuvent influer sur les pratiques de collusion. Un prix de réserve élevé modifie les calculs d'une entreprise qui envisage de participer à une entente : s'il est bas, le choix est entre se livrer à la collusion pour terminer rapidement les enchères à l'économie et les prolonger en enchérissant. Avec un prix de réserve élevé, la première solution – la collusion – est relativement moins attrayante, parce que le prix collusoire de l'entente le plus bas – le prix de réserve – est supérieur. Au pire, si l'on a de bonnes raisons de soupçonner une collusion ou si le nombre d'enchérisseurs s'avère insuffisant, il peut être judicieux d'annuler l'adjudication. Il conviendra de le faire savoir à l'avance pour limiter pour gêner certaines stratégies.

Outre les méthodes directes pour entraver les pratiques collusoires – l'interruption des signaux, l'interdiction du dépôt d'offres en groupement à proximité de la date des enchères et l'augmentation des prix de réserve – une législation efficace sur la concurrence est susceptible d'exercer un effet dissuasif. On peut en effet prévoir des sanctions plus sévères en matière de concession, quand le soumissionnaire a l'obligation d'attester aux autorités qu'il ne participe à aucune manœuvre collusoire lors de la procédure d'adjudication. Si les mêmes entreprises sont aussi censées répondre à de futurs appels d'offres pour des marchés publics ou d'autres concessions, la menace d'être exclues à l'avenir des contrats publics constituera éventuellement un moyen de dissuasion efficace. (OCDE 2005)

3.1.2 Comment favoriser l'entrée de soumissionnaires

Plus il y a de candidats, mieux cela vaut. Précisons : dans les offres sur la base de valeurs privées, en général, et dans beaucoup d'offres sur la base de valeurs communes, des enchères à offres ascendantes sans prix de réserve et avec un nombre N+1 de soumissionnaires symétriques sont plus rentables que « tout type d'enchères envisageable concrètement » – et comportant N soumissionnaires. « Un adjudicateur aura donc généralement intérêt à consacrer davantage de ressources à l'augmentation de la participation qu'au recueil des informations et à l'établissement des calculs nécessaires à la conception du meilleur mécanisme » (Klemperer, p. 27, citant les travaux de Bulow et Klemperer 1996 ; voir aussi ci-dessous l'encadré sur la poste aérienne aux États-Unis).

Favoriser l'entrée de soumissionnaires a pour but d'encourager les plus faibles – c'est-à-dire ceux qui ont le moins de chances d'emporter les enchères – à participer activement. (On présume que ceux qui ont le plus de chances de gagner n'ont pas besoin d'encouragements). A cet égard, les enchères par offres cachetées sont préférables aux enchères par offres ascendantes. On arrive à cette intuition en réfléchissant à la nature du mécanisme: quand on est proche de la fin d'une vente aux enchères à offres ascendantes, il ne reste plus que les candidats les plus solides. Les autres le savent. S'ils sont voués à se retirer vers la fin de

l'opération, il vaut mieux ne pas supporter les frais de préparation de l'offre et ne pas participer du tout. Au contraire, dans des enchères à offres cachetées, les soumissionnaires moins solides peuvent l'emporter à un prix que le plus puissant aurait pu dépasser, mais ne l'a pas fait parce qu'il a arbitré une probabilité accrue de perdre contre une dépense supérieure. Dans les enchères à offres cachetées, le soumissionnaire dominant ne peut modifier son offre après avoir découvert celles des participants moins forts, comme il peut le faire dans des enchères ouvertes. Deuxième intuition : il est moins évident de définir une stratégie d'offre dans des enchères à plis fermés que dans des enchères ouvertes. On peut en déduire qu'en pratique les soumissionnaires ne sont pas susceptibles d'avoir la même opinion sur la distribution de la valeur véritable d'un contrat. Dès lors, un participant plus faible a davantage de chances de l'emporter dans des enchères à offres cachetées (Klemperer p. 133).

Encadré 5: Un exemple d'entrée dans des enchères de télécommunications de la troisième génération

Aux Pays-Bas, il y avait cinq opérateurs de téléphonie mobile déjà en activité quand l'État a vendu cinq licences de troisième génération (3G) en utilisant la technique des enchères par offres ascendantes. Afin de promouvoir la concurrence sur ce marché, chacun des candidats n'était autorisé à obtenir qu'une seule licence. « Reconnaissant la faiblesse de leur position, les nouveaux venus potentiels les plus solides ont passé des accords avec les opérateurs en place. La politique de concurrence des Pays-Bas a été aussi peu heureuse que la conception de la vente aux enchères ; cela a permis à des sociétés comme Deutsche Telekom, DoCoMo, et Hutchinson, déjà solidement implantées sur des marchés étrangers, de s'associer aux opérateurs existants sur place ». En fin de compte, un seul nouveau venu éventuel a soumissionné et il s'est retiré après avoir reçu une lettre menaçante d'un opérateur déjà présent sur le marché. Les cinq opérateurs existants ont obtenu les cinq licences en réglant quelque trois milliards d'euros, soit nettement moins que le résultat de l'adjudication effectuée au Royaume-Uni.

En revanche, les enchères danoises ont été considérées comme un succès. Dans ce pays, où il y avait quatre opérateurs de téléphonie mobile établis, l'État a mis aux enchères quatre licences 3G. Au vu des résultats antérieurs en ce domaine, la décision a été prise de procéder à des enchères par offres cachetées, afin d'attirer des soumissionnaires de moindre poids, de favoriser l'entrée de nouveaux venus et d'obliger ainsi les opérateurs en place à relever leurs offres. L'État n'a ni révélé le nombre des participants effectifs, ni le montant des offres, à l'exception de la quatrième plus élevée. Tous les gagnants ont acquitté le montant de cette offre, d'une valeur de quelque 95 euros par habitant. L'un d'entre eux était un nouveau venu (Klemperer pages 155-6, 163-4)

De façon plus générale, les adjudications impliquant des frais réduits de préparation des offres attirent davantage de candidats. Elles peuvent résulter d'une standardisation des procédures au fil du temps et à l'échelle internationale. Pour certains aspects des adjudications, cela peut impliquer un degré d'arbitrage au détriment d'une conception adaptée aux particularités du contexte. Il est également possible d'effectuer des enchères en bloc. Ainsi, l'autorité tunisienne de la concurrence s'efforce d'atténuer les difficultés et d'assouplir les obligations pour éviter de faire monter les prix ou de dissuader les entreprises de faire des offres. (cf. sixième forum mondial sur la concurrence, Tunisie DAF/COMP/GF/WD(2006)13.)

On peut également favoriser les candidatures en diminuant le coût de la prestation du service ; on fixera par exemple des critères de performance réalisables par divers moyens, au lieu de spécifier une solution technique particulière. (cf. encadré 17 sur le transport aérien régional en Norvège).

La possibilité existe de « renforcer » les soumissionnaires en position de faiblesse. Si l'objet mis en vente a la même valeur aux yeux de tous les soumissionnaires (les études économiques parlent de « valeur commune »), celui qui dispose de meilleurs renseignements – le titulaire de licence existant par exemple – peut enchérir plus agressivement que les autres participants. Ces derniers admettent qu'ils ne gagneront qu'en surestimant la valeur de l'objet plus que de coutume (« la malédiction du vainqueur ») et ils feront des offres d'une prudence inhabituelle. De ce fait, le titulaire de licence l'emporte le plus souvent et à prix réduit. En renseignant mieux la totalité des candidats, on aura des chances de réduire l'asymétrie de l'information et d'aboutir à un résultat plus favorable de la vente aux enchères. L'autre méthode d'encouragement à l'entrée qui jouit du soutien de la théorie économique consiste à établir des clauses

restrictives – en ne permettant par exemple qu'aux petites entreprises de faire des offres pour l'obtention de certaines licences et en restreignant évidemment les reventes. On peut aussi faire crédit, c'est-à-dire exiger seulement des PME le règlement d'un certain pourcentage spécifié du prix qu'elles offrent (Klemperer pages 234-239). Comme exemple d'appels d'offres restreints, on peut également citer l'interdiction faite aux titulaires de licences de participer aux enchères, bien qu'elle vise peut-être davantage à circonscrire le pouvoir de marché à un stade ultérieur.

Encadré 6. Un exemple d'exclusion des titulaires de licences : comparaison entre les enchères de Los Angeles et de Chicago

Les licences de téléphonie mobile vendues aux enchères en 1995, aux États-Unis, concernaient des régions spécifiées. Elles représentaient probablement une valeur similaire aux yeux de tous les soumissionnaires. La vente a pris la forme d'enchères à offres ascendantes, que l'on qualifie d'enchères « anglaises ». Les opérateurs de téléphone fixe dont le rayon d'action correspondait aux licences avaient l'avantage sur les autres, puisqu'ils disposaient d'une base de données des clients potentiels, d'une marque commerciale réputée et de la connaissance des milieux d'affaires locaux. Dans la région de Los Angeles, le revenu des ménages était supérieur, de même que le taux de croissance économique, et la population était moins dispersée géographiquement. Le titulaire de licence existant y a été autorisé à soumissionner et le résultat des enchères a représenté 26 dollars par habitant. A Chicago, où l'opérateur en place n'a pas été autorisé à participer aux enchères, celles-ci ont abouti à un montant de 31 dollars par habitant, alors que les caractéristiques de la population auraient laissé penser que la licence de Los Angeles valait plus que celle de Chicago. (Klemperer 2004, page 107)

3.1.3 Les enchères à répétition

Il y a, par exemple, enchères à répétition quand une concession arrivée à expiration est remise en adjudication. Cette pratique pose des problèmes particuliers dans la mesure où les titulaires de licences sont avantagés relativement aux autres soumissionnaires. Supposons que chaque soumissionnaire pense qu'il donne à peu près la même estimation de la valeur de la concession que les autres, mais ait des renseignements différents sur sa valeur véritable ; tous sauront alors que le titulaire de la licence est mieux informé et soit ne participeront pas, soit feront des offres à bas prix. Il est improbable que l'on résoudra le problème d'asymétrie de l'information en exigeant du titulaire de la licence qu'il divulgue les siennes à tous les soumissionnaires. En tout état de cause, il jouit peut-être d'un avantage de notoriété qui dissuadera les autres participants d'enchérir agressivement.

On doit évidemment arbitrer entre la durée du contrat de concession et la répétition des adjudications.

Procéder à une succession de mises aux enchères peut s'inscrire dans le cadre d'un dessein ingénieux de transfert de l'incertitude. En effet, l'État peut de cette manière assumer davantage d'incertitude et recevoir du même coup des redevances de concession supérieures en moyenne. Une récente concession de chemins de fer aux Pays-bas parvient à ce résultat.

Encadré 7. Un exemple d'emploi de l'incertitude : la concession Betuweroute aux Pays-Bas

L'État néerlandais a préféré une concession à court plutôt qu'à long terme pour la Betuweroute, afin d'assurer lui-même l'incertitude sur l'évolution du marché. (L'État prend en charge l'incertitude dans la mesure où le prix de la concession à long terme qui sera mise aux enchères à l'expiration de la concession à court terme résultera de ce qui se passera effectivement dans le court terme).

La concession de la Betuweroute, qui relie le port de Rotterdam à la frontière allemande et qui est conçue pour le transport de marchandises, sera accordée à un consortium pour une durée allant de 2007 à 2009/2010. Au cours de cette période, l'incertitude relative au volume du fret devrait se réduire. Ensuite, une concession de plus longue durée sera attribuée par voie d'enchères compétitives. Le prix que l'État néerlandais obtiendra à ce titre sera fonction des anticipations existant en 2009-2010 sur l'avenir de cet ouvrage, par exemple en matière de demande de fret et de coûts de maintenance. Ces anticipations seront plus précises grâce à l'expérience acquise dans l'exploitation de la concession de 2007 à 2009. Bien que cette possibilité n'ait pas été mentionnée dans les débats, les membres du consortium, à qui leur situation d'exploitants procurera un avantage en matière d'information, pourraient être contraints de soumissionner séparément pour la deuxième concession

Source: Contribution des Pays-Bas au sixième Forum mondial sur la concurrence, 2006

Selon Williamson (1976), l'utilisation récurrente de contrats à court terme permet d'économiser les charges de calcul des impondérables. On peut adapter ces contrats au moment de leur renouvellement pour tenir compte des évolutions qui sont effectivement intervenues. La concession de la Betuweroute aux Pays-bas semble être un exemple de mise en pratique de la théorie de Williamson.

3.1.4 Autres questions relatives aux enchères

Enchères pour une pluralité de biens

La théorie économique spécialisée donne moins d'indications à propos des cas d'enchères portant sur plusieurs biens ou d'enchères multiples intéressant essentiellement les mêmes acteurs. Alors que la pratique consiste à extrapoler le cas le mieux analysé d'un objet unique au cas d'objets multiples, l'exercice est difficile et propice aux erreurs. On a eu recours aux enchères multi objets pour vendre le spectre radio, de l'électricité, des bons du trésor etc. Quand les objets peuvent être des substituts ou des compléments, cette méthode ne donne pas de bons résultats. Pour les enchères à objet unique, les objectifs de maximisation des recettes et d'attribution à l'opérateur le plus efficace coïncident, mais, avec les enchères multi objets, il faut arbitrer entre eux. Les deux exemples ci-dessous donnent une idée de la problématique de ce type de vente aux enchères.

Encadré 8. Les enchères du spectre radio aux États-Unis

La manière dont la Commission fédérale américaine des communications (FCC) a organisé en 1994 la vente aux enchères des licences SCP (Service de communication personnelle)[8] a inspiré un certain nombre d'enchères multi objets effectuées ultérieurement. On décrit ici la première enchère de ce type.

Il n'existait pas de modèle tout fait d'enchères multi objets avec des valeurs éventuellement très interdépendantes. (La valeur d'une licence dépendait du point de savoir si quelqu'un possédait déjà une licence de substitution ou complémentaire). L'une des difficultés était que certains soumissionnaires possibles recherchaient des licences à l'échelle nationale, alors que d'autres étaient en quête de licences régionales.

On a retenu comme méthode de base des enchères à offres ascendantes simultanées. On a offert un total de dix licences, en divisant le pays en plusieurs grandes régions. Une vente aux enchères était organisée pour chaque licence. A chaque phase (« round »), tous les soumissionnaires faisaient une offre ; mais ils n'ont pas participé à toutes les enchères. A la fin de chaque phase, tous pouvaient prendre connaissance des offres déposées. A chaque phase successive, la FCC fixait l'échelle des enchérissements. On pensait que les participants constitueraient leur propre panier optimal de licences, en tenant compte de la diversité de leurs coûts. Ainsi, à chaque phase, tous pouvaient remodeler leur panier après avoir examiné l'offre couramment la plus élevée faite pour chaque licence.

La règle de clôture des enchères était d'interrompre le processus quand on atteignait une phase dans laquelle il n'y avait plus d'offre sur aucune licence. Une autre règle qui avait été envisagée aurait consisté à interrompre les offres pour chaque licence quand on aurait atteint une phase où il n'y aurait plus eu d'offre pour elle. Cette règle n'a pas été retenue pour la raison suivante: avec elle, un candidat croyant avoir gagné une licence particulière, mais sur laquelle un concurrent aurait surenchéri au dernier moment, ne pourrait faire une offre pour une licence de substitution si l'enchère la concernant était déjà close. Pour empêcher les enchères de durer trop longtemps, une règle imposait aux candidats sérieux d'avoir placé une offre élevée ou de déposer une nouvelle offre de montant acceptable.à chaque phase. Pour la même raison, il existait aussi une règle obligeant les participants à « opérer activement » dans une proportion minimum des enchères auxquelles ils avaient le droit de participer (il était interdit aux entreprises déjà titulaires de licences de téléphonie mobile de détenir une licence SCP dans la même zone).

Les enchères se sont terminées après 47 « rounds » étalés sur cinq jours. Les craintes que la procédure s'avère interminable et trop compliquée pour les soumissionnaires ont été démenties.

Par la suite, les licences multi objets ont été de plus large portée. A partir de cette opération limitée et jusqu'en mars 1998, la FCC a procédé à un total de 5 893 ventes aux enchères. Les règles ont été modifiées au fur et à mesure que les candidats et les pouvoirs publics ont décelé des faiblesses. Citons la FCC: « Avant [la loi de 1993 qui a donné à la commission le droit d'organiser des appels d'offres compétitifs], elle recourait surtout à des auditions comparatives et à des « loteries » pour choisir un licencié unique parmi un ensemble de candidats à l'obtention d'une licence qui s'excluaient mutuellement. La commission s'est aperçue que la vente aux enchères du spectre était un moyen plus efficace d'attribution des licences que les techniques utilisées précédemment ».

Sources : Milgrom 2004,Cramton et Schwartz 2000, ainsi que le site de la FCC fcc.gov/auctions

[8] Le service de communication personnelle (SCP) est le nom qui désigne la bande radio de 1900 MHz utilisée au Canada et aux États-Unis pour la téléphonie mobile numérique.

Encadré 9. L'exemple des licences de télévision en Nouvelle-Zélande

La Nouvelle-Zélande a vendu des licences de diffusion télévisée au moyen d'enchères simultanées par offres cachetées au deuxième mieux disant (on se souvient que, dans ces enchères, le gagnant est le mieux disant, mais qu'il verse le montant correspondant à la deuxième offre la plus élevée). Ce type d'enchères ne fonctionne bien que si les licences ne sont ni des substituts, ni des compléments. Mais, en l'occurrence, ce pouvait être le cas et les soumissionnaires couraient le risque d'obtenir trop ou pas assez de licences[9]. Au regard du résultat effectif, on peut penser que les enchères étaient inefficaces en raison de la faible corrélation entre les demandes exprimées par les candidats, le nombre de licences qu'ils ont obtenues ou les prix qu'ils ont acquittés. En outre, ils ne pouvaient deviner les évaluations faites par chacun d'entre eux. Ainsi, il apparaît que ni Sky – dont l'offre était très supérieure aux autres – ni Totalisator – qui a offert 401 000 NZ$ pour six licences – n'avaient deviné les stratégies de leurs concurrents qui participaient aux enchères.

Tableau 1 Offres retenues pour les lots UHF nationaux: droits aux licences 8 MHz

Lot	Offre retenue	Meilleure offre (en NZ$)	Deuxième meilleure offre (en NZ$)
1	Sky TV	2,371,000	401,000
2	Sky TV BCL	2,273,000	401,000
3	Sky TV BCL	2,273,000	401,000
4	BCL	255,124	200,000
5	Sky TV BCL	1,121,000	401,000
6	Totalisator Agency Board	401,000	100,000
7	United Christian Broadcast	685,200	401,000

Source: Hazlett (1998) cité dans Milgrom, p. 12.

Les enchères auraient pu donner de meilleurs résultats si elles avaient eu plusieurs phases. Le gagnant aurait reçu le nombre de licences correspondant à son offre (dans la limite fixée pour respecter la concurrence) ; la deuxième phase aurait été consacrée à la vente du droit de choisir les licences suivantes etc. Ou encore les enchères auraient pu porter sur les prix et les quantités, le soumissionnaire faisant la meilleure offre ayant l'obligation de donner suite, puis le deuxième, jusqu'à l'attribution de toutes les licences.

Comme l'a illustré ce petit échantillon, il est difficile d'organiser des enchères multi objets. Les arbitrages ne vont pas de soi et la plus grande partie du travail de conception exige une modélisation sophistiquée.

Le problème de la multiplicité des critères

En présence de critères multiples – quand on recherche par exemple le meilleur dosage de couverture, de qualité et de prix – la détermination de l'offre la « plus élevée » risque de s'avérer délicate. Il peut y avoir une formule, annoncée au préalable, qui intègre toutes les variables de l'appel d'offres pour donner un chiffre unique, mais ces formules, de même que toute méthode de conversion de variables qualitatives en valeurs chiffrées (« scoring »), sont forcément arbitraires dans une optique de bien-être économique. Il peut être préférable d'appliquer un filtrage sous forme d'obligations fondamentales, et de désigner la gagnante parmi celles des entreprises candidates dont les offres remplissent ces obligations (voir l'encadré sur le concours de beauté suédois comme exemple de filtrage suivi d'une mise aux enchères). Par ailleurs,

[9] Ce n'est pas un paradoxe. Supposons que trois licences soient mises en vente et qu'un candidat ait besoin de deux d'entre elles pour entrer sur le marché. S'il détient déjà une licence, les deux licences restantes sont des substituts. S'il n'en détient pas encore, ce sont des compléments.

il existe un argument intuitif dont la théorie économique n'a pas encore fait une analyse complète: quand les soumissionnaires présentent des caractéristiques différentes, un « scoring » pluridimensionnel peut augmenter leurs bénéfices et les avantages reçus par l'État (Klemperer p. 247).

La nécessité de prendre en considération de multiples critères est souvent citée à l'appui du recours à des mécanismes d'attribution autres que les enchères. Ainsi, l'État peut rechercher simultanément un engagement sur la couverture, une formule de prix et une redevance. Toutefois, cette pluralité de critères doit finalement aboutir à un classement unique permettant au candidat arrivé en tête d'emporter la concession. En d'autres termes, il faut disposer d'une formule qui traduise les diverses caractéristiques des soumissionnaires en un seul classement.

Quand les concessions sont complexes, il est bon que celui qui les conçoit s'informe des caractéristiques pertinentes, des différentes technologies et des arbitrages. Il peut le faire pendant la période de consultation publique qui précède le dépôt des offres.

Le problème est de savoir à quel moment on aboutit à une formule. Quand elle est établie avant la soumission des offres, il y a lieu de se demander s'il ne conviendrait pas de l'annoncer publiquement à l'avance et de faire porter les enchères sur, par exemple, la redevance de concession. Une annonce préalable est aussi de nature à faciliter l'entrée de soumissionnaires. Une variation de cette méthode consisterait à indiquer publiquement des normes minimales pour les divers aspects du projet et à rejeter toutes les offres ne les respectant pas ; puis, on choisirait en fonction d'offres portant sur la redevance de concession. Ce type d'enchères semble tout aussi réalisable qu'un concours de beauté et présenterait l'avantage d'une plus grande transparence, pour s'assurer de ne retenir dans le classement que des critères pertinents.

Si la formule est définie après la soumission des offres, elle court le risque de paraître arbitraire ou de favoriser des candidats particuliers et d'être propice à la corruption.

Outre les craintes de corruption, les risques de collusion avec l'adjudicateur seraient moindres si l'État publiait ses obligations objectives et les critères d'évaluation des soumissions ou propositions, car cela attirerait davantage de candidats. Mais le risque de collusion par le biais de fuites provenant de l'évaluateur subsisterait.

Même avec les meilleures intentions, le problème posé par l'usage de critères multiples risque de ne pouvoir être évité quand les comparaisons entre soumissions sont très complexes. Et si on évalue ces dernières selon des critères qui sont obscurs, ou n'ont pas été annoncés à l'avance, même les enchères compétitives peuvent présenter certaines des caractéristiques d'une négociation.

La concurrence des concessionnaires existants

Lorsque des sociétés sont déjà présentes dans un secteur, l'attribution de concessions peut soit renforcer, soit affaiblir la concurrence. Il peut être judicieux d'interdire à certaines sociétés de soumissionner pour favoriser la concurrence des nouveaux venus, qui entrent sur le marché par le biais des enchères, ou empêcher les entreprises à intégration verticale de se livrer à la discrimination. Ces questions sont évoquées plus loin, quand on traite la promotion de l'entrée de soumissionnaires et la portée de la législation sur la concurrence.

Collusion entre l'adjudicateur et les soumissionnaires

Une pratique répandue consiste à faire connaître publiquement toutes les offres reçues ; elle vise à déceler une collusion entre l'adjudicateur et les soumissionnaires. Il s'agit d'assurer à ces derniers qu'il n'a

pas écarté inéquitablement leur offre. Malheureusement, cette méthode aide aussi les membres des ententes à découvrir ceux d'entre eux qui trichent.

Encadré 10. L'exemple des mesures prises en France pour améliorer la transparence des marchés publics

Lors des débats sur la révision du code français des marchés publics, il a été proposé de rendre les adjudications plus transparentes. Au lieu de ne révéler publiquement que la soumission retenue, on ferait connaître la totalité des soumissions reçues pour chaque appel d'offres. L'idée était de permettre aux parties prenantes de mieux surveiller la procédure et de s'assurer ainsi de son honnêteté. La plus grande partie des milieux d'affaires a donné son accord, mais le Conseil de la concurrence a émis de sérieuses réserves. Il a soutenu que la transparence empêcherait les membres des ententes désireux de tricher d'enchérir, par crainte d'être découverts et sanctionnés à l'occasion d'une adjudication future. Autre argument avancé par le Conseil : puisque les mêmes entreprises soumissionnent régulièrement aux adjudications de marchés publics, le fait d'être informées des offres perdantes les aiderait à connaître les méthodes de leurs concurrents. Les connaissances ainsi acquises faciliteraient une collusion tacite.

Source: Jenny 2005

L'introduction de la transparence dans la procédure des enchères, pour faire apparaître l'inéquité et la corruption, va malheureusement à l'encontre de l'objectif d'empêcher les pratiques de collusion ; la transparence permet aux auteurs d'une manipulation concertée de découvrir plus facilement et de sanctionner leurs propres tricheurs. Il faut trouver des solutions qui concilient les deux buts poursuivis. Ainsi, un inspecteur général ou un médiateur pourrait superviser l'adjudicateur et examiner les plaintes, sans nécessairement révéler la teneur des différentes soumissions. Mais comment répondre aux préoccupations à l'égard des pratiques de capture ou de corruption à ce niveau? Le degré optimal de transparence dépendra aussi de l'efficacité relative de la dissuasion exercée par les sanctions prévues contre la constitution d'ententes et la corruption (une transparence accrue s'impose si la corruption est plus répandue que les ententes).

Il faut aussi que l'adjudicateur jouisse d'une indépendance suffisante pour agir dans l'intérêt public. Entre autres conditions, il convient de lui donner des incitations opérant dans un sens favorable aux finances publiques ; il doit aussi être indépendant sur le plan intellectuel et pouvoir exercer les contrôles nécessaires pour préserver la confidentialité des soumissions.

3.1.5 Conclusion sur les ventes aux enchères

Quelques exemples concrets peuvent donner une idée des moyens d'améliorer le système:

- En 2000, la Suisse a lancé un appel d'offres pour la vente de quatre licences de téléphonie mobile 3-G. Les candidats de moindre envergure se sont retirés, dont l'un d'entre eux au moins à cause de l'application des règles d'offres ascendantes. L'État a autorisé au dernier moment des soumissions en groupement. Dans la semaine précédant les enchères, le nombre des soumissionnaires est tombé de neuf à quatre. Les licences ont été cédées à leur prix de réserve, les recettes par habitant représentant 1/30ème du montant collecté lors des enchères britanniques et allemandes pour des licences similaires [Klemperer 2004, page 109]. Le Trésor aurait sans doute encaissé davantage si l'on avait fixé un prix de réserve supérieur, interdit les soumissions conjointes de dernière minute et peut-être opté pour des enchères à offres cachetées.

- La Turquie a mis successivement aux enchères deux licences de télécommunications, en indiquant que le prix de réserve de la deuxième serait égal au prix de vente de la première. Une société a fait une offre bien supérieure à ce que la première licence aurait valu en cas de

concurrence avec un deuxième licencié. Personne n'a fait d'offre pour la deuxième licence. [Ibid, p. 110]

- En 1996-1997, les États-Unis ont mis en vente le spectre en utilisant, pour un grand nombre de lots, la technique des enchères à offres ascendantes simultanées. La plupart des soumissions étaient exprimées en milliers de dollars et en chiffres ronds. Deux sociétés se sont durement concurrencées pour obtenir le lot portant le numéro 378. L'une des sociétés a surenchéri sur l'autre, les offres étant de 313 378 dollars et 62 378 dollars, alors que l'autre société semblait jusqu'alors incontestablement la mieux disante. La deuxième société a retiré son offre pour le lot 378. [Ibid. page 105 citant Cramton et Schwartz 2002] La déduction évidente était que la première société signalait à la deuxième qu'elle la punirait lors d'autres enchères en faisant des offres élevées, si elle ne cessait pas d'enchérir pour l'achat du lot 378. Il est possible d'éviter ce genre de pratique en spécifiant des marges d'enchérissement assez importantes.

Tant l'expérience que la théorie dictent quelques règles pragmatiques pour aider les pouvoirs publics à anticiper et à éviter certaines erreurs quand ils fixent les modalités des enchères.

Encadré 11. Règles pragmatiques en matière d'enchères

- Pour tenter d'arrêter l'envoi de signaux, il faut aider les membres d'une entente qui trichent à ne pas être découverts et aussi à différer les mesures de rétorsion à leur égard. On peut le faire en demandant des offres cachetées, en interdisant les soumissions dont le montant n'est pas arrondi et les soumissions en groupement qui ne sont pas faites assez longtemps avant la date des enchères, et en prévoyant un prix de réserve suffisamment élevé. En outre, il faut bien faire respecter la législation sur la concurrence.
- On doit essayer d'augmenter le nombre de participants. On peut notamment y parvenir en faisant une plus large publicité aux enchères, en réduisant les frais de préparation des soumissions et éventuellement en limitant les avantages des licenciés existants sur le plan de l'information.
- Quand les biens ou les concessions constituent des compléments ou des substituts, on organisera les enchères de manière à tenir compte de ces interactions. Prenons un exemple simple: les enchères simultanées à l'anglaise (dans lesquelles les candidats sont constamment en mesure d'apprécier leurs chances d'emporter les divers biens et d'ajuster sans cesse leurs offres) sont un moyen possible de le faire, contrairement aux enchères séparées à offres cachetées. Une fois son offre déposée sous pli cacheté, un soumissionnaire ne peut la modifier quand il s'aperçoit qu'il a perdu les enchères pour l'acquisition d'un complément ou d'un substitut.
- Il faut prévoir la possibilité de réviser les règles d'organisation des enchères si les participants ne sont pas assez nombreux. Ainsi, dans l'hypothèse où l'on met en vente trois licences de téléphonie mobile et où seulement trois soumissionnaires se manifestent, le produit de la vente sera beaucoup plus réduit que si quatre candidats ou davantage soumissionnent. A supposer que les règles annoncées au préalable prévoient de différer l'opération jusqu'à ce que des mesures soient prises pour augmenter la participation, les enchères susciteront sans doute plus d'intérêt et on évitera des résultats décevants.
- Il peut arriver que les soumissionnaires attribuent à l'objet mis en vente la même valeur anticipée ; dès lors, si l'un d'entre eux a un léger avantage sur les autres, parce qu'il valorise l'objet marginalement plus ou dispose d'informations un peu meilleures, cela peut modifier radicalement les recettes réalisées par l'enchère. Dans ces conditions, des enchères à offres cachetées seront plus rentables que des enchères ouvertes. [Klemperer, p. 12-13 or 236-7] Ce point peut, par exemple, être pertinent quand on remet aux enchères une concession et quand le concessionnaire existant est avantagé relativement aux autres candidats, parce qu'il a procédé aux investissements inévitables ou parce qu'il connaît mieux la situation réelle de la concession.
- Les ventes aux enchères doivent tenir compte du contexte dans lequel elles s'effectuent. L'expérience acquise ailleurs a valeur d'information, mais elle ne peut se substituer à l'analyse et aux simulations. Recourir aux services d'un expert habitué à concevoir des enchères peut être de nature à augmenter notablement les chances de succès et à éviter les erreurs.

3.2 Autres mécanismes d'attribution

Les trois mécanismes d'attribution qui n'utilisent pas la technique des enchères sont les négociations simultanées, la négociation avec un seul prestataire et les concours de beauté. On les décrira après une brève présentation des critères multiples.

3.2.1 Les négociations

Dans une procédure de **négociation simultanée,** également qualifiée de négociation compétitive, l'État contacte plusieurs soumissionnaires éventuels et leur propose d'entamer des discussions. Ils présentent différentes solutions qui satisferaient aux obligations de la concession. Puis, ils soumettent leurs offres finales en s'inspirant des solutions dégagées au cours des négociations. Une fois que l'État a sélectionné le vainqueur, de nouvelles tractations ont lieu pour finaliser les termes du contrat. Ce mécanisme est utilisé par exemple en Roumanie. La méthode sera éventuellement appropriée quand le projet est complexe, l'acheteur pouvant alors mettre à profit les renseignements obtenus au cours des pourparlers avec les candidats à la vente pour améliorer la conception du projet souhaité (Bajari et autres, 2004). Cette procédure permet notamment d'intégrer au contrat définitif les solutions techniques de divers candidats. Cependant, on ne voit pas pourquoi l'adjudicateur ne pourrait prendre connaissance antérieurement des différentes possibilités techniques et incorporer les informations acquises dans l'appel d'offres.

En l'absence de problèmes de mandat concernant l'adjudicateur, les négociations simultanées ressemblent aux enchères ouvertes ou « anglaises ». Ces dernières sont particulièrement propices à la collusion si les soumissionnaires sont peu nombreux et savent tous qui participe. De plus, comme la négociation compétitive ne fait pas l'objet d'un contrôle du public et donne à l'État une marge discrétionnaire, elle est susceptible de se prêter davantage à la corruption.

Encadré 12. Un exemple d'appel d'offres préalable à une négociation : l'eau en France

Des preuves existent que l'on peut obtenir de meilleurs résultats en procédant à un appel d'offres avant d'engager une négociation. En France, il était rare, avant 1993, d'octroyer des concessions de distribution d'eau par appels d'offres ouverts et publiés. Au lieu de cela, le même concessionnaire conservait presque toujours la gestion de la compagnie des eaux locale, contrat après contrat. Dans ce pays, trois grandes sociétés multinationales – Vivendi eaux, Suez-Ondéo et SAUR-Bouygues – contrôlent l'essentiel du marché, soit quelque 90% au total. Les affaires de corruption et le mécontentement suscité par le prix de l'eau ont conduit à l'adoption de la *loi Sapin* ; celle-ci prévoit, depuis 1993, une procédure obligatoire d'appel d'offres ouvert pour les contrats de gestion des eaux, avant une deuxième phase de négociation, et limite la durée des concessions. Selon une étude portant sur plusieurs centaines de contrats renégociés, leur durée moyenne est passée de 17 à 11 ans et les tarifs ont fléchi de 10%, bien que l'opérateur en place l'ait emporté dans 80 à 90% des cas.

Source: OCDE Concurrence et réglementation dans le secteur de l'eau *DAFFE/COMP(2004)20, citations omises, et Saussier (2005)*

Négocier avec un seul prestataire potentiel est pire que négocier simultanément avec plusieurs**.** Quand l'État doit décider s'il accepte « la meilleure et la dernière offre » de son interlocuteur unique, le choix n'est pas entre elle et les offres d'autres négociateurs, comme dans une négociation compétitive ; il est plutôt entre l'accepter ou supporter le coût et les délais qu'impliquent des tractations supplémentaires avec un nouveau partenaire, dont l'État ignore encore quelle sera sa « meilleure et dernière offre ». Le fait d'être dans une position moins favorable pour marchander donne des résultats inférieurs.

Comparativement aux négociations, les enchères fonctionnent bien. Il est démontré théoriquement que, dans le cadre d'hypothèses relativement peu restrictives, des enchères impliquant N+1 soumissionnaires aboutissent toujours à un prix plus élevé que n'importe quel type de négociations N soumissionnaires.[10] Autrement dit, si, pour la vente d'un même objet, on peut attirer un participant de plus aux enchères que dans la négociation, les enchères ont alors un caractère plus compétitif[11].

En résumé, négocier simultanément avec plusieurs fournisseurs potentiels, au lieu de recourir à des enchères compétitives, risque de mettre à l'épreuve les mécanismes anti-corruption et anti-discrimination. La théorie des enchères démontre que, dans certaines conditions relativement peu restrictives, une vente aux enchères rapporte plus que des négociations simultanées. Mais, si l'évaluation des offres est complexe, les enchères elles-mêmes peuvent avoir certains points communs avec une négociation compétitive. L'encadré consacré à l'attribution d'une franchise pour la télévision câblée à Oakland en est l'illustration.

Encadré 13. Un exemple de multiplicité des critères et de renégociation: le franchisage de la télévision câblée à Oakland en 1969

En juin 1969, le conseil municipal d'Oakland, en Californie, a pris un arrêté fixant les principales dispositions de l'attribution d'une franchise pour la télévision câblée. Les services ont entamé des discussions avec des candidats éventuels et avec diverses associations représentatives, pour recueillir des informations sur les coûts, les caractéristiques de la demande, les possibilités techniques et définir un « service de base » standardisé pouvant servir de base à la comparaison des offres.

En avril 1970, on a invité les cinq candidats à soumissionner. Pour résumer, il fallait, pour obtenir la franchise, fournir deux systèmes: un système de base A, comportant des chaînes spécifiés, et un système B, donnant accès à des programmes spéciaux et à d'autres services, non spécifiés. Un abonné accéderait au système A en réglant un droit de raccordement et un tarif mensuel de montant « x ». La durée de la franchise était de 15 ans et la redevance annuelle due à la ville était fixée. Les frais de raccordement étaient également précisés. Des spécifications techniques minimum étaient stipulées et la qualité minimale de service était décrite en termes généraux. La couverture minimum de la ville et le calendrier d'extension étaient déterminés (l'ensemble de la ville devait être relié au bout de trois ans). Le franchisé aurait le droit de proposer chaque année un relèvement du tarif d'abonnement, mais l'arrêté municipal ne prévoyait aucune indexation ou autre critère de référence. L'offre de base était un montant x, qui serait tarifé mensuellement aux abonnés au titre du premier branchement leur permettant de capter le système ordinaire A.

Les offres reçues s'élevaient à 1.70$ de la part de Focus Cable, à 3.48$ pour Cablecom-General et à 5.95$ pour la société TelePrompTer. Lors du dépôt de son offre, Focus a informé la ville du retrait d'un associé indispensable pour lui permettre de soumissionner. Cette société avait soumis l'offre la moins chère, était le seul soumissionnaire d'origine locale et représentait une minorité ethnique. La ville ne souhaitait donc pas rejeter sa proposition. Deux

[10] L'hypothèse de symétrie des soumissionnaires est un peu plus restrictive. En cas d'asymétrie, une négociation optimale peut produire des anticipations de recettes plus élevées que des enchères avec un soumissionnaire supplémentaire. Bulow et Klemperer (1996) ont démontré que, dans le cadre de certaines hypothèses, des enchères auxquelles participent N+1 soumissionnaires donneront un prix plus élevé que n'importe quelle négociation impliquant N soumissionnaires. Ils montrent aussi que, si un vendeur pouvait négocier avec N soumissionnaires, tout en se réservant le droit d'effectuer des enchères à offres ascendantes avec un soumissionnaire supplémentaire et sans prix de réserve, ce vendeur aurait toujours intérêt à éviter la négociation et à lancer directement les enchères. Les conditions sont les suivantes : les soumissionnaires sont neutres à l'égard du risque ; leurs fonctions de valeur sont symétriques et leurs signaux indépendants ; leurs évaluations les plus basses possibles dépassent le coût de fourniture du vendeur ; les soumissionnaires recevant les signaux les plus élevés formulent les évaluations les plus fortes.

[11] Une étude empirique sur la "refuse collection" estime que les enchères compétitives permettent des économies de 20 % comparativement à la négociation. (Domberger, Meadowcorft et Thompson 1986, "Competitive Tendering and Efficiency: The case of Refuse Collection" *Fiscal Studies 7: 69-87* cité dans Le Guasch).

semaines plus tard, TelePrompTer suggéra de constituer une co-entreprise avec Focus, dans laquelle elle détiendrait ultérieurement 80% du capital. En novembre 1970, la ville attribua la franchise à Focus. La société demanda et obtint un tarif de 4.45$ par mois pour le système B.

Focus réclama ultérieurement une modification du contrat. Au terme de la négociation, les principaux changements effectués furent les suivants: abaissement des capacités techniques, relèvement du coût de la franchise annuelle, diminution des pénalités pour retard de réalisation à hauteur d'un facteur de 20 ou plus, étalement du calendrier d'édification et quintuplement de l'abonnement mensuel pour les raccordements supplémentaires.
En novembre 1974, 11 131 abonnés étaient connectés, dont 10 361 bénéficiaient du service spécial B et 770 seulement du service ordinaire A.

L'expérience d'Oakland suscite les observations suivantes :

-- Le manque d'intérêt des consommateurs pour le service ordinaire A signifie qu'en mettant l'accent, dans la procédure d'attribution, sur le tarif mensuel de ce service de base, « on avait entravé et peut-être faussé complètement le jeu de la concurrence ».
-- Dans les faits, il n'y a pas de corrélation claire entre les coûts et les prix. Premièrement, les offres faites pour le service A posent la question de l'existence d'une véritable compétition économique. Deuxièmement, le prix du service B a été négocié au lieu d'être déterminé par un mécanisme de mise en concurrence. Troisièmement, l'intégration verticale (TelePrompTer a fourni la plupart des équipements) et l'incompétence des services de la ville en matière d'audit font obstacle à la vérité des coûts.
-- La déduction logique selon laquelle l'offre initiale de Focus avait pour seul but de prendre pied sur ce marché est confirmée par son faible montant, le moment et la nature de la réorganisation de cette société, l'importance de son statut de candidat local et par son succès dans la renégociation du contrat.
-- En fait, la ville n'était pas en mesure de se substituer au franchisé s'il se retirait. Elle ne disposait ni de moyens peu onéreux d'évaluation des actifs, ni d'un plan pour empêcher les interruptions du service.

Source: Williamson 1976

3.2.2 Les concours de beauté

Les concours de beauté sont, comme leur nom l'indique, difficiles à définir. Une définition parle de « procédure dans laquelle les critères d'évaluation comprennent l'expertise technique, la viabilité financière, la couverture du réseau, la rapidité de déploiement, etc. Elle n'est pas transparente et donne souvent lieu à une grande activité des groupes de pression et à des interventions de nature politique ». (Jehiel et Moldovanu, 2003). Selon une autre définition, il s'agit d'une procédure utilisant « des indicateurs mesurables qui permettent de juger les candidats », tandis que la redevance de concession ne varie pas (elle est fréquemment nulle mais peut avoir n'importe quelle valeur). Les partisans des concours de beauté font valoir qu'ils mettent l'accent sur les aspects essentiels de la performance, comme la couverture du réseau et la rapidité avec laquelle elle est assurée ; ils pensent que cela pousse les candidats à « exceller » dans ces domaines. Il va de soi que les engagements pris lors du concours de beauté connaissent les mêmes problèmes d'exécution que ceux qui sont souscrits pendant une mise aux enchères.

Encadré 14. Un exemple de concours de beauté : l'attribution des licences UMTS en Suède

La Suède illustre l'utilisation d'un concours de beauté pour l'attribution de licences UMTS. La sélection s'est opérée en deux étapes. D'abord, on a examiné de très près la solidité financière et les capacités techniques des candidats, ainsi que la faisabilité commerciale de leur projet, tout en vérifiant s'ils possédaient l'expertise et l'expérience appropriées. Ensuite, les entreprises ainsi présélectionnées ont été jugées en fonction de leurs engagements sur la couverture du réseau et sa rapidité de mise en place.

Le nombre de licences, qui était de cinq au départ, a été ramené à quatre. Deux ont été réservées aux nouveaux venus et leur ont permis d'édifier aussi des infrastructures GSM.
Dix candidatures ont été reçues. Quatre ont été écartées lors de la présélection, dont celle de Telia, l'opérateur suédois de téléphonie mobile le plus important et le plus anciennement établi ; et cela parce que l'organisme de sélection a estimé son projet techniquement irréalisable.

Un détenteur de licence – Orange – s'est retiré du marché en décembre 2002. A la fin de 2003, délai de rigueur prévu pour une couverture intégrale, les trois opérateurs restants n'assuraient en fait que, respectivement, 67.5%, 74% et 66% (Bjuggren 2004, dont citation de *Svenska Dagbladet* 28 Mars 2004). Il est manifeste que la renégociation n'a pas été satisfaisante, ce qui pose la question de l'efficacité de la procédure de présélection et d'attribution.

Selon les partisans des concours de beauté, le fait de fixer une redevance de concession modeste ou nulle permettrait d'obtenir ensuite une faible tarification des services. Cet argument repose sur une confusion entre coûts inévitables et coûts fixes ; il suppose aussi l'absence d'une régulation ultérieure des prix. S'agissant des coûts inévitables en ce domaine, une fois le droit de concession payé, il n'influe pas sur le prix des services. (Le coût du capital risque d'augmenter si le paiement de la redevance accroît sensiblement la probabilité de faillite, ce qui a, en retour, une répercussion éventuelle sur les prix). Certes, les coûts incontournables influencent la décision d'entrer sur un marché, mais une société serait d'une grande légèreté si elle soumissionnait pour un droit de concession en quoi elle verrait une source de pertes futures. De plus, si l'on craint que les prix soient trop élevés ultérieurement, il est loisible d'édicter une réglementation – en précisant ses modalités détaillées avant les enchères pour que les candidats en tiennent compte en formulant leurs offres ; on peut aussi augmenter le nombre de licences

3.3 Engagements et renégociation

Une renégociation opportuniste[12] élimine les avantages des enchères compétitives. Si une concession est renégociée peu après son attribution, les enchères de départ se muent alors en une négociation bilatérale entre le gagnant et l'État. Les avantages que présentent les enchères sur le plan de la concurrence disparaissent. Il est fréquent que les États ne puissent refuser de renégocier: en effet, ils craignent des réactions d'ordre politique ainsi que les coûts de transaction supplémentaires occasionnés par un remodelage de la concession, l'organisation de nouvelles enchères et le choix d'un autre concessionnaire.

[12] Dans ce cas de figure, le terme renégociation se réfère à un changement significatif du contrat initial et à une incidence financière substantielle. Il ne s'agit ni des relèvements de tarifs prévus expressément au titre de l'inflation, ni des révisions périodiques stipulées ; on ne vise pas non plus les modifications dues à des impondérables, tels qu'une dévaluation, et que mentionne le contrat.

Encadré 15. Un exemple de renégociation : l'aéroport de Lima

« Au début de 2001, l'aéroport de Lima a été donné en concession à un consortium dirigé par l'opérateur de l'aéroport de Francfort, la société Bechtel et par un associé local, l'offre de ce consortium étant la meilleure. Le critère était le pourcentage des recettes brutes que l'opérateur s'engageait à rétrocéder à l'État. L'offre retenue réservait à l'État 47% du chiffre d'affaires brut, à quoi s'ajoutait l'engagement d'investir plus de 1 milliard de dollars et de construire une deuxième piste d'atterrissage avant la 11ème année de la concession de 30 ans.

Bien que cette offre semble très intéressante dans l'optique de l'État et ait été saluée comme telle, elle apparaît aussi discutable sur le plan financier. Elle implique qu'avec le solde de 53% des recettes brutes l'opérateur parvienne à couvrir les coûts d'exploitation, à amortir ses investissements et à obtenir un rendement correct pour sa mise de fonds. Peu après l'attribution, le consortium gagnant a commencé à réclamer une renégociation du contrat. L'opérateur a retardé les investissements convenus et les deux parties n'ont cessé de chicaner. Le contrat a été renégocié à la fin de 2003 ; on a modifié les obligations en matière d'investissements et le pourcentage du chiffre d'affaires revenant chaque année à l'État »

Source: Guasch (2004), page 47.

Une étude de Guasch (2004) sur un millier de contrats de concession attribués en Amérique latine et aux Caraïbes, du milieu des années 1980 à 2000, constitue le meilleur travail empirique sur ce thème. Les résultats donnent des informations utiles sur les moyens d'améliorer les concessions pour réduire la fréquence des renégociations. Les contrats étudiés concernent 17 pays et se répartissent, dans des proportions à peu près égales, entre quatre secteurs d'infrastructures: les télécommunications, l'énergie, les transports ainsi que l'hygiène et l'eau. Les conclusions les plus importantes figurent ci-dessous:

- 30% de la totalité des concessions ont été renégociées. Le pourcentage s'élève à 55% pour les concessions de transport et à 74% pour les concessions dans les domaines de l'eau et de l'hygiène publique.

- La durée moyenne qui s'est écoulée entre l'attribution et la renégociation a été de 2,2 ans pour des concessions qui étaient censées aller de 15 à 30 ans.

- Les concessions ont été plus souvent renégociées quand elles avaient été attribuées par voie d'enchères compétitives (46%) que sans appel à la concurrence (8%) ; cela si l'on exclut les concessions de télécommunications.

- 61% des renégociations ont été déclenchées par le concessionnaire contre 26% par l'État. Mais le mode de réglementation est assez déterminant à cet égard. En régime de plafonnement des prix, le concessionnaire provoque une renégociation dans 83% des cas ; en revanche, si c'est le taux de rendement que l'on réglemente, le concessionnaire demande de renégocier dans 26% des cas et l'État dans 34% (les totaux ne correspondent pas à 100%, car ce sont parfois les deux parties qui veulent renégocier).

- Le contrat a plus de chances d'être renégocié quand il a été attribué sur la base de l'offre de tarif la plus basse (60%) que sur celle de la redevance de transfert la plus élevée (11%).

- Il en va de même quand le contrat comporte des obligations d'investissement (70% de renégociations) plutôt que des indicateurs de performance (18%).

- La probabilité de renégociation est plus grande si la réglementation plafonne les prix (42%) que si elle porte sur le taux de rendement (13%) ; les renégociations sont aussi plus nombreuses en l'absence d'un organisme régulateur (61%) que lorsqu'il en existe un (17%).

- Le fait que le cadre réglementaire soit fixé par le contrat est plus propice à la renégociation (40%) que s'il est déterminé par un décret (28%) ou par une loi (17%).

Guasch a également procédé à une analyse de probit[13] pour estimer l'effet de diverses variables sur la probabilité de renégociation. En s'intéressant à des aspects comme l'existence d'un « organe réglementaire », il s'est aperçu que celle-ci déterminait largement la tendance à renégocier les contrats. Il a établi que l'existence d'une telle entité diminuait fortement l'éventualité d'une renégociation. D'où l'idée que cela « représentait » un meilleur respect des règles, lequel limiterait les demandes de renégociation. Il s'est aperçu que les critères d'attribution avaient de l'importance: l'octroi d'une concession sur la base du tarif le plus bas, plutôt que de la redevance la plus élevée, rend plus probable une renégociation. Le mode de réglementation – plafonnement des prix ou fixation d'un taux de rendement – joue un grand rôle, le premier système aboutissant à davantage des renégociations plus nombreuses. L'autonomie d'un organe réglementaire n'est pas apparue "robuste" avec les spécifications testées, ce qui signifie que les décideurs ne doivent pas se fier à ces résultats. Les obligations d'investissement sont davantage susceptibles d'entraîner une renégociation. Les concessionnaires nationaux sont plus enclins à renégocier. Les chocs macroéconomiques favorisent les renégociations et ces dernières sont un peu plus fréquentes après un changement de gouvernement. Enfin, une procédure d'attribution à caractère non concurrentiel – une négociation bilatérale par exemple – limite le nombre de renégociations. Ces conclusions sont résumées dans le tableau 6.15 de Le Guasch, reproduit ci-dessous:

Tableau 6.15
Effets marginaux de variables significatives sur la probabilité de renégociation

Variables significatives influant sur la probabilité de renégociation	Effet marginal
Existence d'un organe réglementaire	20–40%
Critères d'attribution	20–30%
Mode de réglementation	20–30%
Autonomie de l'organe réglementaire	10–30%
Obligations d'investissement	10–20%
Nationalité du concessionnaire	10–20%
Caractère concurrentiel de la procédure d'attribution	10–20%
Chocs macroéconomiques (dévaluations)	10–15%
Cycles électoraux	3–5%
Procédure d'attribution	10–20%

Source: Le Guasch (2004).

[13] Le terme « probit » signifie « unité de probabilité ». On applique une analyse probit à des données pour lesquelles la variable dépendante ne peut avoir que deux valeurs possibles. Ici, il y a eu, ou non, renégociation. Une analyse probit révélera les variables indépendantes, comme l'existence d'un organe réglementaire, qui ont la plus grande influence sur la variable dépendante, par exemple la renégociation. Le modèle traditionnel de régression linéaire explique la variable dépendante y en fonction des variables indépendantes x de la façon suivante: $y=\alpha + \beta x + \varepsilon$. Mais le modèle probit explique la distribution de la probabilité y comme suit: prob(y=1)=f(x), où y peut prendre la valeur de 0 ou 1. Voir Kennedy 2003.

Les principaux résultats des renégociations ont été les suivants: « relèvements de tarifs (62%), reports et réduction des obligations d'investissement (69%), hausse du nombre des éléments de coûts répercutés automatiquement dans les tarifs (59%) et diminution de la redevance annuelle réglée à l'État par l'opérateur (31%). Toutefois, un petit nombre de renégociations a entraîné une baisse des tarifs (19%), des majorations du droit annuel versé à l'État par l'opérateur (17%) et d'autres changements défavorables à ce dernier (22%) ».(Guasch, page 18)

Pour amorcer une renégociation, les concessionnaires excipent surtout du caractère financièrement déséquilibré du contrat ; en d'autres termes, ils ne tireraient pas de leurs investissements un taux de rendement équitable. Les principaux arguments mis en avant par les États sont: « un changement des priorités gouvernementales dans le secteur, des considérations politiques (fréquemment liées au cycle électoral), une insatisfaction à l'égard de l'ampleur et de la rapidité du développement du secteur, le non respect par l'opérateur des dispositions convenues. » (Guasch page 18)

L'analyse de ces résultats peut contribuer à la conception de futures formules de concessions qui feront obstacle aux renégociations:

- L'incidence relativement faible des renégociations dans les secteurs des télécommunications et de l'énergie a été en partie imputée à leur caractère plus concurrentiel, qui met l'État en présence de prestataires de services plus nombreux et affaiblit la capacité de négociation des concessionnaires. Dans les télécommunications, le fait que les privatisations pures et simples soient plus répandues que les concessions a aussi été considéré comme un facteur de rareté des renégociations.

- La fréquence assez limitée des renégociations de concessions attribuées selon des modalités non concurrentielles a été expliquée par le fait que les négociations initiales avaient déjà épuisé toutes les marges.

- L'incidence de la diversité des réglementations sur les renégociations a été imputée à leurs différences sur le plan du risque. En régime de plafonnement des prix, le concessionnaire prend plus de risques qu'avec une régulation du taux de rendement[14]. En outre, la renégociation a consisté habituellement à modifier le traitement des éléments de coûts pour permettre de les répercuter automatiquement, ce qui atténue les risques assumés par le concessionnaire.

- Lors de l'attribution d'une concession, on risque d'éliminer les effets des enchères compétitives en recourant à un critère susceptible d'être modifié rapidement, tel que les tarifs, ou qui se prête à des manipulations et décisions arbitraires, comme les propositions techniques. (La logique est la suivante: avec un critère évolutif ou arbitraire, les promesses faites au moment des enchères n'ont pas à être tenues à l'avenir. Il ne coûte donc rien de prendre des engagements qui seraient onéreux à condition d'être respectés. Dès lors, les promesses ne peuvent être le moyen de distinguer le fournisseur le moins cher. Et des enchères compétitives basées sur elles ne font pas ressortir le fournisseur en question).

Autres conclusions:

- Si l'entreprise qui l'emporte peut se déclarer défaillante à peu de frais, elle soumissionne en fait pour avoir l'option d'être concessionnaire. (Lors d'enchères australiennes pour des licences de

[14] Dans le cadre d'une régulation du taux de rendement, le concessionnaire est autorisé à répercuter sur les consommateurs l'évolution des coûts, même si l'on prévoit souvent un délai ou un lissage. En revanche, avec un plafonnement des prix, il ne peut généralement modifier ses tarifs pour le même motif.

télévision par satellite, deux des gagnants ont renoncé aux lots qu'ils ne souhaitaient plus acquérir. L'État ne leur a pas imposé de pénalités pour cette défaillance. Exemple cité par Klemperer, page 110, sans la référence)

- Si la faillite permet de s'exonérer de ses engagements, les enchères favorisent les soumissionnaires sous financés, relativement à ceux à qui leur meilleure situation financière interdit d'être défaillants. On peut éventuellement remédier à ce problème en exigeant des cautions et en sanctionnant les défaillances.

- L'incapacité à offrir aux personnes défavorisées des services à un prix abordable est un autre facteur qui pousse à la renégociation. Quand les aides publiques, les subventions croisées et les tarifs à la charge des usagers ne permettent pas de couvrir les coûts, soit le concessionnaire ne peut respecter ses engagements, soit il ne le fait que momentanément. Les consommateurs, exigeant un meilleur service, font alors pression sur les pouvoirs publics pour qu'ils renégocient ou changent de concessionnaire ; ou bien c'est le concessionnaire qui fait l'objet de pressions pour renégocier ou résilier le contrat.

- Lorsque le concessionnaire est sélectionné selon une multiplicité de critères, chacun d'entre eux se prête à une renégociation. Les parties choisiront vraisemblablement de renégocier sur la base d'un critère qui les place en position avantageuse.

Encadré 16. Exemple de la renégociation de la poste aérienne aux États-Unis

Une étude a été faite sur l'attribution par appels d'offres de concessions des services postaux aériens aux États-Unis dans les années 1920-1930. Elle a abouti aux conclusions suivantes: les liaisons aériennes pour lesquelles la concurrence était la plus forte étaient les moins chères ; les enchères incitaient les concessionnaires à faire augmenter la demande de ce service ; mais ceux qui étaient déjà en place avaient certains avantages sur les autres soumissionnaires, même sans tenir compte des investissements spécifiques à la franchise.

De 1925 à 1930, 32 liaisons aériennes ont été mises en adjudication. La Poste fixait un prix de réserve et des normes de qualité, tandis que les candidats faisaient des offres correspondant à la rémunération nécessaire. Les contrats étaient d'une durée de quatre ans. Des preuves de collusion ont été trouvées pour au moins une adjudication, qui a été recommencée. A partir de 1928, une série de changements de règles a eu pour effet de ne plus soumettre à la concurrence les gagnants des premiers appels d'offres. En outre, on avait coutume de prolonger les liaisons aériennes existantes au lieu de mettre les extensions aux enchères. Deux ont été offertes après 1930. Les contrats furent attribués après la tenue d'une réunion entre le Postier Général et les quatre principaux transporteurs, qualifiée de « conférence des dépouilles ». En réaction à cet évènement, le Congrès lança une enquête sur la procédure d'attribution. En février 1934, le nouveau Postier Général résilia tous les contrats. En mai 1934, on mit en adjudication des routes en partie modifiées, en recourant à des contrats temporaires d'une durée de trois mois (les pouvoirs publics interdirent aux participants à la conférence des dépouilles de déposer des offres dans la deuxième série d'adjudications. Ces derniers adoptèrent alors de nouveaux noms, dont certains sont familiers aujourd'hui, et restèrent ainsi dans la course). Les contrats ont été prorogés à plusieurs reprises et les mêmes contractants étaient en place en 1938, quand la réglementation changea avec l'institution d'un Office de l'aviation civile (Civil Aeronautics Board).

L'étude consacrée aux appels d'offres a conclu que l'augmentation du nombre de participants faisait baisser le prix. Selon un calcul, un doublement réduisait le prix de 30%.

L'étude a également montré que les transporteurs en place étaient avantagés par rapport aux nouveaux venus. Dans la deuxième série d'adjudications, 11 liaisons n'avaient pas encore été concédées, tandis que 21 l'avaient été. Les 12 gagnées par les concessionnaires existants donnèrent lieu à beaucoup moins de concurrence et elles étaient beaucoup plus longues. (peut être parce qu'une expérience antérieure de l'exploitation avait davantage de valeur sur des itinéraires plus longs – à cette époque, la navigation était visuelle et les contractants devaient aménager leurs propres zones d'atterrissage en urgence). Les concessionnaires en place l'emportèrent à des prix nettement supérieurs. On peut conclure de ce fait, et d'autres données, qu'ils jouissaient d'un avantage sur les nouveaux venus, consistant surtout en leur capacité à dissuader les concurrents de soumissionner à certains appels d'offres

A l'appui de l'argument selon lequel les activités postérieures à l'attribution de concessions ne corrigent pas les effets d'adjudications défectueuses, on peut citer un élément anecdotique intéressant: « A la fin des années 1930, American Airlines disposait de la route postale transcontinentale par le sud avec des vols passant par Dallas ; TWA opérait la route traversant le milieu du continent avec des vols passant par St-Louis ; United Airlines avait la route septentrionale avec des vols passant par Chicago. A la fin du 20ème siècle, les plates-formes des trois compagnies aériennes se trouvaient dans les mêmes villes » (Eastern airlines était la quatrième compagnie aérienne ayant participé à la conférence des dépouilles et qui avait ensuite changé de nom).

Source : Wolfram 2004

La renégociation n'est pas toujours de nature opportuniste. Le caractère incomplet inhérent aux contrats de concession[15] oblige parfois à les renégocier. Pour qu'un contrat soit crédible, la renégociation doit obéir à des critères clairs et préétablis, agréés par toutes les parties signataires. « Il faut qu'une règle de renégociation porte sur les évolutions qui n'ont pas été anticipées…Les critères de politique publique utilisés pour vérifier si une révision est nécessaire doivent être préétablis et définis explicitement. De plus, toute modification justifiée du contrat doit se limiter aux problèmes ponctuels qui se posent: il n'est pas question de renégocier l'ensemble. » (Crampes et Estache 1996)

Prévoir officiellement une renégociation et un renflouement risque d'inciter à des comportements opportunistes. Fixer des limites formelles à l'usage de la renégociation et de mesures de renflouement peut s'avérer utile, mais la crédibilité de ces dispositions dépend de celle des pouvoirs publics. Dans la mesure où les institutions internationales ou même les gouvernements d'autres pays ont davantage de crédit, on pourrait envisager de les faire intervenir pour assurer le respect des clauses de renégociation et de renflouement. Les accords commerciaux internationaux peuvent couvrir les ruptures de négociation de contrats qui impliquent des investisseurs étrangers. En outre, il arrive que les prêts de la Banque mondiale ou du FMI bénéficient de garanties souveraines.

(Jamison et autres 2005)

15 Les concessions sont des contrats incomplets. Ainsi, aucune des parties ne connaît exactement, au moment de la signature, le coût de fourniture du service promis, l'importance de la demande de services correspondant aux tarifs agréés, pas plus que les autres variables qui influent sur la rentabilité du contrat. En outre, il est onéreux d'insérer dans un contrat tous les impondérables. Enfin, vérifier la matérialisation des actes et des impondérables mentionnés dans un contrat exige une surveillance coûteuse et peut s'avérer impossible pour l'instance chargée de trancher les litiges, par exemple un tribunal. De ce fait, l'État et le concessionnaire peuvent éventuellement être contraints de négocier pour tenir compte du caractère incomplet du contrat.

Les problèmes surviennent quand les discussions vont bien au-delà de l'intégration dans le contrat des éléments d'incertitude non résolus. Après la réalisation des investissements inévitables (qui vont, littéralement, du creusement de trous dans le sol jusque jusqu'aux mesures prises pour préparer les électeurs-consommateurs à attendre la fourniture de services spécifiques), les atouts des parties à la négociation ne seront plus les mêmes.

Encadré 17. Un exemple d'entrée et de renégociation: le transport aérien régional en Norvège

Cet exemple illustre la pratique des concessions pour un marché où la technologie est réputée, les coûts d'entrée relativement bas et la réglementation technique et économique assez simple. L'administration publique a une réputation d'honnêteté et de compétence. Pourtant, les concessions n'ont pas donné lieu à beaucoup d'entrées ou d'économies, et on s'interroge encore sur les moyens d'améliorer la conception des contrats en matière de renégociation et de durée.

En Norvège, la desserte de certaines liaisons régionales aériennes est un service public. Assurée à l'origine par une société titulaire d'une licence de monopole -- Widerøe, une filiale de SAS – elle fait l'objet d'appels d'offres depuis 1996. Les offres portent sur la subvention demandée pour chaque liaison. Le service doit respecter certaines normes, annoncées à l'avance, sur la fréquence des vols, le nombre de places pour les passagers, le type d'appareil et les plafonds de tarifs. Par ailleurs, les aéroports régionaux exigent des avions pouvant décoller et atterrir sur une courte distance. Widerøe, qui gérait aussi des services régionaux de transport aérien dans des conditions commerciales, fournissait des appareils répondant aux obligations de nombre de places dont la production a cessé ; et cela dans le cadre de la licence de monopole. C'est la seule compagnie aérienne scandinave qui possède une flotte d'avions de cette catégorie.

On a mis en adjudication des concessions d'une durée de trois ans pour se conformer aux règles de l'UE (article 4 du règlement du Conseil CEE No 2408/92, relatif à l'accès des transporteurs aériens communautaires aux liaisons aériennes intracommunautaires). Les enchères se font à offres cachetées simultanées ; cela signifie qu'une offre indique le montant de la subvention demandée par le soumissionnaire pour chaque liaison qu'il souhaite assurer. Le gagnant est le transporteur qui réclame la plus faible subvention. Lors de la première adjudication, effectuée en 1996 pour la période 1997-2000, Widerøe a obtenu toutes les concessions. Les critères de service ont été modifiés pour favoriser une plus grande concurrence. A la demande de Widerøe, trois liaisons ont été disjointes et la société a commencé à les gérer dans des conditions commerciales (Widerøe 2000). Au cours de la deuxième adjudication, Widerøe a emporté la plupart des concessions, à l'exception de certaines liaisons côtières gagnées par Coast Air. Pendant la troisième enchère, Widerøe a obtenu 9 des 15 liaisons contre six autres soumissionnaires. Dans la quatrième, elle en a enlevé 11, Coast Air en a obtenu 3 et les deux autres candidats une chacun. La première enchère a eu pour effet de réduire sensiblement le montant des subventions par rapport au système de licence unique. La deuxième s'est traduite par des relèvements substantiels. Les montants « affichés » des subventions pendant les périodes couvertes par les contrats ont été respectivement de 1 milliard de NOK, 1.1 milliard de NOK et 965 millions de NOK au titre des deuxième, troisième et quatrième enchères ; toutefois, la majoration de 40 millions de NOK, mentionnée plus loin, et la modification des obligations de capacité limite la comparabilité des enchères. En résumé, leur utilisation a permis quelques entrées sur le marché et peut-être une diminution des subventions.

Les clauses des contrats représentent un arbitrage entre le partage des risques et la renégociation. Un transporteur est autorisé à résilier le contrat avec un an de préavis. Il y a donc répartition du risque entre le concessionnaire et l'État, ce qui réduit le coût global de prestation du service aérien. Mais cela facilite la stratégie suivante: on fait une offre correspondant à une faible subvention pour emporter le contrat. On acquiert une expérience de gestion de la liaison aérienne pour être mieux informé que les concurrents. Puis on résilie le contrat. On soumissionne au second appel d'offres contre des rivaux qui ne possèdent ni l'expérience nécessaire de l'exploitation, ni les appareils requis ; autrement dit on demande une subvention élevée. En juillet 2003, Widerøe a effectivement annoncé qu'elle cessait d'assurer la desserte de deux liaisons. Au cours des enchères qui ont suivi, cette société l'a emporté face à deux concurrents. Dans le contrat initial, allant du 1er avril 2003 au 31 mars 2006, la subvention était de 204 millions de NOK pour ces deux liaisons aériennes. Dans le contrat de remplacement couvrant une période plus courte (du 7 juillet 2004 au 31 mars 2007), la subvention totalise 246 millions de NOK.

Les contrats plus longs et échelonnés sont de nature à encourager l'entrée sur le marché. Une durée de trois ans risque d'être trop courte pour permettre à un nouveau venu d'amortir les coûts irrécupérables d'une concession. Le problème est exacerbé par les appels d'offres intérimaires pour des durées encore plus brèves, qui sont lancés quand un transporteur résilie le contrat. L'autorité norvégienne chargée de la concurrence pense que des contrats plus prolongés pourraient augmenter le nombre d'entrées et donc intensifier la concurrence, tout en faisant remarquer que cela exigerait d'amender le règlement communautaire applicable. Elle note aussi que l'échelonnement des contrats serait susceptible de favoriser les entrées, en assouplissant l'obligation imposée aux petits soumissionnaires de démontrer leur capacité à desservir toutes les routes aériennes pour lesquelles ils font une offre.

Il s'agit d'enchères avec offres scellées simultanées et au premier prix. Environ la moitié d'entre elles portent sur la desserte de deux villes, beaucoup sur trois villes et quatre sur des ensembles plus larges, allant jusqu'à huit villes. Elles peuvent avoir un caractère conditionnel: une offre pourrait par exemple énoncer un prix pour (1) la liaison Narvik-Bodø et un autre pour (2) la même liaison, dans l'hypothèse où le soumissionnaire emporterait aussi la liaison Røst-Bodø. Les concessions semblent être conçues pour tenter de bénéficier d'une partie de l'intérêt que représente la desserte de villes entre lesquelles existent des relations. On peut se demander, d'abord, si des enchères ouvertes et simultanées permettraient à l'adjudicateur de capter une plus grande partie de la valeur de desserte de liaisons complétementaires ; ensuite, si le coût supplémentaire d'organisation contrebalancerait d'éventuels gains ; et enfin si le passage d'une procédure avec offres scellées à une procédure ouverte dissuaderait les soumissionnaires les plus faibles de participer ou faciliterait la collusion. L'effet net n'est pas évident.

Sources :
OCDE (2003), "Réforme de la réglementation en Norvège: Introduction des mécanismes de marché dans les services et les entreprises publics" ; divers appels d'offres du ministère des transports et des communications (7 juillet 2005, 10 Avril 2002, 1er avril 2000) et différents articles de presse (Nr.: 135/05 date 02.11.05 "Regionale flyruter: Tildeling av einerett for drift av 16 ruteområde [Transport aérien régional: attribution d'un droit unique de desserte de 16 liaisons]" Nr.: 20/04 date 05.03.04 "Flyruter i Finnmark og Nord-Troms: Widerøe tildelt kontraktar," Nr. 96/99 Date: 20.09.99 "Drift av regionale flyruter: Utvida og betre transporttilbod!", Nr.: 97/2002 date 28.08.02 "Ny tildeling av regionale flyruter: Eit godt tilbod for passasjerar og næringsliv i heile landet") sur le site Internet odin.dep.no/sd; OCDE 2004 *Non-Commercial Service Obligations and Liberalization* DAFFE/COMP(2004)19

Le remède utilisé habituellement pour freiner les comportements opportunistes consiste à renouveler les adjudications. On part du principe que, si une partie se rend compte qu'un tel comportement lui vaudra des sanctions à l'avenir, elle ne l'adoptera pas aujourd'hui[16]. Cependant, les données factuelles figurant dans l'étude sur l'Amérique latine montrent qu'il n'est pas toujours possible de donner aux concessions un caractère répétitif. Quand on s'attend à un changement de gouvernement, par exemple à la suite d'une défaite électorale, les gouvernements peuvent se montrer opportunistes[17].

Les garanties de bonne fin et les droits d'intervention permettent de réduire les incitations à renégocier. Les garanties de **bonne fin** (il s'agit de garanties bancaires d'indemniser la partie publique si l'opérateur privé ne remplit pas ses obligations) constituent un moyen d'empêcher les partenaires privés d'abandonner un contrat ; elles ont aussi pour effet de limiter les possibilités de marchandage après l'attribution. Plusieurs associés d'un consortium gérant une concession d'eau en Amérique latine se sont désistés lorsqu'un litige avec l'autorité délégataire s'est envenimé. Mais les principaux opérateurs sont restés et ont essayé de faire fonctionner la concession, notamment pour se prémunir du risque de mise en jeu d'une garantie de bonne fin de montant élevé (Klein 1998b). La concession fut abandonnée en 1999 (Guasch p. 63). Néanmoins, Guasch recommande d'exiger une garantie de bonne fin qui ne soit pas

16 Si l'on applique la logique de l'argument à un horizon plus lointain, il est possible d'éliminer les comportements opportunistes. La théorie repose sur les hypothèses suivantes: il n'existe pas de concession ou d'année finale (ou de période donnée assez susceptible d'être la période "finale") ; les occasions d'adopter un comportement stratégique sont séparées par de brefs intervalles (ou bien le taux d'intérêt utilisé pour actualiser les bénéfices futurs est faible) ; les rendements d'un comportement constamment opportuniste ne sont pas trop élevés comparativement au respect des règles.

17 Les préoccupations suscitées par les renégociations ont conduit Engel, Fischer et Galetovic (2001) à concevoir le critère de "moindre valeur actuelle des recettes" (least present value of revenues – LPVR), qui dispense de renégocier. Dans ce système, l'État fixe des tarifs maximum et un taux d'actualisation (fixe ou variable). Les offres portent sur la valeur actuelle du total des recettes à percevoir et c'est l'offre la moins élevée qui l'emporte. Toute réduction éventuelle des recettes est automatiquement compensée par l'allongement de la durée de la concession. Quand la LPVR gagnante est reçue, la concession prend fin. Cette méthode convient le mieux quand la qualité du service n'influe pas sur le niveau de la demande. L'incertitude à propos de la durée risque de faire augmenter le coût du capital. Ce modèle n'a pas été adopté sur une grande échelle.

inférieure à : (a) 2% de la valeur totale du contrat et (b) 20% de l'estimation de chiffre d'affaires de la première année de concession (Guasch, p. 143)

Les **droits de substitution** permettent à l'État de prendre en charge la gestion d'une concession quand le concessionnaire ne respecte pas les normes spécifiées. En général, les dispositions en la matière définissent les violations du contrat qui justifient une substitution directe par les autorités ; elles exigent que ces dernières adressent une notification à l'opérateur privé ; elles prévoient une période de redressement pendant laquelle le concessionnaire est autorisé à remédier aux problèmes qui se posent ; elles précisent aussi la durée maximum d'intervention des autorités et le type de mesures qu'elles peuvent prendre. Si, au terme de l'action de substitution, le concessionnaire n'est pas en mesure de reprendre ses activités, la partie publique est fondée à résilier le contrat. La concession de chemin de fer reliant la Côte d'Ivoire au Burkina Faso comporte des clauses de cette nature. Elle prévoit explicitement que, si le concessionnaire n'applique pas des normes de sécurité adéquates pour l'entretien des infrastructures du réseau ferré, les sociétés publiques pourront, après avoir procédé à l'audition du concessionnaire, le contraindre à prendre les mesures qui s'imposent. S'il n'obtempère pas, une notification devra lui être adressée. En cas d'inaction persistante dans un délai de 15 jours, les sociétés publiques effectueront les travaux nécessaires aux frais du concessionnaire et à ses risques et périls.

Un contrat de concession peut stipuler une **obligation de continuité du service** jusqu'au moment où un autre concessionnaire aura été choisi. Grâce à cette disposition, les États n'hésitent pas à résilier le contrat d'un concessionnaire par crainte d'une interruption de services essentiels, comme l'alimentation en eau. En Colombie, cette obligation est prévue par la législation générale qui régit les concessions.(Klein 1998b)

3.4 Conclusion sur l'attribution des concessions

Pour conclure, l'attribution d'une concession est d'une importance cruciale ; les erreurs en ce domaine sont coûteuses et ne peuvent être réparées par une revente de la concession. La mise aux enchères peut permettre de trouver l'opérateur le plus efficace. L'idée est que la personne ou la société présentant l'offre la plus élevée est celle qui attache le plus de valeur à la concession, et qui sera en moyenne capable de la gérer avec la plus grande efficience. Mais des enchères mal conçues peuvent infirmer ce raisonnement et il arrive que l'adjudicateur ne souhaite pas que le meilleur opérateur l'emporte. En outre, quand les critères sont multiples, il peut s'avérer difficile de déterminer quelle offre est « la plus élevée ». Il est possible d'organiser les enchères selon des modalités qui découragent la collusion et attirent davantage de soumissionnaires, sachant que ces problèmes sont importants en pratique.

Les autres solutions sont les négociations, simultanées ou successives, et les concours de beauté. Selon la théorie économique, les enchères donneront de meilleurs résultats que les négociations simultanées. Négociations et concours de beauté sont perçus comme posant des problèmes de corruption, d'arbitraire en matière de « scoring » et de favoritisme. Mais des contrats complexes impliquent nécessairement certaines négociations.

La renégociation des contrats – au-delà de ce qui est nécessaire pour réagir aux contingences qu'ils mentionnent – risque d'éliminer les avantages des enchères compétitives. Le résultat est essentiellement une négociation bilatérale entre le concessionnaire et l'État. Un certain nombre de moyens peuvent décourager cette pratique – davantage de concessionnaires, un type de contrat où l'État assume plus de risques, la hausse du coût d'ouverture de renégociations et des clauses prévoyant des droits d'intervention ou une obligation de continuité du service – elle n'en est pas moins d'usage courant.

4. La solution des problèmes de concurrence qui surviennent pendant la durée des concessions

Les concessionnaires exercent généralement un pouvoir de marché significatif. Le champ d'application et le respect du droit de la concurrence ainsi que d'autres lois, à vocation parfois sectorielle, déterminent les limites d'exercice de ce pouvoir. En outre, le contrat ou les textes d'ordre général régissant les concessions peuvent aussi comporter des dispositions relatives à la concurrence.

4.1 Champ d'application du droit à la concurrence

Si le droit de la concurrence est applicable et son respect assuré par une instance indépendante, l'État est mieux à même de s'engager à ne pas renégocier certains aspects de la concession. Supposons, par exemple que le droit de la concurrence vise l'accès à des équipements essentiels, que le concessionnaire ait besoin de recourir à un équipement correspondant à la définition légale et que l'instance indépendante de protection de la concurrence fasse bien appliquer les textes: cela incite l'État à s'engager à ne pas s'enrichir en exigeant des redevances élevées pour accéder aux équipements et crée un mécanisme d'indemnisation si l'État passe outre. De même, dans l'hypothèse où le contrat de concession ne mentionne pas les redevances qu'un concessionnaire peut imposer pour l'accès aux équipements, ces dernières pourront éventuellement être plafonnées en cas d'application rigoureuse du droit de la concurrence. Ainsi, un concessionnaire producteur d'électricité risquerait d'être « pris en otage » par des redevances onéreuses au titre du transport. Mais une clause du droit de la concurrence sur l'abus de position dominante limiterait sans doute cette pratique.

Plutôt que de miser seulement sur l'application après coup de la loi, on serait sans doute bien avisé de réduire aussi les incitations poussant le concessionnaire à adopter un comportement anticoncurrentiel ou limiter sa capacité à la faire.

Un problème important se pose quand une même société gère un « équipement essentiel » et se trouve aussi en concurrence avec des entreprises qui ont besoin d'avoir accès à cet équipement. Une entreprise peut, par exemple, être à la fois responsable de l'exploitation d'un port et l'utiliser, au même titre que ses concurrents, en tant qu'acteur du marché du transport maritime. Elle a la capacité et généralement la motivation de pratiquer une discrimination à l'encontre de ses concurrents non intégrés, d'une manière qui porte atteinte au bien-être des consommateurs et au jeu de la concurrence. Une situation de ce type ressortit à la « Recommandation du Conseil de l'OCDE concernant la séparation structurelle dans les secteurs réglementés (2001) » ; il est recommandé aux pays membres « de bien peser les bénéfices et les coûts des mesures structurelles contre les bénéfices et les coûts des mesures comportementales ». Le même texte précise que « cette mise en balance devrait intervenir tout particulièrement dans le cadre de la privatisation, de la libéralisation ou de la réforme réglementaire ». L'application de cette recommandation au cas des concessions impliquerait de prendre en considération, au moment d'organiser la concession, les inconvénients et les avantages d'interdire à un concessionnaire d'une activité non concurrentielle de se livrer à une activité complémentaire à caractère concurrentiel.

95. On est confronté à un autre problème important lorsqu'une même société possède ou gère déjà un substitut de la concession, le fait de contrôler éventuellement les deux lui permettant d'adopter un comportement anticoncurrentiel. Il arrive que des concessionnaires puissent cumuler des concessions, de façon à se constituer un pouvoir de marché. Si, par exemple, il n'existe que quelques ports sur la même côte, une société qui emporterait plusieurs concessions d'exploitation – ou même seulement celles de deux ports adjacents – pourrait augmenter les prix ou réduire soit la production, soit la qualité. Il est possible de contrecarrer cette atteinte à la concurrence en envisageant, pendant la phase de conception, les coûts et les avantages qui découleraient de l'interdiction faite à un concessionnaire de détenir des concessions concurrentes. On pourrait mettre en balance la perte des avantages de la concurrence avec les économies

d'échelle ou de gamme, dans la mesure où elles sont prévisibles (On a évoqué plus haut la nécessité de concevoir les concessions et les enchères de façon à tirer parti des complémentarités).

Encadré 18. Un exemple de contrôle des soumissionnaires par l'autorité de concurrence : application aux télécommunications au Mexique

Au Mexique, l'organisme délégataire est compétent pour attribuer les concessions et surveiller leur fonctionnement. L'instance chargée de protéger la concurrence (CFC) est habilitée à donner des avis sur les aspects des concessions et même des adjudications qui touchent à la concurrence. Toutefois, ces avis n'ont pas de caractère contraignant.

En outre, les dispositifs réglementaires conçus pour les télécommunications et le transport ferroviaire évoquent la nécessité d'un avis favorable de la CFC sur les candidats à l'obtention de concessions, avant leur attribution ou pour autoriser le transfert de droits liés aux concessions. Quand elle évalue les entreprises désireuses de participer aux enchères, la CFC le fait au regard des conséquences des conditions de l'offre de services et du pouvoir de marché de ces entreprises.

En 2001, une filiale de Telmex a sollicité la permission d'offrir des services de téléphonie mobile à longue distance. La CFC, notant qu'elle avait antérieurement déterminé que Telmex occupait une position dominante sur le marché des services à longue distance, a conclu qu'autoriser la filiale à entrer sur ce marché ne pourrait qu'aggraver la situation. En définitive, le régulateur des télécommunications (COFETEL) a décidé de recommander la candidature, mais en imposant des conditions.

Sources: Contribution du Mexique au sixième Forum mondial sur la concurrence, 2006 et OCDE 2004

Le problème peut se poser de l'interaction du droit de la concurrence et de lois visant plus spécifiquement les concessions ou le contrat. Ainsi, il faut s'assurer que l'on ne réduit pas par inadvertance le champ d'application du droit de la concurrence. Du point de vue économique, l'octroi par l'État d'un monopole légal, tel qu'une concession, n'atténue en rien la nocivité des comportements anticoncurrentiels. En fait, l'existence d'obstacles légaux à l'entrée peut faciliter ce type de comportement. Il convient de citer à ce propos les Principes directeurs pour la qualité et la performance de la réglementation, formulés en 2005 par l'OCDE: « Combler les lacunes d'ordre sectoriel que peut comporter le champ d'application du droit de la concurrence, sauf à prouver que les intérêts primordiaux de la collectivité ne peuvent être servis par des moyens plus efficaces. Dans un souci de cohérence, l'application du droit de la concurrence et la réglementation sectorielle qui vise à promouvoir la concurrence et la libéralisation des échanges devront être coordonnées ». Ce problème s'est posé dans le cadre de la concession d'un port de Zambie, mentionnée ci-dessous. Le concessionnaire soutenait que le droit à la concurrence n'était pas applicable, au motif que la section 3(f) de la loi sur la concurrence (Competition and Fair Trading Act) exclut de son domaine d'application toutes les affaires dans lesquels l'État est partie et que c'était le cas du contrat de concession. Un arrêt de la Cour suprême semble bien impliquer que le droit de la concurrence s'applique au concessionnaire (Sources: cinquième Forum global sur la concurrence, Zambie DAF/COMP/GF/WD(2005)21 et demande *ex parte* d'ordonnance de Mandamus contre l'Agence zambienne de privatisation, la Commission zambienne de la concurrence et le ministère des finances ; consultable sur http://www.zamlii.ac.zm.)

Encadré 19. Exemple d'une fusion entre concessionnaires: les terminaux portuaires en Argentine

En 1994, des enchères ont eu lieu pour la concession à long terme (18 à 25 ans) de six terminaux de l'un des ports de Buenos Aires, Puerto Nuevo. L'État a imposé à la procédure des conditions visant à créer une structure de marché propice à la concurrence: les candidats étaient autorisés à soumissionner pour plusieurs terminaux, mais ils devaient exprimer une préférence, sachant qu'un seul terminal pourrait leur être attribué. Toutefois, cette clause ne fut pas respectée. Le soumissionnaire qui avait fait l'offre la plus élevée pour le terminal 2 et la deuxième meilleure offre pour le terminal 1 fit appel contre l'attribution du terminal 1 à un concurrent. Pour éviter les lenteurs d'un contentieux porté devant les tribunaux, l'État donna son accord à une fusion des deux soumissionnaires, puis leur attribua conjointement les terminaux 1 et 2.

En 2001, la commission anti-trust de l'Argentine a approuvé l'acquisition du terminal 4 par Maersk Sea Land, l'une des premières sociétés mondiales de transport maritime. Elle a estimé que cette société ne serait pas en mesure de contrôler le marché, d'abord parce que le terminal 4 ne représentait qu'une faible proportion (8%) de la capacité totale de Puerto Nuevo et ensuite parce qu'il existait un port de remplacement.

Source: Trujillo, Lourdes and Tomás Serebrisky, "Market Power Ports: A Case Study of Postprivatization Mergers," (Ports à pouvoir de marché: étude de cas des fusions après privatisation) note no. 260 Public Policy for the Private Sector, Banque mondiale, mars 2003.

Il importe de faire respecter le droit de la concurrence pour s'assurer que le monopole légal (ou parfois l'oligopole) conféré par une concession remplisse bien son objectif d'une amélioration de l'efficacité bénéficiant, en partie au moins, aux usagers.

4.2 Réglementation

Les concessionnaires se voient souvent imposer une réglementation des prix, qui est un moyen de limiter l'exploitation d'un pouvoir de marché significatif. Cette règle générale souffre des exceptions – les mises en concession de monopoles non réglementés – lorsque l'État donne la priorité aux rentrées de fonds ou à la protection de champions nationaux relativement à l'efficacité économique ou au bien-être des consommateurs ; il en va de même quand il n'est pas possible de réglementer. Il arrive aussi que les concessionnaires soient soumis à des règles d'accès, c'est-à-dire obligés de laisser des concurrents non intégrés utiliser des équipements essentiels selon des modalités réglementées. Le régulateur peut aussi décrire avec précision d'éventuelles obligations de service public, comme la nature de la prestation, l'obligation l'offrir, l'égalité de traitement des usagers, la continuité du service, etc.

Les lois sectorielles et les institutions chargées de les faire appliquer peuvent jouer un rôle important, de nature positive ou négative. Recourir à des instances de régulation peut être un moyen plus rapide et moins coûteux que le droit de la concurrence de résoudre les litiges en matière d'accès et de fixer les tarifs. Mais il faut évidemment que ces instances soient dotées d'attributs idoines: compétences professionnelles, ressources suffisantes, transparence des mécanismes de décision, existence d'une procédure d'appel et indépendance vis-à-vis des entreprises qu'elles régulent (On se reportera aux Principes directeurs pour la qualité et la performance de la réglementation formulés en 2005 par l'OCDE). Si, par exemple, un régulateur a aussi des intérêts commerciaux – cas d'une société qui régule un secteur dans lequel elle opère professionnellement – ses décisions ne seront pas prises en fonction de l'intérêt public au sens large.

Il est fréquent que la réglementation porte sur le taux de rendement ou consiste à plafonner les prix. Dans le premier cas, le régulateur estime la valeur de certains actifs nécessaires au fonctionnement des services réglementés, leur assigne un taux de rendement – c'est souvent le taux de rendement, déterminé par le marché, d'actifs ayant des caractéristiques de risque similaires – et fixe des prix permettant d'assurer des rentrées suffisantes pour rémunérer le capital et couvrir les coûts qu'il autorise le concessionnaire à répercuter. Dans le deuxième cas, le régulateur plafonne les prix des services, en prévoyant fréquemment

des ajustements automatiques pour tenir compte de l'évolution des coûts que le concessionnaire ne maîtrise pas et des gains de productivité réalisables et anticipés qu'il maîtrise ; on fixe aussi à l'avance une date de réexamen (une variation de cette formule consiste à fixer un prix maximum pour un panier de services, tout en exigeant parfois un certain lien entre les différents prix: le prix de détail d'un service doit par exemple dépasser au moins d'un montant spécifié le prix de gros acquitté pour accéder aux équipements qui fournissent le même service). La régulation du taux de rendement est considérée comme moins risquée pour le concessionnaire que le plafonnement des prix ; avec la première, en effet, le régulateur est tenu de modifier les tarifs en fonction de l'évolution des coûts, alors qu'il ne l'est pas avec la deuxième[18].

Il peut s'avérer nécessaire de réglementer l'accès quand le concessionnaire est aussi autorisé à approvisionner un marché organisé verticalement. Le risque existe en particulier que le concessionnaire tente de tourner les règles du monopole naturel, en accordant un traitement de faveur à sa propre entreprise intégrée verticalement, et réalise ainsi des bénéfices non régulés sur ce marché. On pourrait certes prohiber l'intégration verticale, mais on perdrait peut-être le bénéfice d'économies de gamme. De plus, il est possible que le candidat le plus efficace soit un opérateur établi de longue date sur le marché à structure verticale – par exemple une mine par rapport à un chemin de fer ou une compagnie de navigation par rapport à un port – qui connaisse particulièrement bien les possibilités d'améliorer la qualité et la productivité ; l'exclure des enchères serait préjudiciable à l'efficience globale. Enfin, quand on est en présence de monopoles successifs, comme un port et la seule voie ferrée reliée à lui, il peut être préférable d'intégrer les deux activités à la concession. Cela crée davantage d'obstacles à l'entrée, puisqu'il faudra désormais entrer simultanément à deux niveaux, mais les conséquences pratiques ont des chances d'être nulles – c'est bien l'improbabilité des entrées qui justifie l'existence des concessions. Au demeurant, l'intégration verticale est de nature à réduire les blocages et l'inefficacité découlant d'une absence de coordination des investissements, de la programmation etc.

Encadré 20. Un exemple d'abus de position dominante en matière d'accès : le port de Mpulungu

En 1997, le gouvernement zambien a accordé une concession de 25 ans pour la gestion du port de Mpulungu. Le contrat de concession prévoyait une révision quinquennale, mais une conduite anticoncurrentielle ne pouvait motiver une résiliation..

Le concessionnaire n'est pas seulement l'opérateur du port ; il est aussi la plus importante des sept sociétés maritimes qui l'utilisent. Il représente 50% du tonnage total. Il n'y a pas de solution de rechange envisageable pour le transport maritime.

Le contrat de concession donne au concessionnaire une totale liberté de fixation des tarifs. Néanmoins, il doit appliquer aux autres les mêmes conditions d'accès qu'à lui-même. Bien que l'exploitation du port soit en principe réglementée par un ministère, la Cour suprême a relevé « l'absence d'exercice cohérent de l'autorité de tutelle ».

[18] Mais les deux principaux modes de régulation ne sont peut-être pas aussi différents qu'ils le semblent à première vue. Il est bien connu que la différence de rendement anticipé du capital entre les deux est une prime de risque. Dans le cadre du plafonnement des prix, le rendement du capital dépend de deux mécanismes. En premier lieu, les investissements effectués sous ce régime doivent être au moins égaux à un taux de marché pour que d'autres investissements se produisent à l'avenir. En deuxième lieu, les pouvoirs publics sont confrontés à des questions de nature politique, lorsque les entreprises réglementées ont un rendement bien supérieur à un taux de marché. Sous ce double effet, le rendement du capital, en régime de plafonnement des prix, avoisine celui réalisé dans le cadre d'une régulation du taux de rendement, plus une prime de risque. Quand, en régime de plafonnement des prix, un plus grand nombre d'éléments de coûts deviennent répercutables, on se rapproche du mode de régulation par le taux de rendement. La situation est analogue lorsque l'on procède plus fréquemment à des réexamens des plafonds de prix.

L'enquête de la commission zambienne de la concurrence a révélé que le concessionnaire abusait de sa position d'opérateur du port, en se livrant à diverses pratiques préjudiciables à ses concurrents sur le marché du transport maritime. On s'est aperçu qu'il répartissait inéquitablement les emplacements des navires utilisant le port, imposait le type de cargaison à charger – ce qui éliminait la concurrence sur les marchés lucratifs des produits très demandés – réservait les installations de stockage à son usage exclusif, etc. Par ailleurs, deux semaines après avoir pris en charge l'exploitation du port, le concessionnaire a majoré les tarifs de 46% sans consultation préalable ni préavis.

La commission de concurrence zambienne a demandé au concessionnaire de se conformer volontairement au droit de la concurrence.

Source: Cinquième Forum sur la concurrence, Zambie DAF/COMP/GF/WD(2005)21

5. La conception des concessions

L'élaboration des concessions doit tenir compte des éléments qui ont été évoqués lors de la présentation de l'attribution de la concession et des problèmes de concurrence qui peuvent se poser pendant sa durée. On met ici en lumière certains des aspects que l'on peut distinguer à l'avance et qui existent de manière générale.

Toutefois, aucune liste de contrôle ne peut être complète. L'une des difficultés du système des concessions est que chaque situation est différente. Il faut prendre en compte les contraintes d'ordre physique, historique ou politique propres à la situation. Un sous investissement manifeste risque d'entraîner la poursuite du versement de subventions substantielles, si l'on veut épargner aux usagers une hausse trop rapide des tarifs, et peut impliquer aussi l' « affichage » d'une redevance de concession d'une modicité embarrassante. Quand l'engagement politique a été pris de préserver l'emploi, la concession risque de devoir inclure des dispositions en ce sens, même si cela rend inefficace la procédure d'adjudication. Au chapitre des difficultés politiques figurent aussi les pressions pour concevoir une concession justifiant une redevance élevée, quelquefois au prix d'une exclusivité ou d'une durée injustifiées, ou encore d'un régime réglementaire trop avantageux. En gardant à l'esprit ces réserves, on doit, en concevant une concession, considérer les points suivants:

- **Le nombre.** Si la concurrence est possible, comme sur certains marchés de télécommunications, elle sera généralement favorisée par un grand nombre de concessions. Certes, il en résultera l' « affichage » de redevances de montant limité et il peut être difficile d'expliquer que la conjonction d'une redevance plus faible aujourd'hui et de tarifs plus modérés à l'avenir est bénéfique aux consommateurs – contribuables. Si le nombre de soumissionnaires probables semble inhabituellement bas, c'est peut-être le signe qu'il faut revoir les règles des appels d'offres et la conception de la concession ; des opérateurs virtuellement efficaces risquent d'être dissuadés par la médiocrité de la conception.

- **L'exclusivité**. Si l'on accorde à un concessionnaire unique une protection contre l'entrée de concurrents, cela implique des arbitrages. L'absence d'exclusivité peut permettre aux entrants de faire jouer la concurrence, surtout si le marché était indûment qualifié de monopole naturel ou cesse d'en être un sous l'effet de l'évolution technologique. Mais l'exclusivité peut être nécessaire si, par exemple, les obligations de service public sont financées par des subventions croisées plutôt que d'autres manières. L'exclusivité peut aussi rendre une concession moins risquée, ce qui a ensuite des effets sur les renégociations et le coût du capital.

- **La durée.** En décidant de la durée d'une concession, on fait un arbitrage. Les concessions de longue durée offrent au concessionnaire des incitations appropriées pour qu'il fasse des investissements à long terme, notamment en matière de maintenance dans les premiers temps de la concession. Celles de courte durée aggravent le problème de l'insuffisance des incitations à investir vers la fin d'une concession, et également celui des avantages des concessionnaires en

place sur les autres soumissionnaires dans le cas de concessions successives. Mais les concessions à brève échéance permettent aussi de lancer plus fréquemment des appels d'offres compétitifs, ce qui facilite l'entrée et fait bénéficier plus rapidement des avantages éventuels d'une concurrence plus intense. Elles permettent enfin de faire assumer l'incertitude par l'État plutôt que par les concessionnaires, ce qui a en général pour effet de diminuer les subventions ou d'augmenter les redevances.

- **La portée horizontale.** Il arrive qu'une concession soit de portée diverse – une licence ou plusieurs pour fournir le même service, un ou plusieurs ports situés sur la même côte – et qu'il s'agisse de substituts ; le moyen de favoriser la concurrence sur le marché est alors d'avoir différents concessionnaires gérant des équipements substituables. Et avoir divers concessionnaires favorise la concurrence pour le marché, si cela réduit le coût des enchères. Mais on risque de devoir faire des arbitrages avec les économies d'échelle ou de gamme. Quand une concession est divisible en parties qui peuvent se compléter, comme dans le cas de licences de télécommunications pour des régions adjacentes, il faut se demander quelle méthode est susceptible de donner le meilleur résultat: le fait du prince – l'État définit la portée des concessions – ou le jeu du marché – les enchères qui permettent aux soumissionnaires de donner un prix aux compléments.

- **La portée verticale.** Si la concurrence peut s'exercer en amont ou en aval, si les économies de gamme sont limitées et s'il est difficile de réglementer efficacement l'accès, il sera peut-être plus efficace d'interdire au concessionnaire d'opérer aussi sur le marché vertical. Mais il faut mettre cet argument en balance avec l'effet produit sur les candidats à la concession ; en effet, le soumissionnaire le plus efficace pourrait bien être l'entreprise qui évolue depuis longtemps sur un marché organisé verticalement et connaît particulièrement bien les possibilités d'amélioration de la qualité et de la productivité.

- En outre, quand il y a des économies de gamme entre des activités dans lesquelles la concurrence ne peut s'exercer – par exemple un port et la seule voie ferrée reliée à lui – il sera éventuellement plus efficace de regrouper les deux activités dans la même concession. Cela devrait réduire les blocages et l'inefficacité résultant d'une absence de coordination des investissements, de la programmation etc.

- **Le droit de la concurrence.** Il convient que le droit de la concurrence s'applique à la procédure d'attribution des concessions et aux concessionnaires comme à l'ensemble de l'économie.

- **Le dispositif réglementaire**. Il faut instituer, avant l'attribution de la concession, une réglementation et une instance régulatrice appropriées, afin d'assurer une meilleure lisibilité aux concessionnaires éventuels. On doit préciser les éléments susceptibles d'influer sur la rentabilité, comme les obligations de service universel, les limites à l'augmentation des tarifs à la charge des usagers, les tarifs spéciaux à caractère « social » ou la formule objective utilisée pour les calculer ; ainsi, les concessionnaires virtuels peuvent élaborer leurs stratégies de soumissionnement ou de négociation. L'instance de régulation doit disposer d'une autonomie et de moyens d'action suffisants pour assurer un grand respect des règles et dissuader les manœuvres politiques opportunistes. On doit aussi réfléchir aux arbitrages entre le plafonnement des prix et la régulation du taux de rendement, y compris sous l'angle de la répartition différente du risque qui en résulte.

- **Le mécanisme d'attribution.** En concevant la concession, on doit aussi se préoccuper du mécanisme d'attribution. Si l'on veut, par exemple, attribuer la concession par voie d'enchères, il faut absolument spécifier ou prévoir d'une autre façon tous les aspects sur lesquels la

concurrence ne s'exercera pas, pour réduire les marges de renégociation. En l'absence d'enchères, la phase de préconception est encore plus importante pour éviter de donner l'impression que le choix du concessionnaire procède du favoritisme et de la corruption. A supposer que l'on puisse écarter un candidat potentiel, on pèsera avec soin les conséquences de cette exclusion au regard de son incidence sur le pouvoir de marché qui s'ensuivra et sur le caractère compétitif des enchères – à la fois directement et à l'égard de la décision que prendront les candidats plus faibles de soumissionner ou non.

- **Les litiges**[19]. Il faut éviter autant que possible que les contrats soient ambigus. Ils doivent définir le traitement des actifs, le mode d'évaluation des investissements, les indicateurs de résultats, les procédures et les lignes directrices pour ajuster et réviser les tarifs. Il convient aussi qu'ils prévoient des critères et des pénalités pour résiliation avant terme, des procédures de solution des litiges et des motifs clairs pour déclencher une renégociation. On envisagera d'imposer une redevance d'un montant significatif pour toute demande de renégociation, remboursable si la renégociation est décidée en faveur de l'opérateur. La renégociation doit être aussi transparente que possible ; on fera éventuellement appel à des panels externes de professionnels, pour aider le régulateur et l'État à analyser la situation et à prendre des décisions ; et on procèdera, en temps utile, à une présentation intégrale et publique des modifications intervenues.

- On mettra en place un système, réglementairement correct, de comptabilisation de l'ensemble de l'actif et du passif, afin de dissiper toute ambiguïté sur les règles régissant le calcul et l'imputation des coûts, des investissements, de la base d'actifs, du chiffre d'affaires, des transactions avec des parties intéressées, des commissions de gestion ainsi que des variables relatives à l'exploitation et aux finances de la concession.

- **Les modifications**. Les soumissionnaires doivent être tenus de se conformer au contenu des offres qu'ils ont faites. Il n'y aura pas lieu de procéder au premier réexamen des tarifs avant une période assez longue, cinq ans par exemple, sauf si les dispositions du contrat relatives aux impondérables jouent. Il convient que les contrats de concession prévoient des indemnisations d'un ordre de grandeur significatif, notamment des pénalités, revenant aux concessionnaires si l'État change unilatéralement le contrat.

6. Conclusions

Les autorités chargées de la concurrence ont un rôle important à jouer à plusieurs stades du fonctionnement des concessions:

- En premier lieu, les concessions sont souvent attribuées dans le cadre d'une vaste réforme réglementaire d'un secteur. Les mesures de réforme comprennent en principe la clarification des objectifs du service et des sources de revenus ; elles révèlent donc souvent des subventions croisées, dont on doit tenir compte en concevant la concession. A l'occasion de la réforme, on a aussi tendance à décider comment régir le secteur pendant la longue période qui suit l'octroi de la concession: où est-il possible et souhaitable de faire jouer la concurrence? Quelles lois visant spécifiquement le secteur et quelles institutions régulatrices faut-il établir? Comment appliquer le droit de la concurrence? Les instances protégeant la concurrence peuvent, à ce stade, préconiser une réforme réglementaire favorable à l'efficacité et à la concurrence.

[19] Une grande partie de ces informations et de celles figurant aux points suivants est tirée de Guasch, pp. 19-21.

- En deuxième lieu, ces mêmes instances peuvent se prononcer en faveur d'une conception plus concurrentielle du contrat de concession. Elles concevront par exemple des dispositions ayant pour but d'encourager les entreprises moins fortes à soumissionner ou de dissuader la renégociation.

- En troisième lieu, il leur est loisible de suggérer une amélioration du mécanisme d'attribution. Si les concessions sont mises aux enchères, elles peuvent concevoir des dispositions de nature à susciter davantage de soumissions et à décourager la collusion. En l'absence d'enchères, elles peuvent favoriser l'usage d'un mécanisme qui tende à distinguer le candidat le plus efficace.

- Enfin, au cours des enchères et ultérieurement, pendant la durée de la concession, elles doivent jouer un rôle conforme à leur vocation de gardiennes du droit de la concurrence ; c'est-à-dire dissuader ou réprimer la collusion pendant les enchères et faire en sorte que les concessionnaires n'abusent pas de leur position dominante. Lors de l'appel d'offres, il leur faut aussi intervenir pour empêcher de soumissionner des entreprises qui acquerraient un pouvoir de marché significatif si la concession leur était attribuée.

Toutes choses égales par ailleurs, les enchères compétitives ont plus de chances, dans de nombreuses circonstances, de désigner le concessionnaire le plus efficace et de lever le plus de fonds. Mais leur efficacité sera compromise si elles sont mal conçues et leurs avantages disparaissent en cas de renégociation.

La renégociation peut être le résultat du caractère incomplet des contrats de concession ou de l'opportunisme. Ces contrats sont forcément incomplets, faute de pouvoir éliminer complètement à l'avance l'incertitude relative à l'évolution des coûts et des recettes pendant des décennies. Les concessions posent des problèmes d'engagement pour deux raisons: d'une part, il faut beaucoup de temps pour amortir les importants investissements inhérents à ce système ; d'autre part, les États subissent des pressions pour conserver ou améliorer les services. Toutefois, la renégociation, qu'elle soit due au caractère incomplet du contrat ou à l'opportunisme, peut éliminer les avantages de la mise aux enchères compétitives des concessions ; le point essentiel est qu'en cas de renégociation, c'est le meilleur négociateur qui gagnera l'adjudication et non pas le meilleur opérateur des infrastructures. En résumé, on a besoin à la fois d'un mécanisme efficace d'adjudication – comme des enchères bien conçues – et d'un dispositif institutionnel pour garantir la crédibilité des engagements d'exécution du contrat qui en résulte.

Les questions de concurrence qui peuvent se poser pendant la durée d'une concession ne sont pas fondamentalement différentes en présence d'un concessionnaire qu'avec le propriétaire des actifs. Il peut s'agir notamment de l'exclusion des concurrents en leur refusant l'accès aux équipements et d'une tarification abusive. Le respect effectif du droit de la concurrence contribue à ce que les concessions réalisent leurs objectifs, tant sur le plan de l'efficacité que sur celui des tarifs à la charge des usagers.

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BRAZIL

To better understand the context of your answers to the questions which follow, please summarise the overall regulatory objectives for concessions for infrastructure. What are the government's major objectives when it considers infrastructure concessions? These may well vary from sector to sector, e.g., maximise revenue or reduce subsidy, improve productivity, improve coverage, increase capacity. What are the circumstances under which concession is chosen rather than privatisation or continued public provision?

By the end of the 1980s, Brazil was facing huge difficulties in its economy. The high level of public debt did not allowed the government to maintain investments and expand public services that had been – until then – mainly provided by state-owned companies. Even where public services were provided in good standards, the classic inefficiency of state-owned companies could be noticed. It was necessary to reduce government participation in the economy.

Due to this fact, Brazil started to review the role of the State in the economy. The result of this process was a wide privatisation plan, called National Privatisation Program (PND), that presented the principles to be observed in order to delegate public services to the private sector.

The main objectives were determined by the PND Law:

- to reorganise the strategic position of the State in relation to the economy and to transfer non-public activities to the private sector (e.g. the steel industry);
- to reduce the public debt;
- to allow investments to be retaken in privatised companies and sectors;
- to contribute to industrial modernisation in Brazil, by increasing their capacity to compete;
- to allow that public administration focus its efforts in activities that can not be provided properly by the private sector;
- to contribute to financial market strengthening, by offering privatised companies shares to the society.

Among the sectors that were included at the PND, there were a large number of infrastructure sectors, such as: telecommunications, ports, water and sanitation, electricity, gas transport and roads.

Briefly describe the overall regulatory system with respect to concessions. Is there a law on concessions?

The overall regulatory system with respect to concessions in Brazil is based on the Federal Constitution, the Auctions and Public Contracts Law (no. 8666/93), the Concessions Law (no. 8987/95), and the Public Partnership Law (no. 11079/04).

The Federal Constitution (1988) establishes that the private sector can only provide public services through concessions and permissions, always preceded by public auctions.

In order to implement the privatisation plan in the early nineties, the Auctions and Public Contracts Law and the Concessions Law were approved by the Congress. In summary, what these two laws established that infrastructure services privatisation could only be done through concessions, and that a private partner could only be contracted through public auction, as determined by the Constitution. This is the rule for all concessions to Federal Government, States and Municipalities in all infrastructure sectors. Exemptions are only accepted in emergency cases, when services are interrupted and for a short and limited period of time.

Although both laws apply for every infrastructure sector, each sector has also a legal framework that establishes the sector regulatory agency and that establish some particularities of the concession awarding process. Some of these laws are:

- Law 9472/97 – telecommunications;
- Law 10233/01 – roads, railways, surface and water transportation;
- Law 9427/96 – electricity.

Which government bodies are involved in designing and overseeing the allocation of and operation of concessions? For example, what are the respective roles of the concessioning authority sector regulator (if any), and competition authority?

In Brazil, there is a separation of function between ministries, regulatory agencies and competition authority. The role of planning and deciding if some service shall be privatised is executed by sectoral ministry (for example, Ministry of Transportation, Ministry of Telecommunications etc.). The role of designing and overseeing the allocation and operation of concessions is conducted by the sector regulatory agency.[1]

In order to describe the role of competition authorities, first it is important to present the Brazilian Competition Policy System (BCPS). It consists of three government bodies: CADE, the Administrative Council for Eonomic Defence, an autonomous agency which has dispositive adjudicative authority in BCPS cases; SDE, the Economic Law Office in the Ministry of Justice, which has the principal investigative role; and SEAE, the Secretariat for Economic Monitoring in the Ministry of Finance, which also has investigative authority but is primarily responsible for providing economic analysis in BCPS proceedings and for providing competition advocacy in regulated sectors. [2]

In summary, the role of competition authorities consists in analysing anticompetitive conducts and merger operations, and in promoting competition advocacy in regulated sectors. All sectors are submitted to CADE's jurisdiction. What may vary from sector to sector is who is responsible for analysing mergers and conducts. The general rule is that all cases are analysed by SEAE and SDE and then judged by CADE.

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1 The regulatory agencies responsible for the infrastructure sectors that will be analysed in this paper (i.e. roads, railways, electricity, telecommunications, water and sanitation) are: National Agency for Telecommunications – ANATEL, National Agency for Electricity – ANEEL, National Agency for Surface Transportation – ANTT (for roads and railways) and National Agency for Water Transportation – ANTAQ (ports). There is no federal regulatory agency for water and sewage because it is a municipality competence to provide this service.

2 OECD – Competition Law and Policy in Brazil – a Peer Review, 2005.

However, in some of them, the regulatory agency may be requested to issue its opinion about the case. An exception is observed only in telecommunications, where the National Agency for Telecommunications (ANATEL) is the only responsible for sending CADE an analysis on the case (if CADE finds it necessary, it may ask SEAE and SDE to also do an analysis).

Competition advocacy is the most important role of the competition bodies in relation to concessions designing and it is mostly played by SEAE that acts as the Ministry of Finance representative in the different inter-ministerial groups involved in the discussion of regulatory issues. Through this participation it is possible to influence auctions and concessions designs to foster more competition in the contracting process.

Which levels of government may award concessions?

The three levels of government may award concession: federal government, States and Municipalities. The general rule, based on the Federal Constitution, is that one level of government may only award concessions for the public services which it is responsible for. Following this rule, federal government is responsible for: electricity generation and transmission, telecommunications, railways and federal roads. States are responsible for gas, electricity distribution (although the regulatory agency is federal) and state roads. Municipalities are responsible for water and sewage and local roads.

Are the regulatory frameworks and institutions established in legislation, or are they established in administrative procedures or presidential decrees?

The general regulatory frameworks for almost all sectors and institutions are established in legislation. Specific rules are established in administrative procedures and presidential decrees, always based and restricted by the law.

How are disputes between government and concessionaire handled?

Disputes between government and concessionaire first must be solved administratively by sector regulatory agency. If both parts do not arrive to reasonable solution they may go to the Judiciary. In 2005 the possibility of arbitration was introduced in the Law of Concessions in order to allow faster solutions for both parts.

Does the general competition law apply?

In Brazil, the general competition law (Law 8884/94) applies to all regulated sectors. The only exception to this general application of competition law is the banking sector, which has its competition issues solved by Brazilian Central Bank.

Does the competition authority have jurisdiction over concessionaires?

The competition authority has jurisdiction over all concessionaires and companies operating in regulated sectors.

Do other bodies also have jurisdiction to enforce the competition law in these circumstances, or to circumscribe the enforcement of the competition law by the competition authority?

Each regulatory agency has the power to promote competition at the regulated sector of its jurisdiction. Regulatory agencies are also responsible for competition advocacy. However, regulatory agencies do not have the power to analyse mergers or to condemn an anticompetitive behaviour. CADE is

the only agency with power to judge mergers and uncompetitive behaviour. When facing an anticompetitive behaviour, the regulatory agencies must notify CADE so that it can act.

What is the role of the competition authority in the design of concessions?

As already said, in Brazil, there are three competition authorities: CADE, SDE and SEAE. SEAE is the one most responsible to promote competition advocacy in regulated sectors. Usually, SEAE participates in discussions with other ministries and regulatory agencies about concessions design in order to promote competition. SEAE does not have a binding opinion, but it may influence decisions as a representative of the Ministry of Finance.

Briefly summarise the experience with infrastructure concessions. What have been the major successes and failures in infrastructure concessions in your country? (A table could be useful, with columns for year awarded, sector, whether the award was by competitive or non-competitive means, whether the concession was renegotiated subsequently, whether the project was subject to rate-of-return or to price-cap regulation or no tariff regulation, and whether there was a regulatory body with specific responsibility for that sector.)

Year Awarded	Sector	Award by competitive or non-competitive means?	Was the concession renegotiated subsequently?	Rate-of-return, Price-cap, or no tariff regulation?	Is there a regulatory body with specific responsibility for that sector?
1994	Roads	Competitive.	Yes	Rate-of-return	Yes. ANTT (for federal roads).
1996	Railroads	Competitive.	Yes.	Price-cap.	Yes. ANTT.
1997	Ports	Competitive.	No.	Price-cap	Yes. CAP and ANTAQ.
1997	Electricity	Competitive.	Yes.	Price-cap	Yes. ANEEL.
2000	Water and sanitation	Competitive.	-	-	No.
1997	Telecommunications	Competitive	Yes.	Price-cap	Yes. ANATEL.

Although the Brazilian privatisation process has faced some problems, it may be considered a successful case: it reduced the participation of the State in the economy; it allowed investments to recover in the infrastructure sectors; it contributed to the reduction of public debt; and it allowed more efficiency and more competition in these sectors.

Obviously, the effects described above vary in intensity from sector to sector, but they can be taken as a general consequence of privatisation. One can observe that some sectors were more successful than others and this is a consequence of how each process was designed: in some sectors, privatisation occurred after the sector regulatory law had been approved by the Congress and the regulatory agency had been implemented; in others public services had already been privatised some years before the creation of a regulatory agency. In the first group, there are electricity and telecommunications, in which one can observe the best results in terms of competition and efficiency gains. All transportation sectors are in the

second group, in which, though one can observe a huge progress, some regulatory changes have been studied by the government in order to improve efficiency.

Water and sanitation sector differs from the others, because they are not public services provided by federal government. The provision of these services is the responsibility of states and municipalities and there still is no general law regulating it, nor proper regulatory agencies. Only few companies were privatised and only few states have a regulatory agency in charge of regulation. As a result, this is probably the sector that requires more attention in terms of developing an efficient regulation nowadays.

Do the contracts for financial advisers and investment bankers to implement concession transactions align their incentives with the objective of long-term efficiency and competition in the sector(s)?

In the beginning of privatisation process, contracts for financial advisers and investment bankers were concerned about auctions and business evaluation. Efficiency was not the main issue by that point, because government was worried about trying to maximise the price of the concessions. After this first stage, the government became more concerned about efficiency incentives and competition, and these started to be a main issue in concessions (as seen in telecommunications, e.g.).

Before the concessions are designed or awarded, is restructuring considered in line with the OECD Recommendation of the Council concerning Structural Separation in Regulated Industries (2001), which relates to the separation of potentially competitive activities from those which are not, as well as horizontal splitting to promote competition where it is feasible?

Structural separation was considered and implemented in the two major sectors privatised (telecom and electricity). In telecom, long distance and local loop operations were already run as separate state enterprises and distinct and multiple licenses were sold in each area. In electricity, although most of the state owned enterprises already were operating in distinct areas (generation, transmission and distribution) laws were passed to move progressively from accounting to structural separation of generation, transmission and distribution.

If your country has significant experience with subsequent concessions, what particular issues arise during the re-allocation especially with respect to asymmetries between incumbents and others?

Brazil has not had a case of subsequent concessions yet.

If an analyst in another country were interested in the experience of infrastructure concessions in your country, are there any books or research papers by your agency or others which provide a useful summary to which you would direct him or her?

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1. Role for Competition in the Allocation of Concessions

Under what circumstances are the different means of allocating concessions employed? For example, when is competitive auction used? Competitive negotiation? Direct negotiation with a single firm? Under what circumstances have these different means been successful?

According to the Federal Constitution and to the Law of Concessions, all concessions in Brazil must be allocated by auction. There is no exception.

Having in mind one or a very few specific instances where concessions were allocated by competitive auction:

How was the auction design arrived at? That is, who designed the auction? What was the role of the competition authority in the design of the auction?

In the beginning of privatisation process, auctions were designed by each sector ministry because regulatory agencies did not exist yet or were being implemented. After their implementation, they became responsible for auctions design. The competition authority has the role of exercising the competition advocacy during the design process.

The case of roads concession is a good example were one can see the changes in auction design process. During the first stage of federal roads' privatisation ANTT had not been created and the Ministry of Transportation was responsible for auction design. Nowadays, as the second stage of privatisation is being carried out, the regulatory agency is responsible for auction design and SEAE has an important role on trying to make auctions more competitive.

What was the auction design? E.g./ were several parts auctioned or only one? If there were several parts, were the auctions simultaneous, and how were bidders able to address the complementary or substitutability of the various parts? Was the auction sealed bid or open bid?

The auction design varies from sector to sector. For federal roads, for instance, in the first privatisation stage, auctions had several bidders, but they were mainly constructors. Auctions were sealed bid, not simultaneous and there was no possibility of complementary bids.

To the second stage, some changes are being carried out in order to increase competition: possibility of participation of bidders other than constructors; simultaneous auctions; and possibility of complementary bids.

Was the process, in fact, competitive? If not, how, in retrospect, could the auction or award process have been made more competitive?

The process is competitive, but it does not mean that some improvements do not have to be made. The number of competitors must be enlarged, by reducing restrictive requirements for participation in the auction increasing the number of bidders.

Was the contract subsequently renegotiated? If so, how long after the contract award? Who initiated the contract renegotiations and what changes resulted?

Brazilian legislation establishes that renegotiation are possible, since concessions prove that they have a disequilibrium in their economic and financial situation, cause by some factor that is not in the contract. The frequency of this currency varies from sector to sector. Some sector laws establish that renegotiation may only occur after five years while others do not mention this. This is the case of road concessions that as a consequence have had many case of renegotiation in the beginning of their existence. In fact, renegotiations in roads concessions used to happen until the second year of contract and in some cases; it continued to happen during the years. Renegotiations were usually initiated by companies and resulted in higher tolls.

Have you investigated allegations of collusive behaviour during auctions for infrastructure concessions? What were the outcomes of those investigations?

There has been no investigation of collusive behaviour during auctions in BCPS.

What is your policy regarding joint bidding in auctions for infrastructure concessions? E.g., under what circumstances would two "likely to win" bidders be forbidden to submit a single bid?

There is no specific rule against joint bidding in Brazil. A company is free to associate with other companies in order to participate on auctions. The only prohibition made by the Concessions Law is that a company cannot participate in more than one consortium of companies.

Although no previous control of the companies in each consortium is made, BCPS analyses if the auction winning consortium is an anticompetitive operation or not.

2. Role of Competition during the Term of Concessions

If the concession contract, decree or law include clauses related to competition, such as ensuring fair and non-discriminatory access, what are they?

To illustrate law clauses related to competition, some parts of regulatory laws will be transcribed below:

For telecommunications, Law 9472/97 establishes that:

"Article 3. The user of telecommunication services has the right:
I - of access to telecommunications services, with standards of quality and regularity adequate to its inherent nature, anywhere within the National Territory;
II - to freedom of choice relative to his/her service provider;
III - of non discrimination as to the access and utilisation conditions of the service;"

"Article 6. The telecommunication services shall be organised based on the principle of free, wide and fair competition among all providers, having the Government to act towards promoting them, as well as to correct the effects of imperfect competition and to repress violations against economic order."

"Article 7. General protection rules to the economic order are applicable to the telecommunications sector, when those do not conflict with this law.

Paragraph 1. The acts involving a telecommunications service provider, under public or private system, aiming at any form of economic concentration, either through merger or incorporation of companies, establishment of holding companies to control enterprises or any form of partnership conglomerate, shall be subject to controls, procedures and conditions provided in the general protection regulations to the economic order.

Paragraph 2. The acts provided in the preceding paragraph shall be submitted to the appraisal of CADE - Economic Defence Administrative Council, by means of the regulatory body.
Paragraph 3. The telecommunications service provider will be in violation of economic order when, upon entering into contracts for rendering goods and services, adopts practices which may limit, falsify or any way hinder free competition or free initiative.'

"Article 19. The Agency shall take the necessary measures to satisfy the public interest and for the development of telecommunications in Brazil, acting independently, impartially, legally, impersonally and publicly, and especially:
(...)
XIX - to exercise legal authority in connection with telecommunications, in the control, prevention, and repression of violations against the economic order, except for the authority belonging to the Economic Defence Administrative Council - CADE;"

"Article 73. The telecommunications services providers of collective interest will be entitled to the use of poles, ducts, conduits and rights of way, belonging or controlled by the telecommunications service provider or the provider of other services of public interest on a non-discriminatory manner and under fair and reasonable price conditions.

Sole Paragraph. The regulatory agency of the licensee whose means are to be utilised will be responsible for defining the conditions necessary to satisfy the provisions of this article."

"Article 127. The regulation of the exploitation of services under the private system, shall aim at the feasibility of compliance with the laws, especially those in connection with telecommunications, as regards the economic order and consumer rights, so as to guarantee:
(...)
II - free, ample and fair competition;"

"Article 152. The provisioning of interconnection shall be made in non discriminatory manner, under adequate technical conditions, thus ensuring equal and fair prices, complying with the strict requirements to the rendering of services."

For electricity, Law 9427 establishes that:

"*Article 3. - In addition to duties pursuant to articles 29 and 30, Law 8987, dated February, 13, 1995, applicable to electric energy services, Aneel shall also be responsible for:*

(...)
VIII - with a view to fostering effective competition among the agents and preventing the economic concentration of electricity services and related activities, establishing constraints, limits or conditions for corporations, corporate groups and shareholders in terms of obtaining and transferring concessions, permissions and authorisations, as well as monopolies and doing business among themselves;
IX - strive to ensure compliance with anti-trust laws, monitoring and overseeing the market practices of the agents in the power sector;"

For surface and water transportation, Law 10233/01 establishes that:

"Article 20. The objectives of the National Surface and Water Transportation Agencies are:

(...)
b) to harmonise, under public interest, the objectives of consumers, concessionaire, licensee and authorised agents, along with lessees/tentants and other delegated entities, by arbitrating conflict interests or preventing any violation of the economic order."
"Article 31. Whenever the Regulatory Agency takes notice of any fact that can constitute a violation of the economic order, it should communicate it to the competition authorities."

If the concession contract, decree or law, or a sector-specific law, include clauses establish regulatory institutions for the concessioned infrastructure, then please describe the institutions such as their degree of independence from the concessionaire, transparency of decision-making and technical capacity.

In Brazil, the regulation of public services, in almost all sectors that have been privatised, is executed by regulatory agencies. These agencies are created by law and have the following characteristics:

- Independence from the government – regulatory agencies have their own budget;

- Autonomy – presidents and directors of regulatory agencies are chosen by the President of the Republic and must be approved by the Federal Senate. They have fixed mandates of 4 to 7 years, depending on what is established by the sector law, and cannot be dismissed.

- Transparency – regulatory agencies' rules and decisions must be preceded by public hearings and must be published, if possible, in the internet.

- Technical capacity – in the beginning, technical staff composed by those who used to work with the public services in each sector ministry before privatisation. Also some staff was hired for a short term period. During the last 2 years, agencies have been contracting technical staff through public contest (the only way that someone can work for the government in Brazil with guarantee that he/she cannot be dismissed without reason) based on technical knowledge in engineering, economics and law.

Are there rules on pricing, coverage, and quality standards for the service provided by the infrastructure and which institution enforces them?

Usually there are rules on pricing, coverage and quality standards for the service provided. They are enforced by the regulatory agencies.

Are there rules on pricing and non-price terms for access to the concessioned infrastructure by non-integrated rivals and which institution enforces them?

Usually there are rules on pricing and non-price terms for access by non-integrated rivals. Regulatory agencies are responsible for their enforcement and also to propose new rules if it is necessary.

Have you investigated complaints of abuse of dominance by infrastructure concessionaires? Was this abuse related to access to essential facilities? Would a line of business restriction (preventing the operator of the essential facilities from entering a vertically related market) have reduced the incentive on the concessionaire to abuse its dominance? What were the outcomes in these investigations?

There have been some cases of abuse of dominance by infrastructure concessionaires investigated by BCPS. Some examples are as following:[3]

Telecommunications:

In 2001, CADE addressed an abuse of dominance claim against the Globo Group, Brazil's largest broadcast television network. Globo controlled both the Globo Channel, the prime broadcast channel in Brazil, as well as Sky TV, the most important Brazilian pay TV satellite company. The complainant was TVA Sistema de Televisão, the owner of competing satellite company DirectTV. TVA asserted that Globo wrongfully refused to license the Globo Channel to TVA for satellite broadcast. ANATEL investigated and concluded that there was no abuse of dominance because the Globo Channel was not an essential facility for satellite TV service. CADE agreed and dismissed the case, observing that TVA was a viable competitor even without the channel and that requiring satellite TV services to share programming would reduce competition and retard incentives for innovation.

Railroads:

With respect to railroads, much of CADE's case activity has focussed on Companhia Vale do Rio Doce (CVRD), a large mining and steel company that were privatised in 1997. CVRD holds operating concessions for a number of freight railway lines and harbour terminal facilities that provide services both to its own mines and steel production facilities and to other customers as well. Some of the customers served by CVRD's lines are competitors in mining or steel production, a circumstance that has led to a series of cases alleging discrimination by CVRD. Where the discrimination does not involve tariffs regulated by ANTT, CADE has prime jurisdiction. One case, for example, dealt with a contract between CVRD and the Samitri Mineral Company for the transportation and export of Samitri's iron ore production. The contract barred Samitri from selling its ore in certain foreign markets and from selling any ore at prices lower than CVRD's. In its 2004 decision, CADE undertook what was in essence a joint venture analysis to conclude that the agreement was not unlawful; noting that CVRD had made a large investment to construct a dedicated rail line to Samitri's mine site, and that CVRD therefore had a legitimate interest in the exploitation of Samitri's iron ore assets...

Other pending rail sector cases involve mergers, including one 2000 transaction in which CVRD acquired four iron ore mining companies and their associated rail lines in the southeast region of Brazil. SEAE and SDE agreed that adverse effects could arise in both the iron ore and the rail service markets and proposed various remedial conditions to CADE. ANTT, in consultation with SDE, invoked its own statutory authority to issue a precautionary order imposing certain restrictions on CVRD until CADE issued a determination. In 2005, CADE determined that the transactions could proceed subject to conditions designed to forestall anticompetitive effects.

Ports:

Each of Brazil's seaports is controlled by a Port Authority, which grants concessions authorising private parties to operate terminals and to provide cargo handling services within the port facility. At

[3] Examples taken from OECD – Competition Law and Policy in Brazil – a Peer Review, 2005.

some ports, there are also independent, privately-owned terminal facilities just outside the port boundaries. A case recently decided by CADE, known as "THC2," involved terminal handling charges assessed by terminal operators against independent warehouses. The case involved allegations that certain terminal operators raised rivals' costs by charging disproportionately more to deliver a cargo container to a warehouse located outside the terminal than they did to deliver the same container to a warehouse within the port. CADE found the price differentials to be an abuse of dominance because they constituted a significant part of storage costs and induced shippers to use the terminal operator's warehouse, thus impairing competition in the warehouse storage market.

CZECH REPUBLIC

1. Introduction

The following contribution describes the current situation in the area of concessions in the Czech Republic and the experience of the Czech Office for the Protection of Competition (hereinafter referred to as "the Office") relevant to this issue, particularly in relation to infrastructure in the sectors of energetic (electricity, gas manufacture, heating plants), water supply, telecommunication and transport.

The restructuring and privatisation in the above-mentioned sectors in the Czech Republic has been under way since the mid-nineties. The conditions in these sectors were completely modified by means of new legal acts; there were set up new regulatory bodies and new private undertakings gradually enter the markets.

Present law system in the Czech Republic does not include the general legal regulation of concession contracts. This drawback has been addressed by compilation of the draft Concession Act in 2004 that would enact the concession in all parts of the economics, including the area of access to infrastructure. It also aims at participating of the private investors (PSP – private section participation) in operation of infrastructure. The draft Act is currently being discussed in the Parliament of the Czech Republic.

2. Goals of the new regulation

The main principals of the new regulation are:

- consistent enactment of the concept of concession contracts;
- transparency;
- assurance of effective and long term sustainable providing of services and infrastructure.

The draft Act considers concession contracts as a means of implementing the public administration obligations and providing public services. It is assumed that the new enactment of the concession contracts will lead to cost economies in public funds due to the fact that providing of public services will be assured by the private sector with the assumption that the private entities would be economically interested in proper functioning of the system. The draft Act on Concession enacts conditions and procedure of signing concession contracts within the framework of cooperation among the contracting authority and other entities. Pursuant to the draft Act, public contracting authority shall be deemed to mean the state, a municipality or an undertaking, established or settled in order of satisfy public needs, on condition that it is funded mainly by the state.

Pursuant to the draft Act, the Act will not be applied on the concession contracts objectives of which are security interests, sensitive intelligence etc.

3. Characteristics of concession contracts

Concession contracts are generally considered to mean the contracts that have a long term status (usually 15 – 25 years) and are characterised by partial transfer of risks associated with providing of

services or exploitation of infrastructure in question. This feature is the main difference between concession contracts and public contracts.

The specific features of concession projects are:

- concession contract with its specifications;
- preparation of approval of so called important concession contracts;
- study of feasibility;
- definition of status of the public entities in the process of preparation and realisation of concession contracts;
- concession procedure;
- framework projecting company;
- fiscal control by the Ministry of Finance;
- index of concession contracts.

The draft Act sets financial limits to be kept. The Office is authorised to perform supervision over observance of this Act. The Office decides on whether the contracting authority followed the rules set by the Act, imposes remedial measures and fines. Maintaining the register of concessions falls within the scope of powers of the Ministry for Regional Development.

With regard to the fact that the legal regulation currently finds it only in the process of approval by the Parliament, the Office has not yet been in the position to apply it and therefore has acquired no experience relevant to it until these days.

4. Other laws related to concessions

Entrepreneurship in individual sectors of economy is comprehensively regulated by relevant sector regulations defining the conditions for business and state administration in a given sector.

In the area of energy such regulation is contained in the Act on Energy (Act. No.91/2005 Coll.) defining, in line with the EU law the conditions for entrepreneurship, performance of state administration and non-discriminatory regulation in the energy sectors, i.e. electric power production, gas industry and heat production, along with related rights and duties of natural and legal persons.

The area of telecommunications is regulated by the Act on electronic communications (Act No. 127/2005 Coll.). The regulation is aimed at satisfying the needs of consumers and the interests of licence holders, together with ensuring reliable, safe and stable supplies in respecting the rules of competition.

In the area of rail transport infrastructure there is **the Act on Rails** (No. 266/1994) and the area of road infrastructure is subject to the Act on Traffic on Terrestrial Communications (No. 361/2000).

All the abovementioned laws have in common that they do not contain particular regulation of concession procedure, however, they regulate the conditions for business in the given areas, especially as

regards the substantial technical issues, and they must be taken into consideration in the concession proceedings.

In the course of drafting these Acts, the Office, as a mandatory commentary spot in the legislative process, enforced and applied its comments aimed at support of competitive environment. This approach was applied by the Office especially in the area of energetic. In doing so, the Office took utmost regard of the OECD recommendation, contained in the Report on Structural Separation in Regulated Industries (2001).

5. Sector regulators

In the areas of energy and telecommunications there are independent sector regulators – in the energy sector (comprising electric power market, gas market and heat production) this is the Energy Regulatory Office, in the area of telecommunications this role is played by the Czech Telecommunications Office. Establishment of an independent regulatory office is currently under consideration. Carrying business in the given sector falls within competence of relevant sector regulator. Establishment of sector regulators has been supported by the Office in long term. Application of procompetitive principles and support of competition is also one of the main goals of sector regulators.

6. Access to infrastructure and the Act on the Protection of Competition

From the competition law´s point of view, concept of concessions is related to the concept of so called essential facilities regulated by the Act on the Protection of Competition (No. 143/2001 Coll., hereinafter referred to as "the Competition Act").

The infrastructure, which is a condition for use of provision of socially important services, is regularly of essential facility character. It is impossible to provide given services, such as i.e. electric power and drinking water supply etc., without such a facility.

The issue of refusing access to essential facility is covered by the demonstrative listing of the possible forms of prohibited abusing dominance under Article 11 of the Competition Act. The Article states in its letter f) that:

> "Refusal to grant other undertakings access, for a reasonable reimbursement, to own transmission grids or similar distribution networks or other infrastructure facilities, which are owned or used on other legal grounds by the undertaking in dominant position, if other undertakings are unable for legal or other reasons to operate in the same market as the dominant undertakings without being able to jointly use such facilities, and such dominant undertakings fail to prove, that such joint use is unfeasible for operational or other reasons or that they cannot be reasonably requested to enable such use; the same proportionately applies also to the refusal of access, for a reasonable reimbursement, of other undertakings to the use of the intellectual property or access to the networks owned or used on other legal grounds by the undertaking in a dominant position, if such use is necessary for participation in competition in the same market as the dominant undertakings or in any other market"

In other words, the provision covers cases, where the dominant entity commands, on the basis of whatever reason, privileged access to an essential facility and the other undertakings that do not have such access may not access to any alternative facility, without use of which they are unable to provide their services. At the same time, the dominant undertaking may be justifiably required to enable access to its facility. Even under meeting these conditions, the dominant undertaking is obliged to enable access to its facility only if the other party is willing to pay an adequate compensation for it. In line with the decision of

the Czech High Court in Olomouc proving existence of an essential facility may be a precondition for finding dominant position of an undertaking.

7. Activity of the Czech Competition Office related to the issue of Concession

7.1 Decision making activity

7.1.1 Refusal of access to the bus central station – application of the concessions principle

The Office recently dealt with a case, where the operator of a local central bus station (hereinafter referred to as "the Station Operator") in the municipality of Znojmo, Czech Republic, refused to provide some of the operators of public bus line transportation with access to the area of the central bus station. The Station Operator carried out its business on the basis of licences issued by the municipality in the role of the operator of national public line personal bus transportation and carried out most of its line transportation in the framework of ensuring basic transport services within the public service obligation (i.e. including subsidies for settlement of provable loss). Furthermore, the Station Operator was the lessee of the bus station.

The new local carriers asked the Station Operator for enabling access to the Station and use of the departure stands. However, this requirement was rejected by the Station Operator. The Station Operator reasoned this step by claiming that it was impossible to enable almost double amount of vehicles departure from the Station at the same time, be it for the cause of capacity, safety or technical issues. The new carriers were thus forced to establish bus stops for their lines at other places in the municipality.

However, the Office found within the proceeding on this matter that the Station Operator enabled certain carriers access to the Station. This was true especially in case of distance lines. In the course of the proceeding the Office dealt especially with the question whether the Bus Station constituted an essential facility in the sense of the Competition Act. The Office dealt also with the issue whether the Station Operator was obliged to enable access to the Station in line with the non-discrimination principle and on the basis of a concession agreement. During an on-spot inspection the Office found that the Station area was not a classical enclosed facility, as it is usually the case, but that it forms sort of integrated transportation terminal, where it was possible to use various means of transportation – railway, bus and local ones.

The Bus Station operated by the party to the proceeding is only a part of this transportation terminal. It was assessed in this case whether it was possible for the carriers to operate the public line personal transportation also without using the services/bus stands of the Station. After considering all circumstances the Office came to the conclusion that the participation of the bus carriers in competition on the market of bus transportation was not depending solely on the use of services/bus stands within the terminal as essential facilities. The carries were capable of carrying out their business even in situation where they would have been using bus stops outside the terminal. For this reason neither the terminal in Znojmo nor its part may be considered an infrastructure facility in the sense of the Competition Act. Therefore the Station Operator was not obliged as a concession provider. In case that it would have been considered an essential facility within the meaning of the Act, the access would have had to be granted subject to principles of non-discrimination and concession application.

As regards the detriment in competition caused to other competitors, the Office found that realisation of departures/arrivals of buses from other stops than those situated within the terminal did not endanger or restrict the new bus carriers from the viewpoint of their competitiveness. Concerning possible detriment caused to consumers – passengers, the Office found that the individual stands located within the terminal

are not significantly different. Therefore the Office did not find any damages caused to competitors or consumers.

7.1.2 Conditions imposed in case of a concentration between undertakings - application of solutions alternative to concessions

The Office has not dealt with the concessions related issue of access to essential facilities only in the area of abuse of dominance, but also in the area of concentrations between undertakings. In number of decisions the Office imposed conditions for realisation of a concentration that assisted support of competitive environment and enabled access of third parties to infrastructure.

7.2 "Virtual power plant" as a condition for approval of a concentration

In the case of a concentration between the dominant producer of electricity with certain regional distribution companies the Office applied a condition consisting in creation of a so called "virtual power plant". In this way, the auction principle was applied as alternative to concession, with the same goal of ensuring transparent and non-discriminatory access. The solution consisted in enabling a part of the production capacity of the dominant producer to independent competitors, which subsequently compete with the electricity produced by the given capacity/facility on the energy markets. The sale of electricity is realised in the form of an auction, which allows transparency of the transaction. The virtual power plant appears to be the only measure for creating a functional and non-discriminatory market that would ensure access of independent traders to the free electric capacity.

The first auction round already took place in the beginning of 2006. The representatives of local and foreign undertakings participated in the auction and the demand exceeded the supply more than five times. The prices resulting from the auction assume 15% increase in the wholesale electricity prices for 2006. This increase follows from the high fuel prices and growing lack of production capacities.

7.3 Competition advocacy

7.3.1 Comments of the Office on the draft Act on Water Ducts and Sewers

In its comments on the draft amendment to the Act No. 274/2001 Coll. on Water Ducts and Sewers, the Office presented its view that from the viewpoint of competition environment in the area of water industry it is more advantageous to enforce so called operational model of infrastructure ownership and services operation consisting in separation of the entity holding the water infrastructure (usually a municipality) from the entity operating this infrastructure. The Office therefore recommended enacting the operational model into the submitted draft Act as the only possible model. Such an arrangement would enable performance of tenders and granting concessions for operation of infrastructure. Such a possibility does not exist in case when the owner and operator are one person.

The Office also enforced the principle that the Act stipulated the maximum period for which it is possible to conclude contracts on operation of water infrastructure. Such a measure should prevent closure of the market as a result of existence of a series of long term contracts between the operators and municipalities leading to actual elimination of functioning "competition for the market".

Enacting the operational model and setting maximum period of duration of concession contracts on operation of water infrastructure would have following positive effects:

- Pressure on lowering prices and increasing quality of services

- Better position of the customers by means of strengthening the position of a municipality as the infrastructure´s owner

- More transparent operation of the water infrastructure

The abovementioned principles will be further enforced by the Office in the future amendments to the relevant legislation.

FRANCE

Procédé ancien et original, la concession constitue l'une des multiples modalités de la délégation de service public pratiquée par l'administration en France. Elle a été utilisée notamment dans des secteurs assez diversifiés tels que l'eau, l'électricité, le gaz ou encore les chemins de fer. De nos jours, elle est le mode privilégié de la délégation et joue un rôle essentiel dans la modernisation des infrastructures économiques en France.

1. Le régime juridique de la concession en droit français

Le droit français est caractérisé par la coexistence de plusieurs types de contrats administratifs, dont la concession. Cette pluralité a été renforcée en juin 2004 par la création d'un nouveau contrat administratif, à savoir « le contrat de partenariat public privé ». Or, chacun de ces contrats obéit à des régimes juridiques différents qu'il convient, de ce fait, d'examiner successivement.

1.1 La délégation de service public proprement dite

La délégation de service public est une catégorie générale de contrat administratif dont les principaux types sont la concession, l'affermage, la régie intéressée, la gérance et le bail emphytéotiques dans certains cas. C'est la loi dite « loi Sapin » du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques qui a consacré l'existence et le régime juridique de la convention dite de délégation de service public, tout en restant muette sur sa définition. La loi du 11 décembre 2001 portant mesures d'urgence à caractère économique et financier est venue combler cette lacune majeure et a défini cette notion de délégation de service jusque là un peu floue.

A cet égard, l'article L. 1411-1 du Code général des collectivités territoriales (ci-après CGCT) dispose :

> *« Une délégation de service public est un contrat par lequel une personne morale de droit public confie la gestion d'un service public dont elle a la responsabilité à un délégataire public ou privé, dont la rémunération est substantiellement liée aux résultats de l'exploitation du service. Le délégataire peut être chargé de construire des ouvrages ou d'acquérir des biens nécessaires au service ».*

Selon cette définition, il est possible de dégager deux caractéristiques principales de la délégation de service public : d'une part, celle-ci suppose qu'un service public soit dévolu par voie contractuelle au délégataire et que, d'autre part, le risque financier lié à cette exploitation soit supporté par l'entreprise délégataire. Or, c'est notamment cet aspect financier qui différencie en droit français, la délégation de service public des marchés publics proprement dits. Alors qu'un marché public est conclu à titre onéreux au profit de l'entreprise soumissionnaire, la délégation de service publique suppose que la rémunération du délégataire soit substantiellement tirée de redevances perçues sur l'usager.

Du point de vue du régime juridique, cette loi de 1993 a eu pour but essentiel d'instituer ***une procédure préalable de mise en concurrence visant à la plus grande transparence***, pour l'octroi de toute délégation de service public (il s'agit de la mise en œuvre du principe de « concurrence pour le marché » suivant la terminologie du secrétariat de l'OCDE). Une procédure de publicité permettant la présentation

d'offres concurrentes est imposée à l'autorité délégante, la durée de la délégation est désormais limitée et des conditions strictes relatives à l'élaboration de ces conventions sont mises en place. Ainsi, l'article L. 1411-1 du CGCT impose l'envoi par l'autorité délégante à chacun des candidats d'un document définissant *« les caractéristiques quantitative et qualitative des prestations ainsi que, s'il y a lieu, les conditions de tarification du service rendu à l'usager ».* Par ailleurs, toujours selon cet même article, les offres ainsi présentées sont librement négociées par l'autorité responsable de la personne publique délégante qui, au terme de ces négociations, choisit le délégataire.

Par la suite, la loi du 8 février 1995 relative aux marchés publics et aux délégations de service public a inclus dans le champ d'application du droit de la concurrence interne, notamment dans l'article L. 410-1 du Code de commerce, les conventions de délégation de service public, qui sont ainsi rentrées dans le domaine de compétence du Conseil de la concurrence.

1.2 La concession

Comme il a été déjà dit, la concession fait partie da la catégorie plus générale des conventions de délégation de service public. Elle constitue le mode de gestion privilégié retenu pour la mise en place de nombreux équipements et infrastructures en France. Pourtant, il n'existe pas de définition législative ou réglementaire de la concession, sous réserve de la loi n° 91-3 du 3 janvier 1991 transposant la directive communautaire « travaux ». La doctrine la définit comme « un contrat par lequel le concessionnaire est chargé de construire un ouvrage public et de gérer le service public à ses risques et ses périls en se rémunérant directement auprès des usagers ou étant substantiellement rémunéré par les résultats de l'exploitation ».

La concession implique la réalisation des infrastructures nécessaires pour l'exploitation du service public dévolu par le concessionnaire lui-même. Cela engendre des risques financiers considérables pour ce dernier, ce qui explique l'établissement des contrats de longue durée en fonction des investissements réalisés par le délégataire (10 à 20 ans, voire même plus selon les ouvrages). Les ouvrages que le concessionnaire construit pour l'exploitation de service public reviennent à la personne publique comme « biens de retour » à la fin du contrat en question.

Compte tenu des longues durées caractérisant ces contrats de concession et de leur importance financière, le processus de désignation des concessionnaires revêt une importance particulière, notamment en ce qui concerne le respect des règles de concurrence.

1.3 Les contrats de partenariat « public-privé »

L'ordonnance du 17 juin 2004, prise sur le fondement de la loi d'habilitation du 2 juillet 2003, a mis en place ce nouveau contrat administratif, aux côtés des marchés publics et des délégations de service public. La particularité de ce nouveau procédé découle du fait qu'il n'est soumis à aucun des régimes juridiques existants. Autrement dit, le contrat de partenariat n'est ni soumis au Code des marchés publics, ni à la loi Sapin de 1993 régissant les délégations de service public.

Ce nouveau contrat, qui est conçu comme une alternative entre marchés publics et délégations de service public, est fortement inspiré des contrats anglo-saxons de *Private Finance İniative (PFI)* développés depuis une dizaine d'années.

Il se définit selon l'article L. 1414-1 du CGCT comme « des contrats administratifs par lesquels la personne publique confie à un tiers, pour une période déterminée en fonction de la durée d'amortissement des investissements ou des modalités de financement retenues, une mission globale relative au financement d'investissements immatériels, d'ouvrages ou d'équipements nécessaires au service public, à la construction ou transformation des ouvrages ou équipements, ainsi qu'à leur entretien, leur maintenance, leur

exploitation ou leur gestion, et, le cas échéant, à d'autres prestations de services concourant à l'exercice, par la personne publique, de la mission de service public dont elle est chargée. »

Par ailleurs, toujours selon l'article précité «… la rémunération du cocontractant fait l'objet d'un paiement par la personne publique pendant toute la durée du contrat. Elle peut être liée à des objectifs de performance assignés au cocontractant. »

Donc, on voit bien que les contrats de partenariat se distinguent des marchés publics par la possibilité de recourir à des contrats qui peuvent s'étendre sur un long terme. Par ailleurs, l'objet même du contrat est beaucoup plus global que celui d'un marché public, pouvant aller de la conception d'un ouvrage et de sa construction jusqu'à sa maintenance et à son exploitation. Enfin, à la différence d'une délégation de service public, le cocontractant est rémunéré par la personne publique durant toute la durée du contrat de partenariat.

Le recours à un contrat de partenariat est strictement encadré par la loi qui impose à l'autorité publique une évaluation qui sera appréciée par l'assemblée délibérante de la collectivité territoriale ou par l'organe délibérant de l'établissement public sur le principe du recours à un contrat de partenariat. Cela est justifié par l'importance de la délégation dans le cadre d'un contrat de partenariat dont l'essentiel intérêt est de permettre aux personnes publiques d'échapper à des difficultés de financement s'agissant des services publics nécessitant des équipements et des investissements lourds.

Comme dans le cadre des délégations de service public, le contrat de partenariat est précédé d'une procédure de publicité permettant la présentation de plusieurs offres concurrentes. Par ailleurs, la procédure de passation d'un contrat de partenariat est soumise aux règles de la commande publique, à savoir, les principes de liberté d'accès, d'égalité de traitement des candidats et d'objectivité des procédures. Enfin, le contrat est attribué au candidat qui a présenté l'offre économiquement la plus avantageuse.

2. L'interaction entre le droit de la concession et le droit de la concurrence

L'importance des contrats de délégations au plan financier, notamment dû à leur longue durée, nécessite une attention particulière de la part de l'autorité nationale de concurrence qui doit veiller sur les comportements des opérateurs privés dans un environnement susceptible de faciliter les pratiques anticoncurrentielles nuisibles au bon fonctionnement du marché.

2.1 La soumission des autorités délégantes et des délégataires au droit de la concurrence

Comme il a été dit au préalable, les délégations de service public rentrent, depuis la loi n° 95-127 du 8 février 1995, dans le champ d'application du droit de la concurrence interne.

Ainsi, l'article L. 410-1 du Code de commerce dispose :

> *« Les règles définies au présent livre s'appliquent à toutes les activités de production, de distribution et de services, y compris celles qui sont le fait de personnes publiques, notamment dans le* ***cadre de conventions de délégation de service public****. »*

Comme on le sait, selon l'article L. 1411-1 du Code des collectivités territoriales, l'attribution d'un contrat de délégation de service public est subordonnée à une mise en concurrence, par appel public à candidatures et à une sélection des candidats éligibles à remettre une offre. Or, la grande transparence qui entoure l'attribution d'un contrat de délégation, notamment en raison de la procédure de publicité préalable, donne lieu à une asymétrie entre les informations qui doivent être données aux opérateurs privés par l'autorité publique et le respect du libre jeu de concurrence nécessitant l'autonomie et l'indépendance

des offres soumises, afin de ne pas induire l'acheteur sur la situation réelle de la concurrence sur le marché en question.

Ainsi, dans son avis du 18 mars 2003[1] relatif aux conditions propres à assurer le libre jeu de la concurrence entre les candidats lors d'une procédure de délégation de service public, le Conseil de la concurrence énonce que *« le déroulement de la procédure de délégation de service public doit respecter les règles du droit de la concurrence. La collectivité est responsable devant le juge administratif de ses propres manquements à ces règles (conditions d'accès à la mise en concurrence, clauses du contrat de délégation) mais pas des pratiques anticoncurrentielles imputables aux candidats à la délégation, à l'entreprise sortant, ou à l'entreprise retenue ».* Il ajoute à cet égard que *«…s'agissant de marchés sur appels d'offres, que le libre jeu de la concurrence impose, d'une part, l'existence chez les candidats de la plus grande incertitude possible quant à l'issue de la consultation et, d'autre part, l'autonomie totale des offres déposées ».* Donc, on voit bien que l'attribution d'un contrat de délégation de service public peut donner lieu à des ententes entre les opérateurs soumissionnaires prohibées par l'article L. 420-1 du Code de commerce. Le risque d'entente entre opérateurs peut être ainsi accru par le volume important des informations communiquées sur le marché par les opérateurs publics, de même que la prévisibilité à moyen terme sur l'ensemble de leurs politiques d'achats publics, du fait des obligations découlant des règles de marchés publics : en d'autre termes, ***le droit des concessions ne se conçoit pas sans le corollaire indispensable représenté par le droit de la concurrence***.

De la même manière, mais cette fois-ci au titre de l'article L. 420-2 du Code de commerce, le Conseil peut être amené à sanctionner un opérateur privé dans le cadre du renouvellement d'une délégation de service public parce que ce dernier abuse de sa position dominante sur le marché en question. C'est notamment le cas de la décision du 3 novembre 2005[2] relative à des pratiques relevées dans le secteur de l'eau potable en Île-de-France. Il s'agit en l'espèce du marché de la production d'eau en Île-de-France qui est dominé par trois opérateurs essentiels. Or, les communes ou syndicats de communes sont, soit de petite taille et ne possèdent que la partie terminale des réseaux de distribution les concernant, soit des entreprises intégrées de grande taille confiant la gestion de la totalité de la chaîne de production et distribution qu'elles possèdent à l'un des deux grands opérateurs : la CGE pour le Sedif et la Sagep (rive droite de Paris), la Lyonnaise des Eaux pour la Sagep (rive gauche).

Dans sa décision, le Conseil de la concurrence précise que la Lyonnaise des Eaux se trouve en monopole de fait sur la fourniture de l'eau. En effet, celui-ci reproche à la Lyonnaise de recourir à des pratiques de couplage s'agissant notamment de la production et de la distribution de l'eau, pour pouvoir rester le délégataire du service de distribution de l'eau de plusieurs communes franciliennes en abusant de sa position dominante. A cet égard, le Conseil constate que lors des différentes procédures d'attributions de délégation, le contrat a toujours été remporté par la société qui produit également cette eau. En l'occurrence : la Lyonnaise. Ainsi, le Conseil précise que *«…aucun renouvellement de délégation n'a permis le changement de l'opérateur quand il est en monopole sur le réseau d'apport de l'eau ».*

2.2 Les problèmes soulevés dans le cadre des contrats de concessions au regard du droit de la concurrence

La concession, le mode privilégié de la délégation de service public en France, implique, comme on l'a déjà dit, une dévolution du service au profit d'un opérateur privé. Or, les risques d'ordre financier incombant à ce dernier sont beaucoup plus importants que dans le cadre des autres contrats administratifs,

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1 Avis n° 03-A-02 du 18 mars 2003 relatif aux conditions propres à assurer le libre jeu de la concurrence entre les candidats lors d'une procédure de délégation de service public

2 Décision n° 05-D-58 du 3 novembre 2005 relative à des pratiques relevées dans le secteur de l'eau potable en Île-de-France

ce qui suppose l'établissement des contrats de longue durée. En d'autres termes, du point de vue économique, force est de constater que l'opérateur retenu pour une quelconque concession est en quelque sorte *« sauvé pour la vie ».*

Cela nécessite notamment qu'une attention particulière soit portée par l'autorité de la concurrence aux conditions dans lesquelles les opérateurs sont amenés à présenter une offre afin d'obtenir la concession du service public au terme du processus concurrentiel. Concrètement, cela signifie que des pratiques anticoncurrentielles telles que la répartition du marché entre les opérateurs concessionnaires ou encore des pratiques d'abus de la part de l'opérateur titulaire, sont susceptibles de se produire dans le cadre de ces contrats de concessions.

Ainsi, dans sa décision du 24 avril 2001[3] relative à des pratiques relevées à l'occasion de la construction du tramway de Grenoble, le Conseil a précisé que si le choix par l'autorité publique de confier une concession n'est pas un acte de production, de distribution ou de services relevant de la compétence du Conseil de la concurrence, *« des concertations entre entreprises en vue de répondre à une demande d'un maître d'ouvrage relative à la réalisation de travaux peuvent constituer des pratiques détachables de la décision administrative d'attribution et sont susceptibles de tomber sous le coup des dispositions du livre IV du code de commerce ».*

[3] Décision n° 01-D-16 du 24 avril 2001 relative à des pratiques relevées à l'occasion de la construction du tramway de Grenoble

ANNEXE 1

COMMUNIQUÉ DE PRESSE DU CONSEIL DE LA CONCURRENCE DU 7 NOVEMBRE 2005

le conseil de la concurrence souhaite plus de concurrence sur le marché de la fourniture d'eau en Île de France

A l'occasion de la publication de la décision 05-D-58, relative à des pratiques relevées dans le secteur de l'eau potable en Île de France, le Conseil de la concurrence souhaite attirer l'attention des collectivités de la région Île de France sur l'importance d'introduire une réelle concurrence sur le marché amont de la fourniture d'eau.

La particularité du marché de la fourniture d'eau en Île de France

Le marché de la production d'eau est dominé par trois opérateurs : le Syndicat des eaux d'Île de France (Sedif) avec 37 % du marché, la Société anonyme de gestion des eaux de Paris (Sagep) avec 33 %, et le groupe Lyonnaise des Eaux avec 19 %. A eux trois, ils couvrent 90 % des besoins franciliens.

La production d'eau est largement excédentaire en Île de France, puis qu'elle représente le double de la consommation, ce qui va bien au-delà de la marge nécessaire au titre de la sécurité générale de l'approvisionnement et pour couvrir les pics de consommation en été.

En outre, les réseaux des producteurs d'eau sont interconnectés au niveau des canalisations principales ou secondaires de transport notamment pour les besoins de l'alimentation de secours.

Les fournisseurs d'eau ne proposent pas de tarif de vente d'eau en gros à destination d'une demande située en dehors de leur zone de distribution respective, ce qui empêche la formation d'un prix de gros par des mécanismes de marché.

Le marché reste cloisonné entre les différentes zones contrôlées par chacun des producteurs

Les communes ou syndicats de communes sont, soit de petite taille et ne possèdent que la partie terminale des réseaux de distribution les concernant, soit des entreprises intégrées de grande taille confiant la gestion de la totalité de la chaîne de production et distribution qu'elles possèdent à l'un des deux grands opérateurs : la CGE pour le Sedif et la Sagep (rive droite de Paris), la Lyonnaise des Eaux pour la Sagep (rive gauche).

Bien que toutes les conditions techniques -en termes de ressource et d'interconnexion- soient réunies pour la mise en place d'un marché de gros de la fourniture d'eau, on constate aujourd'hui que le marché reste cloisonné entre les différentes zones contrôlées par chacun des producteurs.

Faute de marché de gros, il n'existe aucune concurrence possible entre les producteurs d'eau lors de la mise en concurrence des délégations de distribution de l'eau, et il n'arrive que très rarement que la délégation soit obtenue par une entreprise autre que celle qui produit l'eau.

Les communes ont un rôle particulier à jouer pour introduire davantage de concurrence sur le marché de la fourniture et du transport de l'eau

Le Conseil insiste sur la possibilité pour les communes de la région Île de France de dissocier désormais le marché de la fourniture d'eau de celui de sa distribution lors de la remise en concurrence des délégations de service public de distribution d'eau.

Ce dégroupage permettrait aux communes de pouvoir appeler prioritairement les ressources disponibles en eau les moins chères au bénéfice de leurs usagers et de pouvoir parallèlement bénéficier des meilleures prestations en matière de distribution.

Les communes sont, en effet, en droit :

- de cesser de s'adresser exclusivement à l'offreur d'eau en gros qui détient le monopole du réseau de moyen débit qui dessert leur territoire ;
- et de dégrouper leur délégations de service public, lorsqu'elles sont remises en concurrence, en séparant ce qui concerne le service de la fourniture d'eau en gros du service de sa distribution dans la commune.

La décision 05-D-58 que le Conseil de la concurrence vient de rendre, sanctionne le comportement de la Lyonnaise des Eaux et celui du Syndicat des eaux d'Île de France (Sedif)
Le comportement de la Lyonnaise des Eaux illustre, de façon concrète et éclairante, par quels moyens un opérateur en monopole de fait sur la fourniture de l'eau, a obtenu d'être choisi par un syndicat comme délégataire du service de distribution de l'eau.
La Lyonnaise des Eaux a offert au Syndicat du nord-est de l'Essonne (NEE), un prix de vente en gros de l'eau -en cas de fourniture seule- supérieur de 17 % au prix consenti dans sa proposition globale « fourniture + distribution ». Cette pratique de couplage visait manifestement à handicaper toute offre concurrente sur la partie distribution, puisqu'elle permettait à La Lyonnaise de se réserver de manière discriminatoire un prix inférieur à celui de son offre dissociée de vente en gros.

Le comportement du Syndicat des eaux d'Île de France montre, par ailleurs, comment un opérateur en monopole de fait sur la fourniture de l'eau, est intervenu pour empêcher toute ouverture, même très ponctuelle, du marché de l'eau en gros. Ce syndicat est intervenu afin de peser sur la finalisation d'un contrat de fourniture d'eau entre l'un de ses principaux clients, la Semmaris (société gérant le Marché d'intérêt national de Rungis) et son concurrent, la Société anonyme de gestion des eaux de Paris (Sagep), qui disposait d'eau en gros livrable au MIN de Rungis à un prix plus faible de 22,5 %.

- ***Décision n° 05-D-58 du 3 novembre 2005 relative à des pratiques relevées dans le secteur de l'eau potable en Île de France***

INDONESIA

1. Introduction

The granting of concession is an important issue in the development of the infrastructure sector. In the perspective of business competition, there are at least two important aspects of the granting of concession. The first aspect is the concession granting process through solicited and competitive bidding, and or unsolicited bidding or direct appointment through negotiation. The second one is the implementation of concession, especially in relation to the limitation and anticipation of potential abuse of monopolistic position caused by such concession.

This paper is intended to elaborate on both issues of competition in relation to the granting of concession in Indonesian context.

2. Regulatory System

Since the end of 1990s until the reform era, the use of concession concept in the management of economic sectors in Indonesia, especially in public sectors categorised as natural monopoly industry, was very limited. The industrial management pattern in almost all of those economic sectors was implemented by the Government through state enterprises, such as toll road, electricity, telecommunication, seaport and potable water industries.

Regulations on the management of concession in each sector may be different from one another. Several sectors, such as potable water and seaport, cannot be fully managed by private parties. However, private parties may be involved in cooperation with state/regional government-owned enterprises, which usually take the form of joint operation. This practice is applied in the management of seaport and potable water industries.

In other sectors, however, there are regulations encouraging private companies to obtain full concession for managing public infrastructure through full ownership or joint venture with state owned enterprise. This can be found, for example, in telecommunication and toll road sectors.

Prior to the reform era, the planning of various infrastructure developments (including by way of the granting of concessions) was conducted by BAPPENAS, as the development planning authority at the national level. Whereas the approval and allocation process was mostly delegated to the relevant technical ministries. Therefore, despite the coordination at the planning level, the implementation was sectoral in nature. In many cases, the granting of concession was often used as a facility for collusion by certain parties having the access to the authority to obtain concession in those sectors. As the result, concessions could not fully achieve the designated objectives. This was indicated by the poor performance of several sectors which management was delegated to concessionaires.

Learning from this condition, several regulations have been revised to promote transparency and accountability in the management of economic activities especially those related to the public sector. This includes the enactment of competition law through Law No. 5 Year 1999. Based on such law, concession granting process must be conducted in an open, transparent and competitive manner. In order to further ensure a more objective and competitive concession granting process, the government issued special

Presidential Decree regulating procedures for the government procurement of goods and services. Especially for infrastructure projects (mainly the large-scale ones), the government has also issued Presidential Regulation No. 67 Year 2005 regulating procedures for government cooperation with business entities in the development of infrastructure. In general, the objective of such Presidential Regulation is to accelerate the development of infrastructure and improve government cooperation with business entities. The Presidential Regulation stipulates the planning of the infrastructure development by a special inter-ministerial committee, scheme and procedures for government partnership with the private sector in the development of infrastructure (through agreement and or license granting scheme) as implementing guidelines for public-private sector partnership projects. The scope of the aforementioned Presidential Regulation includes all infrastructure sectors, namely transportation, roads, irrigation, drinking water, waste water, telecommunications, electricity as well as oil and gas. In the mean time, the regulation of such procedures includes, among other things, partnership, due diligence, risk management, government support, competitive procurement, unsolicited project and tariff adjustment activities. Based on such Presidential Regulation, infrastructure projects will be planned by a special committee (KKPPI = Coordinating Committee for Infrastructure Project Development) the operation of which will be subsequently run by the chairman of the head of the related agency/department. The aforementioned Presidential Regulation also regulates cooperation procedures between the government and business entities, including therein the selection of private sector partner through a transparent and competitive tender/bid. Therefore, although not specifically regulating the granting of concession, upon the establishment of such Presidential Regulation, planning, supervision, construction implementation and infrastructure development functions involving the role of private sector are currently conducted at the central government level through a special committee the membership of which constitutes the representatives of several related departments.

3. Allocation of Concession

As explained, prior to the reform era, the process of the granting of concession was mostly in the form of picking the winner, especially through direct negotiation. Meanwhile, a transparent tender/bid process for the granting of concession (in the form of agreement or license approval) was relatively rare. Even if conducted, in general a transparent tender process was limited to large-scale projects and only involve a relatively limited number of companies. In short, the process of the granting of concession prior to the reform era was still far from being the form of competitive, open and transparent tender.

Upon the coming into effect of Law No. 5 Year 1999 regarding Prohibition against Monopolistic Practices and Unfair Business Competition, competition law officially comes into effect fully and is cross-sectoral in nature. Accordingly, all stages and procedures for the selection of cooperation with private sector partners (through the granting of concession) must be conducted through a transparent and non-discriminative process. Based on such law, the Commission for the Supervision of Business Competition (KPPU) as a competition supervision authority has two main functions, namely law enforcement towards business actors and the submission of recommendations to the government. Therefore, in the context of the granting of concession to private business entities, the KPPU has a full authority to enforce law upon business actors, if the indication of anticompetitive conduct is found in such concession granting process. The KPPU may also play a role to further ensure a transparent and fair concession granting process through the submission of recommendations to the government, especially with regard to various regulations on the granting of concession that are deemed not in line with the principles of fair business competition.

Following the issuance of Presidential Regulation No.67 Year 2005, cooperation between the Government and its private partners, especially for infrastructures projects, must go through a fair, open, transparent and competitive tenders (or auctions for permit/license granting). The form and model of such cooperation must be based on the mutual benefit principle, with responsibility and mutual support among

the relevant parties. In general, there are various reform efforts for the above regulation in accordance with the spirit and objective of Law No.5 year 1999 namely creating a healthy business climate for the achievement of national efficiency and guaranteeing the principle of fair and just business opportunities for all business actors.

4. Implementation of Concession

Basically, the granting of concession rights although through a competitive bidding process is still defined as delegation of a monopoly right to a certain business actor. Under such condition, regulations are needed for prevention of abuse of monopoly position in the form of excessive pricing and or other anti competitive behaviours that are detrimental to consumers. To anticipate the above, provisions on pricing policy, coverage regulation and minimum service quality standard are needed. Such various regulations can be set forth in a cooperation agreement (as one of the sub clauses) so that the engagement of business actors as the holders of concession rights will be clearer. Supervision on the potential anticompetitive behaviours may also be conducted through mechanism other than agreements such as through formal regulation (such as presidential decree and/or ministerial decree) and also through business competition law. For the context of Indonesia, implementation of general and cross-sectoral competition law enables KPPU as the business competition authority to perform its legal enforcing function on business enactors as the holder of concession rights, if there is indication of competition law violation by the a party[1].

In particular, the Presidential Decree No.67 Year 2005 contains provisions which must be included in cooperation agreements between the Government and its private partners. Some points that have the substances of business competition such as determination of tariffs (prices), the right and obligations of the parties (including allocation of risks), service performance standard, sanctions and supervision mechanism on private partners must be stipulated in such agreements. Therefore, the inclusion of those points can serve as a "tool" to anticipate various anticompetitive behaviours especially by private partners as the holders of concession rights.

However, special regulations on regulatory and supervisory function have not yet been included in the presidential decree. Hence, regulatory/supervisory function must still be referred to sectoral policies or regulations. For the case of Drinking Water Provision, the regulatory function is performed by BPP SPAM (Regulatory and Supervisory Body for Drinking Water Management System, pursuant to Government Regulation No.16 year 2005 concerning Provision of Drinking Water System). The same is the case for the telecommunication sector where the regulatory function is performed by BRTI (Regulatory Body for Telecommunication, pursuant to Decree of the Minister of Transportation No.31 2003). Therefore, supervision on the implementation of concession right will also be automatically sectoral in nature which will be performed by each regulatory body. Based on the ICN scheme or model concerning the cooperation between sectoral regulatory body and business competition supervision authority, the coverage of the sectoral regulatory body should be in general economic-technical specific to that sector, while the aspect of business competition will fully become the duty and responsibility of the business supervision authority. Hence, the issue of coordination between the regulatory body and business competition supervision authority is an important issue that needs further discussion with respect to the granting of sectoral concession right.

Based on the development in the concessed sector, there is a different result between one sector to another. This is greatly dependent on several factors among other things the condition of business environment of the concessed sector, the bidding process and some other factors. In general, the granting

[1] JICT (Jakarta International Container Terminal) case (No.4/KPPU-I/2003): KPPU found that there has been an abuse of monopoly power by the company holding concession right at the seaport sector as a terminal operator. The KPPU decision obtained final legal enforcement *(inkraacht)* by Supreme Court.

process of concession rights and business permits without competitive process have resulted in an imbalanced terms or agreement, especially as it gives more advantages to private partners, for example too broader delegation of authority to the private partner and disproportional allocation of risk (more risk on the government). In some cases, such problem leads to low performance of the concessed sectors. Ironically, although the performance is low the government often cannot do much on the matter, considering the nature of the cooperation agreement that does give much room for the government or the public, as a result of unfavourable making process of the agreement. Under such condition, the best option available to the government is making legal adjustment/revision to the cooperation agreement by giving priority on the interest of the public.

This is seen for example in the harbour sector, which until today still serves as the source of inefficiency due to its very low performance. The investment of infrastructures is also not realised as promised by the concession holders. The output of concession implementation today is the increasingly high price without relative improvement in services. The same is the case in the drinking water sector. Until today, the performance is far from satisfying. This is reflected for example from the very limited improvement in the leakage restoration in the drinking water industry, which until today reaches almost 49%.

Different is the case in the telecommunication sector. The concession granted to a number of business actors to operate in this sector has been utilised by business actors to penetrate the market and to compete with other existing business actors. The condition of this telecommunication sector is different from other sectors, where in this sector monopoly tendency has started to fade in line with the increasingly varied telecommunication facility alternatives. Concession holders in the telecommunication sector (especially for frequency spectrum) have supported increasingly strict competition with existing (incumbent) business actors. The results are very positive, where telephone use teledensity continuously increases, tariff tends to decrease, and quality and service continuously increase.

5. Lessons Learned

Learning from the experience of concession process, in order to keep the concession achieving its purposes, it is required some arrangement directing the following:

- Concession should be granted through transparent, competitive and accountable process and is kept away from collusive process.

- Concession agreement must be made specific and clear, using measured indicators so that the reward and punishment measures can be performed properly.

- Concession planning and implementation must minimise the potential misuse of dominant position, inter-competition behaviour, especially by concession-holding companies.

- It is required cooperation and coordination between business competition authorities and sector regulatory bodies, in order to guarantee the achievement of concession granting purposes technically and economically, and to maintain fair business competition climate.

MEXICO

1. Concessions in Mexico

During the 1990's Mexico began a process to modernise and widen its basic services infrastructure, by promoting private investment and efficiency in areas like railroads, telecommunications, ports, and airports.

Several legal amendments were necessary to intensify private-sector participation in expanding and operating infrastructure. These legal changes included both amendments to the Constitution and the issuing of new sector-specific laws. The process encompassed the privatisation of infrastructure, the granting of concessions to allow the provision of services through the use and exploitation of infrastructure, and the creation of a specific area in charge of regulations for each transport mode within the Ministry of Communications and Transport (SCT) and, in telecommunications, the creation of the Federal Telecommunications Commission (CFT).

In short, during the first years of the Federal Competition Commission (the CFC or Commission), the development of competition in sectors and activities traditionally characterised by a low number of participants —or even dominated by a single firm— was an essential aspect of competition policy and of the CFC's activities.

Restructuring in railroads, telecommunications, ports, and airports has shown relative success. However there is a need to develop better regulatory frameworks that favour competition and promote efficiency in such sectors. The CFC has an important role in initiatives to develop, review, or revise sector regulations.

2. The institutional and legal framework

Article 28 of the Mexican Constitution establishes as the overall objectives of concessions: i) efficiency in the provision of public services and, ii) the use of state resources by the private sector taking into account social benefits. On these grounds, sector-specific laws ordinarily include the objectives of promoting competition, access rights to essential resources and preventing anticompetitive practices and concentrations, among others.

2.1 Scope of concessions

The scope of public sector functions and activities is established in the Mexican Constitution and in some sector-specific laws, such as the regulatory law of the oil industry and the electricity public service law**.** According to such legislation, the following activities can only be performed by the federal government, and therefore the granting of concessions is not allowed:

- Mail services and telegraphs.
- Oil, hydrocarbons and basic petrochemistry. Specifically:

  - The exploration, exploitation, refining, transportation, storage, distribution and first-hand sale of oil and products deriving from its refining;

  - The exploration, exploitation, elaboration and first-hand sale of gas, as well as the transportation and storage required to interconnect its exploitation and elaboration, and

  - The elaboration, transportation, storage, distribution and first-hand sale of oil derivatives susceptible of becoming basic industrial raw materials, and gas derivatives used as basic petrochemicals.

- Nuclear energy generation.

- Public provision of electricity[1].

On the other hand, the legal framework does allow the federal government to award concessions to:

a) establish and operate public telecommunications networks;
b) use and exploit radio spectrum;
c) use satellite orbital positions;
d) construct and operate rail track systems and provide public rail transport services;
e) construct and operate ports and port terminals;
f) construct and operate airports.

Telecommunications, railroad, port, airport and airline services are completely open to private participation. This policy is firmly established in the corresponding sector-specific laws under the following provisions:

- The government is obliged to grant concessions to establish and operate public telecommunications networks and provide public air transport services to any interested party that fulfils the requirements established in the laws and regulations concerning telecommunications and civil aviation.

- The government should call for a public auction of any of the concessions for radio spectrum, railroads, ports and airports when an interested party requires so. A negative answer from the government must be grounded in law and based on hard facts.

- The government should determine the radio-spectrum frequencies assigned to specific uses and issue a program to concession them.

2.2 Rules governing concessions

Under Mexican law, concessions are a legal tool to implement sector-specific law regulations, aimed at promoting private involvement and opening up telecommunications and transport sectors to competition.

[1] The private sector is allowed to engage in cogeneration, small production, self-supply generation and electricity generation for sale to the government agency in charge of providing the electricity public service.

There is no an specific law on concessions. The sector-specific laws establish the regulatory frameworks and the institutions charged with granting and supervising concessions, as well as the administrative procedures for awarding them.

Only the federal government is empowered to grant concessions. The SCT in the case of the transport sector and the Cofetel in telecommunications are in charge of designing and overseeing the allocation and operation of concessions.

These government bodies are in charge of handling disputes between the federal government and concession holders through administrative procedures. When not solved at this level, cases are taken to judicial courts.

There have been different allocation mechanisms. Concessions to establish and operate public telecommunications networks are granted to any party that fulfils the requirements provided for in sector-specific law. All other concessions are allocated by public competitive auction (sealed-bid auction); which is established as mandatory in the respective sector-specific laws. In the case of radio-spectrum concessions, they are generally allocated through simultaneous auction, in which the bidders are able to take into account the complementarity or substitutability of different band frequencies through successive rounds. So far no concession has been renegotiated or revoked.

3. Competition issues in concessions

3.1 The competition authority's role in concessions

The concessioning authority is empowered to allocate concessions and oversee their operation. The CFC has powers to issue opinions on the competition aspects of concessions an even auctions. However, such opinions are non-biding.

Additionally, the regulatory schemes established for the telecommunications sector and for rail transportation all contemplate the need for a favourable opinion from the CFC on prospective concession holders, previous to the award of concessions or to authorise the transmission of concession-related rights.

The Commission is the sole agency empowered to enforce the Federal Law on Economic Competition (LFCE). The LFCE applies to every economic activity including those developed under federal concessions. Therefore concession holders are subject to all provisions in the competition legislation.

Agreements among bidders both on participation in auctions and on prices are considered illegal *per se* by Article 9 of the LFCE, as they are considered absolute monopolistic practices (horizontal agreements).

3.2 Sectoral rules to limit or prevent anticompetitive conduct

The sector-specific laws on telecommunications, railroads, ports and airports prohibit discriminatory practices and refusal to deal when access to essential facilities is involved. These regulations are often included in the concession titles themselves.

The sector-specific laws also establish price and tariff regulation imposed by the regulator agency if the Competition Commission finds effective competition to be absent in the relevant market or, in telecommunications, when there exists an economic agent possessing substantial market power.

Generally, there are no rules on pricing, coverage, and quality standards for services provided by the infrastructure given in concession. However:

- The economic agent interested in obtaining a public telecommunication network concession is required to define the network coverage when submitting his application.

- At present all airport concessions include price-cap rules. This regulation could be removed if the CFC determines the existence of effective competition conditions.

- The telecommunications concession granted to Teléfonos de México (Telmex) during the privatisation process, established price-cap regulation on the telephony services provided by this company. It is important to notice that this regulation considered that Telmex would be the only provider of telephone services, at that time.

Rules on pricing and terms of access are enforced by the SCT in the case of railroads, airports, civil aviation and ports. This Ministry and the Cofetel enforce such rules on telecom concessions. In particular, in the railroad sector, the SCT has the right to intervene and impose access rates and conditions if no agreement between private operators is reached within 90 days.

4. Performance of concessions

In general terms the concession scheme in the transport sector (ports, airports, railroads) and in telecommunications has promoted investment and the development of infrastructure. New investments have enhanced efficiency and competitiveness and have led to more modern and safe systems.

In particular, in the railroad sector, following privatisation, real freight tariffs have fallen and productivity indicators show significant improvement. In spite of these improvements, investments in infrastructure and railroad equipment have remained unchanged; for example, average annual investment for the periods 1990-1996 and 1997-2003 is practically the same. This suggests that productivity enhancements following privatisation cannot be attributed to the elimination of a budget restriction. Rather, investment has been more focused towards increasing productivity by modernising locomotives, acquiring specialised equipment, upgrading operation systems and logistics, strengthening capacity of trunk lines, and improving crossings[2].

However, there are some concerns regarding the implementation of intra-modal competition, particularly in interlinear traffic, derived from a lack of effectiveness of the regulatory framework relating to interconnection fees and access conditions. This has made the problem of interlinear traffic a competition problem, as will be shown in the next section of this contribution.

The communications sector[3] has registered constant growth. In the last 5 years investments reached almost 18 billion dollars, driving a 15% average growth of telecom GDP[4].

The main feature of the telecommunications sector is the constant introduction of technological innovations. A case in point is cable and microwave television, which can offer internet access since 2003, and is expected to reach more than 16 million users at the end of 2005[5].

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2 Mexico´s contribution to the Roundtable on Structural Reform of the Rail Industry of Working Party No.2 of the Competition Committee.

3 The communications sector includes telecommunications, postal and telegraph services.

4 Source: Fifth report of activities 2004-2005. SCT.

5 Idem.

5. Competition cases involving infrastructure concessions

5.1 Relative monopolistic practices in freight railway transportation[6]

In November 2001, Transportación Ferroviaria Mexicana (TFM), the holder of the concession for the Northeast Railway, filed a complaint against Ferrocarril Mexicano (Ferromex), the holder of the concession for the North Pacific Railroad, alleging relative monopolistic practices in the interlinear service of freight transport in some of the routes it operated. The alleged conduct consisted in: i) artificially raising tariffs for interlinear traffic and registering them as the Unique Tariff for Express freight (TUCE); and ii) charging car hire services twice to increase TFM's costs and to displace it from the market. The effect of these practices was to leave Ferromex as the sole provider of this service along its exclusive routes.

The Commission defined the relevant market as railway lines given in concession to TFM and Ferromex, which, if integrated, created a network that covered a number of cities that had as their interconnection point the City of Celaya, Guanajuato. In October 2003, the Commission determined that Ferromex was guilty of relative monopolistic practices in violation of the LFCE. These consisted of cost increases for interconnection and transport in traffic along several interlinear routes where the origin railway was TFM, as well as duplicate charges for car hire services.

Based on these findings, the CFC ordered Ferromex to suppress its practices and implement corrective measures in the relevant market. These measures consisted in setting interlinear traffic service tariffs per kilometer no higher than the minimum tariff charged by Ferromex to its exclusive route customers transporting similar products. The CFC also ordered Ferromex to charge car hire tariffs in traffic along interlinear routes no higher than the minimum tariff charged to its exclusive route customers. In February 2004, the Plenum of the Commission resolved an appeal by Ferromex, which was considered unfounded. Therefore, the Commission confirmed its previous resolution.

5.2 Absence of competition conditions in airport services

In order to prevent any abuse of dominant position from private concessionaires of Mexican airports, the SCT asked for the CFC's opinion on competition conditions in airport service markets. According to the Airport Law, any tariff regulation imposed by the Ministry has to be based on a CFC decision about the inexistence of competition conditions. Following this procedure, in 1999 the CFC made an assessment of competition conditions in the markets related to airports controlled by Grupo Aeroportuario del Sureste[7] and Grupo Aeroportuario del Pacífico[8], and in 2000 for airports controlled by Grupo Aeroportuario del Centro Norte[9]. The following elements were taken into account:

- the existence of legal barriers to entry to build airports and to provide airport services;
- priority granted to the present concession holder for building alternative airports;
- technical and economical difficulties to build new airports.

6 CFC case numbers DE-57-2001 and RA-50-2003.

7 CFC case number AD-78-98.

8 CFC case number AD-24-99.

9 CFC case number DC-01-2000.

Based on those elements, the CFC determined the inexistence of competition conditions in the relevant markets of airport services, and of leasing of airport areas for the provision of airport-related services. As a result, the SCT imposed price-cap regulation on the airport concessionaires.

6. Concluding remarks

The concession scheme in Mexico has had a positive effect on investment and the development of infrastructure. These benefits have promoted efficiency and competitiveness and have led to safer and more modern networks and systems.

Competition could be enhanced through amendments to sector-specific laws to facilitate the efficient functioning of infrastructure networks. These amendments should also strengthen the powers of regulatory bodies to effectively enforce the regulatory frameworks. In the CFC's view, its own participation and involvement in this process is necessary.

Mexico's experience shows that it is not enough to grant concessions; it is essential to consider competition issues in designing the specific concession scheme to be adopted in each case, in order to prevent anticompetitive conditions and guarantee access to essential facilities. In addition, effective enforcement of the competition law is also needed to guarantee, *ex post*, the efficient functioning of markets related to concessions.

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NETHERLANDS

1. Summary

Recently the Dutch government has decided which companies are to be the infrastructure managers of the conventional main-lines railway network with mixed rail transport and of two new rail infrastructure lines, the high speed line from Amsterdam/Schiphol to the Belgian border (HSL), which is a line designated for high speed passenger transport, and the Betuweroute from the harbour of Rotterdam to the German border (BR), which is a designated line for freight transport. The concessions differ from each other. Those differences are caused by the specific characteristics of the rail network, respectively the railway lines HSL and BR. For example the differences in the uncertainties about the volume of transport services, the possibilities of optimize (the maintenance of) the infrastructure, the insight in (the quality of) the infrastructure-elements, the number of private companies which could supply infrastructure elements and systems and the necessity and possibilities of private funding. These different characteristics influenced to a high degree the choice of using competitive mechanisms during the allocation process of the concessions.

A concession of the conventional main-line railways network has been granted to ProRail for the period 2005-2015 without an auction or tendering. The concession of the Betuweroute will be granted, for the period of 2007-2009/2010, to a new formed consortium of four private and public companies to bridge the first years with big risks in the amount of freight transport. After this period a concession will be granted for a longer period to a private company after a tender for the concession. The overall management of the High Speed Line will probably be granted to ProRail, but the construction and maintenance of the rail infrastructure will be managed and done by Infraspeed, a contractor combination that has won the contract after a tendering organised by the Dutch Ministry of Transport for the construction of the line (5 year period) and the maintenance (25 year period). A new Railways Act, which is in force since the 1st January 2005, was enforced to make it possible to issue these concessions.

2. The old Railways Act of 1875

The old Railways act of 1875 was based on the idea that private companies build, maintain and operate rail infrastructure lines. A private company had to ask permission of the King (since 1848 the Crown) to build, maintain and operate a new line including the transport of passengers and freight. The permission was given for a concession for an indefinite period. It was an exclusive vertically integrated concession (infrastructure and transport). During the first period (the first concession was given in 1835) a lot of different private companies existed. The King did not subsidise either the building or the maintenance or the operations of these companies. He only gave, if necessary, state guarantees during the construction period. But during the thirties of the last century companies performed badly. New ways of transport came into use: buses and private cars. This, combined with economic depression times, caused big losses for the companies. Though a number of mergers took place at that time, it was not enough. In the end, in 1937, the government intervened severely and took over all the shares of the remaining companies and created one railway company: the Dutch Railways (NS). So the model with competitors ended at that time and continued until 1995. During this period there was one railway company with an indefinite concession.

3. The new Railways Act

In 1995 the government signed an agreement with NS to make competition possible in the railway sector. The predecessor of the currently existing vertically separated infrastructure manager ProRail was formed and freight transport was liberalised. In the agreement provisions were made for the new Railways Act which had to be drawn up. Nearly ten years later, since the first of January of 2005, this new Railway Act is in force. In this Act not only the directive 91/440/EEC is implemented but also the first Railways package (EU-directives 2001/12/EG – 2001/16/EC). Although the European directives only prescribe the separation in the accounting system of the infrastructure manager and the railway company, the Dutch Government went further. The Railway Act states that the Minister of Transport is obliged to give a concession for the management of the rail infrastructure to a (private) infrastructure manager. There is no obligation for a competition auction or to tender before the allocation of the concession, but it is possible to do so. A concession can be issued per corridor or railways network. It is also possible to split up rail infrastructure management into three processes: the allocation process of rail infrastructure capacity, traffic control activities and the maintenance of the infrastructure. Each process/task can be given to a different company. In the Railway Act the duration of the concession period is not mentioned.

4. Allocation of transport services in the Netherlands

Although it was decided in 1995 to liberalise the rail transport market, it was unclear for a long period in what way competition would be introduced in the public transport market. A lot of discussions and an experiment later, the Dutch Government decided for competition-for-the-market and not for competition-in-the-market. The New Concession Act, in force since the 1st January 2005, prescribes a tender process before the allocation of national and regional public passenger transport concessions. The duration of the concession period has been appointed. The Dutch Parliament decided to grant the first concession for the mainline network to the NS until 2015 without any auction or putting out a tender. The transport of international public passenger transport, realised by a cooperation of railway companies and private passenger transport, is liberalised.

At present, besides the NS, there are already 23 new railway companies operating on the Dutch Railway network, a network of only 2800 kms (6500 kms of rails).

5. The allocation of three Dutch infrastructure concessions

Since the new Railway Act came into force (1st January 2005) the Dutch Government has granted only the concession of the infrastructure management of the conventional main-line railway network to ProRail. This network is used for passenger as well as for freight transport services. It is the existing network in which the oldest line has been in use since 1839 (Haarlem-Amsterdam) and the most recent since 2005. Besides this existing network the Minister has made the main decisions about the concessions for two new lines: the HSL and BR. The HSL is the High Speed Line from Amsterdam/Schiphol to the Belgian border, a line designated for high speed passenger transport, and the BR is the Betuweroute, a line designated for freight transport from the harbour of Rotterdam to the German border. These new lines will be in use on 1st January 2007.

Each concession has its own quality. Characteristics related to specific features of the network, respectively for the HSL and BR, are, for example, the differences in the uncertainty about the volume of transport services, the possibilities of optimising the maintenance of the infrastructure, the insight in (the quality of) the infrastructure-elements, the amount of private companies who can supply infrastructure-elements and systems and the need and possibilities of private funding. These characteristics influenced to a high degree possibilities for the use of the competitive mechanisms during the allocation process of the concessions. The characteristics will be described below in a systematic way.

6. Factors influencing the possibilities to use competitive mechanisms

6.1 First mover advantages for the incumbent operators

The incumbent rail infrastructure manager in the Netherlands is ProRail. ProRail is the legal owner of the ground under the rail infrastructure which is already in use, although the transfer of ownership is foreseen in the Act. As long as this transfer is not realised it is not possible to allocate a concession after an auction or tendering procedure. Another stand-in-the-way of an auction for the conventional network is the exclusive right of NS to exploit all the existing railway stations. The government owns the ground of the new lines, the HSL and BR. ProRail is an infrastructure manager which contracts out the construction and maintenance of the infrastructure. The allocation of the infrastructure capacity and traffic control activities is done by its own employees. Especially the traffic control employees are specialised personnel only employed at ProRail.

The competitive chances for new entrants can also be influenced by informational disadvantages. This depends for instance on the fact whether the infrastructure is new or not. The infrastructure to which the three concessions were granted, differ highly in this respect. The HSL is a completely new infrastructure, fitted out with the new European systems for safety (ERTMS/ECTS) energy (25 kV) and telecommunications (GSM-R). The BR concession exists as a new line combined with existing lines in the port of Rotterdam. The conventional main-lines railway network are lines in use, the oldest one having been in use since 1839, the newest since 2005. Asset management is not yet completely introduced in rail infrastructure management. Because there is no complete register of the infrastructure elements, their technical remaining lifecycle period and the quality, it is impossible for other rail infrastructure managers to asses the maintenance costs of the whole network. Moreover, on these lines typical Dutch systems are in use, for instance the energy system (1500 V) and the safety system (ATB). For the safety system there is only one company which can supply the necessary infrastructure components. Competition mechanisms are less easy to introduce in a market with only one supplier who owns exclusive rights.

These characteristics in the infrastructure were jointly responsible for the decision to give the first infrastructure concession to ProRail. In this concession provisions have been made for the set up of an infrastructure register and to implement asset management. As a competitive mechanism in this concession, ProRail is obliged to make a benchmark every four years with comparable infrastructure managers in other states.

6.2 Efficiency considerations

It is possible to split rail infrastructure management into three processes: the allocation process of rail infrastructure capacity, the traffic control activities and the maintenance of the infrastructure. In the Netherlands each process/task can be given to a different company. In a small country such as the Netherlands, besides the problem that only ProRail employs specialised personnel, it is difficult to split the allocation process of the rail infrastructure capacity and traffic control activities into networks of a smaller scale than the Netherlands. The possibilities of realising efficiency in these tasks by splitting them into smaller networks is difficult and this will cause new coordination problems. In all three concessions (conventional network, HSL and BR), ProRail, the Dutch rail infrastructure manager has a leading role in the allocation process and the traffic control activities. The concessions do not differ in this respect.

Our experience is that the best possibilities of introducing competitive mechanisms are in the third task: the financing, construction and maintenance of the rail infrastructure. The possibilities are influenced in a high degree in the uncertainties about the volume of transport services. Uncertainties in volume of transport are translated into concession-price.

6.3 Uncertainties for future profits

Uncertainties of future profits are highly influenced by the uncertainty of the volume of transport. The uncertainty of the volume of transport differs per concession. The uncertainty is the greatest in the BR-concession. On this line there is no long term appointments with transport companies because this is a liberalised freight market. The competition with other transport modes (inland water transport, road transport) is great, especially for container transport and influenced by political decisions; for instance the introduction of the Maut in Germany and the decision to close the coalmines in Germany. Besides which, the volume of freight transport in the Netherlands is highly influenced by economic developments in Germany, because a great amount of international rail freight transport goes to Germany. In addition the BR is not the only East-West freight line. There are parallel routes, for instance the line Rotterdam-Utrecht-Emmerich and Rotterdam-Venlo. Which route a freight transport company will use, will be dependent of the price for the use of the infrastructure, the availability of train paths and the costs for the railway company. Typical for the BR is that the railway companies have to use locomotives fitted out with the new European safety system ERTMS/ECTS. None of the railway companies nowadays have locomotives fitted out with this system. Rebuilding existing locomotives or buying new locomotives generates extra investment costs. After consultation of the market the government decided that the uncertainties at that moment concerning these aspects made it impossible to get a good concession price for a long period concession. The government decided to give a short term concession for the Betuweroute for the period of 2007 to 2009/2010 to bridge the first years, with big uncertainties about the volume of freight transport services. After this period a concession will be given for a longer period to a private company after a competition auction. The short term concession will be given to a new formed consortium of four private and public companies: the port authority of Rotterdam, the port authority of Amsterdam, Prevail and Towrail. The port authorities have influence on the complete transport chain from shipment to the end destination and has contacts with a lot of transport operators in this chain. Towrail is a new company with the ambition of improving the way the maintenance can be carried out and to introduce new infrastructure related services for railway companies.

For the other concessions there is less uncertainty about the volume of transport, because the transport market is mainly public passenger transport. Because of the concession system for this market the government has made an agreement with a public transport company during the concession period for the infrastructure. The problem of the parallel routes of the HSL are less then the BR because the passenger transport company of the HSL does not have transport rights on the parallel routes and the quality for the passengers of the HSL is better because it is used as a high speed line.

6.4 Other factors

The maintenance costs are highly influenced by the maintenance roster. In a passenger market there is much pressure from the railway companies to do the maintenance work during night time and in a short period. The safety regulations, the noise nuisance regulations and the regulations concerning working conditions make it very expensive to do the maintenance during night time and in short periods. Nevertheless the government decided to prescribe the maintenance roster for the maintenance contractor of the HSL (every night for two hours). In the allocation process of this concession there where the least possibility of reducing the maintenance costs by optimising the maintenance roster. Optimising was possible using infrastructure elements during the construction period which was lacking maintenance. The infrastructure manager of the conventional main-lines railway network has a maintenance roster with longer periods for maintenance, at night time as well as during daytime. The infrastructure manager of the concession for the Betuweroute is free in the choice of reducing the maintenance costs and is not forced to a maintenance roster prescribed by the government.

Besides the above mentioned characteristics of the HSL (the government is owner of the infrastructure, it is a new infrastructure, European systems, prescribed maintenance roster, more certainty about volume of transport, less competition on parallel routes) there were other aspects that made it possible to introduce competitive mechanisms for allocation of the concession of the HSL for the task of building, financing and maintaining the infrastructure. The government decided to tender the combined order for building finance and maintenance of the infrastructure during a lifecycle period (25 years of maintenance after building). This combined order made it possible for the contractor to invest more in building if this investment has an economic profit during the maintenance period. The government decided to pay for the availability of the infrastructure (output financing) and has prescribed very precisely the quality of the infrastructure at the end of the concession period. The last requirements prevent the destruction of the infrastructure at the end of the concession period.

7. Result of the allocation process

The result of the allocation process in the Netherlands of these three concessions is that the concession of the conventional rail network has been given to ProRail for the period of 2005-2015 without a competition auction. The concession of the Betuweroute will be given for the period of 2007-2009/2010 to a newly formed consortium of four private and public companies to bridge the first years with large risks in the amount of freight transport. After this period a concession will be given for a longer period to a private company after a competition auction. The overall management of the High Speed Line will probably be given to ProRail, but the building and maintenance of the rail infrastructure will be looked after by Infraspeed, a contractor combination which has won the contract after a competition auction organised by the Dutch Ministry of Transport for the building of the line (5 year period) and the maintenance (25 year period). The most competitive mechanisms were used in the allocation process of the building, finance and maintenance of the HSL.

8. Conclusions

The use of competitive mechanisms is very limited to nihil in the following situations: if the government does not own the infrastructure; if specialised personnel employed only by the incumbent infrastructure manager is necessary; if economies of scale aspects have a negative influence on the possibilities of splitting the network; if there is not a good register of the infrastructure elements, their technical remaining lifecycle period and their present quality; and if the uncertainty in the volume of transport services is great. In the Netherlands we have positive experiences with using competitive mechanism in the construction and maintenance of the infrastructure including the financing of the task of newly constructed infrastructure lines. Used mechanisms: putting a tender; output financing (availability of infrastructure); the obligation of making benchmarks during the concession; giving the infrastructure manager possibilities to reduce the maintenance costs by optimising the maintenance roster and giving him the opportunity to use infrastructure elements during the construction period, when no maintenance is required. It is necessary to prescribe very precisely the quality of the infrastructure at the end of the concession period to prevent destruction of the infrastructure. A concession period which fits in with the technical lifecycle of the infrastructure (under the condition of certainty about the volume of transport services) gives the best concession price possible. Sometimes, if the uncertainty in the volume of transport services is too great, it is necessary to grant a short term concession to bridge these uncertainties.

ROMANIA

Chapter I: Overview and environment for concessions

1. Objectives and circumstances of the concessions allocation for infrastructure

The main regulatory objectives directed towards co-operation with business environment, through concessions consist in supplementing the budget shortcomings of the regulators by the private financial resources, implementing the know-how and the working methods developed by the private sector in the public sector.

It results from the assessment of the primary and secondary legislation regulating the concessions that the common objectives for concessions are the following: the financing of the operations of maintenance, mending, modernisation or replacing the infrastructure elements for the concession services under the terms and on the basis of the program approved through the bid specifications which leads to the process of allocating the concessions. Depending on the sector which is the object of the concessions contract, the objectives may vary, for instance, in the sector of municipal services, the objectives may be obtaining the sequence, the enforcement of the social programs, the best ratio between costs and quality, acquiring of the minimal indicators of performance established through the regulation of organisation and functioning of the respective service in the field of public railway infrastructure, the performance of the railway or public transport in maximum security, the maintenance and the mending of the railway infrastructure as well as granting access to the respective sectors to other railway operators.

The circumstances under which concession is chosen rather than privatisation or continued public provision are decided on one hand, by the social policy of maintaining an acceptable and monitoring tariff for services and on the other hand, by the performance of the required investments and the cutting off of some expenditures (such as, those for staff, for maintenance and modernisation of infrastructure) that would burden the authorities' budgets and by the necessity to increase the economic activity's output in that sector.

2. The concessions' regulatory system

The primary legislative framework that regulates the concessions services for infrastructure covers:

1. Law no. 219/1998 on the concessions regime, amended and completed through Law no. 528/2004;

2. Law no. 213/1998, on the public property and its juridical regime, amended and completed.

Thus, law no. 219/1998 on the concessions regime, amended and completed through Law no. 528/2004 has as objective the regulation and organisation of allocating concessions of the activities, of the goods (constituting private or public state ownership or belonging to territorial administrative units) and of the public services of national or local interest instead of a royalty.

Law no. 213/1998, amended and completed, on the public property and its juridical regime stipulates that public properties may be awarded only in administration, concession or rent. It also stipulates that the

renting and concession may be done only by auction, under the law provisions. Goods, activities or public services which are not regulated by specific authorities, their opinions being compulsory as concerning the prices or the tariffs used by the concessionaires, can not be the object of concessions.

The Government, the local or county councils may approve through ordinance, the concession of other properties, activities or services belonging to the State private property.

There are legal provisions with respect to concessions in the fields of economic activity which are subject to the present work paper, as follows**:**

1. In the field of municipal public services : Law no. 236/2001, amended and completed, on municipal public services and the respective secondary legislation,

2. In the field of public services of railway and port infrastructure: Government Ordinance(GO) no. 22/1999, republished (on the administration of ports and navigation roots as well as the performance of port transport activities in ports and navigation roots), Emergency Government Ordinance (EGO) no. 12/1998 (regarding transport on the Romanian railways and re-organisation of the Romanian railways), republished,

3. In the field of public services related to the transport networks through pipes and to the distribution of oil and fuel gas: Law of gas no. 351/2004 amended by Law no. 288/2005, oil Law no. 238/2004.

4. In the field of public services related to the transport networks and to the distribution of electric and thermo energy: Law no. 318/2003 of electric energy.

2.1 Authorities involved in designing and overseeing the allocation of and operation of concessions

2.1.1 Within the stage of designing the concessions

The proposal of concession may be done by an interested investor, the conceder (hereinafter named authority who awards the respective concession in infrastructure) being obliged to draw up the feasibility study within a term of 30 days, in case parties do not agree upon another term for taking a decision regarding the concession. In certain cases, this study is mandatory advised by the State Central Office for Special Problems and The Office of General Headquarters as concerns the including of the concession object in the infrastructure of the national defence system.

The bid specifications are elaborated on the basis of the feasibility study and provides for the minimal terms necessary for participating in the auction. It may be drawn up by a private company, upon the request of the conceder, its cost being reimbursed from the conceder sale at the premises or in other places settled by him and stipulated in the advertisement. The bid specifications' price is established by the conceder. The enclosed documentation required is subject to the methodological norms which are approved by the Government.

The guidelines on the organisation and the carrying on of the concession procedure are elaborated by the conceder and are made available upon the draft sale. The guidelines contain the procedure for public auction and for direct negotiation.

2.1.2 Within the stage of allocation of the concession

The participants' offers in this stage are assessed by the commission of examination, whose members are appointed through order, ordinance, or decision by the conceder, varying from case to case.

The commission is made up of:

a) representatives of the conceder, among which, at least one, with juridical background;
b) representatives of the Finance Ministry or of the general directorate for public finance and State financial control;
c) a representative of the competent environment authority, if the good, activity or public service that is the object of the concession launches environment procedures.

The examination commission President is appointed by the conceder among his representatives of the examination commission.

At the meetings of the examination commission, the President may invite, for consultancy distinguished personalities notable for their experience and competence in the field subject to the concession.

The selection criteria of the offers and the weight of their importance are settled by the conceder, depending on the public service subject to the concession contract.

2.1.3 During the operation of concessions

During the operation of concession, the conceder has the right to check the observance of the obligations undertaken by the concessionaire (i.e. to inspect the goods, to verify the stage of carrying out the investments and whether the public interest is fulfilled).

Besides the conceder, the Ministries of resort and the Ministry of Public Finance are empowered to monitor the concessions of national interest. Also the general directorates for public finance and for financial State control are entitled to monitor the concessions of local interest, pursuing, in particular, the observance of the provisions related to:

1. the decision of concession;

2. publicity;

3. the enclosed documentation submitted for the granting of the concession;

4. the membership and the working tools of the examination commission when analysing the offers;

5. the terms provided for by law (during the process of granting the concession);

6. keeping informed the interested parties on the granting or ceasing of the concession;

7. the fulfilment of the contractual obligations by both the conceder and the concessionaire.

2.2 The role of the concessioning authority sector regulator

The authority sector regulator attests/authorises/licenses and oversees the operators of the public services subject to the concession (the operators which have concluded contracts by the date of entering into force of the legislative framework are obliged to submit the documentation required for receiving the certification as operator. Afterwards, an additional act to the concession contract is concluded, stipulating the operators' entire obligations according to that legislative framework).

The operation of the concession public service without the existence of the certification/license for operating, of the authorisation for functioning or of the delegation contract of administration and the delivery of a public service concession contract without the observance of the legal provisions or to an operator unlicensed/ unauthorised, constitute offences, being fined.

The offences acknowledgement and the sanctions application are done by the empowered personnel of the public administration ministry, of the ministry of resort (for instance, the sanitation, water and sewerage services are in the jurisdiction of the ministry of environment and waters management), to the President of the National Regulatory Authority for Municipal Services (in the field of municipal services), to the villages, towns mayors, to the general mayor of the Capital or their empowered staff.

2.3 The role of the Competition Council in the concessions

The competition Law observance is a general obligation, so it is applicable both for the concessionaires and for local and central public administration bodies. When receiving a complaint on the organisation or the handle of an auction, the Competition Council may interfere whether a suspicion arises, related to the breach of the provisions of art. 5 (1), f of the Competition Law no. 21/1996 republished (hereinafter named Law) providing for an agreement between undertakings or associations of undertakings aimed at participating in auctions with rigged bids, and having as an object or as an effect the restrain, the prevent, or the distortion of the competition on the Romanian market or on a part of it. Also, the Competition Council may interfere whether a suspicion regarding the infringement of art. 6 of *the law* arises (abuse of dominant position by the imposing of the tariffs or of the unequal clauses, the exploitation of the dependency situation). In all these situations, Competition Council interferes through the opening of an investigation and the sanctioning of the involved parties in the infringement of the law.

Competition Council may interfere also, through the opening of an investigation, by applying the provisions of art. 9 of the *law*, whether there is a suspicion on the interference of a public authority which may restraint, prevent or distort the competition on a given market.

The observance of the rules specific to a market economy is a general obligation addressed both to the undertakings and to the bodies of public administration. The latter, under the limits of executing their legal functions, can not interfere in the activity performed by the undertakings, confining thus the trade freedom or the undertakings autonomy or establishing discriminatory conditions.

The central or local public administration bodies, which performed anticompetitive practices according to those provided for in art. 9 of the law, are compelled to observe the Competition Council decision; the Competition Council can not sanction them by applying fines but it is entitled to impose any terms or measures to be observed by the central or local public administration, so that the situation prior to the breach of the law may be re-established.

According to the provisions of article 26 lit. l) and m) of *law*, the Competition Council may make recommendations to the authority sector regulator in order to be adopted measures or amended certain law provisions that could ensure a competitive mechanism of designing and allocation of the concessions and of pursuing its carrying on (for instance, the delimitation of the services having a competition potential

from those that do not have such a potential, horizontal separation, if it is feasible, prevention from related concessions, conditions related both to the technical and operational capacities and to the reliability and financial capacity, ensuring thus not to be restraint the number of participants in the auction, or that the execution of the bid specifications not to create incentives in favour of a certain offer– particularly in favour of the operator that already performs the service subject to the concession).

2.3.1 Governmental levels that may allocate concessions

The following bodies are entitled as a conceder, on behalf of the State, county, town or village:

1. the ministries or other specialised bodies of central public administration in jurisdiction for goods representing public or private State propriety or activities and public services of national interest;

2. counties or local councils, or public institutions of local interest in jurisdiction for goods representing public or private county, town or village propriety or activities and public services of local interest.

2.3.2 Regulation framework and institutions' position within Romanian Legislation

Obviously, the regulation framework and the institutions are regulated by law, the administrative procedures being applications of the norms included in this framework.

2.3.3 Ways of handling litigations

In order to handle the potential litigations arisen from the concession contract execution, the parties may provide for a special clause of reaching an agreement, granting the competence of handling the litigations to the commission of experts, on the basis of a contract (in some cases, two levels of experts may be established – the Commission of Experts made up of three foreign natural persons (technical expert, economic regulator and financial analyst) and the technical expert, all presenting view points on the analysed matters sent by the conceder, the concessionaire and the independent authority that oversees the contract execution), and the Romanian or international arbitration courts.

Any person, having a legitimate interest related to a certain concession contract that might have suffered or risk to suffer from a prejudice, as a direct consequence of an unlawful act, has the right to use the appealing provided for by law. In case that person suffered from a prejudice, he/her may require through legal actions remedies, within the terms of the administrative contentious law. The legal action is introduced at the section of contentious administrative of the court in which circumscription the headquarters of the respective authority is located. Against the law court decision, one may appeal in front of the section of contentious administrative of the Court of Appeal.

2.4 Competition Rules and institutions that enforce them

The general law of competition is applicable in the allocation of the concessions contracts, together with the observance of the principles of free competition, transparency, equal treatment and **confidentiality and the observance of the contract-frame and the regulation framework of the respective public services, that are subject to the concession.**

For instance, the local public administration authorities are responsible for the organisation, the regulation, the managing, the administration, the coordination, the monitoring and the control of the functioning of the local administration services. Their strategies will mainly pursue through the creation of a competitive environment that stimulates the private capital, the promotion of the specific mechanisms of a market economy. The concessionaire has the legal obligation to enforce performing management

methods that would lead to the reduction of the operating costs, inclusively through the application of competitive procedures stipulated in the due legal norms for the acquisitions of operations, goods and services.

All the Governmental bodies (ministries, regulatory authorities) involved in the field of concessions besides the conceder perform their activity with a view towards promoting economic efficiency and mechanisms for a market economy, creating and ensuring a competitive environment, stimulating the access of the private capital in the scope of the public services and encouraging the forms of delegated administration (one of them being the concession).

The relations between the competition authority and the regulating authorities may take the form of cooperating agreements having as purpose the prevention and limitation of distort agreements on these markets, monitoring activities, raising economic agents' awareness regarding the measures in case of infringement of Competition Law, cooperation on competition sensitive issues.

Within the process of strengthening the functional market economy, the Competition Council plays an active role in favour of liberalising the markets of public interest services. Therefore it is extremely necessary and useful for all the concerned factors to know the policy and the rules on competition, the legal framework and to promote them in a coherent and consequent way.

Therefore, the Competition Council ensures the implementation of Competition Law through the ex-post regulations (having a sanctioning character), while the regulating authorities have as main responsibility the ex-ante implementation of specific economic and technical regulations (related to the certification/authorisation of the operators/grantors/providers of public services, elaboration of the methodology of fixing, adjusting and amending the prices and tariffs for the respective public services, the advice and the control of the tariffs approved according to the normative acts in force, the surveillance of the auction's process in case of the administration delegation for services. Its actions are focused on maintaining and stimulating competition as economic process, rather than on the individual monitoring of competitors.

3. The experience within infrastructure concession

Our institution does not hold a data basis at national level, reflecting an overview of the concessions in infrastructure. In this respect, the possibilities of intervention of Competition Council were explained above.

In most cases of concessions in infrastructure, financial consulting contracts have not been concluded as a result of both the dimensions of the respective infrastructures and the direct allocation to the companies subordinated to the conceder (reorganisation of the "regies autonomes" - french equivalent for the Romanian expression which designates a form of state owned company – and of those with state capital). Although, there are cases in which financial consultancy takes place on the basis of a contract, the contractual terms (including the price) being in line with the long term efficiency objectives and competition in the respective sector.

Most of the concession contracts had been concluded before 2001. However, it is stipulated in the GO no .32/2001 amended and completed, regarding the organisation and functioning of the public services of water supply and sewerage that the concession particularisation should be done through framework regulations specific to the public services of water supply and sewerage, according to the internal legislation and the European Community regulations, this representing a premise to the application of the OECD 's recommendations made by the Counsel for structural separation within the OECD regulated industries (2001). However, the legislation stipulates that either the delimitation of activities having a

competition potential from those without such a potential or horizontal separation for promoting competition is likely.

For instance:

1. In the field of local administration, the local public administration authorities may ask for the carrying out of the service to one or more operators to whom they transfer by means of a delegate administration contract (particularly, the concession contract), totally or partially the own tasks and responsibilities related to the service administration and the exploitation, functioning and infrastructure's modernisation of the respective public service.

2. In order to ensure the local public transport, the local councils may use one or more transport operators, authorised under law provisions, to which they transfer by means of an auction the respective concession contract. In case the local public administration authority appointed two or more transport operators, a concession contract would be concluded with each of them for different routes or for the same route, if that route can not be operated by a single operator.

3. In the field of railway transport, the railway infrastructure is state property (public or private) and it was granted in concession to the National Railway Company "CFR" SA, ensuring the administration of the railway infrastructure. In order to carry out new elements of the public railway infrastructure or to develop, up-date and rehabilitate those existing, which financing could not be ensured by CFR, the Ministry of Transports may conclude concession contracts with other legal entities, Romanian or foreign under law observance. Since the approval date of the concession, the contract concluded by the Ministry of Transport with the company CFR is amended accordingly. The railway transport social public service may be chartered by the Ministry of transports, constructions and tourism, on the basis of an auction and under the observance of law provided for the railway operators.

4. In the field of naval transport, the normative acts stipulate that the ministry is the one who establishes the activities that may be operated only by the authorised undertakings as well as the authorisation criteria and the activities that may be performed by the management, directly or through the undertakings and under the control of the respective management.

In case of non-observance of the contractual obligations by the concessionaire, the concession contract ceases through one-sided cancellation of the conceder provided that compensation by the concessionaire is granted. For instance, in the field of local administration, it is stipulated that that local public administration authority, signatory of a contract, would organise a new public auction for the delegation of administration (a form of it is the concession) whereas the service operator did not fulfil its contractual obligations related to the service quality and the financial-economic performance during two running years. Also, another explanation for the contract cancellation may be the non-observance of the commitments related to the accomplishment of the investments in the respective infrastructure. The practice proves that the two reasons presented above represent the main grounds leading to the contract cancellation by the conceder.

As concerning second and subsequent concessions, we do not have a practice, due to the fact that most concession contracts are in course of execution. However, the law institutes in the field of local transport, a pre-emptive right in the benefit of the transport operator, titular of the concession contract in two cases:

a) if the transport operator, titular of an ended concession contract participates in a new auction regarding the concession of local public transport,

b) in case of the enlargement of the local public transport on new routes after the concluding of the concession contract, the existing transport operator benefits from a pre-emptive right on the occasion of the auction for the concession of new routes.

Regarding this right, we would like to underline the following:

- The pre-emption right is lost when more operators are benefiting from the concession contracts having as object the local public transportation.

- In case of extension of the transportation network through augmentation of the traffic on one route, the supplementary traffic will be granted to the owner of the concession contract on the specific route. In case of refusal from the owner, the respective supplementary traffic shall be granted by means of public auction.

- In case of expansion of the local public transportation on new routes, part of a group of routes, those shall be granted to the owner of the concession contract on that specific group. In case the owner refuses or the new routes do not form part of a group of routes, the former shall be subject to concession through public auction.

- The operator or the operators' association fully or majority taking over the local public transportation system, benefit from the pre-emption right at the concession or renting of the transportation means park and of the corresponding infrastructure, if these support him in the carrying out of the respective service.

The concession duration is mainly established depending on the amortisation period of the investments which are to be made by the concessionaire, and cannot extend beyond 49 years. The concession contract can be extended by a period at most equal with half of its initial duration, on the basis of mutual consent. In some sectors, the concession duration is established by the law.

The situation within the sanitation field is as follow:

a) for a period of maximum five years - activities of arranging, maintenance and cleaning of the grass plot, as well as public disinfection;
b) for a period of maximum eight years- pre-collection, collection and transport of household waste, as well as the cleaning and watering of the public road routes, clearing of snow and their maintenance on frosty winter time;
c) for a period of maximum 20 years- waste incineration activities and thermo energy production through this procedure, as well as the establishment and management of ecological landfills of waste, selection and waste recycling inclusively.

In the field of local transportation, the duration of the concession contract of the public local transport cannot be less than five years.

4. Bibliography (books or research papers) regarding the experience with infrastructure concession

We do not have books or papers regarding experience within infrastructure concession.

Chapter II: Role for competition in the allocation of concessions

5. The allocation mechanism for concessions

According to the provisions of the law, the allocation of the concession of a good, activity or public service is carried out by means of opened public auction or public auction preceded by pre-selection, through direct negotiations, competitive dialogue or direct allocation.

The opened public auction is that when any natural or legal person of private law, Romanian or foreign, may present an offer.

The public auction preceded by pre-selection implies that natural or legal persons of public law, Romanian or foreign, which the conceder selects on the basis of previously established criteria, have the right to present offers. Pre-selection requests are assessed and the persons selected by the evaluation commission participate with offers in the auction.

In case no winner is named following the second public auction, the conceder shall decide upon initiating a direct negotiation procedure. Following this procedure, the conceder allots the concession to the natural or legal person of private law, Romanian or foreign, at his choice.

The conceder has the obligation of publishing in the Romanian Official Journal, Part VI, in a national and a local newspaper, in the Official Journal of the European Communities or/and in a largely spread international journal, the intention of following the direct negotiation or competitive dialogue procedure. The conditions of the direct negotiations concession cannot be inferior to those of the best rejected offer in the public auction.

The competitive dialogue is a recently introduced procedure, through the last completion of the concession law, which grants the contracting authority the possibility of initiating candidates consultations, with a view to develop one or more alternatives capable of meeting the contracting authority's requirements and on the basis of which the candidates are invited to bid. At the end of the competitive dialogue, the candidates are invited to submit the final offer on the basis of the solution identified during the dialogue. The transparency and equal treatment principles shall be observed. Prior to the privatisation of national or commercial undertakings, established through the restructuring of the "regies autonomes", these can be subject to concession through direct allocation of goods from the state public or private propriety, corresponding to the field of activity, for the setting up of new public infrastructure. At the privatisation of national or commercial undertakings established through the restructuring of the "regies autonomes", private investors are selected on the basis of a competitive procedure, as defined by the law. Public services operators with state capital can be privatised, this decision being taken by the local or regional council under the authority of which the respective operator carries out his activity. The privatisation, meaning the partial or total sale of private goods from the administrative territorial unity, is carried out through public auction exclusively, simultaneously with its concession.

6. Case study

As a practical example, we can present specific case of allocation of a concession in this field. In 2000, an international auction preceded by pre-selection was organised by the local council, according to the law. Prior to the auction, a reorganising, restructuring and privatisation plan of the respective "regie autonome" was elaborated, according to the provisions of EGO no. 30/1997, stipulating that the "regie autonome" was transformed in commercial undertaking (the local council being assisted by a specialised firm), the specifications and the concession contract between the municipality and the newly created commercial undertaking were elaborated, privatisation of the firm through share sale, implementation of the restructuring programme and the transfer to the private investor. A condition for the consultant was the

ensurance of the same consultants' core, led by a director in charge of the whole activity. The selection criterion was established as the minimum tariff of the services and the medium tariff for the offer, as stipulated in the Levels of general services and, as well as of a gradual and limited evolution of the tariff (at that precise moment) in the first years, up to the performance of some of the Levels of services.

After the winning of the action and the signing of the concession contract, the local council became shareholder for this firm, the concentration being previously notified. Since pre-selected firms participated in the auction, the process was competitive.

By now, the contract has not been re-negotiated. No clues or claims from other participants with regard to the carrying out of the auction, nor to a possible agreement between them (or part of them) to bring advantage to the winner were identified.

7. Investigations regarding allegations of collusive behaviour during auctions

By now, no investigations on the existence of supposed agreements between participants at auctions organised in the field of infrastructure concessions have been reported.

8. Joint bidding in auctions for infrastructure concessions

Undertakings may temporarily associate in order to participate in the auction. This joint bidding in auction for infrastructure concession has pro-competitive effects for small firms and anti-competitive effects whereas bigger firms are involved. Therefore, if a single firm meets all the requirements of the conceder, the temporary undertakings joint must be forbidden.

9. Clauses related to competition

Public administration authorities have the following obligations, with a view to ensure free competition, versus public services operators:

a) to apply an equal treatment to all operators and to ensure, through norms adopted in the execution of the prerogatives established through normative acts, a transparent business environment.
b) to ensure the advertising and free access to public information, mainly to information ensuring the preparation of the offers and participation at the action.
c) Public services operators have, among others, the following obligations:
d) Service management based on competitiveness and economic efficiency criteria (reducing operating costs, by means of implementation of the competition procedures stipulated by the legal acts in force inclusively, for the acquisition of works, goods and services).
e) Submission to the central or local public administration authorities, as well as to the regulating authorities, the requested information and to ensure the access to all necessary information for the assessment and evaluation of services performance, according to the concession contract provisions and the legal provisions in force.
f) Ensuring free access to that service for all consumers, in the same conditions.

10. Regulatory institutions for the concessioned infrastructures

All regulating authorities are organised, have functions and operate under the same principles. As an example, the regulatory authority in the field of municipal services, National Regulatory Authority for Municipal Services (hereinafter named NRAMS) is a public institution of national interest with legal personality and is organised and operates under the coordination of the prime minister, having as main objective the regulating, monitoring and control at central level of the activities in the field of municipal

services in its area of regulation, according to the law, and the authorisation of agents providing those services.

NRAMS performs its activity in order to ensure the promotion of the economic efficiency and of the market economy's mechanisms, the creation and the maintenance of a competitive environment, incentives for the access of private capital within the scope of public municipal services and the promotion of the delegated management forms and of the public-private partnership.

NRAMS is exercising its competences and attributions with all operators providing municipal services, as well as with the operators not subordinated to the local public administration authorities, according to the law, regardless of the propriety type, of their organisation and management of the municipal services.

NRAMS supervises the legality of the process delegation (mainly the carrying on of the auction) of the management of municipal services.

NRAMS elaborates and controls the implementation and the observance of the system of regulations, al national level, regarding the organising, coordination and functioning of the municipal services, as well as of these services' market in efficiency, free competition and transparency conditions, in view of meeting the consumers' needs, according to the European standards. Thus, NRAMS elaborates and sets for approval, through Government Decision, the Regulation on awarding licenses and authorisations in the municipal services sector and the Methodological norms on the calculation of tariffs applicable to public municipal products and services, approves and adjusts the price level and the tariffs of the municipal services, depending on the inflation, exchange rate, modification of production and distribution costs structure, as well as following the reorganisation of operators, supervises the observance by the public municipal services operators, as well as by the local administration authorities, of the legislation in this field and of the observance of prices and tariffs approved according to the normative acts in force, applies sanctions in case of non-observance of these rules, approves drafts of normative acts initiated by other central administration authorities, with effects on the activities in this field.

Ministry of Transport, Constructions and Tourism is the state authority in railway and naval transport area.

As a regulatory authority, it elaborates and promotes governmental decrees and specific provisions regarding the administration, utilisation and concession the railway and naval transport infrastructure and assures the state obligation fulfilment of international agreements to which Romania is a part.

The ministry is fulfilling its attributes directly, through special directions or by competence delegation, depending on the case, through public institutions, autonomous state owned company, national companies or firm placed under its authority or subordinated to it.

In the case of the railway and naval transport infrastructure, belonging to the public or private state domain, the ministry is awarding concession to the administrations organised as undertakings or national companies.

The local authorities (which awarded concessions) can establish non-profit autonomous non-governmental local public institutions, under its authorities, to monitor the fulfilment of the concession contract provisions during the operation of concessions (especially the accomplishment of the services levels to whom the concessionaire was obliged by him self), to perform the technical expertise to resolve the disputes between clients and concessionaire and decide in the matter of penalties.

11. Rules on pricing, coverage and quality standards

The basic principles regarding tariff, coverage and quality standards for the services are common to all economic activities sectors. Besides the authorities who award the concession, the law also empowers the sector regulatory authorities. Continuing the example from above, according to the regulations in this sector, the tariffs are established and adjusted only with the approval of NRAMS, based on the rules or formula established by the governmental decision at the initiative of the public authority that award the concession. The tariffs, including amounts designated to social protection granted by public authority who award the concession, must cover at list the expenses linked to the performed service, taxes, including a minimum agreed profit share, with the respect of financial autonomy of the operator. Tariffs adjustments are approved by the local council. In the case of the water and sewerage services, to maintain the concession contractual equilibrium, any subvention of the services will be approved by the local council, only if the operator reduces the tariffs and/or increase the quality of services.

The concession's contractual equilibrium is accomplished on the basis of the following principles:

a) periodic actualisation of the tariff correspondent to the public services performed according to inflation ratio;
b) the modification of the tariff in the situations of major contractual equilibrium changing.

Only the authorised/licensed operators can participate in the auction, in order to ensure a quality standard of the performed service. If the license or the authorisation expires or is lost, the concession contract will be repealed. If the quality standard of the performed service isn't achieved by the concessionaire, this can lead to penalties or to the redraw of the license/authorisation by the NRAMS, by the authority's request. Service levels are established progressive by the authority which award the concession, and refers to water quality delivered (it must reach the EU standards), improving the distribution, expand the coverage and assuring of a certain level of the water pressure, improving and expanding the sewerage system. The supervision of these service levels is assured continuous by the local council (directly or through an institution created by municipality with this purpose) and by the NRAMS, at the same time.

12. The access for non-integrated rivals to the concessioned infrastructures

According to the concession contract, the concessionaire has the right to directly exploit, on his own risk and responsibility, the goods, the activities and public services that are object of the concessions without being able to sub-concession to another person, in whole or in part, the concessioned object and he has the right to conclude contracts with third persons in order to ensure and valorise the exploitation of goods, activities and public services that are object of the concession according to the law, without being able to transfer them the rights acquired through the concession contract. Therefore, the law confers the concessionary an exclusive right to exploit on the whole duration of the contract.

Anyhow, in the field of rail infrastructure, the authority which grants the concession (The Romanian National Company CFR SA) offers the railway transport operators the public infrastructure, on non-discriminatory bases, according to the access contract, in exchange for the tariff of using the infrastructure. The establishing of the general framework for tariff and the use of the public railway infrastructure is based on the contract concluded by the national company that manages the infrastructure with the Ministry of Transportation, Constructions and Tourism (MTCT). In case of an un-interoperable railway infrastructure (low profitability railway sectors) the exploitation is also done by CFR by offering for lease, with the approval of the MTCT, of one or more circulation sections to one or more licensed juridical persons, in order to accomplish the services of managing the infrastructure, as well as the services of public railway transportation of freight and/or passengers, according to the law. The non-price conditions refer to the

combined or passenger railway transport development, in high safety conditions, to the maintenance and the repair of railway infrastructure and used rolling stocks as well as to the according of access of other railway operators to the mentioned sectors. Against the decisions of the CFR or if necessary against those of the railway transport operator, one can appeal at the Monitoring Council, within the MTCT.

13. Investigations regarding complaints of abuse of dominance by infrastructure concessionaires

We don't open investigations concerning the abuse of a dominant position by the infrastructure concessionaires.

RUSSIAN FEDERATION

1. Regulating concession agreements by the Government

1.1 Legislation on concession agreements

Until July 2005 legislation of the Russian Federation had not regulated the process of completing of concession agreements. In accordance with provisions of the Civil Code of the Russian Federation the parties of concession agreement have a full freedom in concession relations on any objects of concession.

In July 2005 new Federal Law of 21.07.2005 No 115-FL "On concession agreements" came into force. The aims of the Law are – attracting investments to the Russian economy, providing effective utilisation of the property being in public or municipal ownership on conditions of concession agreements and increase of the quality of goods, works, services granted to the consumers. Law on concessions have thoroughly regulated relations, arising in connection with preparation, completing, implementation and termination of agreements, stipulated guarantees of the rights and legal interests of the parties of a concession agreement.

Law on concessions regulates completing of concession agreements regarding determined objects of immovable property. In Russia there is no special law regulating concession agreements in a separate industry.

2. Definition of concession

According to concession agreement, one party (concessionaire) takes the commitment to establish or reconstruct at its own expense the immovable property determined by this agreement (object of the concession agreement), the right of property of which will be possessed by the other party (government), to perform the activity with the use (maintenance) of the object of concession agreement, and the government takes the commitment to grant to the concessionaire for the period stipulated by this agreement, the rights of possession and use of the object of concession agreement for performing the indicated activity. Reconstruction of the object of concession agreement includes activities on its rearrangement at the basis of introduction of new technologies, mechanisation and automatisation of the manufacture, modernisation and substitution of obsolete equipment, changing of technological and functional purpose of the object of concession agreement and its separate parts, other activities on enhancing characteristics and operational qualities of the object of concession agreement.

Concession agreement is a treaty, which contains elements of different agreements envisaged by federal laws. The rules of civil law on agreements, which elements are contained in concession agreement, are applicable to the relations of the parties of concession agreement in relative proportions if other rules are not applicable under the Federal law or the contents of concession agreement.

3. Parties to concession agreement

Government – Russian Federation, on behalf of which the Government of the Russian Federation is acting, or the authorised federal executive power body, or the subject of the Russian Federation, on behalf

of which the federal executive body of the subject of the Russian Federation is acting, or municipal authority, on behalf of which local government is acting;

Concessionaire - individual entrepreneur, Russian or foreign legal person or two and more stipulated legal persons acting without establishing of legal person according to the agreement of a simple association.

Objects of concession agreement:

- Motorcar roads and engineer constructions of the transport infrastructure as well as bridges, overpasses, tunnels, vehicle parking places, vehicle check-points, points of charging fees from the owners of freight vehicles;
- Objects of railroad transport;
- Objects of pipeline transport;
- Sea and river ports, as well as hydrotechnic port installations, objects of their production and engineer infrastructures;
- Sea and river vessels, ships of mixed navigation (river-sea), as well as ships of ice-breaker building, hydrografic and science-research activity, ferry docks, floating and graving docks;
- Aerodromes or buildings and (or) constructions designed for take-off, landing, taxing operating and parking of aircrafts;
- Objects of production and engineer infrastructures of airports;
- Objects of unified system of organisation of air traffic;
- Hydrotechnic constructions;
- Objects on production, transmission and dissemination of electric and heat energy;
- Systems of public utilities infrastructure and other objects of public utility, as well as objects of hydro-, heat-, gas- and electric supply, drainage system, water treatment, processing and utilisation of domestic waste, objects designed for lighting of city and countryside territories, objects designed for the accomplishment of territories;
- Underground and other public transport;
- Objects used for executing preventive medical measures, recreation and tourism for citizens;
- Objects of health protection, education, culture and sport and other objects of social-culture and social-domestic purpose.

Mandatory conditions of concession agreement:

- Object of concession agreement subject to reconstruction, at the moment of signing the concession agreement should be in the ownership of the government and be free from the rights of third persons;

- Changing of the purpose of reconstructed object of the concession agreement is not allowed;

- Pawning or amortisation of the object of concession agreement from the party of concessionnaire is not allowed;

- Output and revenue, received by the concessionnaire as the result of the activity envisaged by the concession agreement, are the ownership of the concessionnaire, if the concession agreement does not stipulate otherwise;

- Concessionnaire carry the risk of the accident destruction or accident of the object of concession agreement if another is not stipulated by the concession agreement. Concession agreement charge the concessionnaire to insure the object of concession agreement at its own expense;

- The property created or obtained by the concessionnaire when performing the concession agreement and being not the object of concession agreement is the ownership of concessionnaire, if another is not stipulated by the concession agreement;

- Exclusive rights for the results of intellectual activity, obtained by the concessionnaire for its own expense when performing the concession agreement belong to the government, if another is not stipulated by the concession agreement;

- Concessionnaire carry out all expenses for the fulfilment of obligations under concession agreement, if another is not stipulated by the concession agreement;

- The government has a right to take a part of expenses for the establishment and (or) reconstruction of the object of concession agreement and present the guarantees to the concessionnaire;

- Others.

Sanctions applied to the infringers of concession agreements:

- The parties of concession agreement carry property responsibility for non-performance or undue performance of its obligations under concession agreement, envisaged under the Law on Concessions, other federal acts and the concession agreement itself.

- The Concessionnaire carry responsibility for the infringement of requirements, stipulated by the concession agreement, and (or) requirements of technical regalement, project documentation, other obligatory requirements to the quality of established and (or) reconstructed object of concession agreement. In case the named requirements are violated, the Government has a right to apply for free of charge elimination of the violation during the period stipulated by the Government.

- If the violation was not eliminated during reasonable period or the violation is substantial, the government has a right to demand the payment of damages (compensation paid).

- The concessionnaire carry responsibility for the quality of the object of concession agreement during 5 years from the date of transferring the object to the government, if any other term is not stipulated by the agreement.

Guarantees of the equality of rights of concessionnaires when setting conditions of placing the concessions:

- Equal rights, envisaged by the law of the Russian Federation, legal conditions of work, excluding applying of discriminative and other measures, preventing concessionnaires to freely dispose investments and products and revenues, obtained in the result of the activity under concession agreement are guaranteed to the concessionaires, as well as concessionaires – foreign legal persons.

The role of antimonopoly body when choosing conditions of placing the concessions:

- In case the government or tender commission stipulate discriminative conditions to the concessionaires or give advantageous conditions of participation in the tender for separate participants of the tender, antimonopoly body apply sanctions to violators and binds to eliminate infringements.

- In case the concessionaire stipulates discriminative conditions of access to infrastructure objects of the concession agreement for the consumers, antimonopoly body apply sanctions to the concessionaire, binds it to eliminate violations and provide non-discriminative access to the objects.

Tender for the right to conclude the concession agreement:

- Tender for the right to conclude concession agreement may be public or indoor (private). Indoor tender is held in case if the concession agreement is concluded relating to the object of the concession agreement, information about which is of state secret.

- When holding the public tender, information about holding the tender is placed at the web-page of the government as well as published in official printed mass media. The Government of the Russian Federation determines the web-page, where the information on holding the public tenders is placed.

- Preliminary selection of participants of the tender is held by tender commission, which considers:

  – conformity of the application for participation in the tender with requirements containing in the tender documentation;

  – conformity of the applicant with the requirements containing in the documentation.

- Tender documentation should not contain requirements to the participants of the tender, which baselessly restricts access of any of participants of the tender to participation in the tender and (or) creating advantageous conditions of participation in the tender to any of the participants of the tender.

- Criteria of the tender may be the following:

  – time constraints for establishing and (or) reconstruction of the object of a concession agreement;

- period from the day of signing of concession agreement till the day when created and (or) reconstructed object of concession agreement will conform the stipulated technical-economic indicators of the concession agreement;

- technical-economic figures of the object of concession agreement;

- volume of manufacturing the goods, doing works, rendering services when performing the activities, envisaged by a concession agreement;

- period from the day of signing of concession agreement to the day when manufacturing the goods, doing works, rendering services when performing the activities, envisaged by a concession agreement will be executed in the scope, stipulated by the concession agreement;

- amount of concession payment;

- marginal prices (tariffs) for manufactured goods, works done, services rendered, additions to such prices (tariffs) when performing the activities, envisaged by a concession agreement;

- Consideration and evaluation of tender offers are performed by the tender commission, which determines the conformity of a tender offer to the tender criteria and makes a comparison of conditions containing in tender offers with the view to define the winner of the tender.

- Participant of the tender, which have presented the best conditions of concession agreement performance in accordance with the criteria of the tender becomes the winner of the tender.

- Tender commission is obliged to publish a message on results of holding the tender indicating the name of the winner in an official edition and place this message at official web-page in Internet during 15 working days from the day of signing of the protocol on results of holding the tender.

- Concession agreement should be signed not later than in 90 working days since signing of the protocol on results of holding the tender. Concession agreement is concluded in writing form and comes into force since the day of its signing.

Requirements to the prices and quality of the services, rendered by infrastructure:

- Concession agreement stipulates:

  - Volume of goods manufacture, doing works, rendering services when performing the activities, envisaged by a concession agreement;

  - Period from the day of signing of concession agreement to the day when manufacturing of the goods, doing works, rendering services when performing the activities, envisaged by a concession agreement will be executed in the scope, stipulated by the concession agreement;

  - Marginal prices (tariffs) for manufactured goods, works done, services rendered, additions to such prices (tariffs) when performing the activities, envisaged by a concession agreement;

- Marginal prices (tariffs) for electric and heat energy, gas supplied by the infrastructure, are fixed by authorised state executive power bodies.

- Marginal prices (tariffs) for water supplied by the infrastructure are fixed by authorised state executive power bodies.

- Requirements for the quality of electric and heat energy, gas, water is fixed by authorised state executive power bodies.

Infringement of pricing and non-pricing conditions of access to the concession infrastructure

- When infringing the rules of pricing for goods, works, and services for which marginal prices (tariffs) are fixed by authorised executive power bodies and authorised institutions of local governing, the named state power bodies and local governing, as well as antimonopoly body apply sanctions and obliges to remove infringements.

- Free access with non-discriminative conditions should be provided to the objects of infrastructure.

Cases of investigation of claims regarding abuse of dominant position by concessionaires

None.

TUNISIA

1. Introduction

Concessions: a method of managing infrastructure and public services that has been used only recently in Tunisia

A concept introduced in connection with the reforms and liberalisation of the economy as a result of:

- The withdrawal of the State from certain sectors in order to promote competition.
- Problems with the management of State-owned enterprises.
- Pressure on public finances.
- Macro-economic imbalances (dating from the 1980s).

2. Objectives

- To improve the efficiency and competitiveness of the economy.
- To improve the quality of public services.
- To control production costs and operating costs (reduce subsidies and improve productivity).
- To attract foreign direct investment (FDI).
- To acquire modern technologies and management methods.
- To reduce the budget deficit and public debt.
- To develop less costly and easier methods of privatisation (avoid discontent).
- To create a dynamic reference model for competition.

3. The Regulatory framework for concessions

- Is being developed in the wake of privatisation.
- Is governed by the principles of ordinary law and public law.
- Does not include specific regulations for concessions, but comprises.

3.1 Sectoral regulations

- Telecommunications (code).
- Transport (laws, decrees);
- Electricity (laws, decrees).
- Postal services (code).
- Port services and solid waste management.
- A broad variety of regulatory texts, such as laws, decrees, orders, specifications, agreements.

3.2 Requirements that vary depending on the purpose, sector and nature of the concession

- Duration of concession.
- Amount of investment.
- Universal service.
- Fees, rates, prices.
- Job creation.
- Terms of financing.
- Partnership/outsourcing;
- Technical requirements.

3.3 Types of concessions

- Public domain concession: right to occupy and operate public property: motorways, ports, car parks, spas, etc..
- Public service concession: electricity production, mobile telephony, public transport.
- Delegation of public services to public agencies and enterprises:
  - Registration and regulation of motor vehicles.
  - Parking management.
  - Environmental protection.
  - Health care institutions.
  - Outsourcing of public services: waste collection, cleaning, catering in hospitals and universities.

3.4 A comprehensive regulatory system is being prepared

- In the light of the experience gained in the field of concessions.
- In the interest of uniformity.
- In response to problems with awarding concessions (criteria).
- Because of confusion regarding public procurement rules.
- In order to ensure transparency and protect managers.

4. Methods of awarding concessions

4.1 Principle

Ensure that concession holders are selected competitively, while taking into account:

- Sectoral specificities.
- The fact that it must be possible, and is sometimes necessary, to renegotiate concessions.
- The need to make individual arrangements if there are no bidders or if competition is impossible.

4.2 Criteria for choosing concession holders

- Technical capacity to honour commitments (references).
- Amount of bid (licensing fee).
- Compliance with tender specifications.
- Possibility of outsourcing.
- Proposed pricing (adjustment formula, level):
  - Establishment of a technical selection commission (IPP) and an oversight commission.
  - Choice submitted to the government for decision.

5 Examples of concessions granted

5.1 Telecommunications

- Enactment of a telecommunications code.
- Granting of a concession to a second mobile telephone operator.
- Creation of a national regulatory authority for telecommunications (INT).
- Creation of a National Frequencies Agency (ANF).

- Granting of a mobile telephone concession through competitive tendering in 2000:
  - Pre-selection procedure.
  - Negotiation with bidders (3 bids).
  - Selection of Orascom (Egypt, 2002).
- Creation of Tunisian by Orascom, 11 May 2002, with share capital of TND 330 m.
- Increase in network capacity and satisfaction of demand (number of mobile telephone subscribers in 1998: 30 598; in 2005: 4 000 000):
  - Lower rates.
  - Diversification and improvement of services.
- Introduction of a dynamic of competition within the sector.
- Important role of the regulatory authority (interconnection, numbering, pricing).
- Foreseeable role of the competition authorities (revision of the Act on Competition and Prices in July 2005 to specify methods of co-ordination with the regulatory authorities in order to resolve problems of competition in the sectors concerned).

5.2 Electricity and gas sector

- Monopoly by a State-owned enterprise (STEG).
- In 1996, a law was passed authorising the granting of concessions for electricity production by private entities.
- Selection of concession holders made through consultation after a pre-qualification phase.
- Tender requirements are set by a Higher Commission for Electricity Production chaired by the Prime Minister. This same commission chooses the winning bidder on the proposal of the Inter-departmental Electricity Commission.
- The Ministry of Industry and Energy is responsible for concluding the contract after negotiations with the concession holder.
- Two private foreign companies have already been granted concessions and are now producing over 24% of the country's electricity needs.
- Investment of $290 m ($210 m for the Rades II power plant with a 470 MW capacity and $23 m for the Zarzis power plant with a 27 MW capacity).
- Transmission and distribution remain a monopoly of STEG.
- No regulatory authority; conflicts submitted to the Ministry and/or government.

5.3 Other successful concessions

- Construction and management of motorways.
- Public transport in major cities.
- Construction and management of a new airport in Enfidha (under construction).

6. The role of the competition authorities

6.1 When concessions are awarded

The competition authority gives its opinion on proposed sectoral legislation and regulations and advises operators regarding the rules and principles of competition, and it makes spot checks of compliance with these rules and principles.

The opinions and advice of the competition authority frequently concern the following:

- The need to ensure that transactions are transparent and fair.
- The promotion of competition and greater awareness of how it can benefit all concerned and protect their respective interests.
- Means of reducing barriers and requirements so that they do not cause prices to rise or deter bidders.
- Ways of preventing rent-seeking in the future.

6.2 Ensuring competition during the concession

- Concessions are subject to competition regulations (Section 5 of Act 64-91 on Competition and Prices).
- Abuse of dominant position, abuse of economic dependence and discriminatory practices are prohibited.
- Concession holders and users (consumers) can bring cases involving anticompetitive or restrictive practices before the Ministry of Commerce (DGCEE) or the Competition Council.
- The regulatory authority and the responsible ministry monitor the parties' compliance with rules and requirements so as to ensure a competitive and transparent environment, which is a prerequisite for granting a concession.
- The competition authority can intervene on its own initiative at any time (in response to information received, an investigation, etc.).

7. Conclusion

Limitations of the concession approach:

- Risk of rent-seeking after the concession has been obtained:

  - Increase in rates.
  - Ways of operating that are not always compatible with competition.

- Possible abuse by the government or historic operator when there is no independent regulator.
- Limited development because of a situation of economic dependence or the size of the market.
- Risk of influence-peddling and favouritism.
- Risk of deterioration in the quality of public service when there is no monitoring of compliance with commitments or there are no regulatory authorities.

TUNISIE

1. Introduction

Les concessions, mode de gestion des infrastructures et des services publics sont d'utilisation récente en Tunisie.

Concept introduit dans le cadre des réformes et de la libéralisation de l'économie suite :

- Au désengagement de l'État de certains secteurs en vue de promouvoir la concurrence.
- Aux problèmes de gestion des entreprises publiques.
- A la pression sur les finances publiques.
- Aux déséquilibres macro-économiques (des années 80).

2. Objectifs recherchés

- Améliorer l'efficacité et la compétitivité de l'économie.
- Améliorer la qualité des services publics.
- Maîtriser les coûts de production et les frais de fonctionnement (réduire les subventions et améliorer la productivité).
- Attirer les investissements directs étrangers (IDE).
- Acquérir les technologies et les modes de gestion modernes.
- Alléger le déficit budgétaire et l'endettement public.
- Modalités de privatisation moins coûteuse et plus facile (éviter les mécontentements).

3. Cadre réglementaire de la concession

- S'inscrit dans le sillage de la privatisation.
- Régie par les principes de droit commun et de droit public.
- Absence d'une réglementation spécifique de la concession, mais :

3.1 Existence des règlementations sectorielles

- Télécommunication (code).

- Transport (lois, décret).
- Électricité (lois, décrets).
- Poste (code).
- Services portuaires et gestion des déchets solides.
- Textes très variés : Lois, décrets, arrêtés, cahiers de charges, conventions.

3.2 Obligations variables selon l'objet, les secteurs et la nature de la concession

- Durée de la concession.
- Montant de l'investissement.
- Service universel.
- Redevances, tarifs, prix.
- Création d'emploi.
- Modalités de financement.
- Partenariat / sous-traitance.
- Prescriptions techniques.

3.3 Les formes de concessions

- Concession de domaine public : droit d'occuper et d'exploiter le domaine public : autoroutes, ports, parkings, stations thermales…
- Concession de services publics : production d'électricité, téléphone mobile, transport public.
- Délégation de services publics à des agences ou entreprises publiques :
  - Immatriculation et gestion du parc automobile.
  - Gestion de stationnement des voitures.
  - Protection de l'environnement.
  - Établissements de santé.
  - Sous traitance de services publics : collecte de déchets, nettoyage, restauration dans les hôpitaux et les universités.

3.4 Une réglementation d'ensemble est en cours de préparation

- A la lumière de l'expérience dans le domaine des concessions.
- Dans un souci d'uniformisation.
- Suite aux problèmes d'attribution (critères).
- Confusion avec les règles des marchés publics.
- Garantir la transparence et protéger les gestionnaires.

4. Modes d'attribution

4.1 Principe

Faire jouer la concurrence pour le choix du concessionnaire toutefois :

- Spécificités sectorielles.
- Renégociation possible parfois obligatoire.
- Gré à gré en cas d'absence de candidat, ou de concurrence.

4.2 Critères et choix de concessionnaire :

- Capacité technique d'honorer les engagements (références).
- Offre financière (redevance).
- Conformité aux cahiers des charges.
- Possibilité de sous-traitance.
- Offre de prix (formule de révision, niveau) :
  - Constitution d'une commission technique de sélection (IPP) et commission supérieure.
  - Attribution soumise au gouvernement pour décision.

5. Exemples des concessions accordées

5.1 Télécommunications

- Promulgation d'un code des télécommunications.
- Octroi d'une concession à un deuxième opérateur de téléphone mobile.
- Création de l'autorité nationale de régulation des télécommunications (INT).
- Création de l'agence nationale des fréquences (ANF).

- Octroi d'une concession de téléphone mobile par appel à la concurrence en 2000 :
  - Procédure de présélection
  - Négociation avec les soumissionnaires (3 offres).
  - Choix porté sur Orascom (Egypte en 2002)
- Création de Tunisian par Orascom, le 11 mai 2002 avec un capital de 330 MD.
- Augmentation de la capacité du réseau et satisfaction de la demande (nombre d'abonnées de la téléphonie mobile en 1998 : 30.598, en 2005 : 4.000.000) :
  - Baisse des tarifs.
  - Diversification et amélioration des services.
- Introduction d'une dynamique de concurrence dans le secteur.
- Rôle important de l'autorité de régulation (interconnexion, numérotation, tarification).
- Rôle prévisible des autorités de la concurrence (révision de la loi sur la concurrence et les prix en juillet 2005 pour prévoir les modalités de coordination avec les autorités de régulation pour résoudre les problèmes de concurrence dans les secteurs concernés).

5.2 Secteur d'électricité et du gaz

- Monopole d'une entreprise publique (STEG).
- En 1996, une loi a été promulguée autorisant l'octroi de concession pour la production de l'électricité par les personnes privées.
- Choix des concessionnaires effectué par consultation précédé d'une phase de pré qualification.
- Conditions d'appel d'offres fixées par une commission supérieure de production d'électricité présidée par le Premier Ministre. Cette même commission choisit l'adjudicataire sur proposition d'une commission interdépartementale d'électricité.
- Le Ministère de l'Industrie et de l'Énergie est chargé de la conclusion du contrat après négociations avec le concessionnaire.
- Déjà deux sociétés privées étrangères ont bénéficié de concession, elles produisent plus que 24% des besoins du pays en électricité.
- Investissement réalisé de 290M$ (210 M$ pour la centrale de Radés II d'une capacité de 470 MW et 23 M$ pour la centrale de Zarzis d'une capacité de 27 MW)
- Transport et distribution demeurent monopole de la STEG.
- Pas d'autorité de régulation, conflit soumis au Ministère et/ou gouvernement.

5.3 Autres concessions réussies

- Constructions et gestion des autoroutes.
- Transport en commun dans les grandes villes.
- Construction et gestion d'un nouveau aéroport à Enfidha (en cours).

6. Rôle des autorités de concurrence

6.1 En cours d'attribution

L'autorité de la concurrence donne son avis sur les projets de législation ou des réglementations sectorielles et fait des observations pour rappeler les opérateurs concernés les règles et principes de la concurrence, elle procède à des contrôles pour vérifier le respect de ces règles et principes de la concurrence.

Les avis et observations de l'autorité de la concurrence concernent souvent :

- Le respect de la transparence et la loyauté des transactions.
- Incitation à la promotion de la concurrence et sensibilisation aux avantages qu'elle procure aux différents intervenants et à la sauvegarde de leurs intérêts respectifs.
- Allégement des obstacles et des obligations de manière à ne pas entraîner une augmentation des prix ou écarter des soumissionnaires.
- Éviter des situations de rente dans le futur.

6.2 Garantir la concurrence pendant la concession

- Les concessions sont soumises à la réglementation de la concurrence (article 5 de la loi 64-91 relative à la concurrence et aux prix) ;
- L'abus de position dominante, de dépendance économique et les pratiques discriminatoires sont interdites.
- Les concessionnaires et les usagers (les consommateurs) peuvent saisir le ministère du commerce (DGCEE) ou le conseil de la concurrence des cas de pratiques anticoncurrentielles ou de pratiques restrictives.
- L'autorité de régulation ainsi que le ministère de tutelle veillent au respect des règles et obligations des parties pour garantir un environnement concurrentiel et transparent, condition préalable de l'octroi de concession.
- L'autorité de concurrence a toujours la possibilité d'intervenir par sa propre initiative (suite information reçue , enquête…).

7. Conclusion

Limites de la formule de concession :

- Risque de situation de rente après l'obtention de la concession.
  - Augmentation des tarifs.
  - Formes d'exploitation non sanctionnées toujours par la concurrence.
- Abus possible de l'administration ou de l'opérateur historique en cas d'absence de régulateur indépendant.
- Limite de développement dû à la situation de dépendance économique ou à la dimension du marché.
- Risque de pouvoir d'influence et de favoritisme.
- Risque de détérioration de la qualité de service public en cas d'absence de contrôle du respect des engagements et de l'absence des autorités de régulation.

TURKEY

İzmir, Mersin, İskenderun, Derince, Bandırma and Samsun ports[1] operated by TCDD (The State Railway Company, General Directorate of the State Railway Administration of Turkey) have been included in the privatisation programme by the Privatisation High Council (PHC)[2] in 2004. Their privileged geographical location, their connection to highways and railways unlike other ports, the size of investments they have concerning infrastructure and superstructure and largeness of their back spaces bring these ports to a position that has de facto concession. Moreover, Mersin, İskenderun and Bandırma ports have legal concessions to offer pilotage and towage to neighbouring ports. Privatisation in Turkey with respect to ports is a partial privatisation (landlord port model) in the sense that at the end of the bidding process a contract to transfer the right to operate the port is signed and this contract is a concession contract whereby the government transfers operating rights to private parties while keeping the ownership of the assets including the land.

The basic targets in privatisation of ports via contracts to transfer the right to operate the ports are that the projects including necessary investments could not be realised due to various reasons such as absence of bidders in tenders for projects regarding specific ports, delays in tenders, court decisions etc, that the ports became far from being functional in the face of increasing volume of trade due to deficiencies[3] in the management of TCDD. Therefore, privatisation has been seen as an opportunity to realise necessary investments. For instance, the contract to transfer the right to operate Mersin port requires the operator to realise compulsory investments within the first five years. As a result, the main objectives regarding privatisation of ports are to realise the investments, bring efficiency and provide rapid high quality service.

With respect to supervision, TCDD tries to carry out all operational activities and managerial transactions and it is known that they can not be done in an efficient manner.[4] It is not realistic to expect a

1 Haydarpaşa is another port operated by TCDD and it will be closed and therefore it is excluded from the privatisation coverage.

2 The decisions of Privatisation High Council are executed by Privatisation Administration.

3 Due to deficiencies in TCDD management, congestion has been experienced in İzmir port which complicated the realisation of port operations. As a result of congestion, congestion premium began to be implemented for shipments to Northern Europe, Ireland, Scandinavia and England that was expanded to America with increase in freight. It was suggested by International Freight Forwarders Association of Turkey that the congestion premium would create an additional €38 million cost for Turkish import and export if the congestion would continue in İzmir port. Although these problems are partially caused by lack of investments, the functionality of the port decreases day by day due to inefficient management of TCDD and absence of necessary computer systems and computer programs.

4 Port activities can be examined under two headings that are public and commercial and subtitles cover ownership (administration of immovable properties within the port, development in the long term, maintenance etc.), planning (preparing master plan and improving the initial project, expansion, new projects/terminals etc.), marketing and promotion (commercial duties, attracting new customers to the port etc.), provision of freight handling service (storage, distribution etc.), provision of ancillary services (fuel supply, information system, insurance, banking etc.), regulatory activities (regulations and their implementation, monitoring compliance with regulations, security, environment, safety etc.), supply of maritime services (duties of harbour master, coordination of maritime services etc.).

single unit to assume performance of various and different duties. There is not a central body to provide supervision and regulation of ports or a port authority to oversee public benefits specifically for ports. General Directorate for Construction of Railways, Ports and Airports under Ministry of Transport (DLHİ), Ministry of Transport, State Planning Organisation and Ministry of Finance have powers regarding investments, Undersecretariat for Maritime Affairs regarding maritime services, Ministry of Public Works and Settlement and municipalities regarding development of ports. For instance, with respect to İzmir port, infrastructure is carried out by DLHİ, superstructure and tariff setting by TCDD, pilotage and towage services by Turkish Maritime Organisation Inc (TDİ), services for ship and freight by Directorate of Port within TCDD. Tariff settings, services for ships and freight that can be subject to competition are performed by TCDD and Directorate of Port within TCDD.

With respect to privatisations, the Competition Board, the decision taking body of the Turkish Competition Authority (TCA), has a dual function that can be summarised by citing Articles 3 and 6 Communiqué Regarding the Methods and Principles to be Pursued During the Course of Pre-Notifications and Applications for Authorisation Made to the Competition Authority in order to Acquisitions via Privatisation to Judicially be Valid Communiqué No: 1998/4 (the Communiqué).

Article 3 provides that "For procedures of acquisition via privatisation under the scope of this Communiqué, in the case where the market share of the undertaking to be privatised or the unit aiming at producing goods and services at the relevant market exceed 20% or where the turnover of the same undertaking or unit exceed 20 trillion Turkish Liras or even though the aforesaid limits are not exceeded, but where the undertaking to be privatised does have judicial or de facto privileges, it is necessary to make a pre-notification to the Competition Authority before tender conditions are announced to the public **in order to evaluate the results of such privatisation in the relevant market, the condition of judicial or de facto privileges –if any- of the undertaking to be privatised after privatisation** and it is necessary to take the view of the Competition Board which shall be taken as the basis in the preparation of tender conditions document."

Article 6 provides that "Application for Authorisation to the Competition Authority shall be after the tender procedure is finalised and but before the decision of Privatisation High Council, regarding the final acquisition procedures of the undertaking or the unit (aiming at the production of goods and services) to be privatised, in the form of independent files for each bidder taking part in draft resolution of the Privatisation High Council submitted by Privatisation Administration to Privatisation High Council. To such an extend that, in case the number of bidders in draft resolution is more than three, authorisation application for other bidders cannot be made before Competition Board Resolutions regarding the first three bidders' acquisition procedures are not notified to Privatisation Administration."

For the sake of convenience, pre-notification stage can be called as Phase I, whereas second stage as regulated in Article 6 may be named Phase II.

1. Phase I

It is compulsory to mention following explanations to explain the position of the Competition Board in the privatisation of the ports.

While operated by TCDD, the ports are structured as state service port or tool port. They will become landlord ports after transfer of the right to operate. TCDD performs its transactions without the need for any regulations due to its monopoly right under current structure and in previous periods competition infringements are known issues due to the operation of private undertakings in handling in port quays and absence of supervision in TCDD contracts for the purchase of service the subject of which is only to carry out the service for the purpose of carrying freight inside the port (limbo). In the next step to liberalise the

mentioned service, that is the landlord model, the state transfers all commercial activities to private undertakings with the exception of ownership. The need for necessity of regulation will be more obvious at this stage.

In the absence of a port authority responsible for supervision and regulation of port services after privatisation the responsibilities and powers of which are defined and officials of which are determined, establishing intra-port competition via dividing on the basis of terminal becomes a necessity because inter-port competition is absent due to absence of short and medium term alternatives for some ports in geographic regions that these ports are located, whereas there is no need for any structural regulations for some other ports after taking into account the geographical market conditions (inter-port competition, existence of alternative supply resources, regional investments towards ports that can be realised by private sector initiative).

Having taken into account these explanations regarding Phase I for privatisation of ports operated by TCDD as a monopoly, the Competition Board formed its opinion regarding İzmir, Mersin, İskenderun, Samsun, İzmit Derince and Bandırma ports and sent it to Privatisation Administration. The Opinion can be summarised as follows.

1.1 Concerning the privatisation of İzmir port

- With the aim to avoid creation of dominant position after privatisation in the field of provision of container handling service in the port, to assist in formation of prices of services in market conditions with competition it will create and to provide efficiency of services; the area used for container handling and the back space should be privatised by splitting them into two in a form that the area consisting of three quays and 10 terminals (4-3-3) should not violate the totality of the other two quays and that two separate undertakings would be enabled to provide services through offering one quay to operation by a separate undertaking.

- There is no disadvantage in offering the operation of the quay reserved for handling conventional cargo and its back space with the quay for passenger ship and its facilities to the same undertaking and/or association of undertakings and therefore the quays, back space and facilities under consideration can be privatised together.

1.2 Concerning the privatisation of Mersin port

- To ensure that the quays reserved for container handling and their back spaces are not within the control of a single undertaking; quays numbered 7-8-9-10-11 with quays numbered 12-13 should be privatised as a package with their back spaces in a way that totality of the container quays are not violated; and quays numbered 20-21 and their back spaces with the quay adjacent to the area used by Coast Guard concreting and dredging of which have been completed should be privatised as a separate package to put them under operation of two different undertakings and/or association of undertakings.

- There is no disadvantage in offering the operation of the quays reserved for handling conventional cargo and their back spaces with the quay for passenger ships and its related facilities to the same undertaking and/or association of undertakings and therefore they can be privatised together.

1.3 Concerning the privatisation of İzmir and Mersin ports

- In the privatisation of container handling areas in İzmir and Mersin ports, because if the right to operate container quays is acquired by the same undertaking (or by the undertaking that is within the same economic group) and/or associations of undertakings, a dominant position would have been created in favour of the mentioned undertaking and/or association of undertakings in the market of Republic of Turkey, İzmir and Mersin ports should not be given under the operation of an undertaking in the same economic group and/or associations of undertakings.

- However, regarding the sections for container handling to be formed by dividing İzmir port into sections, there is no disadvantage in

  - acquisition of the rights to operate the quays terminal number of which is relatively little among container handling sections already set up in Mersin port by the undertaking and/or associations of undertakings who acquired the rights to operate the quays terminal number of which is relatively more among sections to be formed for container handling in İzmir port

  - acquisition of the rights to operate the quays terminal number of which is relatively more among container handling sections already set up in Mersin port by the undertaking and/or association of undertakings who acquired the rights to operate the quays terminal number of which is relatively little in sections to be formed for container handling İzmir port

  - acquisition of the rights to operate quays in both ports terminal number of which is relatively little by the undertaking that is within the same economic group and/or association of undertakings

- In case there are shipping agencies and/or liners and those that are in the same economic group with them among each of undertaking and/or associations of undertakings that will acquire the right of operation of the quays terminal number of which is relatively more in container handling units set up in İzmir and Mersin ports, the undertakings of the mentioned nature should not either alone or together have the instruments that provide direct or indirect control of undertaking/associations of undertakings that will acquire the rights to operate.

1.4 Concerning the privatisation of İskenderun, Bandırma and Derince port

There was nothing to mention at the stage of pre-notification according to Article 3 of the Communiqué No: 1998/4.

1.5 Concerning the privatisation of İskenderun and Mersin ports

There is no disadvantage in acquisition of the right to operate İskenderun port by undertaking and/or associations of undertakings that will acquire the right to operate anyone of the container handling units divided into sections in Mersin port.

1.6 Concerning the privatisation of Samsun port

- To avoid a vertical integration that has the potential to prevent competition;

  - the right to operate Samsun port should not be transferred to

– undertaking and/or associations of undertakings that deal in ro-ro liner any consortium in which undertaking and/or association of undertakings that deal in ro-ro liner have instruments that directly or indirectly provide the right to control.

2. Phase II

Phase II has been complete only for Mersin and İskenderun ports. Before granting the decision of the Board in Phase II regarding Mersin and İskenderun ports, following explanations should be given.

Regarding transfer of the right to operate Mersin and İskenderun ports, the contract for the transfer provides that price tariffs should be those currently applied by TCDD till the end of the next three years beginning from the date of signature of the contract. Other matters should be under the control of the prospective port operator. However, after three years, due to absence of port authorities in Turkey to supervise port services and pricing, there are concerns that conduct that may be subject of Article 4 regarding agreements, concerted practices and decisions limiting competition and Article 6 concerning abuse of dominant position of the Law on the Protection of Competition No 4054 (Competition Law/Law No 4054) may occur. Therefore, there are fears that the parameters which are main subjects to competition will not totally be determined under free market conditions after privatisation.

In the contract to transfer the right to operate Mersin port following privatisation, there is a provision aiming to prevent abuse of dominant position (prohibition of discrimination, excessive price and limitation of supply) that is very important both for undertakings operating in the relevant and neighbouring markets and for the security of the sectors benefiting from externality of port services. The authority mainly responsible to supervise the provision is TCDD. However, the problem is that the boundaries of the powers assigned to TCDD via such contracts are not clear. For instance, it is emphasised that the level of TCDD official to conduct the examinations regarding subjects that TCDD are responsible for, their powers to intervene immediately against the prospective operator of the port and to stop the act or acts contrary to the Law (for instance violation of non-discrimination obligations by port operator through favouring some groups for approaching the quay without following the ship waiting order) should be clarified.[5] Moreover, that the section to be allocated to the officials and the administrative costs are being provided by the port operator does not seem to be measures to remove the concerns regarding the existence of the state in the ports for the purpose of supervision. Although Law No 4054 can be seen as a precaution against such conduct, the market is dynamic and requires immediate intervention against anti-competitive conduct that can not be satisfied by long periods for finalisation of administrative transactions in the Law No 4054. Therefore, unambiguous ex-ante determinations may be more meaningful than ex-post interventions.

With these explanations in mind, when successful bidders were sent to the Competition Board, it ruled that anyone of the successful bidders could acquire the right to operate Mersin port for 36 years and as a result the bidder, PSA-AKFEN Joint Venture, who offered the highest bid, would acquire that right after the transaction is realised. The Competition Board, in contrast to its Opinion requiring privatisation disallowing a single undertaking to obtain the right to operate Mersin port, allowed acquisition of the right by PSA-AKFEN Joint Venture. The permission was granted by the Competition Board because of the existence of provisions in the contract for transfer of the right to operate Mersin port including compulsory investments within the first 5 years that will increase container handling performance 2.25-3.2 times, performance criteria to be satisfied while compulsory investments are done in order to avoid failure in services given in the port, provisions prohibiting abusive practices such as discrimination, excessive prices and limitation of supply, reporting of port activities annually by separation of costs, responsibility given mainly to TCDD to oversee compliance with these obligations which gives the impression that a structure similar to a port authority is tried to be set up. Moreover, the contract includes provisions regarding quality

[5] It is expected that such ambiguities will be clarified for prospective privatisations in the short term.

of the service, its duration, criteria to assess the efficiency, and minimum amount of handling that will be controlled by TCDD and other governmental bodies.[6] The Competition Board was convinced that these provisions in the contract would substitute the expected benefits of establishing intra-port competition as foreseen in its Opinion in Phase I. Actually the Opinion of the Competition Board in Phase I favouring creation of intra-port competition was due to the initial strict attitude of the Privatisation Administration that no regulatory arrangements could be done in ports.

However, when PSA-AKFEN Joint Venture submitted the highest bid for the right to operate İskenderun port, the Competition Board has decided that transfer of the right to operate İskenderun port which is within the same geographic market and shared back spaces with Mersin port should not be permitted because it would strengthen PSA-AKFEN Joint Venture's dominant position if it would acquire Mersin port. The basic concern of the Competition Board which also constitutes the reasoning of its decision is to create inter-port competition after privatisation of Mersin port in favour of a single undertaking due to its medium-scale and other reasons. Tender procedure for İzmir, Derince, Bandırma and Samsun ports has not been finalised yet.

Generally, the Competition Board, to form its Opinion in Phase I, benefited from some works such as World Bank Port Reform Tool Kit of 2001 and UNCTAD's Anlayses of Port Privatisations published in various dates, 8th Five-Year Development Plan by State Planning Organisation. The Competition Board, in the absence of a Port Authority to ensure supervision and regulation after privatisation era, aimed to bring some structural measures such as operation of some ports by at least two separate undertakings (to ensure intra-port competition) where there is no prospect for inter-port competition and prevention of vertical integration that has the potential to prevent competition, to be taken into account before the tenders to ensure a certain level of competition. In Phase II, the Competition Board takes into account the behavioural measures provided in the contract to transfer the right to operate Mersin port and the role of TCDD in overseeing that the behavioural measures are obeyed and deems them sufficient enough to avoid competition concerns that it raised in its Opinion in which it has proposed privatisation of quays separately to enable intra-port competition. Moreover, the Competition Board, regarding İskenderun port, aims to avoid acquisition of it by the same JV who will acquire the right to operate Mersin port in order to ensure inter-port competition between these two ports that are located in the same geographic region. Therefore, it can be said that the Competition Board takes into account both behavioural and structural measures in both phases and tries to ensure competition by taking into account the effects of both measures before forming its Opinion or final decision.

[6] Contract may be terminated in case the port operations are not carried out wholly or significantly, port services do not satisfy the service quality. To ensure efficiency of the port after compulsory investments are made, the average length of time of service to ships should not fall below the average length of time in 10 Mediterranean ports with highest traffic.

UNITED STATES

Take-off and landing slots at congested airports are a scarce resource that can be allocated by government authorities as a type of concession. The U.S. antitrust agencies have consistently supported the goal of finding an effective and comprehensive method of handling the allocation of slots that both addresses the problem of airport congestion and encourages competition at congested airports. This paper is derived from comments filed in May 2005 by the Department of Justice (DOJ) in proceedings concerning slot allocation at Chicago's O'Hare Airport.

Slots, or rights to take-off or land at a particular time, were first used in the U.S. in 1969 and until recently were imposed to allocate capacity at four major airports: New York's LaGuardia, New York's Kennedy, Chicago's O'Hare, and Washington's Reagan National. Slots have always been apportioned administratively by the Federal Aviation Administration (FAA), largely to incumbent carriers based on existing service. The airlines with service at O'Hare in 1969 still have most of the slots at that airport. In 1985, the FAA created a buy/sell market for slots, which was expected to lead to a more efficient allocation of these scarce resources. Instead, the FAA found that it was rare for more than a few slots to be available in the secondary market at any given time. Only when an existing carrier exited the airport, as when Eastern and TWA went out of business, were large groups of slots available for sale. Due to the sporadic availability of slots, entrants (or incumbents seeking to expand service) often found it difficult to acquire sufficient slots to establish a viable service pattern in a city pair.

On two occasions, the FAA and Congress responded to this difficulty by relaxing the slot constraints at various airports. Both experiments failed, however, because they were unaccompanied by any mechanism, other than costly congestion, for limiting service to the airport. In 2000, Congress lifted slot controls at LaGuardia for smaller regional jets. The resulting rush of new flights led to major congestion problems at LaGuardia until the FAA restored administrative controls to limit arrivals and departures. At O'Hare, Congress mandated the lifting of all slot restrictions in July 2002. In response the two hub carriers American Airlines and United Airlines, promptly over-scheduled the airport.

Some of the congestion at O'Hare stems from the airlines' move to regional jets, which may inefficiently use O'Hare's limited capacity. An examination of data from a representative day in December 2004 shows that regional jets accounted for 44% of operations, but only 24% of seating capacity. This disparity between operations and seating capacity arises because regional jet operations at O'Hare average only 56 seats, compared to 140 seats on the average domestic jet flight. Regional jets do allow efficient service on feeder routes at hub airports, and to smaller communities that might not have enough traffic to justify larger jets. With the current system of airport pricing, however, congestion costs are not factored into the service decisions of airlines. There is no price signal to the airlines that would encourage them to balance the value of regional feeder service in small aircraft against the costs created by congestion. Instead, congestion at the airport creates a classic externality where the costs of delay are imposed on all users of the airport.

Faced with the problem of congestion at O'Hare, the FAA responded by convincing United and American to roll back some of their flights voluntarily in 2004. This scheduling reduction, however, was offset by the addition of flights by other carriers at the airport, leading to no net reduction in congestion. The FAA called a "delay reduction meeting" of all carriers serving O'Hare in the summer of 2004. The

meeting resulted in an order, effective November 1, 2004, that limited arrivals to 88 per hour during peak hours, and that effectively prohibited entry at O'Hare without FAA permission.

The slot buy/sell market did not result in an efficient allocation of slots at O'Hare. No matter how slots are distributed (including a government giveaway to market incumbents), as long as a secondary market exists and transaction costs are low, slots should be bought and sold until each finds its highest valued use.[1] In practice, however, the slot market previously attempted at O'Hare and LaGuardia did not result in an efficient allocation among incumbents, nor did it facilitate competitive entry in the constrained airports.[2] The secondary market never became sufficiently liquid to achieve these results, for several reasons.

1. Transparency

Transparency in the market for slots is one reason the secondary market never became sufficiently liquid. Transparency means that the identity of buyers and sellers is widely known. Transparency in the secondary slot market permits strategic purchases by incumbents to prevent new entry. An incumbent carrier probably would never knowingly sell to an entrant that was likely to compete against it, given that such a sale would likely decrease the slot holder's profitability. More importantly, a potential entrant would have equal difficulty buying from other slot holders. Such slot holders, if approached by the potential entrant, would have every incentive at that point to seek out the threatened incumbent and solicit a better offer. Because the rents from limiting competition almost always exceed the more competitive rents an entrant would earn, the threatened incumbent should be willing to outbid the entrant, even if it would use the slots in an economically less efficient manner. Strategically purchasing available slots can be an effective entry deterrent, especially since multiple slot holdings required for significant entry rarely come up for sale.

Similarly, slot leases are transparent because the leasing process necessarily involves the identity of lessons and potential lessees being disclosed, and thus have the same problems associated with a transparent buy/sell rule. Although slot leasing is fairly common, the leases come with provisions that allow the lease holder to terminate the lease on relatively short notice. Leasing is therefore a substantially more risky and thus inferior means of entering a market. A new entrant understandably may be reluctant to incur the cost of beginning new service to Chicago if its lease could be pulled at any moment by an incumbent.

2. Market Power

Another reason the secondary slot market never became sufficiently liquid is that the FAA's initial allocation of slots at O'Hare gave the bulk of all slots to two carriers, American and United. This allocation gave those carriers much larger market shares in slots than any other carrier could obtain, and effectively limited the amount of competition other carriers could offer to O'Hare on at least some routes. Both of these carriers developed hubbing operations out of Chicago O'Hare, and any slot they sold would have almost certainly been used to compete with them on some route. Therefore, neither American nor United were willing to sell slots to potential competitors, making the bulk of O'Hare slots unavailable to others.

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1 See, *e.g.*, Ronald Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960). "Highest valued use" for the carriers, however, might translate into market power on particular routes. Any distribution of slots must be subject to vigilant antitrust oversight.

2 Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets, Government Accounting Office, October 1996, GAO/RCED-97-4.

3. Uncertainty of Duration and Value

Another obstacle to creating a liquid market in slots is the repeated use of temporary administrative allocation mechanisms that do not create long-term property rights. Under each of the FAA's administrative allocation systems, the award of a slot has been a temporary right, exercisable only until the system changes again. That right has become quasi-permanent in practice, but anyone interested in buying a slot takes the risk that the system may change in a way that reduces the expected value of the property conveyed. The uncertainty about the time period over which the right can be exercised, therefore, makes it difficult for buyers and sellers with different views about the likely duration of that time period to agree on price. In addition, by periodically giving away slots, Congress and the FAA have contributed to the uncertainty about slot value. The result is that fewer slot transactions occur, and the market is less liquid than it would be absent the uncertainty.[3]

The best solution to airport congestion problems is to implement market-based solutions. To a great extent, the problems described above are inherent in any administrative allocation of slots, and can be fixed only by a more comprehensive market-based approach. Any design for a market-based system should keep two objectives in mind. First, the system must establish a price-setting mechanism that reflects both supply of and demand for scarce airport resources. This price should replace existing regulatory fee structures which encourage carriers to use scarce airport capacity inefficiently by scheduling too many smaller planes. Second, the system should promote competition by enabling scarce capacity to be more easily transferred among carriers, and by preventing capacity from being locked up in ways that allow the exercise of market power. There must be a sufficiently liquid market in slots to permit new carriers to enter an airport rapidly and on a large enough scale to efficiently serve routes in competition with large incumbents.

There are two possible market-based approaches for allocating scarce airport capacity: congestion pricing and auctions. Both have the potential to be far superior to an administrative system. Each approach has strengths and weaknesses, as outlined below; the optimal choice will depend on particular market conditions.

3.1 Congestion Pricing

Under a congestion pricing system, the existing slot allocation system would be abolished in favour of congestion fees set for particular times.

Airlines currently pay weight-based fees for landing. The consequence of the weight-based fee structure is that a small regional jet, which causes just as much airspace congestion as the largest 737, pays a much lower landing fee than the much larger plane. Airlines thus do not face a price that reflects the fact that airspace is a scarce input.

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[3] The interaction between the lack of liquidity in the marketplace and the uncertain nature of the property right being transferred may also make existing slot holders less willing to sell slots. For existing slot holders, the value of a slot includes not only the current value of operating a slot at the slot-constrained airport, but also the option to change their operational patterns in the future by adding flights ("option value"). To avoid paying a high price to get back into an airport later, slot holders may prefer to retain their slots if they are unconvinced that they can buy back into the airport later at a reasonable price. Although in theory someone could pay for acquiring this additional option value as well, the uncertainty surrounding the future of slots makes such a transaction more risky, and thus sales may simply not take place.

If airlines were charged a flat landing fee based upon demand at particular times of day, regardless of the size or type of plane, smaller aircraft such as regional jets would appropriately have to bear a higher per-passenger cost for using an airport's scarce landing capacity than they do now. Regional jets would continue to be part of the airport's mix of aircraft, but at the margin where airlines are choosing between larger jets and regional jets, larger jets operating slightly less frequently will become a more attractive option than scheduling multiple trips on regional jets. The result would be an increase in passenger throughput at capacity-constrained airports.

The advantage of congestion pricing is that it is relatively easy to implement. The regulator would set prices for slots at different times and airlines would set their quantities accordingly. If the prices are initially too low, then the congestion prices can be raised over time to ration demand. A uniform fee for landing at a particular time would reduce the congestion bias caused by the current system of weight-based landing fees.

Congestion pricing has been used for several years to improve the flow of traffic on two highways in Southern California. Highway SR-91 in Orange County, California has four free lanes next to two toll lanes in each direction. There is a pre-determined toll schedule for every hour of the day. The rates vary from $1.05 for most overnight and pre-dawn hours to $7.00 for some afternoon rush hour time periods. On Interstate 15 in San Diego, there is a toll schedule for two reversible lanes. The toll varies with the level of congestion on the road and can change as often as every six minutes.

Although congestion pricing is likely superior to administrative allocation, a drawback to congestion pricing is the regulator's lack of knowledge about what price to set. A regulator may not have good enough information to allow it to set the right price without frequent experimentation. Even that mechanism may have problems because the necessary feedback for quantity adjustment may be slow. In particular, airlines often advertise service well in advance so as to schedule and make ground facility arrangements efficiently. This, in turn, implies that adjustments based on the changing price of arrival authorisations may be slow. For highly congested airports, the cost of setting the wrong price and getting too much (or too little) airline traffic may be high.

3.2 Slot Auction

A slot auction would allocate scarce arrival authorisations through a periodic open- bidding mechanism. For example, the FAA has good information about O'Hare's capacity for arrivals and departures, and can set a maximum quantity relatively precisely. An auction would determine the price for arrival authorisations at a particular time, regardless of the size or type of plane.

A well-designed slot auction would both assign prices to allocate efficiently scarce airport resources, and limit the maintenance or accumulation of market power by individual carriers. Such goals require careful attention to the details of auction design. For instance, the auction should limit informational feedback during the auction itself. Bidders might know the aggregate level of demand and supply of all arrival authorisations in each time period, but not be permitted to know the identity of the other bidders. This practice is fairly typical at auctions and is designed both to limit collusion among bidders and to prevent strategic bidding. Although more information allows more informed bidding on the part of bidders in ways that can be efficient, full knowledge of which airlines are bidding for which slots in an auction could encourage incumbent airlines to attempt to foreclose entry by particularly strong competitors. In this case, the government's interest in preserving competition among carriers should take priority over bidders' desires to have complete information about rival bids.

Any auction design must allow for sufficient liquidity so that potential entrants are not unnecessarily impeded. Annual auctions of a significant portion of airport arrival capacity (20%, for instance) would

help allow for rapid entry when it is efficient.[4] Such a five-year rotation would provide a concrete duration for the property right, and therefore assist airlines in valuing the slots.

A switch to a market-based mechanism for allocating arrival authorisations will not by itself achieve the twin goals of reducing congestion and encouraging more competitive outcomes. Entry and expansion of new carriers, a key mechanism for encouraging competitive outcomes, is constrained not only by scarce landing rights, but by the limited availability at some airports of ground-based assets such as gates, baggage-handling, and check-in positions. To make any auction for arrival authorisations effective in this environment, aviation authorities must help ensure that ground-based assets will not be a constraint for new slot owners. A common-use pool of gates, for example, might be one solution to overcome some of the hurdles associated with limited ground-based assets. Another issue that authorities must take into account is that the transfer of ground facilities to slot holders can be disruptive of current operations. Auctioning off only 20% of the airport's capacity at a time, as discussed above, would allow for efficient transfer of needed ground facilities.

[4] There is a trade off involved in limiting the duration of the property right – it induces some uncertainty in airlines' future plans, in return for keeping avenues of entry open.

PUBLIC OR PRIVATE PROVISION OF INFRASTRUCTURE SERVICES? IF PRIVATE, FIXED TERM CONCESSIONS OR FULL PRIVATISATION?*

by Mr. Alberto Heimler**

1. Introduction

While in the past most infrastructure services were provided directly by governments in almost every country, in recent decades, especially because governments did not deliver the required quality and were not quick in adopting up-to-date technologies, there has been a progressive movement towards privatisation. At the same time technical progress and innovation changed the boundaries of natural monopolies, allowing competition in a number of activities.

In principle, privatisation[1] pursues productive efficiency, while allocative efficiency is achieved through competition. In practice, privatisation and competition reinforce each other: privatisation is very often necessary for introducing a level playing field among market participants, so that competition could more easily develop. This is the case for telecommunications and electricity where the privatisation of most former State monopolies, coupled with the introduction of independent regulators, contributed to the development of greater competition, leading to a strong improvement of both productive and allocative efficiency. In other industries, because of their natural monopoly characteristics, competition is impossible. The objective of privatisation in these industries is to improve corporate governance and increase incentives for cost minimisation.

Privatisation, however, does not eliminate the need to regulate market power. Economists are aware that in principle market power could be regulated directly through some form of price control. However, having developed the theory of regulatory capture[2], they started to suggest that competition be used also for choosing the single supplier of a natural monopoly market, granting the monopoly for a fixed term. The suggestion, originally made by Chadwick (1859)[3] and developed by Demsetz (1968)[4], was to organise bids

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1 Throughout the paper by privatisation I mean transferring the control of a State owned firm in private hands. I will not consider partial privatisations of a company's capital (short of losing control) because they are mainly directed to solve budget deficits problems and are therefore outside the scope of the paper.

2 See G. Stigler, The Process of Economic Regulation, Antitrust Bulletin, Spring (1972).

3 E. Chadwick, Results of different principles of legislation and administration in Europe; of competition for the field as compared to competition in the field, Royal Statistical Society Journal, 381-87 and 408-9 (1859).

4 See H. Demsetz, Why regulate utilities, Journal of Law and Economics, 55-65 (1968).

by which firms, competing for the right to serve a monopoly market, would compete away all monopoly profits, thus eliminating the need for ex-post regulation.

In practice, competition for the market in infrastructure services has never been a substitute of regulation, but has always been introduced in order to choose the most efficient company which would still have to be regulated. Unfortunately the proposition that competition for the market requires nonetheless regulation is rarely made clear to the public, to politicians or to the bidding parties. As a consequence, the simple use of the term "competition" is widely (and unfortunately wrongly) perceived as an alternative to regulation.

Economists are now almost all in favour of bidding and auctions. Quite a change from the past! Sixty years ago economists were suspicious when they observed any form of externality or monopoly power, and they invariably thought it necessary for governments to intervene in a very substantial way. In both circumstances, they generally advocated nationalisation and public ownership.[5] Simons, a U.S. free market economist who nonetheless accepted and promoted public ownership of public utilities, believed that nationalisation would, by itself, eliminate the profit motive from managers' action, turning natural monopolies into companies that would maximise consumer welfare.

Economists in the U.S. began to convert to a free market ideology in the mid 1950s, believing that private firms would be more efficient also in circumstances where monopolistic conditions prevailed. In such cases the solution would be price regulation. In contrast, in Europe, nationalisation continued to be considered the best form of control of market power by natural monopolies for many years. In many countries, this led to a production structure where the role of the State was quite substantial in the provision of both private and public goods. Only with the collapse of the communist economies of Eastern Europe did the case for nationalisation weaken also in Western European countries, and the number of advocates for privatisation of public enterprises has increased geometrically until very recently.

The problem with privatisation is that it cannot be a solution for every activity because regulation is not always adequate for disciplining market power. For example, certain public goods (such as roads) clearly facilitate the operation of markets. If roads were private and priced, the economy may suffer. More generally, there is a trade off between private and public ownership in terms of costs and benefits, which depends on the specific characteristics of the product being supplied.

For natural monopolies, like for example a highway, should there be State production or a regulated private monopoly? In the case of a private monopoly, how should this private monopolist is chosen? Should the license be fixed term or have an infinite duration? Is the situation different for industries that are not natural monopolies? Taking quite a broad perspective, this paper will try to offer some views on these issues, suggesting a lot of caution with respect to the not always easy competition-for-the-market solution.

The plan of the paper is the following. Section 2 will discuss the terms under which a choice between private and public provision should be made. Next, should a decision to grant a concession be made, whether the auction should have a fixed term or an infinite horizon. Section 4 will address the problem of renegotiations in fixed-term auctions, providing some examples taken from the vast Latin American experience. A discussion of the benefits of an auction vis-à-vis a beauty contest will then follow. In section 6 the problem of technical progress changing the boundaries of existing natural monopolies will be

[5] J. Meade, Planning and social Mechanism: The Liberal-Socialist Solution, George Allen & Unwin London (1948); H. Simons, "A Positive Program for Laissez Faire", IN ECONOMIC POLICY FOR A FREE SOCIETY, CHICAGO UNIVERSITY PRESS (1948); M. Allais, "Le Problème de la Planification Economique dans une Economie Collectiviste", 2 Kyklos 48 (1947).

addressed together with the corresponding need that the issue is taken up by proper restructuring in the process of privatisation of infrastructure services. Section 7 concludes.

2. Concessions or public provision?

Concessions imply the transfer of a right from the government to a private entity. That right may originate from the fact that a certain activity (for example broadcasting or electricity production) is reserved to the State by the Constitution or that a certain resource (for example a forest or the spectrum) is owned by the State. In both cases the problem is how to choose those that would be entitled to enter that activity or to use that resource. Of course the problem exists only in so far as there is (real not artificially created) scarcity in supply or if there are some externalities associated with the reserved activity or with the use of the State owned resource. If there is no scarcity and there are no externalities then anybody could (and should) enter without any restriction. Otherwise the problem is how to choose the entrants.

As for concessions for the right to use a State owned resource, for example the spectrum, if there are no other public interest uses (for example defence), its use can be conceded to a private entrant. The problem is how many entrants should be let in, how to organise the bid, whether the transfer of property rights should only be temporary. The answer to these questions is easy, but only in principle: 1) entry should be allowed until entrants are willing to enter and a price for the State resource should be charged only if there is scarcity; 2) the resource allocated to each market participant should be in proportion to the use it is expected to be put at; 3) in any case firms should not be allowed to purchase multiple licenses so as to reduce competition[6]; 4) the bid should be organised carefully so as to avoid any strategic behaviour on the part of the bidding partners to pay less[7]; 5) the transfer of property right may be temporary only to the extent that there are no substantial sunk costs. In practice, organising a problem free auction can be very demanding, even for allocating a scarce resource like the spectrum[8]. In many circumstances a similar difficulty may arise even when the auction is organised for identifying the lowest cost provider in a public procurement setting[9]. There is a huge literature on these issues that shows that auction theory can be very effectively used for identifying the optimal auction-design mechanism[10].

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6 In practice it is not always clear how can the Government assess scarcity *ex-ante*, nor is it always fair that first comers pay nothing and late comers, when the resource becomes scarce, pay

7 On this see P. Klemperer, Auctions: Theory and Practice, Princeton University Press: Princeton, N.J. (2003).

8 In the case of the spectrum allocations for the 3G mobile service, the aim of all governments was to assign the spectrum efficiently, to promote competition (given that the spectrum to be allocated allowed for multiple service providers) and to realise the full economic value. As a consequence, governments fixed the number of licenses to be issued according to engineering considerations (otherwise leaving the number of licenses being endogenously determined would have required a very complex auction design) and did not allow bidders to hold more than one license. The product to be sold, the spectrum, was clearly identified; the use to which the spectrum was going to be put to was also identified; prices of the 3G services were to be freely set; there were no universal service obligations, except that the service to the public had to be initiated at a given date, common to all license holders. The question was only what type of bidding design to choose in order to minimise the possibility that incumbents in 2G mobile service would threaten new entrants not to bid or that bidders would collude in order to share the market among them at the minimum cost. Nonetheless a number of mistakes were made in auction design and the proceedings of the auctions were manipulated in many countries by the strategic behaviour of bidders, as Klemperer (2003) shows.

9 The problem with auctions is not only that bidders may collude or behave strategically in order to threaten other potential bidders. Sometimes markets are two sided, further complicating the auction design. For example in Italy in the auction for purchasing vouchers for restaurant services for government employees, the design of the bid did not sufficiently address the issue that in order for the vouchers to have any value

With respect to the case of a reserved activity there is a further problem that logically anticipates how to choose a private entrant: it is that in some instances governments are better placed to keep that activity for themselves. For example, the privatisation of local bus transport services may disrupt service regularity[11], a negative externality from waste disposal or cemetery services could cause social harm, or universal service may not be guaranteed. In such cases government supply may well be the solution[12]. The problem of auctioning out an infrastructure-service activity will be pursued further in section 3.

2.1 Public vs private provision of public services

In a world of perfect information and no asymmetries, government provision of public services would lead to the same results as private provision. The government would either enter a contract that fully covers the provision of the service with an outside producer, or instruct the appropriate government branch/State owned company to provide the service. Accordingly, the question of who should provide these services would be irrelevant.

Public versus private ownership of assets becomes an important issue when the government is unable to write and enforce a complete contract. The government may know exactly what is needed in general, but it may be very difficult to write down exactly all possible contingencies that the provider might face. Furthermore it may be impossible to verify some dimensions of the quality of the service provisions *ex post*. If contracts are incomplete (which in fact is always the case), the ownership of assets becomes important because it determines who benefits from *ex post* bargaining over situations not covered by the contract.[13] For example, property rights are important for ensuring that innovation is carried out and that efficient strategies are pursued. As Shleifer[14] notes:

> [O]wnership strengthens the owner's incentives to make investments that improve or reduce the costs of using the assets, because the owner has the power to reap more of the rewards on these innovations.

The problem of how effectively residual profits are controlled is a key issue for establishing whether incentives for efficiency are sufficiently strong. In particular, in the absence of clear incentives to monitor managers by absent owners, the propensity to innovate and to minimise costs is strongly reduced. In the case of State ownership, citizens and taxpayers are indeed the ultimate owners, but are unable to effectively monitor the managers. As a consequence, the incentives for cost minimisation and innovation

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at all for the users, enough restaurants had to be on board (for example by imposing a stricter required number of associated restaurants). As a consequence competition among issuers reduced the price of the vouchers so much that the number of vouchers accepting restaurants was much lower than expected. Angry, and hungry, government employees strongly protested.

10 See P. Klemperer, Auctions: Theory and Practice, Princeton University Press (2003) and P. Milgrom Putting Auction Theory at work, Cambridge University Press (2004).

11 As a UK regulator once told me during an OECD meeting on competition and regulation on local transport, privatisation does not necessarily operate to the benefit of consumers: a profit oriented supplier tries to run buses as full as possible (maximising revenues given costs), while consumers like buses to be frequent and half empty (but cannot compensate suppliers for the lost revenue). In such circumstances how can privatisation with a proper regulation be the solution in local transport?

12 For a more detailed analysis of these issues with respect to local public services in Italy, see A. Heimler, Local Public Services in Italy: Make, Buy or Leave it to the Market?, in The anticompetitive impact of regulation, Edward Elgar; Cheltenham (G. Amato and L. Laudati (Eds) 2000).

13 O. Hart, Firms, Contracts and Financial Structure (1995); G. Grossman & O. Hart, The Cost and Benefits of Ownership: A Theory of Vertical and Lateral Integration, 94 Journal of Political Economy 691 (1986).

14 See Shleifer, A.

are severely weakened in State owned enterprises. This is why State owned enterprises often dissipate rents with other stakeholders, such as workers, managers and suppliers, so that rents do not accrue to the owners (the public) that by the way, contrary to the other possible owners, are much less inclined to compensate Contracts are often incomplete in that they do not specify an objective and verifiable minimum quality standard. If a contract cannot guarantee a required level of quality, a private firm would have the incentive to cut costs by reducing the quality of service provided. For example, with respect to nursing homes and prisons, private employers subject to price regulation could easily reduce the quality of services, serving food of lower quality or employing personnel that would mistreat the elderly or prisoners. Regulators, because of the difficulty of actually observing such behaviour, would face a lot of difficulties in identifying or punishing strategic behaviour of that sort.

One possible solution is to eliminate the private firm's incentive to cut costs through a contract that provides that the firm will be compensated for all its costs. Under such a contract, the firm would have low incentives for both cutting costs and enhancing quality. It would, however, always have the incentive to increase costs, leading to monopolistic rents. In such circumstances, the government would have the incentive to monitor all expenditure decisions. Private ownership would then acquire most characteristics of public ownership (except for the very relevant fact that government would not directly control supply).

It is not always the case that when a contract does not effectively specify a minimum quality standard, a private supplier will provide low quality services. If it is possible to introduce competition in the market, then suppliers will have an incentive to improve quality in order to attract more customers. Thus, competition among private suppliers is one solution to the quality reduction problem. Competition, however, is not possible when natural monopoly conditions prevail[15].

Even without direct competitors however, a private firm may be sometimes motivated to maintain or improve quality because this might enhance their reputation as a high quality service provider. If the incentives are correctly established (for example by measuring quality by the number of complaints by unsatisfied customers), firms with a good reputation for high quality services may be in a better position to win additional contracts, or have their contract renewed when it expires.

Finally, private provision of services may be preferable because it will enhance the possibilities of innovation. If there is a potential for innovation, a private firm will have the incentive to do so. A government owned firm, in contrast, will be more reluctant, because it will be unable to fully enjoy the As Schleifer has suggested[16], these considerations imply that public provision is superior to private provision only when: a) the opportunity for cost reduction stemming from a decrease in non-contractible quality is high; b) the probability of product or process innovation is limited; c) gaining reputation as an efficient service provider is unimportant; and d) competition is weak and consumer choice is ineffective. Most public services that are sold at market price (in contrast to services that are given away for free or at below-cost prices) do not fulfil these prerequisites, which implies that, in order to increase the efficiency of supply, privatisation (accompanied by regulation) is quite effective. On the other hand, some public services, for example local transport, fulfil these prerequisites and are probably better served by public provision.

The problem is that the choice between public or private property is almost always resolved on political grounds and not enough consideration is given to the fact that the structure of managers'

15 See C. Henry, "Competition and the Regulation of Public Utilities in the European Union", Laboratoire d'économétrie, École Politechnique, Paris Working Paper No. 469 (1997), Henry cites the report by the Transport Committee of the House of Commons on "The consequences of bus deregulation" in support of his claim that the effects of competition between bus companies were not satisfactory.

16 A. Shleifer, "State versus Private Property", 12 Journal of Economic Perspectives 133 (1998).

incentives is not the same in the two systems. While, at least in principle, public firms are less likely to pursue efficiency while providing quality, private firms are more likely to be efficient but less likely to provide quality. The realism of these trade offs can be judged on a case by case basis and around those a political/regulatory solution could be found.

3. Fixed-term auctions, privatisation and efficiency

Once private supply has been found preferable to public provision, auctions for entering into a reserved activity for a pre-determined period of time have been proposed as an alternative to privatisation.

One of the differences between the two is that with privatisation the license has an infinite time horizon. In this respect, the crucial issue with fixed term licensing is the extent to which inefficiencies might appear near the end of the license. In particular, such inefficiencies result from a company's failure to make efficiency-improving investments (in capital goods, training, restructuring, etc.) not at the beginning (when the length of the license allows for such investments to be paid back), but whenever necessary throughout its life. Except at the beginning of a license, the incentive to invest (even in maintenance) will be quite low, leading to distortions and disadvantages for consumers. The possibility of a payback by new entrants is generally not sufficient to eliminate the distortions. A new entrant would be unable to pay especially for non-capital investments, which are often even more important than capital investments[17], given the difficulties involved in determining their exact amount. However also for capital investment their valuation at the time of the transfer may not be easy since the economic value of the assets to be transferred may be then different from its costs. This is why, especially when sunk investments are substantial, permanent licenses (and the possibilities they provide for internal growth, mergers and acquisitions) are more efficient than fixed-term licenses. In such circumstances, that is when sunk investments are substantial, privatisation, accompanied by regulation, is more efficient than a fixed term.

In contrast, if there are no substantial sunk investments, fixed term licenses are efficient because the danger of distortions in the propensity to invest around the end of the license term would be minimal. Competition for the market can thus be effectively introduced. For instance, an auction to provide waste removal services would lead to efficient results if the outside contractor required to provide services would take his know-how, equipment and work force to the next town if he does not win the next auction. The possibility of quality reductions due to lack of maintenance at the end of the franchise period would be minimal. The contract could be granted to the bidder that offers to supply the service for the minimum fee, and it should have short time duration. The shorter the license term, the greater the probability that circumstances will not change, which would necessitate a renegotiation of the level of subsidies or the price.

The argument that fixed-term concessions are particularly effective when there are no substantial sunk investments is however only a partial one because, especially for essential services, there might be the possibility of hold-ups that is for the provider to blackmail the government or the municipality that it would stop delivery unless tariffs are increased. This is why, for example, in waste collection services the municipality of Phoenix, Arizona, after having split the city in a number of zones each auctioned out to different contactors, assigned one zone to itself, ensuring that the government could resist any possible hold-up by one the private contractors[18]. Whether all this created real benefits to tax payers is not clear, however.

The possibility of hold-ups is much greater in the case of concessions for infrastructure services where sunk costs are widespread and renegotiations strongly decrease the benefits originated from competitive

[17] See R. Nelson & H. Pack, "Asian Miracle and Modern Growth Theory", 109 Economic Journal 416.

[18] See OECD ...

bidding. A further problem they create is that the existence of hold-ups may strongly undermine the confidence in competition by the population at large.

According to a 2001 survey by Latinobarometro[19] "63 percent of people in 17 countries in Latin America and the Caribbean believed that privatisations of state companies had not been beneficial, up from 57 percent in 2000 and 43 percent in 1998. ... To a large extent these negative sentiments are driven by the high incidence of renegotiations and the response to it. ... Renegotiation has occurred if a concession contract underwent a significant change or amendment ... in any of the following areas: tariffs, investment plans and levels, exclusivity rights, guarantees, lump-sum payments or annual fees, coverage targets, service standards, and concession periods".

The major reason for all these renegotiations is that there are widespread hold-up problems: the franchisee threatening the government that it cannot guarantee the quality of services as agreed unless subsidies or prices are increased. Given the essential nature of the services, it is unlikely that a government would decide to re-tender, given the problems that an interruption of such services would cause. The existing pressure to accommodate any request by an incumbent franchisee makes short-term license preferable, a solution however which is not very suitable for infrastructure services, given the high sunk-costs that characterise them.

For infrastructure services a well structured regulation reduces the problem of hold-ups. However, for regulation to be beneficial, the auction, as I will argue in the next sections, should be organised around an up-front fee and should not have the objective of minimising the tariff under which the service will be supplied (with no subsidy).

In any case a further argument in favour of privatisation (infinite-horizon concessions) is that the competition for fixed term concessions is strongly reduced the second time the concession is auctioned out because of information asymmetry on the part of potential bidders. Once the first license is expired, the incumbent that bids on a new contract may use internal information on the relevant market's cost structure. Other potential bidders may be unwilling to under-price the incumbent, leading to a structural reduction in the number of participants in the tendering process at the end of a first license, especially for contracts of a special and unique nature. Unfortunately, since infrastructure concessions have all been granted quite recently and for a very long time, there is not much experience with second time auctions[20].

One solution to favour second time auctions is to create markets that are similar to each other, so that a company operating in one location would have enough information to participate in the tender offer of another location. If scale economies are not important, a solution would be to divide a larger market into smaller sections for which separate tenders could be made. This would increase the number of bidders, because even small companies could take part. Whether this is beneficial or not, will also depend on an evaluation of all costs involved, including transaction and coordination costs.

In any case irrespective of the time for which they are granted, where concessions are most efficient is when clear responsibilities, including full property rights, are handed to the concessionaire. For example, a local transport concession might require the concessionaire to come in the municipality with all the necessary buses and all the necessary employees. In this way, a market for concessions might develop nationwide with companies bidding for concessions, while municipalities would only (!) have the duty to write the contract and to regulate. On the other hand, one of the most important characteristic of a fixed-

19 Reported in L. J. Guash Granting and Renegotiating Infrastructure Concessions. Doing it Right, The World Bank: Washington D.C. (2004).

20 Klemperer (2005) reports of an auction once the first licence expired: in the case of the UK lottery auctions there were six bidders the first time, only two the second, but in any case the incumbent won.

term concession is that very often a concession does not lead to the transfer of ownership of any fixed asset, which continues to remain in government hands, nor to any power with respect to existing employees, who maintain the job they already had when the company was State owned. In such circumstances, which are quite common when local services are tendered out for license, it is not clear what the auction is for, besides leading to a new CEO. Furthermore leaving to the State the property of all assets, the contract of the concession has to introduce some specific incentive for maintaining these assets and some provision in order to account for technical progress. Finally the separation between asset ownership and management of the services that these assets provide leads to a possible conflict of responsibility in the case of accidents. For example would the State as owner of the pipeline or the concessionaire be responsible for a gas leak? Again the concession contract would have to account for all these contingencies. Not an easy task.

4. Concessions, auctions and renegotiations: some practical experience

In the past twenty years privatisations and liberalisations have characterised the world economy. In Europe the transition economies of Eastern Europe have undergone significant economic reforms that have led to a strong reduction of the role of the State, opening up domestic markets and relying more and more on indirect government controls, rather than on direct State interventions. Before 1990 also in most EU countries the role of the State was quite significant, with State owned companies operating in most sectors of the economy, including heavy industry (steel and chemicals), car manufacturing, banks, and public utilities. Now companies operating in competitive sectors have almost all been privatised, while the State continues to be present in traditional natural monopolies, like rail, water supply, local services, airports and ports, where competition is almost impossible to introduce. Privatisation has been the solution for competitive sectors, while State owned companies (of course with many exceptions by country and by sector) continue to be present in natural monopoly industries. Again with a number of quite relevant exceptions, concessions have been important for granting access to State owned resources (the spectrum, forests, ports, airports etc.), but not so much for granting access to reserved activities characterised by natural monopoly conditions.

In the same period of time also Latin American and Caribbean countries have undergone significant economic reforms, mostly originating from the low quality of government run utility services. As a matter of fact, a significant part of these reforms had to do with allowing the private sectors into the management of public utilities. In the process, the choice between fixed term (concessions) and infinite horizon licenses (privatisations) was not based on the existence of substantial sunk costs as I have argued should be the criterion, but on whether competition in the market could exercise some discipline on the market power of the incumbent operator, privatisation being the preferred option should competition in the market exercise some disciplining effect. Indeed, as Guash (2004) reports, especially in telecommunications, and also in electricity generation and in natural gas, private sector participation was mostly achieved by outright privatisation. On the other hand, in natural monopolies, like rail, ports, airports, roads, water and electricity transmission, fixed-term concessions have been much more frequent.

Although concessions have significantly improved infrastructure service in many countries, they have also created quite a number of problems. The most important one has been the fact that renegotiations have been very frequent and most of the times, through these renegotiations, most advantages achieved by competitive bidding have been eliminated. Renegotiations however should not be completely ruled out in concession contracts. In fact one of the characteristic of a concession contract is that it is never complete so that some renegotiations should be expected, although probably not to the extent they have been experienced. The simple fact that renegotiations are the natural consequence of an incomplete contract, leads bidders to bid more aggressively in the hope that governments would bail them out. This is particularly the case when the bid is organised around the lowest possible tariff. In that situation the

likelihood is strong that parties would bid low, so that the concession is awarded to them and then recoup profits through renegotiations?

Guash (2004) identifies a number of issues that eventually led to the failure of the competitive bidding process for granting concessions: aggressive bidding, faulty contract design, government failure to honour contract clauses, defective regulation. For each of these issues Guash (2004) provides some examples and a few of them will be summarised here[21].

4.1 Aggressive bidding

Aggressive biddings originate from the belief that governments are unable to commit to a policy of no renegotiation. Usually governments renegotiate and the benefits of competitive bidding are eliminated, as, for example, was the case with the Lima Airport.

> *In early 2001 the concession to operate Lima airport was awarded to a consortium, led by the Frankfurt Airport operator, Bechtel, and a local partner, that submitted the highest bid. The winning bid offered the state 47 percent of gross revenue in addition to a commitment to invest more than US$1 billion and construct a second landing strip by the 11th year of the 30-year concession. As should have been expected, the concession contract was renegotiated at the end of 2003 reaching much more sustainable conditions.*

Very rarely, like in the case of Buenos Aires water services, renegotiations were not allowed and, as a consequence the concession was abandoned.

> *In May 1999 the province of Buenos Aires used competitive bidding to award a concession for the provision of water services. Of the seven firms that pre-qualified for the operation, four submitted bids. The award criterion was the highest (lump-sum) transfer fee to the government of the province. The winning bidder, Azurix, offered 277 million dollars. The other firms bid 15 million dollars, 10 million dollars and 8 million dollars respectively. Azurix, as should have been expected, asked for a renegotiation that was denied and in 2002 the government reassumed responsibility for providing water services.*

4.2 Faulty contract design

The most difficult issue with concessions is that problems emerge ex-post, while solutions have to be identified ex-ante. As a consequence faulty contract designs are the most common problem that emerges in an auction. For example objectives to be pursued have to be clearly defined, especially taking into account the trade-off between the maximisation of economic efficiency and that of the proceeds to be obtained from the concession granting process. When the proceeds are maximised than economic efficiency suffers. For example, in Jamaica's sale of its telecommunications company, the winning bidder was given a 25-year monopoly and a guaranteed 18 percent annual return! Faulty designs can also involve the use of inadequate award criteria, for example minimum prices or tariffs, or direct adjudication. Faulty designs can also be caused by improper regulatory oversight. The impacts of faulty designs vary considerably: they can lead to renegotiation, abandonment of a concession, or other very negative outcomes.

> *In 1997 the Mexican government launched a 3.3 billion dollars plan to restructure 52 highways built under private concessions in the early 1990s. This renegotiation and bailout of private operators followed a very poorly designed program. First of all the bidding standard under which to award the concessions was the minimisation of the time needed to operate each concession, so that some concessions were awarded for as short a period as eighteen months. Furthermore the government*

[21] For greater detail see Guash (2004) from page 44 onwards.

provided extremely optimistic guarantees of traffic volumes and an implicit insurance for construction cost overruns. As a consequence, the system was characterised, as should have been anticipated, by significant cost overruns and by socially unacceptable high tolls to support the short concession periods.

A very similar situation occurred in the Dominican Republic that granted road and railway concessions through direct adjudication. The contracts for these concessions provide a risk-free profit guarantee. In fact if costs exceed original estimates then Dominican taxpayers will cover the losses.

In the case of the Samana highway, which is the country's only toll road construction concession as of 2002, the contract stipulates that 6,050 vehicles will use it in its first year of the concession (2001) and that traffic will increase by 5 percent a year thereafter. If traffic does not reach those levels, the government will have to pay the winning bidder the shortfall in toll revenue. The government is also responsible for covering any deficits created by inflation, devaluation of the peso, and other cost-increasing components.

Very favourable concession terms originating from faulty contract designs can lead to very strong unexpected increases in prices and violent responses from unhappy consumers.

The water concession in Cochabamba, Bolivia, granted in October 1999, were terminated in April 2000 by the government following violent protests because of high tariffs. Steep tariff increases were necessary to pay for an expensive bulk water scheme chosen by the government over a lower cost option.

4.3 Government failure to honour contract clause

Very often governments fail to honour the provisions of concession contracts, especially in order to favour domestic groups. Such behaviour creates great uncertainty and enhances risks, discouraging auction participation especially by foreign bidders and sometimes leading the winners to abandon the awarded concessions.

In 1997 the Ukrainian government awarded two sets of frequencies in order to create two competing cellular phone networks. Two consortia were awarded the tender, one led by Motorola and one by Deutsche Telekom. As soon as the tender was over, the government unexpectedly requested the winning consortia to pay a 65 million dollars annual fee, a very significant amount considering the size of the market. Then, also without notice, the government awarded a third set of frequencies to a domestic company, stopping all frequency allocations for five months, presumably to allow the domestic company to catch up. As a result Motorola abandoned the granted concession.

A very similar result occurred with the 1999 concession for the management of Peruvian regional ports, even though in this case the auction was changed just before the opening of the bids, in any case providing an indication to bidders that Government was unreliable.

The contract of the concession of the small port of Matarani in Peru provided for a duration of 30 years. Four firms pre-qualified. Before the opening of the bids, however, the government decided to shorten the concession to 15 years. As a result three of the firms abandoned the auction and the concession was awarded to a local group at about the base price

4.4 Defective regulation

Quite often proper regulation has been missing, either because regulatory institutions were not in place at the time the concession was granted, existing regulators lacked enforcement power or were impeded to act by some domestic law. In this respect, the fact that a concession was awarded with a

competitive procedure led many jurisdictions to exclude the concessionaire from any regulatory oversight, unless the regulator had already been mentioned in the concession contract. Such shortcomings have been particularly important at the local level, where independent regulators do not exist even in developed countries. It is necessary therefore that the proper regulatory institutions be in place already at the time of the auction.

Even if the right institutional structure is in place, regulation is not always effective in disciplining a natural monopolist, because regulators do not have access to all the relevant pieces of information so as to effectively regulate, especially with respect to the assessment of the monopolist production costs. As a consequence, regulators may need to allow regulated firms to reap at least a portion of the benefits expected from their information advantage, for example by introducing some sort of price-cap constraints. Furthermore, whenever significant externalities or information asymmetries exist, regulators should seek adequate public participation in policy formulation, consulting all those who can provide relevant information – particularly when their interests are adversarial to those held by the regulated firms. Finally, parliaments/governments should be capable to intervene upon the horizontal and vertical organisation of the industry, identifying non competitive components of the production process and, when beneficial, separating them out. Indeed when competition is possible, promoting it can significantly reduce the information imbalance faced by the regulator.

5. Auctions or beauty contests?

The extent of the problems encountered with auctions for concessions implies that before a concession is awarded tariffs (and the rules and regulations under which they would evolve) should be fully specified, so that the concession is given to the party willing to provide the highest initial payment. Indeed, as Guash (2004) suggests there are some beneficial effect with having the concession awarded to the party willing to pay up front the highest fee. The most important one is t it commits the awarded company to respect the contract and that it grants the government some leverage in the case of non-compliance.

Designing the proper auction does not eliminate all problems. As already mentioned, the main weaknesses of a fixed term license are the following: 1) incentives to invest or to improve operations near the end of the license are reduced; 2) there are not many incentives on the part of new potential entrants to bid at the time of renewal and 3) in the case of separation between assets ownership and their management, there is no clear division of responsibility between the owner and the manager.

In this respect full privatisation (of a firm operating in a reserved activity) is preferable to fixed-term concessions. What privatisation does not eliminate is the problem of hold-ups of public administration by monopolies supplying essential services. In this respect infinite-horizon or long fixed-term licenses are not different. Hold-up problems are eliminated with public provision (but in that case government employees instead of the companies may have the power to exercise them instead) or when the license is short term.

Should the decision to grant a concession be taken, then auctions over an up-front fee are far more efficient than beauty contests, where the parameters over which the concession is granted are usually not as clearly defined and the scope for bilateral negotiations before the concession is granted greatly enhanced. By the way this lack of transparency strongly increases the possibility of corruption.

Guash (2004) reports that, contrary to what has happened with auctions, renegotiations were quite unlikely in the case of beauty contests because bilateral negotiations lead to much more favourable concession terms. Beauty contests are not really an instrument for achieving an effective competition for the market. Indeed the major benefit of an auction, as Klemperer (2003) puts it, is that “rather than relying on government bureaucrats to assess the merits of competing firms’ business plans, an auction forces

businesses men to put their *money where their mouths are* when they make their bids". So if the auction is well organised, there is no question that auctions are far more efficient than beauty contest.

In any case auctions are efficient only if the number of participants is sufficiently high. When the investment needed to participate in a bidding is too high, for example because technical details are very complex to disentangle, then participation may be low and the benefits of the bidding process are strongly reduced. There is therefore a trade off between the complexity of auctions and competition that would be very difficult to solve *ex-ante*.

6. Public services and competition

Not all public services are natural monopolies. Moreover, within a given public service some activities may be exercised under competitive conditions, while others are intrinsically monopolistic. All these elements have to be taken into consideration at the time of privatisation or when granting a concession.

Exclusive franchises are normally granted not only to assure protection to a natural monopolist, since it is extremely rare for a more efficient competitor to enter a market that is "naturally" monopolistic, once an incumbent is already present. They are also granted to ensure that a service provider remains profitable should prices be regulated and service obligations are imposed. If tariffs are not designed to cover the costs of the service being provided, but instead they guarantee the coverage of costs only on average, then it is likely that some services will be priced below and other services above their incremental costs. A new entrant, competing away the profits gained on the most profitable service, might prevent the incumbent from continuing to cover its costs at the given prices. In such circumstances, opening the service to competition without a thorough reform of the tariff structure may disrupt universal service. Such a tariff reform is at times politically and technically feasible. In such cases, while competition could be an efficient solution, should it be politically impossible to rebalance tariffs, the monopolist must be protected from outside entry.

Even if the service provider is protected from outside entry for its main mission, some of its activities could well be open to competition. For example, although the distribution of electricity, gas and water cannot be opened to competition (a single pipe enters each residence), supply can easily and efficiently be opened to competition. The identification of potentially competitive activities for each public service must be done on a case-by-case basis. For any identified competitive activity there should be a free entry regime.

It is questionable whether a company that has been granted a special and exclusive right should be allowed to continue supplying a complementary competitive activity and, if so, whether separation should be required. Competition law provisions that prohibit abuse of a dominant position are not always effective in eliminating any possible abuse by a vertically integrated firm. A natural monopolist subject to cost-plus regulation might have the incentive to artificially increase costs of the regulated service, in order to cover some of the costs of the competitive activity. The regulated company could thereby supply the potentially competitive activity at prices below average incremental costs, and equally efficient competitors would be kept out of the market. Predation could not always be used to prohibit such practices because the possibility for recoupment, in many jurisdictions a key element in a predation case, would not always be there. The reason is that government owned firms (or firms that are completely dependent on a government decision, such as renewal of a license) very seldom maximise profits. Lott argues that pricing below costs is more likely with government owned enterprises that are not profit maximising, but output, employment or revenue maximising[22].

[22] J. Lott, Are Predatory Commitments credible? Who should the Courts Believe? (1999).

A company controlling an essential facility may refuse access based on objective reasons (such as the absence of capacity), which would be justifiable from a competition policy perspective. However, such reasons may be the result of strategic decisions by the company controlling the essential facility. For example an electricity transmission company that is vertically integrated with a generation facility may have decided not to enlarge transmission capacity in order to impede entry of more efficient generators. In such cases, only separation can eliminate the anticompetitive exclusion[23].

On the other hand, if (vertical) economies of scope are important, then separating the two activities would lead to inefficiencies. Thus, an analysis of the importance of economies of scope is necessary for deciding whether to separate. If significant economies of scope are present, it would be inefficient to separate the competitive activity, and it would be unlikely that a "competitive" activity would indeed exist, since a firm would be unable successfully to compete without being able to exploit those economies. The recent OECD report to Council (REFERENZE) on member countries experience with vertical separation suggests that while there is substantial evidence that separation of transmission is beneficial in gas and electricity, the prospects for competition in rail passenger services are very limited and so the benefits of separating the rail infrastructure are at best unclear.

7. Conclusions

Governments supply public and private goods and services, for some of which they operate in competition with private firms, while for others governments are the only suppliers.

In the case of natural monopolies, the choice between public or private property is relevant because the structure of managers' incentives is not the same in the two systems. Public firms are less likely to pursue efficiency, instead favouring political patronage. If governments are interested in efficiency, they should encourage private firms to supply local public services. On the other hand public provision is more efficient when the effect on costs of a reduction of quality is high, quality is non-contractible and users value quality significantly.

In many infrastructure services technical progress may reduce the width and depth of natural monopoly. As competition increases, prices have to be structured so as to sustain it. For example, when competition becomes possible in long-distance telecommunications services, the subsidisation of the cost of local calls from long distance revenues may no longer be sustainable. Furthermore, as the scope for competition increases, it may be necessary especially at the time of privatisation to separate the natural monopoly part of the industry from the rest, so as to eliminate even the incentive for all sorts of exclusionary strategies. However the benefits of the separation have to be compared with its costs which in many industries are high.

The optimal solution is to:

- Continue with public provision when: a) the opportunity for cost reduction stemming from a decrease in non-contractible quality is high; b) the probability of product or process innovation is low; c) gaining reputation as an efficient service provider is not important; and d) competition is weak and consumer choice is non existent. Otherwise conditions are appropriate for private provision. In that case one important decision to be made is whether the license should be fixed term (long or short), or have no term. The longer the license, the greater the need for regulation because unexpected events can occur and the firm may need to renegotiate the terms of providing

[23] On this see OECD Recommendation of the Council concerning structural separation in regulated industries, Paris (2001).

the service. The shorter the license, the more the results of a process of competition *for* the market resemble a competitive system (*in* the market).

- When there are large sunk costs, give the company a permanent license (full privatisation). Otherwise, the incentives to invest and to maintain the efficiency of the firm will be strongly distorted close to the end of the license term and remedies will be difficult to introduce. When sunk costs are not substantial (and contracts are easily written), competition for the market (and short-term licenses) can eliminate the need for regulation.

- Unless there are clear economies of scope to be gained, make sure that monopolists are not allowed to provide any liberalised activity. In fact, when the monopolist objective is not profit, but revenue or employment maximisation, anticompetitive cross-subsidisation becomes more likely. If that is the case more efficient producers may be kept out of the market by having captive consumers pay indefinitely for the difference between costs and revenues in the liberalised activity. Furthermore, a natural monopolist may refuse access to an essential facility based on objective reasons, such as the absence of capacity, that are justifiable from a competition policy perspective. However, such reasons may result from strategic decisions by the company controlling the essential facility. Separation is efficiency enhancing only if the complementary activities do not enjoy significant economies of scope. Otherwise consumers are better off if both activities are supplied by the same concern.

- Should the decision be made to grant fixed medium and long-term concessions, the auction should be organised around a single criterion and in particular around the up-front fee to be paid to the granting government. In this way the awarded company is committed to respect the contract and governments are granted some leverage in the case of non-compliance. Auctions designed to identify the minimum tariff for providing service are inefficient because they inevitably lead to renegotiations. For very similar reasons also beauty contests should be avoided. Furthermore beauty contest enhance the possibilities of corruption.

- If a concession does not lead to the transfer of ownership of the infrastructure but is only a management concession, provide the concessionaire with broad powers over the organisation of the company, including the power to fire existing redundant employees. Otherwise, the benefit of the auction may completely disappear. Furthermore when leaving to the State the ownership of all assets, the concession contract has to contain some specific incentive for maintaining these assets and some provision in order to account for technical progress. Finally the separation between asset ownership and service management leads to a possible conflict of responsibility in the case of accidents that is very difficult to solve *ex-ante* for all contingencies.

- Make sure that the proper regulatory institutional structure is in place at the time the concession is granted. Otherwise, if regulation is introduced after adjudication or after privatisation, the probability of legal disputes strongly increases. Furthermore, since long term contracts cannot contain provisions about future innovation possibilities, regulators need to allow regulated firms to reap at least a portion of the benefits expected from possible future innovations. In any case, whenever significant externalities or information asymmetries exist, regulators should seek adequate public participation in policy formulation so as to identify additional sources of information.

With respect to the role and powers of competition authorities all these suggestions relate to advocacy, since the greater concerns with privatisation, concessions and auctions for natural monopoly infrastructure services is that market power of natural monopolists is sufficiently disciplined by regulation and that there are incentives in place to pursue (productive) efficiency. Of course there can be collusion in

tendering, but such collusion, as I have briefly argued in the paper, is also addressed by the optimal design of the auction and by making sure that the number of competitors is sufficiently high. Advocacy has an important role to play also into this respect.

There are two additional issues that I would like to briefly discuss here as a concluding remark. The first one is that natural monopolies are not stable in time and technical progress is continuously reducing their extent. This is of course very visible in telecommunications, but also in electricity generation, where the average size of a generating plant has strongly decreased in recent years, or in local services, where waste collection is now much more capital intensive than before and the service could easily be auctioned out. The problem with fixed or infinite-term concessions is that the future extent of technical progress is unknown and existing natural monopolies may disappear, opening up many markets to competition. If the concession is short term there is no problem, but long term concessions may introduce unnecessary restraints to competition. The solution is to make sure that the exclusivity period is no longer than necessary.

The second question relates to the possibilities that antitrust authorities have in intervening ex-post with respect to restrictions of competition in infrastructure services. We all know that there is a lot of room for intervening in infrastructure services in the case of impediment abuses, but I do not see anything special with concessions and privatisation because the antitrust law could be applied, in all jurisdictions I know, also in the case of public provision. Exploitative abuses are much more difficult to address. First of all because the exploitation does not always take the form of high prices (which most of the time are regulated), but much more frequently by reductions of quality. Furthermore the existence of exploitative abuses, in the absence of any yardstick competition as is the case in infrastructure services, are very difficult to identify and regulators are in this respect much better positioned than antitrust authorities.

SUMMARY OF THE DISCUSSION

Committee Chairman, Frédéric Jenny, introduced Ms. Barbara Lee, Executive Director of the Jamaican Competition Authority, as Chair of the discussion.

Ms. Lee noted that the involvement of a national competition agency in the concession process can vary significantly across countries. The agency may be involved from the outset, in the fashioning of the process, or it may not become involved until after the concession is awarded, which was the case in Jamaica. She expressed the hope that this issue, as well as several others, would be explored in this roundtable. She complimented the delegations on the quality and quantity of their written submissions for the roundtable.

The Chair invited Ms. Sally Van Siclen from the Secretariat to summarise the background paper that she prepared for the discussion.

Two preliminary questions had been posed to the Secretariat: what is a concession, and why should I, a competition law enforcement official, care? An accepted definition of a concession is: a grant to a private firm of the right to operate a defined infrastructure service and to receive revenues deriving from it. A concession could be granted to operate an airport, for example, or to provide water to a municipality. There could be many parameters to the concession, including specification of tariffs, of investment, of levels of service, of fees to be paid to the government, or of the duration of the contract. The agreement may include the transfer of the relevant assets, and may also require that they be returned to the government at the end of the concession. There is another type of concession, incidentally: a concession for natural resource exploitation. That type of concession is beyond the scope of this discussion.

As for why a competition official should care about concessions, it is likely that the agency would inevitably become involved at some stage in the operation of the concession in the normal course of its law enforcement responsibilities. In general, it is better that the agency become involved sooner rather than later. The initial stage in the process could be when concessioning takes place as a part of broad reform of a sector. Fundamental issues relating to the industry and regulatory structure are addressed at this stage.

The second stage in the process is designing the concession itself. Questions that are addressed at this stage include: What should be concessioned? Should the assets be vertically or horizontally split? What is the term of the concession? How many concessions? The third stage in the process is the award of the concession. There are several ways of awarding concessions, including by auction, by simultaneous negotiations with more than one party, by sequential negotiations with a single party a time, or by what has been called a "beauty contest," a more subjective evaluation of potential concessionaires on the basis of specified criteria. In general, the economics literature concludes that better outcomes result from competitive auctions rather than from negotiations or beauty contests.

The competition agency could provide useful input at all of these initial stages – by helping to ensure, through competition advocacy, that there is as much competition as possible in a newly reformed sector; by helping to design the auction in a way that preserves competition, for example by advocating vertical splits in the assets, in order to minimise possible denial of access to essential facilities; and by assisting in the design of the concession process to ensure that there is as much competition as possible for the market.

Of course, perhaps the most important role of the competition agency in the concessioning process is to apply the competition law, both at the award stage, for example, to identify and punish collusion among bidders, and at the performance stage, for example, to sanction and prevent abuse of dominance.

The Chair then introduced the first of two principal discussants, Mr. Alberto Heimler, Director of Research and Institutional Relations in the Italian Antitrust Authority. Mr. Heimler introduced a challenging and somewhat controversial proposition: that while competition in the market is always to be encouraged, competition for the market, in this case through concessioning, may not always be preferred to public provision of the service or good. When efforts at creating such competition turn out badly, as sometimes happens, the good reputation of competition in general, and of the competition agency specifically, can suffer. In support of this proposition he cited a survey conducted in 2001 in several Latin American countries, which showed that substantial majorities in these countries felt that privatisation, much of which had occurred in infrastructure industries, had not been successful. Mr. Heimler described a few cases of privatisations or concessions that had apparently gone wrong in these countries.

A problem arises when the assets that are privatised or concessioned are natural monopolies, when the opportunity for cost reduction stemming from reductions in quality is high, and there is no way to reward quality improvements. Quality may suffer and there may be little technological improvement. In this context, it may be better not to privatise, but to provided the good or service publicly.

In considering whether to grant a concession for a fixed term or for an indefinite term – in other words to privatise – an important issue is whether there are significant sunk costs that the private party must bear. If there are none, concessioning is the better course. When sunk costs are high, on the other hand, it is better to fully privatise. This eliminates the incentive that would exist in a fixed term concession for the concessionaire not to make investments near the end of the term. Privatisation is also preferred when it is likely that at the end of the initial concession there would be little competition for the subsequent concession; the incumbent would have informational and other advantages that would discourage new entry.

The opportunity for renegotiation of concession agreements can be a significant drawback to the process. If the winning bidder is permitted to return to the bargaining table and acquire through negotiation what it conceded in the competition phase, the benefits of competition are lost. Of course, because concession contracts are by nature incomplete, that is, not all can be known and agreed to at the beginning of the contract, renegotiation is sometimes inevitable.

The design of a concession or privatisation should provide for competition to exist wherever it is possible. For example, in the provision of electricity, the transmission grid is a natural monopoly, but competition can exist in generation. For this reason, the two functions should be separated; the operator of the grid should not also be permitted to operate as a generator. The competition agency can play an important role in the design phase for this purpose. More generally, the competition agency should be ready to enforce the competition law in these sectors when it detects collusion or exclusionary abuses of dominance.

The Chair then introduced the second principal discussant, Mr. Baris Ekdi, Director of Training of the Turkish Competition Authority. Mr. Ekdi stated that there is an important role for the competition agency in the granting of concessions. One purpose for granting concessions is, of course, to enhance efficiency in the sector involved; the competition agency has expertise in this area, and its participation can be especially useful because the relevant sectors are usually characterised by some aspect of monopoly. But further, the government may have another motive for concessioning – to enhance revenues. This purpose may be fundamentally inconsistent with that of enhancing efficiency – a concessionaire who is granted market power will pay more for the concession. This is another reason for the participation of the

competition agency in the process. And finally, the agency conducting the concessioning may not have sector-specific expertise; this would be especially true if there was not yet a regulatory regime established.

There are many ways in which the competition agency can participate in the concession process. There are two in general: competition advocacy and competition law enforcement. Anti-cartel enforcement is important at the award stage, and protecting against abuse of dominance after the award is also necessary. The agency can offer competition advocacy in several contexts, including designing the concession, interpreting the contracts, in renegotiations if they occur, and in the regulatory process.

Mr. Ekdi provided some examples of cases that arose in Turkey in which there were competition issues. One involved sequential bidding for two mobile telephone licences. Due to the design of the auction, the highest bidder could exclude competition for the second licence and make the holder of the third licence face high sunk costs. These negative outcomes of the auction, accompanied by poor regulation and inefficiency of the regulatory authority, resulted in roaming wars after the auction and as a result the Turkish Competition Authority had to intervene and impose fines on the two GSM operators holding collective dominant position in the market. A second case involved the restructuring of the Turkish electricity supply sector, in which the monopoly operator of the distribution grid was also permitted to own and operate a generating facility. When the monopoly operation prevented access of an electricity generator to the transmission grid, the TCA intervened in line with the essential facility concept and imposed fine.

A third case involved what Mr. Ekdi called, "hidden concessions" in domestic passenger air service. There was no formal concession process at all; instead a government agency quietly issued a decree setting forth requirements for participation in the sector that effectively protected the dominant carrier from competition through new entry. Later the "concessions" were annulled, there was new entry, prices fell and capacity increased. The fourth case involved legal monopoly for the sale of coal in Ankara granted to an undertaking owned by Ankara municipality. The competition agency intervened, fining the offending firm and recommending that legal monopoly be removed.

1. Concessions during regulatory reform

The Chair announced that she would move into brief interventions by countries that had provided written submissions for the roundtable. She would begin with Brazil and Indonesia, both of which indicated that their agencies were involved in the initial stages of broader regulatory reform in one or more sectors.

Brazil has had the experience of concessioning or privatising both before a regulatory regime was in place – in the case of ports and roads, and after – in the case of telecommunications. The latter worked much more smoothly, with fewer incidents of renegotiation and opportunistic behaviour. It's best to work out in advance the major contact issues, such as tariff rebalancing and universal service requirements. If an independent regulatory agency already exists it will be better positioned to manage the contract, and it will also enhance certainty for the bidders, increasing the price. In general it is easier to resolve important issues such as industry structure with the government before creating the concessions rather than with private parties afterward.

The Brazilian delegate agreed with Mr. Heimler that full privatisation is usually to be preferred to concessioning, but in Brazil the Constitution sometimes made privatisation not possible, thus requiring concessions instead, if the assets are to be privately managed. As for public vs. private provision, public provisioning may sometimes be preferable, as urged by Mr. Heimler, but in Brazil's experience the government is often highly inefficient as compared to the private sector in this regard.

The Chair noted that Indonesia's submission described three concessions, in harbours, drinking water and telecommunications. The submission described the first two as having encountered significant problems, while the third, telecommunications, was considered a success. She asked the Indonesian delegate to, if possible, give the reasons for these different outcomes.

The process of concessioning in Indonesia has been an evolutionary one. At first there were no clear goals for concessions, and most of the early ones were granted to state-owned monopolies. Later the concessions were given to private parties, but the operational and regulatory functions were not clearly separated. Finally, after a monetary crisis in the country, it became clear that concessions should have specific goals of enhancing efficiency and attracting investment in infrastructure.

In the cases of harbours and drinking water, the sectors were essentially natural monopolies, and concessions were granted without there having been an effective regulatory agency created. In telecommunications, on the other hand, it was recognised that competition could and should exist. The participation of the private sector was more carefully planned and openly implemented. Today, the telecommunications sector in Indonesia is competitive and robust, while harbours and drinking water continue to lag.

2. Allocation of concessions

The Chair stated that the discussion would now turn to the methods for allocating concessions. She noted that auctions are often cited as the most efficient means of doing so. The submission of the Netherlands described an interesting process for concessioning three different types of railway service. The concessions for each were different, based on different characteristics of those markets. She asked the delegate from the Netherlands to describe the three different methods and the reasons for using them, and also whether the Netherlands competition authority was involved in the process.

The delegate from the Netherlands stated that the competition agency was not involved in the granting of these concessions, which was the sole responsibility of the Ministry of Transport.

The three concessions involved different sets of assets: the conventional passenger and freight network, a new high speed passenger network and a new network dedicated to freight. While the three concessions are different in some respects, they also have at least one thing in common. In all three the responsibility for allocation of capacity and traffic control was given to the incumbent infrastructure manager. The task is similar in all three situations and it was considered not efficient to separate these responsibilities. It was possible to have competition for the market at another level, however: infrastructure maintenance and the accompanying charges for maintenance to be paid by infrastructure users.

There were differences among the three networks as to the quantity and quality of available information about the infrastructure. As for the conventional network, the assets were not owned by the government but rather by the incumbent manager. There was not sufficient data about these assets, some of which were many decades old, to permit potential providers to submit informed tenders, and so the concession for infrastructure maintenance was given to the incumbent without tender for a period of ten years, with a provision for the ultimate transfer of the assets to the government. As for the other two networks, which were new, there was good knowledge about the assets, which would facilitate a tendering process for their maintenance. There was, however, relatively more certainty about market conditions for passenger transportation, which had been managed by the government, than about freight transportation, which had been liberalised and which faced competition from other transport modes. The government decided that it would assume the risks associated with the uncertainties in the freight market by granting a concession for maintenance of that network for a shorter term, which was five years, during which time the

relevant information could be accumulated. The short concession would be followed by one for a longer term. The concession for the maintenance of the high speed passenger network, on the other hand, about which there was less uncertainty, was awarded for a period of 25 years.

The Chair then asked the French delegate to describe the concessioning process in that country.

France has a long history in concessions, dating from the 19th century. There are essentially two forms of concessioning currently practiced in France, one in which the management of a public utility is entrusted to a public or private enterprise, which assumes the associated financial risks, and a second, more similar to the British system, which resembles a public-private partnership. It seems that neither one is inherently more conducive to competition; more important is intervention by the competition authority both before and after the award of the concession for the purpose of promoting competition.

The French delegate then briefly described two concession cases that have arisen in that country, involving drinking water and motorways. The provision of drinking water, like electricity, actually involves three distinct services: production, transport to municipalities and distribution to individual customers. As in electricity, the possibility exists for competition in the production stage, and possibly in transport as well, but local municipalities traditionally have not made that distinction and have contracted for all three services with a single firm. The French competition authority has strongly advised municipalities to tender the production and transport of water separately from distribution, as means of introducing competition and lowering prices. In motorways, the French government is in the process of privatising these assets, and recently the competition authority made a series of recommendations designed to prevent the vertical integration of the operators of these motorways and large construction and public works companies, which would serve to protect competition in the construction market.

These two cases are examples of intervention by the competition authority at the time the concession is designed, for the purpose of preserving competition.

The Chair turned to the United States, whose submission described the role of the U.S. competition agency in the allocation of takeoff and landing slots at congested airports.

There were a few large airports in the United States that were overly congested – the airlines serving them desired to make more takeoffs and landings than the airport could handle. The U.S. sector regulator, at the urging of the Department of Justice, dealt with the problem by awarding to incumbents a finite number of "slots," or rights to take off and land. It was expected that these rights would be freely traded as with any other property right, resulting in their efficient allocation. This did not happen, however, for more than one reason, the most important one being that the large incumbents were unwilling to sell them to potential entrants or fringe firms that might expand into their markets.

In its advocacy role the Department of Justice offered two market-based solutions: (1) to reduce congestion, raise the price of landing or taking off at peak periods to more closely approximate the real cost of congestion; and (2) to enhance the trading of slots, convert them to a form of leasehold and auction each year a significant percentage of them, say 20%. The Department also offered a third suggestion: to encourage public investment in the air traffic control system for the purpose of making it more efficient, thereby reducing congestion.

While not all of these proffered solutions have been implemented, this case points up an essential feature of effective competition advocacy: the competition agency must invest in acquiring competence and expertise in sectors in which it intends to provide advocacy.

3. Design of concessions and allocation of subsequent concessions

The Chair noted that the design of any given concession must be tailored to the specific market at hand. Further, there are special competition problems when a concession comes to an end and it is put up for auction again. In particular, the incumbent may have special advantages that could discourage other potential bidders from participating. She turned again to the Netherlands, noting from its submission that the concession for the new freight line was given to a consortium of companies for a short period of time. What were the reasons for selecting a consortium, rather than just one company? Was it to promote competition for the subsequent concession?

The Netherlands delegate replied that the award to more than one company does benefit competition, but the principal reason for doing so was to involve a new private company in providing the service, which could result in improved efficiency and reduce the subsidy required of the government. That turned out to be the case, as the consortium's offer was 13 billion less than that of the incumbent. It was also useful, however, to involve a new company in the initial, short concession. It would force the incumbent to co-operate within the consortium – to share information – which could promote competition in the long run.

The Chair raised the issue of the level of government that conducts the concessioning. Should it be done centrally, at the national level, or in the case of municipal services, should the process be decentralised? The submission by Romania described an interesting innovation: the creation of a national agency, the National Regulatory Authority for Municipal Services (NRAMS), which would have the responsibility for concessioning municipal services. Has this arrangement been successful?

The Romanian delegate first gave some background on the participation of the competition agency in the concession process. The agency strives to participate ex ante where possible, and to date this has taken the form of co-operation agreements between the competition agency and sector regulators, including NRAMS. These arrangements are working well; there are frequent inter-agency contacts as a result. NRAMS was created less than a year ago, however, so there has been little experience with that agency.

4. Renegotiation

The Chair stated that renegotiation was identified in the background paper and by the principal discussants as an important issue: renegotiations could diminish or eliminate the advantages that result from competition in the award stage. Only one submission addressed the topic, however, that of **Brazil's**. It described the use of arbitration in that country as a way of resolving disputes in concession contracts. She asked Brazil to describe how it uses arbitration for this purpose.

The Brazilian delegate stated that recently the law on concessions was amended to permit the use of arbitration to resolve disputes. In the right circumstances, arbitration can be more efficient than the judiciary for this purpose. Because the government is a party to concession contracts, the arbitrator in these instances may be an international or foreign expert. Of course, it is understood that the government must not surrender its sovereignty in these situations, so its use of arbitration must be restricted to interpreting specific contract terms. The limits of this new law permitting arbitration have not yet been fully tested.

The Chair questioned Romania about a case described in its submission in which a state-owned enterprise was privatised and the new entity then participated in a municipal tender. It seemed that following the tender the municipality continued to hold shares in the enterprise. Did this in fact happen, and if so, what were the welfare benefits, if any, that resulted?

The Romanian delegate explained that its submission may not have been fully clear on this point. The state-owned enterprise, which had been providing the relevant municipal service, was fully privatised into a commercial undertaking. It then participated in the subsequent tender for a concession to provide these services, but the tender was won by a private foreign company. This tender did provide benefits for consumers, as it was conducted in a competitive manor, and the resulting tariffs were considered reasonable.

5. The role of the competition authority in concessioning

The Chair stated that this topic is probably the most important of all in this discussion, in view of the fact that the participants are competition agencies. As has been pointed out previously, the competition agency may participate *ex ante*, in the design stage, and *ex post,* through enforcement of the competition law. The Chair noted that in Mexico the competition agency apparently has the power to evaluate prospective concession holders and to exclude from the competition those whom it considers unqualified. She asked Mexico to describe this process.

In Mexico the sectoral laws give the competition authority this power. The Mexican delegate cited the *ex ante* participation of the agency in the railroad and telecommunications concessions as having been particularly successful. In rail, tariffs have decreased in real terms, productivity has more than doubled in ten years, rail's share of the total transport sector has increased and investment in the sector, while not increasing absolutely since privatisation, has become more efficient. The Mexican delegate also described his agency's *ex post* participation in regulation of the rail sector. It feels that current regulations controlling interlinear activity are not efficient, and it intends to recommend changes to them.

The Chair asked France to describe a third case in which the competition authority was involved in concessioning through enforcement of the competition law.

The French delegate described a case in urban bus transport. An anomalous situation existed in this sector, in which the concessions for this service were granted by local municipalities, but the concessionaires operated nationally. Moreover, there was no national regulation or oversight of this service. The result was that there was little or no competition for these concessions at the local level; the incumbents almost always were awarded successive concessions. While there were lawful explanations for this behaviour – the incumbents enjoyed informational advantages and there were costs associated with new entry – there was another possible cause: collusion. The French competition authority conducted an in-depth study of the sector and concluded that three national enterprises had indeed engaged in collusion, by agreeing not to compete with the incumbent across local markets. It imposed heavy fines upon the respondents, and its decision was upheld by the courts.

The Chair noted that in 2005 Russia enacted a new law on concessions. She asked the Russian delegate to describe the law and the reasons for enacting it, and to state whether the Russian competition authority has had occasion to intervene in the concession process since the law was enacted.

Prior to July 2005, when the law was enacted, concessions were not separately regulated; they were subject to the general code governing commercial transactions in Russia. The purposes of the law are to attract investment, to promote effective use of publicly-owned infrastructure assets and to improve the quality of goods and services provided to consumers. The law regulates the completion, operation and termination of concession agreements and it stipulates certain rights and legal interests of the parties to these agreements. There are no laws regulating concessions in specific sectors, but such agreements are possible in many sectors, including transport, pipelines and public utilities such as heat, gas and electricity supply.

The Russian competition authority has the power to intervene in cases in which the government or tender commission introduces discriminatory measures in the concession agreement or discriminates in favour of one or more parties, and in cases in which a concessionaire abuses its dominant position by imposing discriminatory conditions of access to infrastructure assets that are the subject of a concession agreement. Because the law is new, however, the competition agency has not yet acted in a case.

The Chair returned to Indonesia, noting that the competition agency has the power to make recommendations to the government regarding terms of concessions that are deemed not to be consistent with the principles of fair competition. She asked the Indonesian delegation to give an example of such a recommendation and to describe the results.

The powers of the Indonesian competition authority to make such recommendations are derived from the Constitution, from sector-specific laws and from the competition law. The agency recommends that concessions be granted through open tenders, and it has recommended that they be accompanied by the creation of a regulatory body, where necessary. The agency has made recommendations regarding access to essential facilities and the government's supervisory role in regulating tariffs. In one case, involving roads, the competition agency recommended that a concession not be granted because it was anticompetitive, and the government accepted the recommendation. The agency's recommendations were not followed in harbours and drinking water, however, and the agency continues to work to improve the situation in those sectors.

6. General discussion

The United Kingdom offered several perspectives on the topic. Some regard the UK as having originated the concept of concessions. One of its most significant concessions was for the operation of the Channel Tunnel. It should be noted that the tunnel concessionaire continues to be in financial distress, but it is also true that there was an effort to preserve competition in the operation of the tunnel wherever possible, for example in ferries. This is one important lesson in concessioning: to preserve residual competition. Another is that the competition agency has an important role in concessioning, and it should become involved as early in the process as possible.

Another important issue is the interface between the sector regulator and the competition agency. In particular, the regulator may in certain circumstances have the power to apply the competition law, though in most cases it chooses to use its regulatory powers instead. In any case, there should be consistency when more than one agency applies competition principles. Finally, there is the issue of duration of concession contracts. They use to be as long as 20 or 30 years, but now we see shorter periods, for example in the case of railroads in the Netherlands. A related issue that has arisen in the UK is when concessionaires choose to sell their investments to infrastructure funds, which are more interested in long term cash flow. These new owners may be less inclined to make investments that would enhance the quality of the good or service, and these transactions may not therefore be in the best interests of consumers.

Brazil offered some suggestions regarding the participation of the competition agency in the design phase. One is to use simulations. They offer the means for testing various proposals, and can be persuasive as advocacy tools. Second, pre-screening of candidates – for example as to capacity, experience and financial resources – is important. Also the use of performance bonds can identify those who have a commitment to the project. Finally, the competition agency may have a specific comparative advantage as against the concessioning authority – its cadre of expert industrial organisation economists. Other agencies will have technical expertise, but the competition agency's economic expertise will often assure the agency a seat at the table.

Denmark offered some disagreement with the principal discussants. It agreed that renegotiations can be especially harmful if they are permitted, but it cited one of its experiences in mobile telecom auctions in which it threatened to re-open the auction rather than renegotiate, and the party seeking the renegotiation then dropped its objections. The Danish delegate then addressed the point made by Mr. Heimler that when it is difficult to control quality of a service to be delivered it may be better to provide the service publicly rather than through privatisation or concession. In fact, there is growing ability to measure and control quality in several sectors, including the bus transportation sector cited by Mr. Heimler.

Finally the Danish delegate noted a problem that has occurred in that country: co-ordination between an incumbent and labour unions to limit opportunities for training in specific sectors, thereby inhibiting new entry. The competition authority has advised that these practices not be permitted.

South Africa offered a new perspective, comparing concessioning with what it called part-privatisation. It cited an example in fixed line telephony in that country, in which the government sold a minority share of the fixed line monopolist to a private consortium, and the result was highly unfavourable, having the effect of excluding a second competitor in the sector for ten years. The problem with concessioning is that it could align the interests of the government and the private operator in a way that harms consumers. In South Africa, privatisation has become unpopular because of some unfavourable experiences with it, and concessioning has taken its place. But concessioning could simply another form of industrial policy, with attendant negative outcomes.

The United States commented that one point that has emerged from the discussion is that there exist significant opportunities for corruption in concessioning. Competition law enforcement can play an important role in limiting corruption, first by explicitly prohibiting "hidden concessions" – informal arrangements between government officials and private parties. A second way is for the competition agency to publicly draw attention to manifestly harmful arrangements, and third, the agency can promote the use of an open, fair concessioning process, which by its terms makes corruption more difficult.

Another point that comes through in the discussions is that empirical work is an important component of successful competition advocacy. It is not sufficient for the agency simply to say "competition is good." It must support its position with empirical information, and some of this might come from experience in other countries, what might be called "economic precedence." In this regard, organisations like the OECD could act as repositories for information of this type, making it searchable and accessible to individual counties.

Chinese Taipei described a case from that country that involved bidding for the construction of a large construction project, worth more than USD ten billion. There were two bidders. The bid by the more aggressive one did not require any capital investment by the government, and included an offer to pay a royalty fee if it were selected. The more conservative bidder specified that the government would have to invest at least USD 300 million. Predictably the bid was awarded to the first bidder, but then the project soon encountered delays, cost overruns and requests by the contractor to renegotiate. In this situation the government was effectively a hostage to the contractor, because termination of the contract would have been very difficult and expensive. The lesson from this experience was that the design stage of a concession is highly important, and if the competition agency is permitted to participate at this stage it should. Unfortunately, in this example the contract was considered to be simply one for procurement or construction, and the CFTC could not participate.

The European Commission noted that most of the issues raised in this roundtable are more appropriate for Member States rather than for the EU as such. Still, the Commission has promulgated some general standards for public procurement. Recently it adopted a new directive on public procurement, which imposes EU-wide competitive tendering for public works contracts above a certain

value, and which may be extended to service contracts as well. The EC delegate noted that the discussions had included references to public transportation by rail and road, and recently it adopted a proposal for a directive in that area. The directive would impose transparency requirements in such contracts. Other subjects of inquiry for the Commission are standards for compensation of concessionaires for public service contracts, measuring and reporting costs and imposing certain publication requirements.

The Chair noted that Professor Allen Fels from Australia was present, and invited him to speak on the subject.

Mr. Fels stated that the sharing of experiences across countries, as in this Forum, can be quite valuable. He noted generally that in the public-private contracting arena the government often comes out second best. There may be several reasons for this. The private party is more focused on profits, while governments have much more diverse goals, including enhancing revenue, quality of service, universal service, and so on. The private party will probably have more technical expertise than the government in the relevant sector, and the government may generally lack important commercial know-how. The challenge for the public sector in this situation is to import specialised knowledge when it is required. This includes the expertise of the competition agency in competition policy and economics, as well as technical expertise, which might be supplied by consultants. Finally, he noted that most concessions today are in infrastructure industries, but in the future there may be more such arrangements in services, such as health care and education, where the issues are even more complex.

A representative of the World Bank addressed the topic of the role of the competition agency in the concession process. He proposed that the agency consider this issue through three filters: (1) prices, i.e. tariffs, and the means for compensating the concessionaire for providing universal service; (2) output, which includes timing and quality issues; and (3) entry, which includes the number and qualifications of bidders. He advised that the competition agency should concentrate on these issues rather than more technical ones, such as identifying the best bid or possible renegotiation scenarios.

Within the World Bank, privatisation is not always considered the best alternative to concessioning or public provision. Ownership is less important than ensuring that there will be competition in the market. This points up the importance of the competition law and the competition agency. There should be no exemptions from the competition law for specific sectors or transactions, and the competition agency should participate to the extent that it can pre-award, and vigorously enforce the competition law post-award.

The Chair again brought up the Jamaican experience, in which contracts for long duration were granted before liberalisation of certain sectors, and this led to confusion about whether liberalisation had the effect of voiding these contracts, or parts of them. Some of these issues have not yet been sorted out.

7. Conclusion

She then stated that the roundtable would close with final remarks from the two leading discussants.

Alberto Heimler returned to the subject of renegotiation. Often a threat to reopen a tender if renegotiation is demanded is not credible, if the product or service is essential and the public authority cannot quickly provide an alternative. Mr. Heimler cited a case in solid waste removal from the U.S., which offered one solution to the problem. There, the municipality awarded concessions to four parties to provide the service in specific sectors of the city, and in a fifth sector it continued to provide the service itself. One purpose of this arrangement, of course, was to provide "yardstick" competition, but a second was to make it possible for the city to quickly offer service if a concessionaire defaulted or demanded renegotiation.

In general, the discussion has pointed up the number and complexity of issues that can arise in the concession process. It is important to deal with them as much as possible *ex ante,* but this is difficult.

Baris Ekdi also addressed renegotiation. He agreed with the Danish delegate that there are means of minimising the problem and that threatening to re-open the auction is one, but he reiterated that renegotiation offers a means for opportunistic behaviour. Second, the goal of efficiency results in a preference for private monopolies over public ones. In this context, ownership does matter, but the challenge is to ensure that the efficiency gains are transferred to the consumer. This points up the important role of the competition agency.

The Chair thanked the delegates for their participation in this useful and informative roundtable discussion. In conclusion, she read from the submissions of Indonesia and Mexico, and adopted these recommendations as her own. From Indonesia:

> Concessions should be granted through transparent, competitive and accountable process and should be kept away from collusive process. Concession agreements must be made specific and clear, using measured indicators, so that the reward and punishment measures can be performed properly. Concession planning and implementation must minimise the potential misuse of dominant positions, anticompetitive behaviour, especially by concession holding companies. And it is required that [there be] co-operation and co-ordination between business competition authorities and sector regulatory bodies in order to guarantee the achievement of concession granting purposes technically and economically, and to maintain fair business competition climate.

And from Mexico:

> . . . [I]t is essential to consider competition issues in designing the specific concession scheme to be adopted in each case, in order to prevent anticompetitive conditions and guarantee access to essential facilities. In addition, effective enforcement of the competition law is also needed to guarantee *ex post* the efficient functioning of markets related to concessions.

RÉSUMÉ DE LA DISCUSSION

Le Président du Comité de la concurrence, M. Frédéric Jenny, présente Mme Barbara Lee, Directeur exécutif de l'autorité de la concurrence jamaïcaine, qui préside les débats.

Mme Lee note que l'implication de chaque autorité nationale de la concurrence dans le processus de concession peut varier considérablement d'un pays à l'autre. L'autorité peut s'y impliquer dès le début, en intervenant dans l'élaboration du processus, ou bien seulement après l'octroi de la concession, comme c'est le cas en Jamaïque. Elle espère que cette question, et d'autres encore, seront examinées durant cette table ronde. Elle félicite les délégations pour la qualité et la quantité de leurs contributions écrites à la table ronde.

La Présidente invite Mme Sally Van Siclen du Secrétariat à présenter une synthèse de la note de référence qu'elle a préparée pour les besoins de la discussion.

Deux questions préliminaires ont été posées au Secrétariat : qu'est-ce qu'une concession, et en quoi ce sujet concerne-t-il les responsables de l'application du droit de la concurrence ? Selon une définition communément admise, une concession consiste à accorder à une entreprise privée le droit de gérer un service d'infrastructure et de percevoir les recettes qui en découlent. Une concession peut être octroyée pour l'exploitation d'un aéroport, par exemple, ou pour l'approvisionnement en eau d'une commune. Elle peut faire intervenir de nombreux paramètres, notamment en spécifiant des tarifs, des investissements, des niveaux de service ou le niveau des redevances devant être versées à l'État ou la durée du contrat. L'accord peut prévoir le transfert des éléments d'actif concernés et peut également exiger que ceux-ci reviennent à l'État à l'expiration du contrat. Il existe également une autre catégorie de concession, concernant l'exploitation des ressources naturelles, qui ne sera pas traitée ici.

A la question de savoir pourquoi les autorités de la concurrence doivent s'intéresser aux concessions, on peut répondre que l'autorité de la concurrence concernée sera sans doute inévitablement impliquée à un stade ou un autre du déroulement du processus de concession, dans l'exercice normal de ses responsabilités en matière d'application de la loi. En règle générale, il est préférable que l'autorité intervienne au plus tôt dans le processus et non dans les derniers stades. La première étape du processus peut se situer au moment où l'octroi de concessions s'inscrit dans le cadre de la réforme générale d'un secteur donné. Les questions fondamentales ayant trait au secteur en question et au cadre réglementaire qui s'y rapporte seront traitées à ce stade.

La conception des concessions en soi constitue la deuxième étape du processus. A ce stade, les questions traitées sont notamment les suivantes : que faut-il concéder ? Les actifs concernés doivent-ils faire l'objet d'une séparation verticale ou horizontale ? Quelle sera la durée de la concession ? Combien de concessions attribuer ? La troisième étape du processus réside dans l'octroi de la concession proprement dit. Il existe plusieurs méthodes d'attribution des concessions, notamment les enchères, les négociations simultanées avec plus d'un candidat, les négociations successives avec un candidat à la fois ou encore l'organisation d'un « concours de beauté », consistant en une évaluation plus subjective des concessionnaires éventuels sur la base de critères prédéfinis. En général, les travaux économiques sur la question concluent que les enchères concurrentielles produisent de meilleurs résultats que les négociations ou les « concours de beauté ».

L'autorité de la concurrence peut apporter des éléments utiles à chacune des ces étapes initiales – en contribuant, de par son rôle de promotion de la concurrence, à faire en sorte qu'un secteur tout juste réformé soit aussi concurrentiel que possible, en contribuant à organiser les enchères de façon à préserver la concurrence – en encourageant par exemple la séparation verticale des actifs afin de minimiser tout risque de refus d'accès à des installations essentielles – et enfin, en apportant son concours à la conception du processus de concession en vue d'assurer que la concurrence soit aussi forte que possible sur le marché considéré.

A l'évidence, le rôle peut-être le plus important de l'autorité de la concurrence dans le processus d'octroi de la concession est de faire respecter le droit de la concurrence, lors de la phase d'attribution (pour détecter et sanctionner, par exemple, toute collusion entre soumissionnaires) comme lors de la phase d'exécution du contrat (pour sanctionner et prévenir, par exemple, tout abus de position dominante).

La Présidente présente ensuite le premier des deux orateurs principaux, M. Alberto Heimler, Directeur du Département des recherches et des relations institutionnelles de l'autorité italienne de la concurrence. M. Heimler avance une position provocatrice, qui peut prêter à controverse, affirmant que s'il convient toujours d'encourager la concurrence *sur* le marché, la concurrence *pour* le marché, en l'occurrence par l'attribution d'une concession, n'est pas toujours préférable à la prestation du service ou du bien considéré par les pouvoirs publics. Lorsque les efforts accomplis pour susciter cette concurrence ont des retombées défavorables, comme c'est parfois le cas, la bonne image de la concurrence en général et de l'autorité de la concurrence en particulier, peut en pâtir. A l'appui de ses vues, il mentionne une enquête menée en 2001 dans plusieurs pays d'Amérique latine en réponse à laquelle les personnes interrogées estimaient à une large majorité que les privatisations, menées en grande partie dans les secteurs d'infrastructure, n'avaient pas été une réussite. M. Heimler présente un petit nombre de cas de privatisations ou de concessions qui se sont apparemment mal passées dans ces pays.

Un tel problème peut survenir lorsque les actifs privatisés ou concédés concernent des monopoles naturels, lorsque les possibilités de réductions de coûts découlant de baisses de la qualité sont importantes, et lorsqu'il n'existe aucun moyen de rentabiliser les progrès réalisés sur le plan qualitatif. La qualité peut en pâtir et les améliorations technologiques peuvent être insuffisantes. Dans ce cas, il peut être préférable de s'abstenir de toute privatisation et de faire en sorte que les pouvoirs publics fournissent eux-mêmes le bien ou le service concerné.

Pour déterminer s'il convient d'attribuer une concession pour une durée limitée ou indéterminée – autrement dit de privatiser – il importe de se demander si la partie privée devra ou non supporter d'importants coûts irrécupérables. Si tel n'est pas le cas, l'octroi d'une concession est la meilleure option. En revanche, si les coûts irrécupérables sont élevés, il est préférable de procéder à une privatisation intégrale. Le concessionnaire ne sera ainsi plus incité, comme ce serait le cas dans le cadre d'une concession à durée limitée, à s'abstenir de réaliser les investissements nécessaires lorsque le contrat touche à sa fin. La privatisation est également préférable lorsqu'il est probable qu'à l'expiration du contrat de concession initial, le jeu de la concurrence ne s'exercera guère dans le cadre de la concession suivante, le concessionnaire en place bénéficiant d'avantages informationnels et autres décourageant l'arrivée de nouveaux concurrents.

Les possibilités de renégociation des contrats de concession peuvent constituer un écueil important du processus. Si l'adjudicataire est autorisé à revenir à la table des négociations pour acquérir ainsi ce qu'il a été amené à concéder lors de la phase d'appel à la concurrence, on perdra les avantages issus de la mise en concurrence des candidats. Cela étant, sachant que les contrats de concession sont par nature incomplets (tous les aspects ne pouvant être connus et convenus au début du contrat), leur renégociation est parfois inévitable.

La conception d'un processus de concession ou de privatisation doit permettre à la concurrence de s'exercer lorsque cela est possible. Ainsi, en ce qui concerne la fourniture d'électricité, le réseau de transport constitue un monopole naturel, mais la concurrence peut s'exercer dans le domaine de la production. C'est pourquoi il convient de scinder ces deux fonctions : l'exploitant du réseau ne peut dès lors être autorisé à intervenir dans la production. À cet égard, l'autorité de la concurrence peut jouer un rôle important lors de la phase de conception. Plus généralement, elle doit être prête à faire respecter le droit de la concurrence dans les secteurs concernés lorsqu'elle a connaissance de cas de collusion ou d'abus de position dominante ayant un effet d'exclusion.

La Présidente présente ensuite le deuxième orateur principal, M. Baris Ekdi, Directeur de la formation au sein de l'autorité turque de la concurrence. M. Ekdi déclare que l'autorité de la concurrence a un rôle important à jouer lors de l'attribution des concessions, qui vise bien sûr notamment à renforcer l'efficacité du secteur concerné. L'autorité de la concurrence possède certaines compétences à cet égard et son intervention peut être particulièrement utile car les secteurs concernés présentent généralement certaines caractéristiques des monopoles. Les pouvoirs publics peuvent avoir encore une autre raison d'attribuer une concession : engranger des recettes supplémentaires. Cet objectif peut être en contradiction fondamentale avec l'objectif de renforcement de l'efficience puisqu'un concessionnaire paiera plus cher pour la concession qui lui est adjugée si un pouvoir de marché lui est accordé. Il s'agit là d'une autre raison motivant l'intervention de l'autorité de la concurrence dans le processus. Enfin, l'autorité concédante peut ne pas posséder les compétences particulières se rapportant à tel ou tel secteur. Cela est particulièrement vrai lorsque aucune réglementation *ad hoc* n'est encore en place.

L'autorité de la concurrence peut intervenir dans le processus de concession de bien des façons. Elle s'implique en général des deux manières suivantes : en assurant la promotion de la concurrence et en faisant respecter le droit de la concurrence. L'application de la législation anti-monopole est importante lors de la phase d'attribution du contrat, mais l'autorité de la concurrence doit aussi assurer une protection contre les abus de position dominante après l'octroi du contrat. Pour promouvoir la concurrence, l'autorité de la concurrence peut intervenir dans plusieurs circonstances, notamment lors de la conception de la concession, de l'interprétation des contrats et, le cas échéant, de leur renégociation, ainsi que lors du processus de réglementation.

M. Ekdi présente quelques exemples d'affaires survenues en Turquie qui ont soulevé des problèmes du point de vue de la concurrence. L'une concernait l'offre successive d'un soumissionnaire à deux procédures de concession de licences dans le secteur de la téléphonie mobile. Le système d'enchères avait pour effet de permettre au soumissionnaire le plus élevé de supprimer la concurrence pour la seconde licence et de faire subir des coûts irrécupérables élevés au détenteur de la troisième licence. Ces effets négatifs des enchères ainsi qu'une mauvaise réglementation et des défaillances de l'autorité régulatrice ont eu pour conséquence de déclencher des batailles de roaming ; l'autorité turque de la concurrence a donc dû intervenir et imposer des amendes aux deux opérateurs GSM qui détenaient une position dominante collective sur le marché. Une deuxième affaire concernait la restructuration du secteur turc de la fourniture d'électricité dans le cadre de laquelle l'exploitant du réseau de distribution, en situation de monopole, était également autorisé à posséder et à exploiter un site de production. Quand l'opérateur monopolistique a empêché un opérateur de transmission d'accéder à un générateur électrique, le TCA est intervenu en conformité avec le concept de facilité essentielle et a imposé des amendes.

Une troisième affaire concernait des « concessions occultes », selon les termes de M. Ekdi, dans le secteur du transport intérieur aérien de passagers. Aucun processus officiel de concession n'a été engagé ; en lieu et place, un organisme public a tranquillement publié un décret définissant des règles de participation au secteur qui protégeaient, dans la pratique, le transporteur dominant vis-à-vis de la concurrence de nouveaux venus. Par la suite, ces « concessions » ont été annulées, de nouveaux

concurrents sont arrivés, les prix ont baissé et les capacités ont augmenté. Enfin, une quatrième affaire concernait le monopole légal pour la vente de charbon à Ankara qui avait été octroyé à une entreprise dont la ville d'Ankara était propriétaire. L'autorité de la concurrence est intervenue, en imposant une amende à l'entreprise contrevenante et en recommandant de supprimer le monopole légal.

1. Attribution de concessions dans le cadre d'une réforme de la réglementation

La Présidente annonce qu'elle donne maintenant brièvement la parole aux délégués de pays ayant remis des contributions écrites pour la table ronde, en commençant par le Brésil et l'Indonésie dont l'autorité de la concurrence respective est intervenue dès les premiers stades de la réforme plus générale de la réglementation d'un ou plusieurs secteurs.

Le Brésil a attribué des concessions ou mené des privatisations avant la mise en place d'un régime réglementaire – dans les secteurs des ports et des routes – puis après cette mise en place – dans le secteur des télécommunications. Dans ce dernier cas, le processus a été moins heurté, il s'est accompagné d'un nombre moins élevé d'incidents (renégociations des contrats ou comportements opportunistes). Selon le délégué du Brésil, il est préférable de mettre à plat à l'avance les principaux aspects du contrat, comme le rééquilibrage des tarifs et les obligations de service universel. Si une autorité de tutelle indépendante est déjà en place, elle n'en sera que mieux placée pour assurer la gestion du contrat et la certitude pour les soumissionnaires n'en sera que plus grande, ce qui augmentera le prix qu'ils devront acquitter. En général, il est plus facile de régler en amont les questions importantes, telles que l'organisation du secteur concerné, avec les pouvoirs publics avant de mettre sur pied les concessions que par la suite, avec les parties privées.

Le délégué du Brésil convient avec M. Heimler qu'une privatisation intégrale est généralement préférable à l'attribution de concessions, mais au Brésil, la Constitution ne permet pas toujours de procéder à une privatisation. Il est alors nécessaire de recourir aux concessions, si certains éléments d'actifs doivent être gérés par le secteur privé. En qui concerne la prestation du service par le secteur public plutôt que par le secteur privé, il peut être parfois préférable, comme l'affirme M. Heimler, que celle-ci soit dévolue aux pouvoirs publics. Cela étant dit, au Brésil, la puissance publique est souvent bien moins efficace que le secteur privé à cet égard.

La Présidente relève que la contribution de l'Indonésie évoque trois contrats de concessions concernant respectivement le secteur des ports, de l'eau potable et des télécommunications. D'après cette contribution, les deux premières concessions se sont heurtées à des problèmes importants alors que dans le troisième cas, celui des télécommunications, le processus passe pour un succès. Elle demande au délégué indonésien d'expliquer si possible pourquoi les résultats ont été dissemblables.

Le processus d'attribution des concessions en Indonésie a évolué. Dans un premier temps, il ne visait aucun objectif précis, et la plupart des premières concessions ont été accordées à des monopoles appartenant à l'État. Par la suite, des concessions ont été attribuées à des parties privées, mais sans séparation nette des fonctions relevant de l'exploitation de celles relevant de la réglementation. Enfin, après la crise monétaire qui a frappé le pays, il est apparu avec évidence que le processus de concession devait viser certains buts précis : renforcer l'efficience et attirer l'investissement dans les infrastructures.

Dans les secteurs des ports et de l'eau potable, il s'agissait essentiellement de monopoles naturels et les concessions ont été attribuées sans qu'aucune autorité de tutelle sectorielle ne soit mise en place. Pour les télécommunications, en revanche, il était admis que la concurrence pouvait et devait s'exercer. La participation du secteur privé a été plus soigneusement planifiée et a été menée à bien par l'intermédiaire d'une procédure ouverte. Actuellement, le secteur indonésien des télécommunications est concurrentiel et solide tandis que celui des ports et de l'eau potable accuse toujours un certain retard.

2. Attribution des concessions

La Présidente déclare que la discussion va maintenant porter sur les méthodes d'attribution des concessions, relevant que les enchères sont souvent citées comme étant la procédure la plus efficace d'octroi des concessions. La contribution des Pays-Bas décrit un processus intéressant d'octroi de concession dans différentes catégories de services ferroviaires. La méthode d'attribution retenue, tenant compte des caractéristiques de chacun des marchés concernés, a été à chaque fois différente. La Présidente demande au délégué des Pays-Bas de décrire les trois méthodes utilisées et les raisons qui ont motivé leur choix et de préciser également si l'autorité de la concurrence néerlandaise est intervenue dans le processus.

Le délégué des Pays-Bas indique que l'autorité de la concurrence n'est pas intervenue dans l'octroi de ces concessions, qui a relevé de la seule responsabilité du ministère du Transport.

Les trois concessions concernaient différents ensembles d'actifs : le réseau classique de transport de passagers et de marchandises, un nouveau réseau à grande vitesse de transport de passagers et un nouveau réseau réservé au transport de marchandises. Bien que les trois concessions accordées divergent à certains égards, elles ont aussi un point commun. Dans les trois cas, la responsabilité de la répartition des capacités et du contrôle du trafic a été dévolue au gestionnaire de l'infrastructure déjà en place puisqu'il s'agissait, dans ces trois cas, d'une même tâche qu'il n'a donc pas été jugé efficace de scinder. Cela étant, la concurrence pour le marché a pu s'exercer à un autre niveau, celui de la maintenance des infrastructures et des coûts de maintenance qui sont à la charge des usagers de l'infrastructure.

Pour ces trois réseaux, il existait en outre des différences quant à la quantité et à la qualité des informations disponibles concernant les infrastructures. Pour le réseau classique, les actifs n'appartenaient pas à l'État, mais au gestionnaire en place. Les informations s'y rapportant étaient insuffisantes (certaines datant de plusieurs décennies) pour permettre aux candidats de soumettre une offre éclairée, et la concession de la maintenance de ces infrastructures a donc été attribuée au gestionnaire en place pour une période de dix ans, sans appel d'offres, le contrat prévoyant le transfert, *in fine*, des actifs à l'État. En revanche, pour les deux autres réseaux, qui étaient nouveaux, il existait des informations de bonne qualité sur les éléments d'actif, ce qui a facilité l'organisation d'un appel d'offres pour le contrat de maintenance. Entre ces deux réseaux, il existait cependant plus de certitude sur les conditions du marché prévalant pour le service de transport de passagers, qui avait été géré par l'État, que pour le transport de marchandises, qui avait été libéralisé et était donc en concurrence avec d'autres modes de transport. Les pouvoirs publics ont décidé d'assumer les risques associés aux incertitudes du marché du fret en attribuant, pour l'entretien de ce réseau, un contrat de concession d'une durée plus brève, fixée à cinq ans, au cours desquelles il allait être possible d'amasser les informations utiles. Ce premier accord serait suivi d'un contrat à plus long terme. La concession pour l'entretien du réseau à grande vitesse de transport de passagers, présentant moins d'incertitude, a été attribuée, quant à elle, pour une période de 25 ans.

La Présidente demande ensuite au délégué français de décrire le processus d'attribution des concessions dans son pays.

La France a une longue expérience des concessions, qui remonte au 19^{e} siècle. Il existe pour l'heure deux méthodes d'octroi des concessions en France : la première consiste à déléguer la gestion d'un service public à une entreprise publique ou privée qui assume les risques financiers en découlant, alors que la seconde méthode, plus proche du système britannique, s'apparente davantage à un contrat de partenariat public/privé. Apparemment, aucune de ces deux méthodes ne semble en soi plus propice que l'autre à la concurrence ; il importe surtout que l'autorité de la concurrence intervienne avant et après l'octroi de la concession, afin de jouer son rôle de promotion de la concurrence.

Le délégué français évoque ensuite brièvement deux exemples de concession dans les secteurs de l'eau potable et des autoroutes dans son pays. La fourniture d'eau potable, comme d'électricité, fait actuellement intervenir trois services distincts : la production, le transport vers les communes et la distribution aux consommateurs. Comme pour l'électricité, la concurrence peut s'exercer au niveau de la production et sans doute aussi du transport, mais les communes ne font traditionnellement pas la distinction entre ces trois services et les confient à une entreprise unique. L'autorité française de la concurrence leur a fermement recommandé de lancer, pour la production et le transport de l'eau, des appels d'offres qui soient séparés de la distribution, en vue d'introduire une concurrence et de faire baisser les prix. En ce qui concerne les autoroutes, le gouvernement français a engagé la privatisation de ces actifs et l'autorité de la concurrence a récemment formulé une série de recommandations destinées à empêcher l'intégration verticale des exploitants d'autoroutes et de grandes entreprises de construction et de travaux publics, afin de protéger la concurrence sur le marché de la construction.

Il s'agit là de deux exemples d'une intervention, au stade de la conception du contrat, de l'autorité de la concurrence visant à préserver la concurrence.

La Présidente s'adresse au délégué des États-Unis, dont la contribution décrit le rôle de l'autorité américaine de la concurrence dans le cadre de l'attribution de créneaux horaires de décollage et d'atterrissage dans les aéroports saturés.

Aux États-Unis, un petit nombre de grands aéroports étaient saturés. Les compagnies aériennes qui les desservaient souhaitaient y effectuer plus de décollages et d'atterrissages que ces aéroports ne pouvaient en gérer. A la demande expresse du ministère de la Justice, l'autorité de tutelle sectorielle a réglé le problème en attribuant aux transporteurs aériens en place un nombre déterminé de « créneaux horaires » ou de droits de décollage et d'atterrissage. On s'attendait à ce qu'à l'instar de tout autre droit de propriété, ces droits puissent être échangés en toute liberté, ce qui aurait assuré l'efficacité de leur attribution. Tel ne fut pas le cas pour plusieurs raisons, la première étant que les grands transporteurs en place ne souhaitaient pas céder leurs créneaux horaires aux entrants éventuels ou aux transporteurs n'exploitant que quelques lignes, susceptibles de prendre de l'importance sur leurs marchés.

Jouant son rôle de promotion de la concurrence, le ministère de la Justice a proposé deux solutions fondées sur le marché : (1) afin de réduire la saturation, une augmentation des prix d'atterrissage et de décollage en période de pointe pour mieux approcher le coût réel de la saturation et (2) afin de renforcer les échanges de créneaux horaires, leur conversion en baux ou la mise aux enchères tous les ans d'un pourcentage important (20 % environ) d'entre eux. Le ministère a également fait une troisième proposition : encourager l'investissement public dans le dispositif de contrôle du trafic aérien afin le rendre plus efficient et de réduire ainsi la saturation.

Si ces solutions n'ont pas toutes été appliqués, cet exemple met en lumière le fait que, pour promouvoir efficacement la concurrence, il est essentiel que l'autorité de la concurrence investisse en vue d'acquérir les compétences et les qualifications requises concernant les secteurs où elle entend jouer ce rôle.

3. Conception des concessions et attribution des concessions suivantes

La Présidente relève que la conception de toute concession doit être adaptée au marché visé. En outre, certains problèmes particuliers de concurrence se posent lorsqu'une concession arrive à son terme et est remise aux enchères. Le prestataire en place peut notamment disposer d'avantages particuliers susceptibles de décourager d'éventuels autres candidats. Elle s'adresse à nouveau aux Pays-Bas, notant dans leur contribution que la concession de la nouvelle ligne de transport de marchandises a été attribuée à un consortium d'entreprises pour une brève période. Pourquoi le choix s'est-il porté sur un consortium, plutôt

que sur une seule entreprise ? L'objectif était-il de promouvoir la concurrence dans le cadre de la concession suivante ?

Le délégué des Pays-Bas répond que si l'octroi de cette concession à plusieurs entreprises favorise en soi la concurrence, le choix du consortium était surtout lié à la volonté d'amener une nouvelle entreprise privée à assurer ce service, ce qui était susceptible de renforcer l'efficience tout en réduisant l'aide financière demandée à l'État. Tel fut bien le cas, puisque l'offre faite par le consortium était inférieure de 13 milliards à celle du gestionnaire en place. De plus, il a également été utile d'impliquer la nouvelle entreprise dans la première concession de courte durée afin d'imposer au gestionnaire en place de coopérer au sein du consortium – autrement dit, de partager des informations – ce qui était de nature à favoriser la concurrence sur le long terme.

La Présidente demande ensuite quel niveau de l'État doit piloter le processus d'attribution des concessions. Ce processus doit-il être centralisé, au niveau national, ou être décentralisé, dans le cas des services municipaux, par exemple ? La contribution de la Roumanie décrit une innovation intéressante à cet égard : la création de l'autorité nationale de tutelle des services municipaux, une instance nationale chargée d'attribuer les concessions des services municipaux. Ce dispositif a-t-il été un succès ?

Le délégué roumain rappelle d'abord dans les grandes lignes comment l'autorité de la concurrence intervient dans le processus de concession. Lorsque cela est possible, elle s'efforce d'y prendre part, ex ante, en concluant, pour l'heure, des accords de coopération avec les autorités de régulation sectorielles, dont l'autorité de tutelle des services municipaux. Ces accords fonctionnent correctement, donnant lieu à des échanges fréquents entre les diverses autorités concernées. L'autorité de tutelle ayant été créée moins d'un an plus tôt, il ne peut toutefois guère donner d'indication la concernant.

4. Renégociations

La Présidente souligne que les renégociations de contrat sont une question qui est jugée importante dans la note de référence comme par les orateurs principaux. Ces renégociations peuvent en effet diminuer ou réduire à néant les avantages de la mise en concurrence ayant eu lieu au stade de l'octroi. Cela étant, seule une contribution, celle du Brésil, traite de cette question. Elle décrit comment le recours à l'arbitrage dans ce pays constitue un moyen de régler les différends concernant les contrats de concession. La Présidente demande au délégué du Brésil d'exposer de quelle manière son pays utilise l'arbitrage dans cette optique.

Le délégué brésilien explique que le droit des concessions a été récemment modifié afin de permettre le recours à l'arbitrage dans le règlement des différends. Lorsque les circonstances s'y prêtent, l'arbitrage peut être plus efficace que la voie judiciaire à cet égard. L'État étant partie aux contrats de concession, il est possible de faire appel, dans ces cas là, à un expert international ou étranger pour arbitrer, étant bien entendu que l'État ne peut renoncer à sa souveraineté et que l'arbitrage doit seulement porter sur l'interprétation de certains termes du contrat. On ne connaît pas encore entièrement les limites de cette nouvelle loi.

La Présidente interroge le délégué de la Roumanie sur un cas décrit dans la contribution soumise par son pays : après la privatisation d'une entreprise appartenant à l'État, la nouvelle entité créée a répondu à un appel d'offres municipal. Apparemment, après l'appel d'offres, la commune a continué à détenir une participation dans l'entreprise en question. Cela s'est-il vraiment passé ainsi et, dans l'affirmative, quels ont été les avantages pour la collectivité ?

Le délégué roumain explique que sa contribution manque peut-être de clarté sur ce cas précis. L'entreprise d'État, assurant le service municipal en question, a été entièrement privatisée et constituée en

société commerciale. Elle a ensuite répondu à l'appel d'offres consécutif concernant une concession pour la prestation des services concernés, qui a été cependant adjugée à une entreprise étrangère privée. L'appel d'offres a donc bien procuré des avantages aux consommateurs, puisqu'il y a eu mise en concurrence et que les tarifs qui en ont résulté sont jugés raisonnables.

5. Le rôle de l'autorité de la concurrence dans le processus de concession

La Présidente précise que ce sujet est sans doute le plus important de tous ceux abordés lors de cette discussion, dont les participants ne sont autres que des représentants des autorités nationales de la concurrence. Comme on l'a vu, l'autorité de la concurrence peut intervenir, *ex ante*, au stade de la conception et, *ex post*, en faisant respecter le droit de la concurrence. La Présidente relève qu'au Mexique, l'autorité de la concurrence est apparemment habilitée à évaluer les éventuels titulaires des concessions et à exclure de l'appel d'offres ceux qu'elle n'estime pas qualifiés. Elle demande au délégué du Mexique de décrire ce processus.

Au Mexique, ce sont les lois spécifiques aux différents secteurs qui confèrent ce pouvoir à l'autorité de la concurrence. Le délégué mexicain précise que l'intervention *ex ante* de cette autorité dans le processus d'attribution de concessions dans le secteur du transport ferroviaire et des télécommunications a été une vraie réussite. Dans le secteur ferroviaire, les tarifs réels ont baissé, la productivité a plus que doublé en dix ans, la part du rail dans le secteur du transport dans son ensemble a progressé et les investissements consacrés aux chemins de fer, sans avoir augmenté dans l'absolu depuis la privatisation, ont gagné en efficacité. Le délégué mexicain explique en outre la nature de l'intervention *ex post* de son autorité dans la régulation du secteur ferroviaire : jugeant inefficientes les réglementations actuelles régissant l'activité d'interconnexion, l'autorité entend recommander que certaines modifications y soient apportées.

La Présidente demande à la France d'exposer un troisième cas où l'autorité de la concurrence est intervenue dans le processus de concession en vue de faire appliquer le droit de la concurrence.

Le délégué français décrit un cas concernant le secteur du transport urbain par autobus. Une situation anormale prévaut dans ce secteur puisque les concessions concernant ce service sont attribuées par les communes, alors que les concessionnaires exercent leur activité à l'échelon national. De plus, il n'existe aucun dispositif national de tutelle ou de contrôle dudit service. Localement, il n'y a donc pas ou peu de concurrence pour ces concessions, les transporteurs en place se voyant presque toujours attribuer les concessions suivantes. Même si ce comportement peut en partie s'expliquer légitimement (les transporteurs en place sont mieux informés et l'arrivée de nouveaux concurrents occasionnerait des coûts) une autre raison – la collusion – peut en être la cause. L'autorité française de la concurrence a mené une étude approfondie du secteur. Elle en a conclu qu'il y avait bien collusion entre les trois entreprises nationales, qui se sont entendues pour ne pas faire concurrence au transporteur déjà en place sur tel ou tel marché local. Elle a imposé de lourdes amendes aux parties entendues et sa décision a été confirmée par les tribunaux.

La Présidente note qu'en 2005, la Russie a promulgué une nouvelle loi sur les concessions. Elle demande au délégué russe de présenter ce texte et les raisons ayant présidé à son adoption ainsi que de préciser si l'autorité russe de la concurrence a eu, depuis lors, l'occasion d'intervenir dans le processus de concession.

Avant juillet 2005, où la loi a été adoptée, les concessions ne faisaient l'objet d'aucune réglementation distincte ; elles relevaient du code général régissant les transactions commerciales en Russie. La nouvelle loi vise à attirer les investissements, à promouvoir une exploitation efficace des infrastructures appartenant à l'État et à améliorer la qualité des biens et des services fournis aux

consommateurs. Elle régit l'établissement, l'exécution et la dénonciation des accords de concession et accorde certains droits et intérêts juridiques aux parties à ces accords. Aucune loi spécifique ne régit les concessions dans les différents secteurs, mais de tels accords peuvent être conclus dans nombre d'entre eux, notamment dans les secteurs du transport, des oléo- et gazoducs et des services collectifs comme la fourniture de chauffage, de gaz et d'électricité.

L'autorité russe de la concurrence peut intervenir dans les cas où l'État ou la commission adjudicatrice introduit des mesures discriminatoires dans l'accord de concession ou exerce une discrimination en faveur d'une ou plusieurs parties, ainsi que dans les cas où un concessionnaire abuse de sa position dominante en imposant des conditions d'accès discriminatoires aux actifs d'infrastructure relevant de l'accord de concession. Cela étant, cette loi étant nouvelle, l'autorité de la concurrence n'est pas encore intervenue dans une affaire de cette nature.

La Présidente revient à l'Indonésie, soulignant que l'autorité de la concurrence de ce pays peut soumettre aux pouvoirs publics des recommandations concernant les termes des contrats de concession jugés contraires aux principes de concurrence équitable. Elle demande à la délégation indonésienne d'en donner un exemple et d'en décrire les résultats.

Le pouvoir dont dispose l'autorité de la concurrence indonésienne lui est conféré par la Constitution, par les lois spécifiques aux différents secteurs et par le droit de la concurrence. L'autorité recommande que les concessions soient attribuées par le biais d'appels d'offres ouverts et qu'elles s'accompagnent de la création d'une instance de tutelle, si nécessaire. L'autorité de la concurrence a formulé des recommandations concernant l'accès aux installations essentielles, mais aussi le rôle de surveillance des pouvoirs publics en matière de régulation des tarifs. Dans le cas des routes, l'autorité de la concurrence a recommandé qu'une concession ne soit pas attribuée en raison de son caractère anticoncurrentiel et les pouvoirs publics l'ont suivie. Dans le cas des ports et de l'eau potable, il n'en a pas été de même et l'autorité poursuit donc son action en vue d'améliorer la situation dans ces deux secteurs.

6. Débat général

Le Royaume-Uni apporte plusieurs éclairages nouveaux sur le sujet traité. Certains considèrent que ce pays est à l'origine du concept même de concession. L'un de ses principaux contrats a été la concession de l'exploitation du tunnel sous la Manche. Le concessionnaire du tunnel connaît toujours des difficultés financières, mais un effort a été fait pour préserver, dans la mesure du possible, la concurrence malgré l'exploitation du tunnel – celle des *ferries* par exemple. La préservation de la concurrence résiduelle est donc une résultante importante du processus d'octroi de concessions, un autre enseignement étant que, dans ce domaine, le rôle de l'autorité de la concurrence est significatif et que celle-ci doit intervenir aussitôt que possible dans le processus.

La relation entre l'autorité de tutelle sectorielle et l'autorité de la concurrence est une autre question importante. En effet, l'autorité de tutelle peut notamment, dans certains cas, être habilitée à appliquer le droit de la concurrence, même si généralement elle s'en tient plutôt à ses pouvoirs réglementaires. En tout état de cause, la cohérence est de mise lorsque plusieurs autorités font respecter parallèlement les règles de concurrence. Se pose enfin la question de la durée des contrats de concession qui est généralement de 20 ou 30 ans. Certains d'entre eux ont néanmoins désormais une durée plus brève comme c'est le cas dans le secteur du transport ferroviaire aux Pays-Bas. Une question connexe qui s'est posée au Royaume-Uni concerne le cas où les concessionnaires décident de céder leurs investissements à des fonds d'infrastructure, plus intéressés par les flux de trésorerie à long terme. Ces nouveaux propriétaires peuvent être dès lors moins enclins à réaliser certains investissements en vue d'améliorer la qualité des biens ou des services et de telles opérations peuvent donc ne pas servir au mieux l'intérêt des consommateurs.

Le Brésil soumet à son tour quelques propositions concernant l'intervention de l'autorité de la concurrence lors la phase de conception, la première d'entre elles concernant la possibilité de recourir à des simulations. Ces simulations permettent de confronter diverses offres et peuvent être un outil de promotion convaincant. Deuxièmement, le filtrage préalable des candidats – en fonction de leurs capacités, de leur expérience et de leurs ressources financières, par exemple – est important. L'utilisation de garanties d'exécution peut aussi permettre d'identifier les candidats s'investissant réellement dans le projet. Enfin, l'autorité de la concurrence peut posséder certains avantages qui font défaut à l'autorité concédante, comme son corps d'économistes spécialisés dans l'organisation des différents secteurs. Les autres autorités possèdent certes des compétences techniques, mais les compétences économiques qui lui sont propres garantiront généralement à l'autorité de la concurrence une place à la table des discussions.

Le Danemark exprime son désaccord sur certains propos des orateurs principaux. S'il convient avec eux que les renégociations de contrat peuvent être fort préjudiciables lorsqu'elles sont autorisées, il cite pour sa part un cas auquel il été confronté concernant des enchères menées dans le secteur des télécommunications mobiles. Il avait menacé de rouvrir les enchères plutôt que de renégocier le contrat et la partie demandant la renégociation avait alors retiré ses objections. Le délégué danois revient ensuite sur le problème soulevé par M. Heimler selon lequel, lorsqu'il est difficile de contrôler la qualité du service à fournir, il est préférable que les pouvoirs publics assurent le service en question, en s'abstenant de toute privatisation ou concession. Or selon lui, il est de plus en plus possible d'évaluer et de contrôler en pratique la qualité du service dans plusieurs secteurs, notamment celui du transport par autobus cité par M. Heimler.

Enfin, le délégué danois soulève un problème survenu dans son pays : la coordination entre l'entreprise en place et les syndicats en vue de limiter les possibilités de formation dans certains secteurs, décourageant de ce fait l'arrivée de nouveaux concurrents. L'autorité de la concurrence danoise a préconisé l'interdiction de telles pratiques.

L'Afrique du Sud livre un nouvel éclairage sur le sujet, en comparant l'octroi de concessions à ce que le délégué appelle une « privatisation partielle ». Celui-ci cite un exemple dans le secteur de la téléphonie fixe dans son pays. L'État a cédé à un consortium privé une participation minoritaire dans un monopole de ce secteur, pour un résultat fort préjudiciable puisque cette opération a eu pour effet d'exclure du marché tout autre opérateur pendant dix ans. Le problème des concessions est donc que ce processus peut faire converger les intérêts de l'État et ceux de l'opérateur privé au détriment des consommateurs. En raison de certains précédents défavorables, les privatisations sont mal vues en Afrique du Sud et l'octroi de concessions leur est préféré. Cela étant, les concessions peuvent être simplement une autre forme de politique industrielle, avec les conséquences négatives qui en découlent.

Les États-Unis déclarent que les débats ont mis notamment en évidence le fait que l'octroi de concessions donne lieu à d'importantes possibilités de corruption. L'autorité de la concurrence peut jouer un rôle important pour limiter la corruption, premièrement en proscrivant expressément les « concessions occultes » – autrement dit, les accords officieux passés entre les pouvoirs publics et des parties privées. Deuxièmement, elle peut attirer l'attention du public sur des accords manifestement préjudiciables et troisièmement, elle peut promouvoir l'utilisation d'un processus ouvert et équitable d'attribution des concessions rendant, de par ses modalités mêmes, la corruption plus difficile.

Lors des discussions, les participants sont tombés d'accord sur le fait que les travaux empiriques sont une composante importante de la réussite du plaidoyer pour la concurrence. L'autorité de la concurrence ne peut se contenter de proclamer que la « concurrence est une bonne chose ». Elle doit étayer cette position au moyen d'éléments empiriques issus notamment des enseignements tirés des autres pays, constituant ce qu'on pourrait appeler des « précédents économiques ». A cet égard, des organisations telles que l'OCDE

peuvent jouer un rôle de dépositaire de ces informations que les différents pays pourraient alors rechercher et se procurer facilement.

Le délégué du Taipei chinois évoque une affaire survenue dans son pays concernant un appel d'offres portant sur un grand projet de construction, d'un montant supérieur à 10 milliards USD. Deux candidats étaient en lice. Le plus agressif des deux a fait une offre qui ne nécessitait aucun investissement de la part de l'État, proposant notamment de verser une redevance en cas d'adjudication en sa faveur. L'autre candidat, plus prudent, précisait que l'État devait investir au moins 300 millions USD. Comme l'on pouvait s'y attendre, le contrat a été attribué au premier des deux, mais le projet a ensuite rapidement pâti de retards, de surcoûts et fait l'objet de demandes de renégociation du contrat de la part du concessionnaire. Dans ces circonstances, l'État s'est, de fait, trouvé « pris en otage » par le concessionnaire, car il lui aurait été très difficile et coûteux de dénoncer ce contrat. On peut en conclure que la phase de conception d'une concession est de la plus haute importance et que l'autorité de la concurrence se doit d'intervenir dès ce stade, si elle en a le pouvoir. Dans cet exemple, malheureusement, le contrat étant considéré comme un simple contrat de marché public ou de construction, la CFTC n'a pas été en mesure d'intervenir.

La Commission européenne relève que la plupart des questions soulevées durant la table ronde concerne davantage les différents pays de l'UE plutôt que l'Union européenne en tant que telle. Elle a néanmoins promulgué des normes à caractère général en matière de passation des marchés publics et a récemment adopté une nouvelle directive à ce sujet qui impose un appel à la concurrence, à l'échelon communautaire, pour les contrats de travaux publics dépassant une certaine valeur, directive dont le champ d'application peut également être étendu aux contrats de services. Le délégué de la Commission européenne souligne que les débats ont notamment porté sur les secteurs des transports publics ferroviaires ou routiers et que la Commission a récemment adopté une proposition de directive dans ce domaine imposant des règles de transparence à cette catégorie de contrats. En outre, la Commission examine également d'autres aspects de la question comme les normes de rémunération des concessionnaires de contrats de service public, l'évaluation des coûts et leur communication et l'imposition de certaines obligations de publicité.

La Présidente note que le professeur Allan Fels d'Australie assiste aux débats et l'invite à s'exprimer sur ce sujet.

M. Fels déclare que les échanges d'expériences entre les pays, comme c'est le cas lors de ce Forum, peuvent être tout à fait précieux. De manière générale, il relève que dans le domaine des contrats public/privé, les pouvoirs publics semblent toujours être les moins bien servis. Plusieurs raisons peuvent expliquer cela. La partie privée vise principalement à obtenir des bénéfices tandis que les pouvoirs publics poursuivent des buts divers, notamment l'augmentation des recettes publiques, l'amélioration de la qualité du service, l'extension du service universel, etc. Dans le secteur concerné, la partie privée aura sans doute davantage de compétences techniques que les pouvoirs publics, qui sont en outre généralement dépourvus d'un important savoir-faire commercial. Pour la puissance publique, toute la difficulté consiste alors à importer les connaissances spécialisées qui lui sont nécessaires, notamment celles de l'autorité de la concurrence en matière de politique de la concurrence et d'économie ou encore les compétences techniques que peuvent lui apporter des consultants extérieurs. Il relève enfin qu'aujourd'hui, la plupart des concessions concernent les infrastructures, mais que dans l'avenir, de plus en plus d'accords de ce type auront trait aux services (comme les soins de santé et l'éducation) où les problèmes sont encore plus complexes.

Un représentant de la Banque mondiale aborde le sujet du rôle de l'autorité de la concurrence dans le processus de concession. Il propose que cette autorité envisage la question sous trois angles : (1) les prix, autrement dit les tarifs appliqués et les modes de rémunération du concessionnaire pour la prestation d'un

service universel, (2) les résultats, notamment les questions de calendrier et de qualité et (3) l'accès au contrat, notamment le nombre de candidats et leurs qualifications. Il préconise que l'autorité de la concurrence s'intéresse avant tout à ces questions plutôt qu'aux aspects plus techniques, comme l'identification de la meilleure offre ou les scénarios éventuels de renégociation des contrats.

Au sein de la Banque mondiale, la privatisation n'est pas toujours considérée comme la meilleure alternative à la concession ou à la prestation de services par les pouvoirs publics. En effet, le régime de propriété importe moins que l'assurance qu'une concurrence s'exercera sur le marché, ce qui met en avant l'importance du droit et de l'autorité de la concurrence. Aucune dérogation au droit de la concurrence ne saurait être accordée à tel ou tel secteur ou transaction et l'autorité de la concurrence doit intervenir, dans la mesure du possible, avant l'octroi de la concession et faire respecter avec fermeté le droit de la concurrence après.

La Présidente revient sur le cas de la Jamaïque, pays où des contrats de longue durée ont été attribués avant la libéralisation de certains secteurs, ce qui a pu à prêter à confusion car l'on s'est demandé si la libéralisation avait entraîné l'annulation desdits contrats ou d'une partie d'entre eux. Certains de ces problèmes n'ont pas encore été réglés.

7. Conclusion

La Présidente déclare ensuite que la table ronde se clôt sur les dernières remarques des deux orateurs principaux.

M. Alberto Heimler revient sur le sujet de la renégociation des contrats. Selon lui, la menace de rouvrir une procédure d'appel d'offres en cas de demande de renégociation n'est généralement pas crédible, si le produit ou le service concerné est essentiel et que les pouvoirs publics ne sont pas en mesure de fournir rapidement de solution de rechange. M. Heimler cite un cas concernant l'enlèvement des déchets solides aux États-Unis, qui constitue une solution à ce problème. Dans ce cas, la commune a attribué des concessions à quatre parties différentes pour fournir le service en question dans certains secteurs de la ville tout en continuant à l'assurer elle-même dans un cinquième secteur. A l'évidence, ce dispositif visait notamment à susciter une émulation, mais il permettait aussi à la municipalité de fournir rapidement le service en question si l'un des concessionnaires venait à faire défaut ou exigeait la renégociation de son contrat.

De façon générale, la discussion a mis en lumière la quantité et la complexité des problèmes susceptibles de survenir dans le cadre du processus de concession. Dans la mesure du possible, il importe de régler ces problèmes *ex ante*, même si cela n'est pas facile.

M. Baris Ekdi revient lui aussi sur le problème de la renégociation des contrats. Premièrement il convient avec le délégué danois qu'il existe des moyens de minimiser ce problème, la menace de rouvrir l'appel d'offres étant l'un d'entre eux, mais il maintient que la renégociation ouvre en soi une possibilité de comportement opportuniste. Deuxièmement, il avance que l'objectif d'efficacité du processus de concession privilégie les monopoles privés par rapport aux monopoles publics. Dans ce contexte, le régime de propriété a son importance, toute la difficulté étant d'assurer que les gains d'efficience seront bien répercutés sur le consommateur. Cela met encore en lumière le rôle important de l'autorité de la concurrence.

La Présidente remercie les délégués d'avoir pris part aux discussions de cette table ronde, qui a été utile et instructive. En conclusion, elle lit des extraits des contributions de l'Indonésie et du Mexique, reprenant à son propre compte leurs recommandations.

Contribution de l'Indonésie :

> Les concessions doivent être attribuées dans le cadre d'un processus transparent, concurrentiel et responsable et être tenues à l'écart de tout processus de collusion. Les contrats de concession doivent être précis et clairs, utiliser des indicateurs d'évaluation, afin que les mesures de rémunération et de sanction puissent être appliquées comme il convient. Le calendrier et la mise en œuvre du processus d'octroi des concessions doivent minimiser les éventuels risques d'abus de position dominante et de comportement anticoncurrentiel, notamment de la part des entreprises titulaires d'une concession. Il est également nécessaire [qu'il y ait] une coopération et une coordination entre les autorités de la concurrence et les autorités de tutelle sectorielles afin d'assurer que les objectifs visés par l'octroi de concessions sont pleinement atteints, techniquement et économiquement, et de préserver des conditions de concurrence équitable entre les entreprises.

Contribution du Mexique :

> . . . [I]l est essentiel de tenir compte des problèmes de concurrence lors de la conception de tout dispositif d'octroi de concessions qui doit être mis en place au cas par cas, en vue d'empêcher l'instauration de conditions anticoncurrentielles et de garantir l'accès aux installations essentielles. Il faut en outre que l'autorité de la concurrence fasse respecter efficacement le droit de la concurrence afin d'assurer le bon fonctionnement *ex post* des marchés donnant lieu à des concessions.