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**COMPILATION OF THE RESPONSES TO THE UNCTAD
QUESTIONNAIRE**

Part I: Public Monopolies, Concessions and Competition Law and Policies

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Albania

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

In accordance with the new law on Concessions (Law no 9663, dated 18.12.1006 ON CONCESSIONS) the maximum duration of a concession is 35 years. The transitory dispositions of the law state that the concessions awarded with the old law are valid with the same terms but if renewed the dispositions of the new law apply. The new law does not give any definition of the types of concessions. Companies are generally interested in ROT and BOT types of Concessions.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

The law that regulates implementation of concessions is the law on Concessions (Law no 9663, dated 18.12.1006 ON CONCESSIONS). The Concession is granted from an ad hoc contracting authority through a competitive selection procedure supervised by the Ministry of Economy and the Public Procurement Agency.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

The role of the Albanian Competition Authority is mainly *ex post* in these cases. An exception is only in cases of mergers and Agreements that need to be excluded that have to be checked *ex ante*.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

All sectors fall under the scope of competition law. There are different regulatory bodies in Telecommunications, Media, Energy, etc. which have specific competences but not exclusive competences in the field of competition. Under Albanian Competition law all types of economic activity including those granted through concession fall under the scope of the law And are scrutinised if there is an Abuse of Dominant Position, Forbidden Agreement or Merger.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

In electric energy sector Albania has a good experience with concessions and a number of Small energy providers (Hydro Electro Centrals of Small Capacities) had a positive impact in diversification of energy sources, green energy (better quality) and much more energy provided to end consumers.

Argentina

1. *¿Cuántas concesiones, y de qué tipo, se han otorgado en el país? ¿Cuál es la duración habitual o media de una concesión?*

En un sentido amplio, el proceso de privatizaciones de empresas y servicios públicos durante los años 90, abarcó una amplia variedad de actividades del estado en Argentina. En este contexto las concesiones fueron sólo una modalidad de las privatizaciones.

Las principales actividades involucradas en los procesos de privatización fueron telefonía fija, la generación, transporte y distribución de electricidad, transporte y distribución de gas por redes, la principal empresa petrolera del país Yacimientos Petrolíferos Fiscales (YPF), el servicio agua potable y saneamiento en el Área Metropolitana de la Ciudad de Buenos Aires, el servicio postal universal, gestión del espectro radioeléctrico, terminales portuarias del puerto de Buenos Aires, transporte metropolitano de pasajeros por ferrocarril en el área metropolitana de Buenos Aires y zonas aledañas, el sistema de autopistas de acceso a la Ciudad de Buenos Aires con cobro de peaje y diversas rutas nacionales por el mismo sistema, transporte de cargas por ferrocarril, terminales portuarias del puerto de la Ciudad de Buenos Aires, red de subterráneos de la Ciudad de Buenos Aires, la principal aerolínea del país (Aerolíneas Argentinas), las principales terminales aeroportuarias del país, la creación de un régimen mixto de ahorro previsional con un componente de cuenta de capitalización individual a cargo de las llamadas Administradoras de Fondos de Jubilaciones y Pensiones (AFJP), bancos de estados provinciales, etc.

En cuando a las duraciones son muy diversas desde 10 años en algunos casos, 35 años en otros, etc. Incluso a pocos años de entrar en vigencia los contratos se comenzó a generar litigiosidad por el nivel de cumplimiento o incumplimientos de las partes involucradas, es decir el Estado Nacional y el sector privado empresario. También se dieron situaciones como, por ejemplo, en el transporte ferroviario de pasajeros que transcurridos pocos años se comenzó un proceso de negociación para extender la concesión por un período sustancialmente más largo sujeto a ajustes tarifarios e inversiones distintos de los previstos en los contratos originales (este proceso en particular no se terminó de concretar).

Lo más significativo que puede mencionarse en relación a la duración de las concesiones en Argentina es que como en casi todos los aspectos de la economía argentina, la crisis financiera del período 2001-2002 tuvo un impacto significativo en los sectores de infraestructura. Los contratos de privatización y acuerdos de concesión con los inversores privados en estos sectores habían sido negociados en dólares durante el período de la convertibilidad. En el mes de enero de 2002, se puso fin a la convertibilidad a través de la Ley de Emergencia Pública y de Reforma del Régimen Cambiario No. 25.561 y el valor del peso cayó hasta alcanzar una relación de 1 dólar = 3,9 pesos. La misma ley dispuso que los contratos de servicios públicos se pesificarían a partir de ese momento a una relación de 1 a 1 entre el peso y el dólar. La ley también autorizó al Poder Ejecutivo nacional a renegociar los contratos de servicios públicos, teniendo en cuenta factores tales como la competitividad de la economía, la calidad del servicio, los intereses de los usuarios y de los prestadores y la

seguridad de los sistemas. Estos cambios fueron sustanciales en las condiciones de desempeño de las empresas privatizadas y, como se verá seguidamente, desembocó en distintos casos la reestatización de empresas.

2. *¿Cuáles fueron las modalidades empleadas para otorgar concesiones (oferta, licitación pública, decreto, etc.)? ¿Hay en el país alguna ley que rija el otorgamiento y la rescisión de concesiones? ¿En los acuerdos de concesión se incluyen disposiciones que permitan la rescisión por parte del Gobierno?*

El principal instrumento legal que dio marco jurídico para todos los procesos de privatización fue la llamada Ley de Reforma del Estado N° 23.696 que entró en vigencia en agosto del año 1989.

Luego de declarar en estado de emergencia la prestación de los servicios públicos (art. 1) el Capítulo II de dicha norma es el que fija los procedimientos básicos que deberían seguirse en los procesos de privatización. El requisito previo para proceder a la privatización total o parcial o a la liquidación de empresas, sociedades, establecimientos o haciendas productivas cuya propiedad perteneciera total o parcialmente al Estado Nacional es que sean declaradas “sujeta a privatización”. La declaración de “sujeta a privatización” debería ser hecha por el Poder Ejecutivo Nacional debiendo, en todos los casos, ser aprobada por ley del Congreso.

Las modalidades de privatización contempladas explícitamente por la Ley son las siguientes o combinaciones de ellas:

- 1) Venta de los activos de las empresas, como unidad o en forma separada.
- 2) Venta de acciones, cuotas partes del capital social o, en su caso, de establecimientos o haciendas productivas en funcionamiento.
- 3) Locación con o sin opción a compra, por un plazo determinado estableciéndose previamente el valor del precio de su venta.
- 4) Administración con o sin opción a comprar por un plazo determinado estableciéndose previamente el valor del precio de su venta.
- 5) Concesión, licencia o permiso.

A su vez, la ejecución de estas modalidades se concretaría por alguno de los siguientes procedimientos o combinaciones de ellos.

- 1) Licitación Pública con base o sin ella.
- 2) Concurso Público, con base o sin ella.
- 3) Remate Público, con base o sin ella.
- 4) Venta de acciones en Bolsas y Mercados del País.
- 5) Contratación directa.

En cuanto a los procesos de privatización específicos algunos fueron hechos por decretos del Poder Ejecutivo Nacional (por ejemplo telefonía fija – Decreto 62 del año 1990) otros por Leyes (por ejemplo todas las privatizaciones del sector de gas y electricidad Leyes 24.075 y 24.076 del año 1992).

Respecto de las cláusulas de rescisión, independientemente de cómo hayan sido redactadas las distintas normas de privatización, lo cierto es que por lo general se han introducido disposiciones sobre determinados compromisos que deberían asumir los adjudicatarios que se harían cargo de las empresas, por ejemplo, en términos de inversiones, mantenimiento de calidad de servicios, eficiencia operativa, traslados de ahorros de costos a las tarifas que cobran, pago de un canon al estado, etc. Los incumplimientos de algunas de estas cláusulas o similares dio lugar a que el estado nacional tomara medidas muy concretas en ciertos sectores que en definitiva dieron como resultado que haya quitado concesiones o directamente reestatizado ciertas empresas de algunas de estas empresas. Ejemplos del primer tipo pueden ser algunas de las concesiones ferroviarias de transporte de pasajeros del Área de Buenos Aires, en tanto que se han reestatizado el servicio postal universal, los servicios de agua potable y saneamiento en la Ciudad de Buenos Aires, la gestión del espectro radioeléctrico, la principal línea aérea que opera en el país, los fondos previsionales administrados por empresas privadas (AFJP).

3. *¿Se han tomado en cuenta las consideraciones relativas a la competencia en el otorgamiento de concesiones? ¿Qué nuevas consideraciones o cuestiones se han planteado como consecuencia de las concesiones otorgadas en el país? ¿Se ha dado a los concesionarios protección especial con respecto al abuso de posición de dominio, la entrada o el control de los precios al otorgárseles una concesión?*

Aún cuando no se dispone de datos sistemáticos sobre todos los procesos de privatización puede afirmarse que explícita o implícitamente hay cláusulas que contemplan cuestiones de competencia. Algunos ejemplos en este sentido pueden ser los siguientes:

- En telecomunicaciones se mantuvo un período de diez años en los cuales se concedió el monopolio de los servicios privatizados a las empresas licenciatarias. Luego de dicho período se abrieron a la competencia todos los servicios de telefonía fija residencial local, telefonía de larga distancia, telefonía celular, etc.
- En electricidad la integración vertical de la industria está muy restringida. Las tres empresas de transporte no pueden adquirir o vender energía eléctrica. Los generadores y distribuidores no pueden ser titulares de participaciones mayoritarias en las empresas de transporte. También existen limitaciones en cuanto a la integración horizontal en la generación y distribución.
- También en el caso del gas natural la anterior compañía estatal fue privatizada en distintas partes, dos empresas de transporte de alta presión que cubren las regiones norte y sur del país respectivamente y ocho empresas de distribución a las que posteriormente se sumó una novena.
- En la operatoria portuaria el anterior monopolio estatal sobre las terminales que realizan carga y descarga de contenedores, bultos y granel fue privatizado en distintas terminales que permitieron la competencia de las mismas.
- En el caso de la empresa estatal de petróleo y gas que operaba tanto en la exploración y explotación de petróleo y gas, refinación de hidrocarburos y venta minorista de combustibles. La privatización fue casi en su totalidad en un único bloque, a excepción de una cantidad de bocas de expendio minoristas de combustibles líquidos y parte de sus reservas de petróleo y gas por lo que la

empresa privada que adquirió los activos también ostentó una posición dominante en distintos mercados del sector energético.

En los casos de empresas que prestan sus servicios en condiciones de monopolios naturales la imposibilidad de competencia fue sustituida por un esquema de precios regulados, compromisos de inversión y traslado a los consumidores o usuarios de las ganancias de eficiencia obtenidas.

4. *¿Qué sectores de la economía están exentos de la aplicación del derecho sobre la competencia? ¿Qué sectores o que tipo de concesiones son objeto de una reglamentación específica? ¿Las concesiones están sujetas al derecho nacional sobre la competencia?*

En Argentina no hay excepciones por sectores de actividad económica para la aplicación de la Ley de Defensa de la Competencia. Por lo tanto, sus alcances se extienden incluso a los sectores privatizados con marcos regulatorios específicos.

Al mismo tiempo, la Ley de Defensa de la Competencia quita toda atribución en materia de competencia existente al momento de su entrada en vigencia a cualquier otro organismo del estado. En este sentido su artículo 59 indica “Queda derogada toda atribución de competencia relacionada con el objeto finalidad de esta ley otorgada a otros organismos o entes estatales”.

Todos los procesos de privatización incluso los que tuvieron la modalidad de concesión han tenido un marco regulatorio específico. Por otro lado, no existe la obligatoriedad de que una eventual privatización o concesión tenga que ser analizada a la luz de la Ley de Defensa de la Competencia aunque si tal operación encuadrara en los supuestos de tal Ley como operación de concentración económica debería ser notificada para su eventual aprobación.

5. *¿Hay pruebas de que las concesiones hayan aportado beneficios a los consumidores del país en términos de infraestructura, diversificación, calidad, precios o bienestar general del consumidor?*

Efectivamente, hubo mejoras en los términos planteados especialmente en aquellas compañías que se encontraban en situación crítica en el período inmediatamente anterior a su privatización como, por ejemplo, las del sector eléctrico donde existían cortes programados del suministro, ferrocarriles y subterráneos con numerosos cortes de servicio y otros. También fueron reconocidas importantes inversiones en infraestructura energética y evidente algunas mejoras en la infraestructura de aeropuertos.

En cualquier caso, es difícil establecer un balance generalizado ya que las situaciones fueron bastante heterogéneas e incluso con el transcurso del tiempo servicios que en una primera instancia registraron mejoras luego sufrieron un proceso de deterioro importante. Este podría ser el caso del transporte de pasajeros por ferrocarril particularmente de aquellas concesiones que se cancelaron.

Asimismo, hay un balance entre inversiones, rentabilidad de la empresa privada y precio final al usuario o consumidor que debería ser tenido en cuenta a la hora de evaluar los beneficios para estos últimos.

Brazil

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

It is very difficult to determine the number of concessions in Brazil. It would be around several thousand concessions, since there are concessions at the Federal, State (26 States and 1 Federal District) and local (around 5.500 municipalities) levels. There are concessions in sectors such as air and road transportation, ports, roads, railways, energy (generation, transmission, distribution), oil, gas, telecommunications, water and sewage provision.

The average duration of a concession is 25 years. Duration varies according to the sector and in some cases, it can be extended or renewed.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

A private partner could only be contracted through a public bid, as determined by the Constitution. This is the rule for all concessions by the Federal, State and local entities in all infrastructure sectors. Exemptions are only accepted in emergency cases, when services are interrupted and for a short and limited period of time. The judgment criteria adopted can be (i) the lowest rate for the service to be rendered; (ii) the greatest offer, in cases where payment will be made to the granting entity by the grantee of the concession; and (iii) by the combination of these two criteria when stipulated by the bidding announcement.

The regulation of the concession and permission regimes for the provision of public services, as set forth in Article 175 of the Federal Constitution, is mostly provided by Law # 8.987 of 02.13.95, also known as the "Concessions Law", and Law # 9.074 of 07.07.95. This regulation enables the State to delegate the provision of public services to third parties. In this kind of contract, the concessionaire invests at its own account and risk, in the name of the State, while receiving remuneration by the collection of rates. Since the Concessions Law is generic, establishing the directives for the delegation of public services at the federal, state and municipal levels, there is a need for specific regulations for each sector and sometimes for each contract.

The Public-Private Partnership Law (or PPP Law) of December 2004 (Law # 11.079 of 12.30.2004) created new modalities of concessions which allow government disbursements to the concessionaire and eliminated the need of legislative authorization for government financial commitments to private partners. The main characteristic of this Law was to divide the risks of the activity to be delegated between the government and the private third party. To guarantee the fiscal sustainability of PPPs and to control the governmental commitments to projects (limits on the amount of subsidies, contingent liabilities and overall debt), the PPP

Law established some requirements and limits. It also granted specific agencies the power to enforce the standards and rules on this matter, specially on its budgetary aspects.

Although the above mentioned laws are applicable for any infrastructure sector, each sector has also a legal framework that establishes its regulatory agency and some particularities of the concession awarding process. Some of these laws are: Law # 9.472/97 - telecommunications; Law 10.233/01 - roads, railways, surface and water transportation; Law 9.427/96 and Law 10.848/04 - electricity.

The bidding announcement should contain:

- a description of:
 - the object;
 - goals;
 - documents;
 - judgment criteria; and
 - reversible property;
- time limits for:
 - concessions;
 - the receipt of proposals;
 - judgment; and
 - signing of the contract;
- the possible sources of alternative revenues;
- the rights and obligations of the granting party and of the concessionaire;
- the readjustment criteria for the revision of rates;
- a draft of the contract;
- explicit indication of the party responsible for the expenses of any expropriations required for the execution of the service, public works or public easement;
- the condition of leadership of the company responsible in the case of a consortium.

As determined by the Concessions Law, a concession is extinguished in the following cases:

- maturity;
- expropriation (recovered by the granting party for reasons of public interest);
- forfeiture (recovered by the granting party due to non-compliance with the contract);
- rescission (on the initiative of the concessionaire, through a judicial proceeding, in the case of non-compliance with the contract by the government);
- annulment;
- bankruptcy.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance,*

entry or price control granted to concessionaires at the time of granting a concession?

The Federal Constitution and the Law of Concessions require concessions to be awarded under competitive bidding procedures. Therefore, competition for the market is a constitutional and legal requirement when it comes to awarding concessions in Brazil. Furthermore, the Law of Concessions establishes that, except in the case of economic impossibility, concessions should be awarded under arrangements that allow competition in the market. The Concessions Law established a legal framework regulating the conditions for entrance, exit and operation of private initiative in infrastructure sectors. It is also mandatory that all concessions have specific rules concerning price control. However, due to the large number of concessions awarded in Brasil, it is difficult to verify whether competition concerns about dominance and other aspects were fully taken into consideration while they were being granted.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

There are no sectoral exemptions in the Brazilian Competition Law. Antitrust law is enforced in regulated sectors, which may also have a legal framework of its own that establishes the sector regulatory agency and some peculiar aspects of it, which may or may not include competition aspects of that peculiar market. The most important regulated sectors, such as electricity, oil, natural gas, telecommunications, railways, air and road transportation, are all under the supervision of specific independent federal regulatory agencies.

Although all concessions are subject to the national competition law, the Council for Economic Defense (*Conselho Administrativo de Defesa Econômica – CADE*) has recognized in some cases that the supervision of prices by a regulatory agency does not allow regulated companies to exert dominance, specially in those cases where a natural monopoly is in place and the regulation explicitly takes into consideration the market power problem.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

As a general rule, the costs of public services rendered by the Government are much higher than the costs of the same services provided by a private supplier due to various sorts of inefficiencies such as poor procurement mechanisms, low management capacity and possible difficulties to comply with agreed payment schedules. This creates room for efficiency gains by private partners. It would be worthy comparing, on a case-by-case basis, the efficiency gains to be obtained by private participation against some shortcomings and difficulties involved in privatization. However, due to a lack of adequate historical information on the costs faced by the public sector, and on the costs of privatized services (not all regulatory

agencies release adequate information on privatized services) we still face difficulties in comparing the costs of public and private provision of services. It would be desirable to eventually develop a sort of Public Sector Benchmark suited to the Brazilian case that would allow *ex ante* evaluation of contracting out projects.

Bulgaria

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

The Bulgarian Concessions Act states that according to its object, a concession may be one of the following types: i) public works concession, ii) service concession, iii) mining concession.

Concessions may be divided also on the basis of the grantor of the concession: i) municipal concession – the grantor is a municipality, ii) state concession – the grantor is the Council of Ministers, iii) public concession – the grantor is a public law organization, represented by a body in accordance with its act of establishment – in regard to facilities in its ownership.

A point should be made that the Bulgarian Commission on Protection of Competition (the CPC) is the Concessions Review Body. The CPC's decisions following complaints concerning public procurement procedures are subject to judicial control by the Supreme Administrative Court.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

Under the Concessions Act, the procedure of granting a concession includes: i) taking preparatory action, ii) conduct of the concession procedure, iii) execution of a concession agreement.

The procedure for granting concessions includes: i) adoption of a decision to launch a concession procedure, ii) conduct of an open procedure for granting a concession iii) selection of a concessionaire.

Prior to the procedure for granting a concession preparatory activities are carried out. Those are the obligation of the ministers – in state concessions, or of the municipal mayors – in municipal concessions.

A new positive legislative step is the right of each interested individual to propose a grantor to consider the possibility of granting a concession and opening a procedure to grant a concession.

During the preparatory activities, certain analyses are carried out (financial, legal, ecological), as well as coordination activities to objectively evaluate the public interest with regards to environment and security. Only after the completion of these preparatory activities do grantors initiate an opening of a concession procedure.

The Bulgarian Concessions Act, in force since 1 June 2006, last amended at the end of 2008. The Concessions Act regulates the conditions and procedure for granting, implementation and termination of concessions. It defines the concession as the right to operate a facility of public interest, made available by a grantor to a merchant (the concessionaire), in exchange for the latter's obligation to build and/or manage and maintain the facility subject to the concession at his/her own risk.

This Act also defines the types of concessions as i) public works concession, ii) services concession and iii) mining concession.

According to the Concessions Act (Art. 65 (1)), a concession is granted by means of a concession agreement. The possibility to terminate a concession agreement is provided for in the Concessions Act (Art. 73).

Before the expiry of the period of the concession, terminating the agreement is possible in two cases – the termination could be compulsory (Art. 74 (1) of the Concessions Act) or optional (Art. 75 and 76 of the Concession Act). The latter option could be exercised unilaterally or by mutual agreement between the parties.

The provisions of the Concessions Act (Art. 74 (1)) state that before the expiry of the concession period the concession agreement is terminated without any party being required to serve a notice:

- in case of loss of the object of the concession – from the date of loss;
- in the event of death of the natural person or winding down of the concessionaire – legal person with a legal successor – as of the date of death, respectively of the winding down, unless an agreement has been executed to extend the concession agreement with the legal successor under the terms and the procedure of the Concessions Act (Article 72);
- in the event of death of the natural person or winding down of the concessionaire – legal person without a legal successor – as of the date of death, respectively of the winding down;
- in case of an effective decision for declaring the concessionaire bankrupt – as of the date of entry into force of the decision;
- on other grounds, provided for by law or in the concession agreement – as of the date, indicated therein.

Concerning the possibility laid down in the Concessions Act (Art. 75(1)) to terminate the agreement by mutual agreement between the parties or unilaterally, this option could be exercised:

- in case of subsequent emergence of any threat to the national security and defence of the State; to the environment or human health; to protected territories, zones and sites and to public order, or
- under conditions, provided for in a law or in the concession agreement.

Unilateral termination of the concession agreement on the part of the grantor, as well as the making of a proposal or the acceptance of a proposal for termination by mutual consent, take place by decision of the grantor.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

The main principles of competition law are introduced in the concessions law by the provisions of Art. 23(1), p. 2 of the Concessions Act. According to these provisions the concession procedures shall respect the principles of:

- free and fair competition;
- openness and transparency;
- equal treatment of, and non-discrimination against, any candidates or participants in the concession procedure;
- information confidentiality and non-discriminatory provision of information;
- prohibition of including in the announcement and the documentation for participation conditions and requirements, which discriminate against or favour certain participants.

Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?

The legal provisions applied to concessions do not restrict the participation in the procedures of undertakings with dominant position on the market. However, Art. 21 of the LPC prohibits the abuse of dominance. The latter provision is applicable to concessions.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

The Bulgarian legal system does not exempt any sector of the economy from competition law. Some sectors, such as telecommunications, energy, transport, finance, are subject to specific regulatory regime. To ensure efficient implementation of the national and the EU competition legislation, the CPC has established collaboration with the sector regulatory bodies. A series of cooperation agreements have been signed and cooperation has been strengthened through exchange of periodic information, publications and expert consultations in areas of relevance to the partner institutions. A frequently used form of cooperation is participation of CPC representatives in interinstitutional meetings.

(Are concessions subject to the national competition law?) Yes – according to the LPC (Art. 2(1)) the law applies to:

- undertakings and associations of undertakings which carry out their activities within or outside the territory of the Republic of Bulgaria, if they explicitly or tacitly prevent, restrict, distort or may prevent, restrict or distort competition in the country;
- undertakings to whom the state or the municipality have assigned services of public interest insofar as the application of the Law does not impede de facto or

de jure the fulfillment of the tasks assigned to them and competition in the country is not affected to an appreciable extent;

Thus, concessions are not excluded from the scope of the Law on Protection of Competition.

Moreover, as mentioned above, the main principles of competition law are embedded in the Concessions Act.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

In Bulgaria, the granting of concessions is a relatively new legal instrument. It is yet to be seen what benefits concessions will bring about for consumers in terms of greater infrastructure, diversification higher quality, better prices and overall consumer welfare.

Chile

1. *¿Cuántas concesiones y de qué tipo se han otorgado en el país? ¿Cuál es la duración habitual o media de una concesión?*

En Chile, los procesos de concesiones han sido ampliamente utilizados para establecer el traspaso del rol proveedor desde el sector público al sector privado. En relación qué tipo de concesiones se han otorgado, se pueden considerar, entre otros, los siguientes sectores y/o actividades:

- a) Infraestructura
 - Concesión de Obras Públicas (en cuanto a construcción y explotación de obras)
 - Concesiones portuarias
- b) Telecomunicaciones
 - Concesiones de espectro radioeléctrico
 - Concesiones del servicio de radiodifusión sonora
- c) Servicios públicos
 - Concesiones de zonas (áreas operacionales) de distribución de gas
 - Concesiones del áreas operacionales de servicios sanitarios
- d) Transporte
 - Concesiones de frecuencia aérea

En lo que sigue, se intentará cubrir los temas consultados haciendo referencia a los mecanismos de concesiones empleados en estos sectores, en función de la información disponible.

En relación a las concesiones de obras públicas:

Iniciada la década de los años noventa, y como un modo de apoyar el crecimiento económico del país potenciando la precaria infraestructura pública existente a esa fecha, Chile puso en práctica un innovador sistema de concesiones sustentado en una alianza público-privada que permitiría inicialmente desarrollar importantes planes de conectividad vial y aeroportuaria; haciendo partícipe al sector privado de los procesos de inversión, mantención y explotación de grandes obras públicas, por medio de un procedimiento que permitía al sector privado financiar obras económicamente rentables, recuperando su inversión a través del cobro directo de una tarifa a los usuarios.

El sistema de concesiones, entonces, se estableció bajo el amparo de la Ley de Concesiones de Obras Públicas (Decreto MOP N° 900 de 1996), permitiendo al Ministerio de Obras Públicas (MOP) otorgar en concesión toda obra fiscal y, en caso que la obra a concesionar fuese competencia de otro organismo del Estado, delegar la facultad de concesión bajo la forma de convenio mandato.

Sobre el número de concesiones otorgadas, cabe decir que desde 1993 al último trimestre de 2008 se han invertido más de US\$ 9.300 millones en infraestructura vial interurbana y urbana, aeroportuaria, penitenciaria, de riego y de edificios públicos, conforme se aprecia en el siguiente cuadro:

Cuadro 1
Concesiones de Obras Públicas: 1993 - 2008

	Proyectos concesionados (*)	Obras concesionadas	Duración promedio en años (**)	Antes de la creación del sistema de concesiones (1996)
Autopistas Doble Calzada	13	2.156 Km.		796 Km.
- Ruta 5	8	1.520 Km.	23,8	
- Rutas transversales	5	636 Km.	26,9	
Carreteras calzada simple	6	231 Km.	26,9	
Autopistas y vías urbanas	9	194 Km.	31,6	
Aeropuertos	10	130.700 m ²	13,2	48.268 m ²
Edificación pública	7	461.000 m ²	23,2	
Riesgo (embalses)	1	237.000.000 m ³	27,5	
Estaciones intermodales (transbordo Transantiago)	1	24	14,7	
Cárceles	10	177.000 m ²	22,5	
Corredores urbanos (Transantiago)		12,2 Km.	17,5	

* Incluye sólo proyectos actualmente en explotación o construcción.

** Los promedios son ponderados por el número de obras concesionadas en cada categoría

Finalmente, en lo que se refiere a la duración promedio de la concesión, se tiene que las carreteras suelen ser concesionadas por plazos más largos que el resto de las concesiones.

2. *¿Cuáles fueron las modalidades empleadas para otorgar concesiones (oferta, licitación pública, decreto, etc.)? ¿Hay en el país alguna ley que rija el otorgamiento y la rescisión de concesiones? ¿En los acuerdos de concesión se incluyen disposiciones que permitan la rescisión por parte del Gobierno?*

En relación a las concesiones de obras públicas:

La Ley de Concesiones establece que la adjudicación de las concesiones se efectúe vía licitación pública de contratos, de tipo nacional o internacional. Adicionalmente, el MOP puede hacer un llamado a precalificación de empresas o consorcios cuando la obra revista especiales características de complejidad, magnitud o costo.

En general, el marco jurídico de una concesión de obras públicas se conforma por:

Norma general

- a) Artículos 86 y 87¹ del DFL 850 de 1997 (Ley Orgánica MOP).

Normas especiales

- a) Ley de Concesiones de Obras Públicas (DS MOP N° 900 de 1996), que contiene el Texto Refundido, Coordinado y Sistematizado del DFL MOP N° 164 de 1991, Ley de Concesiones de Obras Públicas.
- b) Reglamento de la Ley de Concesiones (DS MOP N° 956 de 1997)

Otras, que forman parte del contrato de concesión

- a) Convenio mandato (si procede)
- b) Bases de licitación y circulares aclaratorias
- c) Oferta técnica y económica del adjudicatario
- d) Decreto Supremo de adjudicación

Este marco jurídico garantiza un adecuado equilibrio entre el sector público y privado en cuanto a los derechos y obligaciones de las partes, incorporando mecanismos de resolución de controversias, de mediación, arbitraje y herramientas que facilitan el financiamiento de los proyectos.

Finalmente, también cabe destacar que los contratos de concesión son del tipo B.O.T (Build, Operate and Transfer), o bien DBOT (Design, Build, Operate and Transfer). Ambos sistemas comprometen la participación del sector privado en el diseño, la construcción y explotación de la obra pública, de manera que una vez finalizado el plazo de concesión, el adjudicatario entregue la obra al Estado en condiciones óptimas con el fin de volverla a licitar.

En relación a las concesiones de frecuencias aéreas:

La Junta Aeronáutica Civil, JAC, es la entidad responsable de llevar a cabo de proceso de concesión de frecuencia aérea vía licitación pública, en virtud del siguiente marco jurídico establecido:

Norma general

- a) Artículo 32, N° 8 de la Constitución Política
- b) Artículos 3° y 6°, número 1 del DFL N° 241, de 1960 (Estatuto Orgánico de la Junta Aeronáutica Civil, actualizado al 23 de noviembre de 1981)
- c) Artículos 2° y 3° del DL N° 2.564, de 1979, Ley de Aviación Comercial²

Normas especiales

¹ El Art. 87 del DFL 850/197, establece que “Las obras públicas fiscales podrán ejecutarse, asimismo, mediante contrato adjudicado en licitación pública nacional o internacional, siempre que ésta última no afecte la seguridad nacional, a cambio de la concesión temporal de su explotación o de los bienes nacionales de uso público o fiscales destinados a desarrollar las áreas de servicios que se convengan...”.

² “2°.- Que es necesario crear las mejores condiciones de competencia entre todas las empresas interesadas en el servicio de transporte aéreo chileno, a objeto de que éste tenga las características antes señaladas;” y “3°.- Que dicha competencia supone la libertad de tarifas y minimizar la intervención de la autoridad estatal, a fin de garantizar la estabilidad de las normas que rigen el transporte aéreo.”

- a) Art. 2° del Decreto Supremo N° 102 / 1981 del Ministerio de Transportes y Telecomunicaciones, que Reglamenta la Licitación Pública para Asignar Frecuencias Internacionales a empresas áreas nacionales.³

En relación a las concesiones de espectro radioeléctrico

La Subsecretaría de Telecomunicaciones (SUBTEL) del Ministerio de Transportes y Telecomunicaciones (MTT) es la entidad responsable de llevar a cabo el proceso de asignación de espectro radioeléctrico, en virtud del siguiente marco jurídico establecido:

Norma general

- a) Art 6° y Art. 8° Ley 18.168 /1982, General de Telecomunicaciones (LGT), que establece un principio básico respecto de la regulación del espectro radioeléctrico.
4 5
- b) Plan General de Uso del Espectro Radioeléctrico Decreto N° 127, de 2006 del MTT

Si bien, el marco jurídico no establece el medio por el cual la SUBTEL deberá administrar el espectro radioeléctrico y realizar las asignaciones, en mayo de 2007 consultó al H. TDLC sobre la conveniencia –desde el punto de vista de la competencia- de realizar una determinada asignación de ancho de banda vía concurso o licitación pública, argumentando que “Esta Subsecretaría, luego de analizar la experiencia internacional, la disponibilidad de equipos y el estado del mercado y la tecnología en general, estima que ya están dadas todas las condiciones técnicas y comerciales para hacer un llamado a concurso público a fin de asignar las concesiones respectivas y con ello introducir en el país la prestación de estos servicios avanzados en directo beneficio de los usuarios”.

En relación a las concesiones del servicio de radiodifusión sonora:

La Subsecretaría de Telecomunicaciones (SUBTEL) del Ministerio de Transportes y Telecomunicaciones (MTT) es la entidad responsable de llevar a cabo la asignación de las concesiones de servicio de radiodifusión sonora.⁶

El mecanismo de asignación de la concesión se realiza sobre la base de solicitud de los interesados.

Norma general

³ Dicho artículo establece que la JAC “...llamará a licitación pública para asignar la o las frecuencias disponibles, en base a ofertas en dinero, mediante la publicación de un aviso en el Diario Oficial y en un diario de Santiago, señalando las características de las frecuencias, el tipo y monto de la garantía que se deba rendir para participar, y el lugar, fecha y hora de apertura de la licitación, la que no podrá efectuarse antes de 15 días contados desde la publicación del aviso”.

⁴ El Art 6° establece en su inciso primero que será la SUBTEL la institución responsable por la aplicación y control de la ley y sus reglamentos; en tanto que en su inciso segundo, considera expresamente que también esta materia puede ser de injerencia de la institucionalidad de competencia “Le competará además, exclusivamente, la interpretación técnica de las disposiciones legales y reglamentarias que rigen las telecomunicaciones, sin perjuicio de las facultades propias de los tribunales de justicia y de los organismos especiales creados por el decreto ley 211, de 1973.”

⁵ El Art 8° establece que “Para todos los efectos de esta ley, el uso y goce de frecuencias del espectro radioeléctrico será de libre e igualitario acceso por medio de concesiones, permisos o licencias de telecomunicaciones, esencialmente temporales, otorgadas por el Estado.”

⁶ La aplicación y control de la Ley le corresponde al Ministerio de Transportes y Telecomunicaciones, a través de la Subsecretaría de Telecomunicaciones. Esta, debe velar porque los servicios de telecomunicaciones, sistemas e instalaciones que generan ondas electromagnéticas, sean operadas y explotados de modo que no causen lesiones a personas o daños a cosas, ni interferencias perjudiciales a los servicios de telecomunicaciones nacionales o extranjeros. Además le corresponde controlar y vigilar el funcionamiento de estos servicios y la protección de los derechos de los usuarios.

- a) La LGT, en sus Arts. 9° bis y 13°, que establece la obligatoriedad de llamar a concurso o licitación para renovar las concesiones del Servicio de radiodifusión sonora
- b) Reglamento de Radiodifusión (1998)

Otras normas relacionadas

- a) Inciso segundo del Art. 38 de la Ley N° 19.733/2001 del Ministerio Secretaría General de Gobierno (Ley sobre las libertades de opinión e información y ejercicio del periodismo)⁷
- b) Auto Acordado N° 6/2005, del H. TDLC, que establece los antecedentes mínimos a ser informados por el solicitante de una concesión de frecuencia radial y ordena a la SUBTEL y al Consejo Nacional de Televisión que remita periódicamente información relativa a las concesiones de radiodifusión sonora y televisiva vigentes y sobre la disponibilidad de frecuencias para el otorgamiento de concesiones adicionales, en cada área geográfica.

En relación a infraestructura portuaria

La Ley N° 19.542 que Moderniza el Sector Portuario Estatal, transformando los puertos públicos existentes en empresas estatales autónomas, formando parte del Sistema de Empresas Públicas SEP (organismo encargado de supervisar y realizar el control de gestión de las empresas del Estado). El objetivo de esta Ley fue permitir que los puertos estatales se desarrollen teniendo la posibilidad de incorporar capitales privados, lo que se admitió al permitir que las empresas portuarias pudiesen concesionar la administración de los frentes de atraque y los terminales de los transbordadores bajo su administración.

Norma general

- a) Artículo 7° de la Ley 19.542 /1998, que establece normas y procedimientos que regulan los procesos de licitación pública de las Empresas Portuarias.
- b) Art. 3° del DS N° 104, de 24 de abril de 1998, de Transportes que reglamenta el Art. 7 de la ley anterior

3. *¿Se han tomado en cuenta las consideraciones relativas a la competencia en el otorgamiento de concesiones? ¿Qué nuevas consideraciones o cuestiones se han planteado como consecuencia de las concesiones otorgadas en el país? ¿Se ha dado a los concesionarios protección especial con respecto al abuso de posición de dominio, la entrada o el control de los precios al otorgárseles una concesión?*

En términos generales, las distintas concesiones introducen elementos pro-competencia a partir del criterio de otorgamiento, el que se realiza bajo la modalidad de licitaciones públicas, estableciéndose por ley que dichas licitaciones podrán ser nacional o internacionales, pudiendo presentarse a ellas toda personal natural o jurídica, nacional o extranjera, que cumpla con los requisitos que se establezcan en los

⁷ Que establece la necesidad que la autoridad de competencia evalúe el impacto de las concesiones asignadas, al señalar que “Con todo, tratándose de medios de comunicación social sujetos al sistema de concesión otorgada por el Estado, el hecho o acto relevante deberá contar con informe previo a su perfeccionamiento de la respectiva Comisión Preventiva respecto a su impacto en el mercado informativo. Dicho informe deberá evacuarse dentro de los treinta días siguientes a la presentación de la solicitud, en caso contrario se entenderá que no amerita objeción alguna”.

reglamentos, y bases, asegurándose de esta manera que no exista criterios exclusivas ni discriminación arbitraria entre los postulantes (principio general de competencia).

A modo de ejemplo, en el caso de concesiones de obras públicas, las consideraciones relativas a competencia se sientan sobre los principios rectores del procedimiento de licitación pública, a saber, (i) la observancia estricta de las bases que la regulan (Artículo 24 del DS MOP N° 956/97 sobre las Aclaraciones de la Oferta), y (ii) la igualdad de los licitantes.

Por otro lado, ninguna concesión entrega protección especial a los concesionarios contra el derecho de la competencia (revisar extractos de jurisprudencia relevante presentada en la respuesta siguiente).

En relación a otro tipo de concesiones, también se puede ver en la respuesta entregada en el numeral anterior que los marcos jurídicos relevantes hacen consideraciones expresas a la opinión de la institucionalidad de competencia sobre la materia.

4. *¿Qué sectores de la economía están exentos de la aplicación del derecho sobre la competencia? ¿Qué sectores o qué tipo de concesiones son objeto de una reglamentación específica? ¿Las concesiones están sujetas al derecho nacional sobre la competencia?*

Como se desarrolla en extenso posteriormente (Pregunta 5 de la parte II de este cuestionario), la ley chilena de defensa de la competencia aplica para todas las actividades y sectores de la economía (bienes, servicios, personas naturales, jurídicas, asociaciones profesionales, etc.), considerando tanto al sector público como al sector privado, no existiendo excepciones ni exenciones legales ni judiciales para su aplicación. De esta manera, las concesiones sí estarían sujetas al derecho nacional sobre la competencia.⁸

A modo de ejemplo, considérese las siguientes causas analizadas en la jurisprudencia nacional de defensa de la competencia, vinculadas a empresas concesionarias y/o servicios privatizados:

- Sentencia N° 81 del H. TDLC de enero de 2009, que acoge el requerimiento de la FNE en contra de la Junta de Aeronáutica Civil (JAC), para que modifique las bases de licitación elaboradas por la para el proceso de licitación pública de siete frecuencias aéreas directas entre las ciudades de Santiago y Lima, por un plazo de cinco años, a fin de que se incorporen condiciones de competencia en la industria. De este modo, el H. TDLC resuelve ordenar a la JAC a modificar sus bases, a fin de que éstas establezcan que la autoridad aeronáutica podrá adjudicar a un mismo postulante, en una primera ronda, como máximo un 75% del total de frecuencias aéreas internacionales directas existentes en la ruta Santiago-Lima, sumadas las asignadas y por asignar y, en caso de que esta primera ronda se declare desierta, no rija en la segunda ronda la limitación al porcentaje de frecuencias internacionales que puede adjudicarse una misma compañía y sus relacionadas. Estas bases, además,

⁸ A modo de ejemplo, y aunque no está referido a concesiones de obras públicas llevadas a cabo por la Coordinadora de concesiones de Obras Públicas, sino a concesiones de otro tipo; –concesiones de frecuencias la Fiscalía Nacional Económica

deberán ser modificadas, a fin de procurar que los plazos de inicio de operaciones que se exijan a los postulantes, no restrinjan o perjudiquen la participación del mayor número de interesados posible.

Adicionalmente, en esta sentencia, el H. TDLC ordena –entre otros- a la JAC: (i) Realizar un monitoreo constante y eficaz del uso efectivo u operación regular por parte de las aerolíneas de los Derechos de Tráfico o Frecuencias Aéreas Internacionales que se les hayan adjudicado, de forma que se promueva y defienda la libre competencia; (ii) Asegurar que las bases de licitaciones de frecuencias aéreas internacionales que realice en lo sucesivo garanticen la creación de las mejores condiciones de competencia entre todas las empresas interesadas en el servicio de transporte aéreo en dicha ruta; (iii) Remitir las bases de las licitaciones públicas de frecuencias aéreas a la Fiscalía Nacional Económica, a lo menos con 30 días corridos de anticipación a la fecha en la que habrá de publicarse el respectivo llamado; y (iv) Informar por escrito a la Fiscalía Nacional Económica de todo acto jurídico cuyo objeto o efecto sea la transferencia entre aerolíneas de frecuencias aéreas o derechos de tráfico asignadas, en cuanto tome conocimiento del mismo. Finalmente, también propone al Ejecutivo (i) modificar el Decreto Ley N° 2564 /1979 a fin de que la JAC deba siempre y en todos los casos llamar a licitación pública -en condiciones que faciliten la participación de múltiples interesados- cada vez que existan frecuencias disponibles, sin hacer distinción alguna de causas que originen la necesidad de tal asignación; (ii) modificar el reglamento de asignación de frecuencias aéreas restringidas, contenido en el DS N° 102 / 1981, del Ministerio de Transportes y Telecomunicaciones (MTT); y (iii) recomienda que el MTT estudie la conveniencia de establecer una limitación a la duración de las frecuencias aéreas que hayan sido asignadas con carácter de indefinidas, respetándose en cualquier caso las garantías establecidas en nuestro ordenamiento jurídico.

- Sentencia N° 75 del H. TDLC de septiembre de 2008, que acoge parcialmente la demanda de la Asociación Gremial de Transporte Expreso Internacional (en adelante “ATREX”), conjuntamente a un conjunto de empresas de courier⁹ en contra de SCL Terminal Aéreo de Santiago S.A. por la fijación de precios abusivos y discriminatorios, abusando de su posición monopólica como operador del Aeropuerto y de las barreras de entrada que lo protegen, incumpliendo las restricciones tarifarias que se establecieron en las Bases de Licitación, y negándose injustificadamente a permitir la ampliación de la infraestructura necesaria para la operación de las empresas courier

En su sentencia –la que fue ratificada en todas sus partes por la Exc. Corte Suprema en enero de 2009-, el H. TDLC declara que SCL ha incurrido en las conductas de discriminación y abuso de posición dominante; condenándola al pago de una multa ascendente a 1800 UTA (aprox. US\$ 1,2 millones). Adicionalmente, el H. TDLC declaró que SCL sólo puede cobrar a las empresas courier de acuerdo a lo permitido en las Bases de Licitación, y que SCL deberá entregar en arrendamiento a las demandantes y a las empresas courier que se lo requieran un terreno dentro del Aeropuerto Arturo Merino

⁹ TNT Express, Air Facility Courier, ATC Chile, Blitzen Kurier, Columbia Courier, DHL Express, EXPRESSIT, Fastpack Chile, Federal Express, Hot Express, OCS Santiago, Security Express Service, TLC Courier, UPS Chile y World Courier.

Benítez que sea apto para la operación de servicios del Terminal de Carga a fin de que éstas, conjunta o separadamente, construyan las instalaciones que permitan su adecuada operación. Finalmente, se declara que es contrario a la libre competencia que SCL y la inspección fiscal practicada por el MOP exijan normas de constructibilidad distintas al edificio a construir para las empresas courier, según si el proyecto sea elaborado por SCL o por las empresas referidas; debiendo primar por sobre todo el criterio de no discriminación arbitraria.

- Sentencia N° 73 del H. TDLC de agosto de 2008, que acoge el requerimiento de la FNE contra EDELMAG, por conductas abusivas de su condición de monopolio en el servicio eléctrico de la localidad de Puerto Williams, Región de Magallanes, consistentes en incrementos injustificados de las tarifas a sus clientes.

La empresa demandada, EDELMAG, operaba en servicio eléctrico en dicha región desde el año 2002, en que el sistema fuera privatizado y adjudicado mediante una licitación privada a dicha empresa, luego de declararse desierta una primera licitación pública. El contrato de concesión suscrito entre el Gobierno Regional de Magallanes y EDELMAG habría considerado las fórmulas de indexación de las tarifas a clientes finales, que habrían sido violadas por ésta.

En su sentencia, el H. TDLC acoge parcialmente el requerimiento de la Fiscalía Nacional Económica, declarando que EDELMAG incurrió en un abuso de posición dominante en el mercado de generación, transmisión y distribución de energía eléctrica en la localidad de Puerto Williams y sus alrededores, condenando a la empresa al pago de una multa por 400 UTA (aproximadamente US\$ 275,680) y ordenándole el cese inmediato de la conducta sancionada.

Esta sentencia fue ratificada en todas sus partes por la Exc. Corte Suprema, con fecha noviembre de 2008.

- Resolución N° 27 del H. TDLC de julio de 2008, sobre la Consulta sobre participación de actuales concesionarios de Telefonía Móvil en Concurso de Telefonía Móvil Digital Avanzada; a objeto de asignar porciones de espectro radioeléctrico destinado al servicio público de este tipo de telefonía. En su disposición, el H. TDLC establece que no es procedente excluir la participación de los actuales concesionarios de servicio público telefónico móvil en el Concurso consultado, por lo que éstos podrán participar en él cumpliendo con la normativa aplicable y con los demás requisitos de general aplicación que establezcan las bases del concurso público consultado. Adicionalmente, también instruyó para que se entregue en forma previa a la fecha prevista en las bases como plazo máximo para la entrada en operación o puesta en marcha de los proyectos técnicos de los adjudicatarios del Concurso, la consultante deberá implementar la portabilidad del número telefónico móvil, estableciendo que la tarifa por dicho servicio que fuere procedente sea cobrada al público, entre otras.

- Consulta sobre la Solicitud de la Empresa Portuaria de Valparaíso (EPV) sobre Licitación de Concesión del Frente de Atraque N° 2 de dicho Puerto, ingresada al H. TDLC por EPV en octubre de 2008, pidiendo su pronunciamiento respecto de las condiciones de la licitación pública por medio de la cual procederá a entregar en concesión el Espigón o Frente de Atraque N° 2 de dicho puerto para su operación bajo un esquema monooperador. La estructura de la licitación pretendida considera el levantamiento condicional de la restricción a la integración horizontal intraportuaria establecida en el Dictamen N° 1.045 de la Comisión Preventiva Central. A este respecto, la Fiscalía Nacional Económica evacuó en enero de 2009 un informe al TDLC, en su calidad de informante técnico en materia de competencia.¹⁰
- Sentencia N° 61 del H. TDLC de diciembre de 2007, que acoge parcialmente la demanda presentada por Transportes Delfos S.A. y el requerimiento de la Fiscalía Nacional Económica en contra de SCL Terminal Aéreo Santiago S.A., por conductas contrarias a la libre competencia consistentes en abuso de posición dominante y acuerdos colusorios en la asignación de las subconcesiones del servicio de taxis en el Aeropuerto Arturo Merino B. de Santiago en la fijación de las tarifas a público y a los operadores subconcesionarios.

En dicha sentencia, el TDLC resolvió acuerdo a las facultades establecidas en el artículo 18 N° 4 del DL N° 211, proponiendo a la Presidenta de la República –a través del Ministro de Obras Públicas-, la modificación de los preceptos legales y reglamentarios pertinentes, de manera tal que, cuando se faculte a un concesionario de obra pública o de servicio público para asignar subconcesiones u otro tipo de contratos que consideren una limitación de los operadores de un determinado servicio, se establezcan los mecanismos de licitación necesarios para evitar conductas abusivas, mediante procedimientos competitivos de asignación que garanticen que las tarifas a público no sean abusivas, y/o regulando los precios o tarifas que recibirá el concesionario. En dichos preceptos deberá prohibirse la modificación posterior de las condiciones y elementos, establecidos en la adjudicación de la licitación, que determinan los precios a público, sin seguir el mismo procedimiento que permitió su asignación original.

5. *¿Hay pruebas de que las concesiones hayan aportado beneficios a los consumidores del país en términos de infraestructura, diversificación, calidad, precios o bienestar general del consumidor?*

La siguiente respuesta se realiza en relación a la participación de privados para la construcción y/o operación de infraestructura pública, operadas bajo la modalidad del sistema de concesiones del MOP:

¹⁰ El texto del informe consulta "Solicitud de Informe de EPV sobre Licitación de Concesión Portuaria del Frente de Atraque N° 2 del Puerto de Valparaíso", Rol NC N° 313-08, puede ser consultado en el link [http://mail.fne.cl/db/jurispru.nsf/60e31f9065c2d5a38425733e005df9fa/D1E16ABD6A4AAEA38425754D00513D51/\\$FILE/APORTA%20ANTECEDENTES-NC-313-08-2009.pdf](http://mail.fne.cl/db/jurispru.nsf/60e31f9065c2d5a38425733e005df9fa/D1E16ABD6A4AAEA38425754D00513D51/$FILE/APORTA%20ANTECEDENTES-NC-313-08-2009.pdf)

No se dispone de evaluaciones del sistema de concesiones en Chile que consideren indicadores para medir diversificación en la oferta, calidad de bienes o satisfacción del consumidor, u otra serie de medidas de impacto económico y social de éste. Sin embargo, los indicadores de resultados asociados dan cuenta que el desarrollo de infraestructura ha permitido mejorar la conectividad del país y su integración al exterior, permitiendo ahorros de tiempo y costos de operación. A modo de ejemplo, en el tramo Talca-Chillán los vehículos livianos ahorran 35 minutos y los pesados 43 (en temporada alta el ahorro es de 45 y 46 minutos, respectivamente) y en los tramos en que se pasó de calzada simple a doble (Los Vilos-La Serena y Talca-Linares) los ahorros de combustible en periodos de congestión alcanzan hasta 30% en vehículos livianos y entre 20% y 30% en los vehículos pesados.

No obstante lo anterior, la Dirección de Presupuesto del Ministerio de Hacienda (DIPRES), en el marco de su línea de evaluación de programas e instituciones,¹¹ ha realizado en el año 2006 la evaluación del Programa de Administración del Sistema de Concesiones del MOP, tanto en su línea de Licitación y adjudicación de obras (Componente 1), como en la de Inspección de Obras en Construcción y en Explotación (Componente 2). Los resultados de dicha evaluación pueden ser consultados en el sitio Web de la DIPRES,^{12 13} pero de entre ellos destacan los siguientes¹⁴:

- Sobre el número de obras licitadas: La cantidad promedio de obras licitadas y adjudicadas anualmente en el período 2003-2006 fue de 3,8 (un mínimo de 1 proyecto en el año 2003 y un máximo de 9, en el 2004) en comparación con el periodo 1995-2002 que fue de 4 obras adjudicadas anualmente (un mínimo de 2 (1998-9 y 2001) y un máximo de 7 (1997)). Por otra parte, la programación 2003-2004 consideraba adjudicar 15 proyectos, adjudicándose el 66% (10) de ellos y la programación 2005-2006 consideraba adjudicar 18 proyectos, adjudicándose sólo el 17% (3)¹⁵
- Aspectos relacionados a la competencia (en cuanto a generar competencia ex ante): Los resultados en cuanto a la participación de las empresas en las 18 licitaciones efectuadas en el período 2002-2006, muestran que en el 39% de los casos se presentó un único oferente y en el 33% se presentaron dos oferentes. De acuerdo a recomendaciones internacionales una licitación con un sólo oferente debe ser declarada desierta, y debería considerarse un mínimo de 3 oferentes en cada licitación. En este sentido, si bien lo realizado no contraviene ninguna norma interna, no cumple con estándares internacionales más estrictos en esta materia.
- Sobre el componente obras inspeccionadas y el cumplimiento de metas de puesta en servicio: Las estadísticas muestran un desempeño dispar, dependiendo del tipo de obras y si la puesta en servicio es definitiva o

¹¹ En <http://www.dipres.cl/572/propertyvalue-2131.html>

¹² Descargables de la plataforma ubicada en el siguiente link: en <http://www.dipres.cl/574/propertyvalue-15843.html>

¹³ Dicha evaluación quedó a cargo de los siguientes panelistas externos de DIPRES: Fernando Cartes (COORDINADOR), Juan Esteban Doña y Jorge Rojas.

¹⁴ A modo de referencia, considérese la Minuta Ejecutiva de la Evaluación del Programa de Administración de Concesiones, descargable en el siguiente link http://www.dipres.cl/574/articles-31607_doc_pdf.pdf

¹⁵ Otros 3 proyectos: Ruta 5 tramo acceso norte la Serena – Bahía Inglesa, sistema de conectividad X Región y el Ferrocarril Trasandino Central se licitaron pero no hubo presentación de oferentes y el resto fueron pospuestos ya sea porque los estudios aún no finalizaban o por decisión política (concesiones de embalses y Hospital Salvador Infante).

provisoria. Por ejemplo, las rutas transversales tuvieron 8 hitos de puesta en servicio provisorio en el periodo 2002-2006,¹⁶ cumpliéndose el 75% (6) de ellos dentro del plazo, mientras que ninguno de los 9 hitos de puesta en marcha definitiva se cumplió dentro del plazo.

- Sobre los aportes estatales: El aporte estatal al Programa ha aumentado en un 50% en el periodo 2002-2006, lo cual se explica fundamentalmente por el aumento en el ítem “compensaciones y convenios complementarios”, el cual pasó de \$48.300 millones el año 2002 a \$205.000 millones el año 2006. No se dispone de un diagnóstico claro de las razones que han generado el aumento experimentado por el ítem “compensaciones y convenios complementarios”. Algunas de las causas que podrían estar explicando esto son la existencia de: contratos de licitación no suficientemente normados o incompletos, que dejan un margen demasiado amplio para su interpretación por las partes; una inadecuada asignación de los riesgos constructivos del proyecto; y/o un mecanismo inadecuado de resolución de controversias.

Los costos para el Estado por sentencias arbitrales y conciliadoras¹⁷ alcanzaron un monto de \$41.514 millones el 2006, representando un 16% del aporte del Estado en el programa el año 2006 (\$267.624 millones) y un monto casi 3 veces mayor respecto del año 2005, mientras que en los años 2003 y 2004 no existieron estos costos.

- Recomendaciones de la evaluación DIPRES: La justificación de la continuidad del programa permanece en cuanto exista déficit de infraestructura y obras que sean social y económicamente rentable su operación a través del sistema de concesiones, ya que permitiría liberar recursos para otros programas sociales. Adicionalmente, la actual Ley de Concesiones establece que una vez concluido el plazo inicial de las concesiones, éstas deben ser vueltas a concesionar, lo que respalda la continuidad del programa.

Por su parte, Un reciente estudio del World Economic Forum (2007), concluye que Chile tiene los mejores resultados de América Latina en la provisión privada de infraestructura. Es más, muestra que nuestro país es el único de la región que tiene nivel de clase mundial en este campo. Destacan los resultados acerca del nivel de satisfacción de los servicios, transparencia y entorno macroeconómico. Un indicador importante que demuestra los buenos resultados del sistema en Chile es el bajo nivel de proyectos cancelados, con apenas el 2% de la inversión total, uno de los más bajos de la región y el más bajo dentro de los países que han usado intensivamente las concesiones de obras públicas.¹⁸ A su vez, el sistema de concesiones ha profundizado el mercado de capitales a largo plazo en el país, teniendo como consecuencia – externalidad positiva- una mejora en estabilidad de las carteras de las Administradoras de Fondos de Pensiones, AFP.

Finalmente, el sistema de concesiones en Chile ha sido objeto de otras evaluaciones y comentarios internacionales, de donde destacan las siguientes:

¹⁶ Las rutas transversales son todas las rutas interurbanas menos la Ruta 5, y Se consideró cada sector o etapa de obra como un hito.

¹⁷ Las discrepancias que surgen entre los concesionarios y el Estado son resueltas por una comisión conciliadora, en primera instancia, y por una comisión arbitral, en última instancia.

¹⁸ World Bank, Private Participation in Infrastructure Database, Febrero 2007.

- Rivera, Eugenio (2008) “La regulación económica como complemento de las licitaciones en las concesiones de obras públicas”, en Revista de la CEPAL, N° 95, agosto 2008, p. 51-65.
- CEPAL (2004), Concesiones viales en América Latina: situación actual y perspectivas [LC/L.2207-P], en Serie Recursos Naturales e Infraestructura, N° 79, 43 páginas.
- Engel, E., R. Fischer, A. Galetovic y M. Hermosilla (2008), “Las Renegociaciones de Concesiones y la Nueva Ley”, en Puntos de Referencia N° 297, CEP , septiembre.
- Engel, E., R. Fischer y A. Galetovic (2001), “El Programa Chileno de Concesiones de Infraestructura: Evaluación, Experiencias y Perspectivas”, en el libro La transformación económica de Chile, CEP Ed.
- Ghisolfo, Francisco (2001), La evaluación socioeconómica de concesiones de infraestructura de transporte: caso túnel El Melón, Chile; en Serie Recursos Naturales e Infraestructura CEPAL, N° 20.
- ILPES / CEPAL (1999), “Concesiones de infraestructura vial en Chile: fundamentos para el marco estratégico y económico” [LC/IP/L.165] en Diseño estratégico e infraestructura básica. Santiago, Juan Martin Coord., p. 95-118

Colombia

1. *¿Cuántas y qué tipo de concesiones han sido otorgadas en su país? ¿Cuál es la duración típica/promedio de una concesión?*

En Colombia, los contratos de concesión, según lo dispuesto en el numeral 4 del artículo 32 de la Ley 80 de 1993, son aquellos que “(...) celebran las entidades estatales con el objeto de otorgar a una persona llamada concesionaria la prestación, operación, explotación, organización o gestión, total o parcial, de un servicio público, o la construcción, explotación o conservación total o parcial, de una obra o bien destinados al servicio o uso público, así como todas aquellas actividades necesarias para la adecuada prestación o funcionamiento de la obra o servicio por cuenta y riesgo del concesionario y bajo la vigilancia y control de la entidad concedente, a cambio de una remuneración que puede consistir en derechos, tarifas y tasas, valorización, o en la participación que se le otorgue en la explotación del bien, o en una suma periódica, única o porcentual y, en general, en cualquier otra modalidad de contraprestación que las partes acuerden.”

De conformidad con lo anterior, la remuneración puede consistir en (i) derechos, tarifas, tasas, una valorización o participaciones que el contratista cobra a los usuarios con aprobación de la autoridad competente por un tiempo determinado; (ii) una suma periódica o porcentual y, en general, (iii) cualquier otra modalidad de contraprestación que las partes acuerden.¹⁹

Asimismo, el artículo transcrito indica el objeto sobre el cual puede versar una concesión en Colombia, que para fines prácticos podemos señalar, a modo de ejemplo, las concesiones (i) portuarias, (ii) férreas, (iii) de carreteras, (iv) aeroportuarias, (v) de telecomunicaciones, (vi) de cárceles, (v) energía y gas, (vi) acueducto y alcantarillado, (vii) mineras, cuya duración promedio oscila entre 5 y 20 años.

Finalmente, es preciso señalar que no contamos con cifras consolidadas que permitan indicar cuántas concesiones han sido otorgadas en Colombia.

2. *¿Cuáles fueron las modalidades para crear una concesión (Oferta pública, concurso, decreto, etc.)?, ¿Hay alguna ley en su país para el otorgamiento/terminación de concesiones?, ¿En los acuerdos de concesión se incluyen disposiciones que permitan la rescisión por parte del Gobierno?*

Las concesiones públicas en Colombia, se otorgan mediante licitación pública de conformidad con la ley 80 de 1993. Ahora bien, respecto a su terminación, es preciso mencionar que puede ser conforme con las causales de terminación que se hayan acordado en el contrato de concesión, así como en virtud de las facultades excepcionales que tienen las entidades estatales para terminar unilateralmente el

¹⁹ “El contratista hace la obra, la conserva, la restaura, etc., y para pagarse su inversión, la entidad concedente le permite que cobre a quien use la obra una tarifa, por un determinado tiempo. La tarifa es controlado por la autoridad competente, que puede ser la entidad concedente u otra que tenga tal función. Las tarifas se aumentarían o modificarían de acuerdo con el contrato y con la autorización del funcionario competente”. TAPIAS Perdígón, Camilo Aspectos Prácticos de la Contratación Pública. Editores e Impresores Ltda., Bogotá mayo 2003

contrato previo cumplimiento de ciertas condiciones. Entre éstas últimas se encuentra la caducidad que de conformidad con lo dispuesto en el artículo 18 se entiende como “la estipulación en virtud de la cual si se presenta alguno de los hechos constitutivos de incumplimiento de las obligaciones a cargo del contratista, que afecte de manera grave y directa la ejecución del contrato y evidencie que puede conducir a su paralización, la entidad por medio de acto administrativo debidamente motivado lo dará por terminado y ordenará su liquidación en el estado en que se encuentre.

En caso de que la entidad decida abstenerse de declarar la caducidad, adoptará las medidas de control e intervención necesarias, que garanticen la ejecución del objeto contratado. La declaratoria de caducidad no impedirá que la entidad contratante tome posesión de la obra o continúe inmediatamente la ejecución del objeto contratado, bien sea a través o de otro contratista a quien a su vez se le podrá declarar la caducidad, cuando a ello hubiere lugar.”²⁰

Además de lo dispuesto, el concesionario quedará inhabilitado por el término de cinco años para contratar con el Estado, sin perjuicio de que éste último haga efectivas las garantías constituidas para garantizar el cumplimiento de las obligaciones adquiridas.

3. *¿Se han tomado en cuenta las consideraciones relativas a la competencia en el otorgamiento de concesiones? ¿Qué nuevas consideraciones o cuestiones se han planteado como consecuencia de las concesiones otorgadas en el país? ¿Se ha dado a los concesionarios protección especial con respecto al abuso de posición de dominio, la entrada o el control de los precios al otorgárseles una concesión?*

No hay un caso específico en el que el otorgamiento de una concesión haya sido objeto de consulta a esta Entidad por un aspecto vinculado con competencia. Sin perjuicio de lo anterior, cuando sea pertinente podrán ser presentados ante la autoridad de competencia los asuntos que en esta materia surjan en el desarrollo del proceso de concesión.

4. *¿Qué sectores de la economía están exentos de la aplicación del derecho sobre la competencia?, ¿Qué sectores o qué tipo de concesiones son objeto de una reglamentación específica?, ¿Las concesiones están sujetas al derecho nacional sobre la competencia?*

En Colombia ningún sector está exento de la aplicación de las normas sobre libre competencia.

Entre los sectores que tienen supervisión regulatoria específica están los asuntos relacionados con el sector financiero, servicios públicos domiciliarios, aeronáuticos, telefonía móvil celular y portuaria, entre otras.

Las concesiones, así como cualquier otro asunto que afecte la competencia en los mercados, están sujetas a la ley de competencia.

²⁰ Ley 80 de 1993 art. 14

5. *¿Hay pruebas de que las concesiones hayan aportado beneficios a los consumidores del país en términos de infraestructura, diversificación, calidad, precios o bienestar general del consumidor?*

Las concesiones tienen como finalidad general contribuir con el desarrollo de la competitividad del país logrando altos niveles de calidad en la infraestructura concesionada en términos de cobertura, economía, seguridad y comodidad. Evidencia de los beneficios que las concesiones en materia de infraestructura de transporte han traído a Colombia podrían encontrarse en la página web del Instituto Nacional de Concesiones, INCO (www.inco.gov.co)

Czech Republic

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

Generally, there have been 27 concessions granted in the Czech Republic. There is no typical/average duration for the concessions as for the Act on Concessions does not stipulate the duration of concessions and four of the concessions were terminated so far. (thus, average duration of the concession, including ongoing, would be approx. 9 years).

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

Earlier concessions were created on grounds of public offering and subsequent tender, later the Act on Concessions has been introduced and thus the concessions were awarded according to the this Act.

There are provisions in particular concession agreements, which enable the granting authority (i.e. the government) to terminate the concession for reasons that are usually also listed in the concession agreement. In particular, it is an infringement of contractual duties, obvious incapability to meet the purposes of the concession or expiration of the general public interest in particular concession, which may lead to termination of the concession.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

During the process of preparation of the public offering the Czech Office for the Protection of Competition has always had the chance to comment on any provisions or whole concession project in order to protect the competition in affected market. Providing the fact that economic entity pursues its economic interests on grounds of the concession (e.g. provision of exclusive services) there is no further exception from the competition law. Therefore, even establishing a dominant position within particular sector, the concessioner should always respect the Competition Act (e.g. in terms of price settings). Should the competition authority have a suspicion that the Competition Act is being infringed, it has full responsibilities to act in favour of the competition. Thus, special regime may be observed only in terms of barriers to entry which are sometimes natural consequence of concession in specific economic sector. In such cases the competition concerns are assessed with special attention to the consumer's benefits arising from the concession.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

There are no sectors exempted from the scope of competition law. Concessions are subject to the national competition law.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

The number of concessions in the Czech Republic is not very high and concessions which were granted definitely resulted in significant benefits for consumers. In general, it has been especially development of infrastructure (road and rail transportation concessions) leading to improvement of quality of transport networks along with price stabilization, which subsequently lead to the overall consumer welfare.

Ecuador

1. *¿Cuántas concesiones, y de qué tipo, se han otorgado en el país? ¿Cuál es la duración habitual o media de una concesión?*

El Ecuador de acuerdo a su normativa constitucional y secundaria tiene la facultad dar en concesión el manejo y explotación de los sectores estratégicos, servicios y empresas públicas, en donde el Estado se reserva el derecho de administrar, regular, controlar y gestionar los sectores estratégicos, de conformidad con los principios de sostenibilidad ambiental, precaución, prevención y eficiencia. Los sectores estratégicos, de decisión y control exclusivo del Estado tienen trascendencia y magnitud decisiva y una influencia económica, social, política o ambiental y que deben orientarse al pleno desarrollo de los derechos y al interés social.

Los sectores estratégicos son: la energía en todas sus formas, las telecomunicaciones, los recursos naturales no renovables, el transporte y la refinación de hidrocarburos, la biodiversidad y el patrimonio genético, el espectro radioeléctrico, el agua, y los demás que determine la ley.

El será responsable de la provisión de los servicios públicos de agua potable y de riego, saneamiento, energía eléctrica, telecomunicaciones, vialidad, infraestructuras portuarias y aeroportuarias, y los demás que determine la ley.

El Estado garantizará que los servicios públicos y su provisión respondan a los principios de obligatoriedad, generalidad, uniformidad, eficiencia, responsabilidad, universalidad, accesibilidad, regularidad, continuidad y calidad. El Estado dispondrá que los precios y tarifas de los servicios públicos sean equilibrados, y establecerá su control y regulación.

El Estado podrá delegar la participación en los sectores estratégicos y servicios públicos a empresas mixtas en las cuales tenga mayoría accionaria. La delegación (concesión) se sujetará al interés nacional y respetará los plazos y límites fijados en la ley para cada sector estratégico.

El Estado podrá, de forma excepcional, delegar a la iniciativa privada y a la economía popular y solidaria, el ejercicio de estas actividades, en los casos que establezca la ley.

Sobre esta base hay una cantidad de delegaciones (concesiones) innumerables dentro de los temas de hidrocarburos, minería, telecomunicaciones, vialidad, infraestructura portuaria, saneamiento, etc.

La duración depende del sector, pero para poner un ejemplo en telecomunicaciones la concesión es de 15 años.

La duración la determinará la ley y su contrato de concesión respectivo.

2. *¿Cuáles fueron las modalidades empleadas para otorgar concesiones (oferta, licitación pública, decreto, etc.)? ¿Hay en el país alguna ley que rija el otorgamiento y la rescisión de concesiones? ¿En los acuerdos de concesión se incluyen disposiciones que permitan la rescisión por parte del Gobierno?*

Por lo general a través de licitación pública, otras a través de invitación.

No hay una ley específica para las concesiones, se elabora un contrato para cada una y sustentado en la normativa que para el sector específico existe, ejemplo la Ley Especial de Telecomunicaciones, La Ley de Radio y Televisión, etc.

Efectivamente existe tanto en la ley respectiva como en los contratos de concesiones las razones en las cuales operaría la rescisión del contrato por parte del Estado.

3. *¿Se han tomado en cuenta las consideraciones relativas a la competencia en el otorgamiento de concesiones? ¿Qué nuevas consideraciones o cuestiones se han planteado como consecuencia de las concesiones otorgadas en el país? ¿Se ha dado a los concesionarios protección especial con respecto al abuso de posición de dominio, la entrada o el control de los precios al otorgárseles una concesión?*

No por qué no existe una política y una normativa de competencia en el país

El de que se lleve adelante la explotación de acuerdo a la nueva constitución, con una nueva visión de carácter social y de conservación, además de poder revertir la concesión en cualquier momento siempre y cuando se den las condiciones legales establecidas en la ley y el contrato.

Sobre la base de lo manifestado anteriormente, no hay temas dentro de las concesiones relacionadas con el abuso de posición dominante u otros como el control de precio y si los hay como en el caso de telecomunicaciones, al no existir autoridad de competencia es inejecutable.

4. *¿Qué sectores de la economía están exentos de la aplicación del derecho sobre la competencia? ¿Qué sectores o qué tipo de concesiones son objeto de una reglamentación específica? ¿Las concesiones están sujetas al derecho nacional sobre la competencia?*

Al no existir ley, nos tendríamos que remitir a lo que manda la Constitución en materia de competencia, en tal razón, no habría sector que esté exento de llevar adelante sus actuaciones dentro de los límites que la Carta Fundamental dispone a los agentes económicos en materia de competencia.

Cada sector tiene su propia normativa y se elaboran contratos de concesión para cada caso.

No por que no existe ley de competencia en el Ecuador, pero si estarían a lo que dispone la Constitución para el tema de competencia.

5. *¿Hay pruebas de que las concesiones hayan aportado beneficios a los consumidores del país en términos de infraestructura, diversificación, calidad, precios o bienestar general del consumidor?*

Si hay pruebas pero no son empíricas, al no existir una autoridad que haya realizado estudios de mercado para determinar dicho grado de afectación al mercado no se ha determinado de manera técnica y real tales beneficios.

Estonia

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

The exact term “concession” is a relatively new legal instrument in Estonian legislation, being introduced as late as 2001 into the Public Procurement Act as a “works concession”. The term “services concession” was introduced yet later, though the new Public Procurement Act of 2007. The definition of a “concession”, either as a works or a services concession in the Public Procurement Act is essentially analogous to the definitions in relevant EU public procurement directives.

Although the term itself is relatively new concept, concessions and concession like agreements have been concluded in various other forms and on the basis of other legal acts for years. There is no single legal act on concessions as in a number of other countries. In principle, Estonian legislation allows the concluding of public-private partnerships (PPPs) through utilizing a concession model through public law contracts and private law contracts. The relevant legal acts which in principle allow such contracts to be concluded are Administrative Co-operation Act (contracts under public law), Public Procurement Act (works and services concessions), the Competition Act and a Governmental Decree²¹ issued on the basis of it (granting special or exclusive rights). A number of sectoral legislative acts also allow concluding contracts which are very similar to a concession, for example in the public transport sector.

Due to the relatively high number of different legal acts which can be used for creating a PPP in the form of a concession, the exact number of granted concessions is difficult to state. For example, the possibility of granting services concessions under the Public Procurement Act has been to our better knowledge used only once for finding a private sector partner to run shops in Estonian prisons. The duration of this services concession was set to 5 years. Relatively small scale concession contracts for works have been concluded twice. The duration of these concession contracts were set to 24 and 30 years, respectively.

Contracts under public law can be concluded only if there is an explicit legal basis stipulated by a relevant law. Unfortunately, there is no statistics on the number of such contracts and whether some of those contracts could be regarded as being concessions in substance. In any case, the Administrative Co-operation Act does not foresee a maximum duration for contracts under public law, but this duration can be established by other legal acts. Therefore, in practice some contracts under public law have been concluded without a set term, some remain valid only until the object of the contract is met and some have a fixed term, usually for five years.

Granting of special or exclusive rights on the basis of the Competition Act and a dedicated Governmental Decree is another instrument used for concluding concession like agreements. The “special or exclusive right” is defined in the § 14 (2) if the Competition Act and stipulates that special or exclusive rights are rights granted to an undertaking by the state or a local government which enable the undertaking to have a

²¹ Governmental Decree no 303 of 25.09.2001 „Procedure for organizing a public tender for the grant of special or exclusive rights“

competitive advantage over other undertakings in a goods market or to be the only undertaking in the market. This definition does not in itself indicate that this right has similar characteristics to a concession, but the implementation of this right along with a contract, creates a framework where the chosen undertaking receives an exclusive right to offer a certain service along with the right to charge users (usually the general public) for using that service, which may be accompanied by a remuneration from the awarding authority. Due to this similarity, the granting of a special or exclusive right has a similar consequence to the granting of a concession and therefore is generally considered to be comparable to granting a concession. According to the Governmental Decree, the maximum duration of a special or an exclusive right is set at 3 years, for longer periods, the grantor must ask for a special dispensation from the Government of Estonia.

The award procedure for granting “special or exclusive rights”, which is regulated by the mentioned Governmental Decree, is analogous to the award procedure for public contracts, stipulated in the Public Procurement Act.

The granting of special or exclusive rights is used mainly in the water distribution and waste management sector. According to the Waste Act, local governments are obliged to designate a waste transport operator according to the tender procedure stipulated in the Governmental Decree. The chosen operator is granted an exclusive right for waste collection and transport in whole or a part of a territory of the local government. According to the most recent data, about a hundred exclusive rights have been granted in this sector and this number is expected to rise, as a large proportion of local governments have not yet tendered for a waste transport operator. According to the Waste Act, the maximum duration of an exclusive right for waste transport operators is 5 years, which is usually the term used in practice, although there have been instances where exclusive rights have been granted for a shorter period.

The Public Water Supply and Sewerage Act also utilises the granting of exclusive rights for “water undertakings”. A water undertaking is a legal person in private law who supplies the water supply of the registered immovable of a client through the public water supply with water or organises discharge of waste water from the sewerage facilities of the client.

If a public water supply and sewerage system is in the ownership of a local government, a water undertaking is appointed by a decision of the local government council on the basis of the provisions of the Competition Act, using the Governmental Decree as the basis of the tender procedure. Unfortunately there is no reliable statistical data available on the number of exclusive rights granted to water undertakings. Duration wise, a number of local governments have asked from the Government for a dispensation to allow granting of an exclusive right to water undertakings for a prolonged period, as water distribution services usually require considerable long-term investments in infrastructure, necessitating a prolonged period of exploitation. These extended exclusive rights have been granted for periods between 10-15 years.

There also exist a number of exclusive rights (in essence reserved tasks) which have been granted directly by law without contractual ties between the grantor and the grantee of an exclusive right.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

Works and services concessions are created according to the regulations of the Public Procurement Act. Currently the applicable regime (award procedure) for granting of concessions is less detailed and simpler compared to the procedural rules applicable for public contracts, which is somewhat unbalanced, as some concessions might be more complex and important to the public interest than conventional public contracts. This unbalance is partly due to the fact that rules applicable for awarding of concessions are only harmonised on the EU level to a certain degree, and in case of services concessions, only the general principles of public procurement apply.

For the two works concessions mentioned in the previous point and one services concession that have been awarded on the basis of the Public Procurement Act, open tender procedure has been used.

The Administrative Co-operation Act requires that for the conclusion of a contract under public law, the tender procedure applicable for public service contracts stipulated in the Public Procurement Act must be used.

For granting special or exclusive rights, the procedural rules for tendering are regulated by the Governmental Decree, which are analogous to the provisions of the Public Procurement Act. The decree allows using the open tender procedure, negotiated procedure and negotiated procedure without a prior publication of a contract notice.

As stated previously, there is no concession law in Estonia. The conditions for termination of concession agreements depend on whether the contract is under the public law or private law. The legislation at issue does not specifically address the principles of termination of concession contracts.

In case of a contract under the public law, the contract can be terminated on the same grounds as a private law contract, with the exception that a contract under the public law can be terminated on the grounds of overriding public interest. This is stipulated in the Administrative Procedure Act § 102, which states that an administrative authority may unilaterally amend a contract under public law or terminate a contract under public law if this is absolutely necessary in order to avoid severe damage to predominant public interest.

Upon amendment or termination of a contract under public law, an administrative authority shall reason the amendment or termination of the contract under public law. Upon amendment or termination of a contract under public law, an administrative authority shall compensate for the proprietary damage caused thereby to the other party to the contract.

For the single services concession contract concluded for running shops in Estonian prisons, the conditions for terminating the contract seem to be customary to private law contracts, keeping in mind the specific particulars of the object of the contract.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Evidently from the answers given to the previous questions, most of concessions or similar contracts are granted by local governments and therefore it is difficult to assess, whether or what specific concerns are taken into account when granting them. In the waste transport and collection sector, granting a concession is compulsory by law. For that reason it is safe to assume that in the legislative process (for the Waste Act) competition concerns were taken fully into account when choosing such a legislative solution. Understandably, exclusivity on markets is always accompanied by competition concerns, but the lawmakers decided that the benefits on environment outweigh the possible negative effects of restricted competition. In any case, as concessions in the waste collection sector are granted using a public tender, with usually a quite large number of competitors, there is no state discretion in choosing a concessionaire.

In principle concessions usually entail exclusivity (right of exploitation) for the concessionaire, which frequently implicates that the concessionaire might hold a dominant position in a certain market, which is most probably the case in waste transport sector.

As regards special protection this is a somewhat two-sided concept in practice. If we consider price controls for works and services provided by concessionaires in Estonia, these can be best described as co-ordinated prices.

For example, in waste collection sector, the chosen waste transport undertaking (concessionaire) will provide its services for customers using the prices and conditions which they stated in their tender. These prices are approved by the grantor of the exclusive right (local governments). This is also analogous in the water distribution sector. For that reason, the concessionaires are not entirely free to set their prices and other trading conditions. Due to this fact, it is debatable, whether the economic risk (risk of exploitation) for the undertaking enjoying an exclusive right, is considerable enough that the relationship between the grantor and the holder of the exclusive right, could be regarded as being analogous to that of a grantor of a concession and a concessionaire under the EU public procurement directives.

In addition, paragraphs 17 and 18 of the Competition Act foresee restrictions and obligations for undertakings enjoying special or exclusive rights. These regulations allow the grantor of a special or an exclusive right to lay down prices to be used by the undertaking enjoying such rights, taking into account the reasoned costs of the undertaking, or impose other conditions or obligations on the undertaking so that the buyers of the goods or services of such undertaking or sellers of goods or services to

such undertaking are not placed in a substantially worse situation than they would be if competition were present in the corresponding area of activity.

This piece of regulation is somewhat archaic and has been used only seldom by local governments. The relationship between the mentioned paragraphs of the Competition Act and other legislation is also somewhat unclear.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

Exclusions or exemptions from general competition law in Estonia are extremely rare. The few existing special regulatory regimes stem from relevant EU legislation applicable for these sectors.

For example, according to § 4 (2) of the Competition Act, the prohibition on agreements, concerted practices and decisions by associations of undertakings which restrict competition, excluding agreements on prices or other trading conditions, does not apply to agreements and practices of agricultural producers or to decisions by associations of agricultural producers, which concern the production or sale of agricultural products or the use of joint facilities, unless competition is substantially restricted by such agreements, practices or decisions. This partial exemption derives from the objectives of EU common agricultural policy and relevant EC council regulations²².

Behaviour of concessionaires is subject to national competition law like the behaviour of any other undertakings. The supervision of compliance with the Competition Act of undertakings granted a concession in any form is carried out by the Estonian Competition Authority.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

Evidently from the answers given to the previous questions, most of the concessions are granted by local governments, which make the conclusive answering to this question difficult. We are not aware of any studies carried out on this subject.

When considering the purposes of creating a concession based system in waste transport activities, this was created mainly due to the need for decreasing harm to environment. A single waste transport operator, chosen by an open tender to exclusively service a certain area, could in theory provide services on a comparable price level and quality to that in a market where competition exists with decreased levels of pollution to the environment.

²² Council Regulation (EC) No 104/2000 of 17 December 1999 on the common organization of the markets in fishery and aquaculture products
Council Regulation (EC) 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products

In water distribution sector, the reasons why prolonged exclusive rights have been granted to water undertakings are mainly connected to the need of ensuring large-scale investments to water infrastructure, which necessitates a longer period of exploitation to the water undertakings. Whether, the decreased competition to the longer exclusive right is outweighed by needs of investment and service reliability is open to interpretation, but as competition in this sector is scarce, due to the inseparable connection between water infrastructure and service provision, public tenders in this field seem to be ineffective.

Finland

In Finland, public monopolies exist, for example, on the retail sale of alcoholic beverages, on betting and on slot machines.

In addition, the electricity network operations are subject to a monopoly and require a grid permit granted by the electricity Market Authority. Some of the network companies are owned by the municipalities whereas other are owned business undertakings. The Electricity Market Authority controls the electricity market in Finland. The national grid operator in Finland, Fingrid Oyj, is placed under the so-called system operator responsibility by the Energy Market Authority.

Germany

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

In the context of German law, a concession is an administrative measure in which a public authority entrusts a third party with the total (or partial) management of an economic activity which is normally the authority's responsibility and for which the third party assumes the operating risk.²³

Germany is a federal state. Concessions may be granted by the Federal Government, the Laender (state entities), their administrative districts and local/municipal authorities.

The spectrum of fields where concessions may be granted is wide, ranging from e.g. building concessions to the permission to run a lottery, a taxi service or to produce alcohol. Depending on the type of concession their duration can vary and may last up to more than ten years.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

The modalities for granting concessions differ according to the type of concession. The two categories of concessions under German law are building concessions and service concessions. Only the procurement of building concessions²⁴ has to follow the national and EU-rules for public procurement. Service concessions can be tendered or publicly offered etc., but there is no legal obligation to do so (and this would not necessarily be deemed reasonable in every case).

There are a number of sector specific regulations governing concessions in Germany. A significant regulation in this context is the regulation about concessions in the gas and electricity sector (Verordnung über Konzessionsabgaben für Strom und Gas²⁵). This regulation details the rules for granting concessions in the gas and electricity sector and for the reliability and adequacy of payments for such concessions by the energy supply companies.

Concessions are of a civil nature and it is, generally, within the discretion of the contracting parties to agree on the duration of the concession or the circumstances for terminating it (however, in specific cases, competition law can set a limit; cf. question 3). In practice, a lot of concessions follow model contracts which have been published, for instance, by the Laender.²⁶

²³ Please see Langen/Bunte, GWB, 10. Print run, § 32 ref. 3

²⁴ According to § 99 III ARC building contracts are contracts covering the execution or the planning and execution of surface or underground construction projects.

²⁵ Please see <http://bundesrecht.juris.de/bundesrecht/kav/gesamt.pdf>

<http://www.staedtetag->

http://www.staedtetag-bw.de/media/custom/1198_1600_1.PDF?loadDocument&ObjSvrID=1198&ObjID=1600&ObjLa=1&Ext=PDF

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

As a general rule, concessions have to comply with competition law.

E.g. in 2005/2006 the Federal Cartel Office investigated long-term municipal concessions (running for decades) that had been granted to gas suppliers. These concession resulted in a market foreclosure and higher prices because other suppliers could not enter the markets for years. These concessions had a foreclosure and thus price-raising effect because they prevented the market entry of newcomers and deprived third providers of supply possibilities for years.²⁷ As regards the conclusion of new contracts with regional and local gas companies, those contracts are to be prohibited which run for more than four years and which cover more than 50 per cent of actual gas requirements, or which run for more than two years and cover more than 80 per cent of requirements.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

There are no general rules that exempt concessions from competition law. In fact, as a general principle, concessions have to meet the standards of competition law (please see also answer to question 3).

Over the years, Germany has brought a number of formerly exempted sectors under competition law. However, there are sector specific laws for some economic sectors, which are enforced by the specific regulatory authorities. The Federal Network Agency is the regulatory authority for electricity, gas, telecommunications, the postal service and railways. In some respect, regulatory law may take precedence over competition law in these sectors.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

In Germany concessions have helped to (pre-)finance public construction projects like the widening of streets, the modernisation of public swimming pools or sewages.

- An important example is the use of concessions for the extension of the federal motorways (e.g. the widening of two-lane motorways). In return

²⁶ and <http://www.ravensburg.de/session/bi/pdf/00017583.pdf>

²⁷ Please see: http://www.Federal Cartel Office.de/wEnglisch/News/Archiv/ArchivNews2006/2006_01_17.php

for the construction work, the construction companies receive a part of, or the total revenue from the lorry toll levied on these road sections.

- Also in the municipal scope concessions may be granted for the building of car parks and the like. In return the construction company may e.g. receive the fee earned from operating the car park (over the duration of the contract period).²⁸

²⁸ See Heiermann/Riedl/Rusam: Handkommentar zur VOB, 8. Aufl. zu A §32 Rn1.

Greece

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

The Greek legal framework allows both concessions: a) where the contract price in total or in part is paid by the end consumers and b) public private partnerships (PPPs) where the contract price is paid by the contracting authority through availability payments. The typical duration of a concession is 25 years. Longer concessions may have been granted for the renovation/ exploitation of public property such as long term leases of resort installations.

There has been a number of major infrastructure projects designed, built, financed and operated within a framework of concession contracts. For three of them, namely the International Athens Airport (Eleftherios Venizelos) at Spata, the Free Motorway of Elefsina - Stavros - Spata Airport and Ymittos Western Peripheral Motorway and the Rion – Antirion Bridge, the tendering procedures have been successfully concluded and the contracts signed in the mid '90ies and all of them are well in operation. Some details are given in Annex 1 for the two of them followed by the competent services of the Ministry of Environment, Physical Planning and Public Works (MEPPPW).

During the years that followed, another set of motorway projects have been launched also within a concession contract framework. All of them are under way now.

It is also worthy to mention that, following the issue of law 3389/2005, a significant number of PPP projects followed/monitored by the Ministry of Economy and Finance (MEF) have been tendered or under tendering.

2. *What were the modalities for creating a concession (public offering/tender, decree etc)? Is there a law in your country for the granting /termination of concessions? Are there provisions in concession agreements which allow the Government to terminate the concession?*

The awarding of public contracts – such as concessions and PPPs – is governed by the EC directive 2004/18 and special Greek legislation such as Law 3389/2005 on PPPs. The Presidential Decree 60/2007 and Law 3669/2008 implementing the Council Directive

2004/18 are also applicable in some cases. A tender procedure is imperative for such awarding. There are provisions in concession agreements and PPPs which allow the Government to terminate the concession. Relevant indemnification clauses for the private party in such a case are also stipulated in these agreements.

For instance, the Ministry of Environment, Physical Planning and Public Works, acting on behalf of the Greek State, conducted an International Tender under the Restricted Procedure for the implementation of the Project “Design -Construction - Self-Financing and Exploitation of the Free Motorway of Elefsina - Stavros - Sparta Airport and Imittos Western Peripheral Motorway” and the project “Rion – Antirion Bridge”. The exclusion, selection and awarding criteria together with their weightings were included in the invitation to tender. The Concession Contracts followed the Greek legislation relevant to public procurement and they included the procedure for granting the concession and for the termination of the contract. The concession agreements include provisions that allow the Government to terminate the concession.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

The Greek Ministry of Environment, Physical Planning and Public Works reports that when granting concessions competition concerns are taken into account according to the Greek Legal system and the European Community thresholds. A restricted procedure with publication is followed (a pre-information notice and the call for tender was published in accordance with the prescribed time limits and in the appropriate media). Also special protection in regard to dominance, entry or price control is granted to concessionaires at the time of granting the concessions.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are subject to specific regulatory oversight? Are concessions subject to the national competition law?*

Only regulated sectors such as public monopolies (e.g. Water Supplies and Sewerage Companies). Also entities under privatization are excluded from merger/acquisition control. Generally speaking concessions are subject to the national competition law.

5. *Is there any evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices or overall consumer welfare?*

According to questionnaires answered by the consumers, it is concluded that Attiki Odos and Rion-Antirion Bridge have minimized the transport and trip time and that consumers are satisfied with the facilities provided by the Attiki Odos Road and Rion-Antirion Bridge.

Grenada

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

Concessions are granted to sectors to include: tourism, agriculture, manufacturing, agro processing, and services.

An "approved enterprise" within a specific sector can be granted relief from customs duties and taxes as follows:

- 100% relief from import duties and taxes on building materials, fixtures and furnishings for first installation, extension, refurbishment, and renovation of buildings
- 100% relief from import duties and taxes on production machinery, equipment
- 100% relief from import duties and taxes on raw material, packaging material, spare parts for production machinery, and equipment for use in manufacturing
- 100% relief from import duties and taxes on office supplies and stationery for 100% export services operations
- 50% relief from import duties and taxes on commercial vehicles required for the production of the approved product or service

Approved enterprises can also qualify for an investment allowance where capital investment into the project can be written off against taxable income for a period of ten (10) years.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

The grant of concessions is governed by Acts passed by Parliament.

The concessions could be terminated if:

- a. The concessionaire commits an act of bankruptcy, becomes insolvent, makes an assignment for the benefit of creditors, or enters into any arrangement or composition with creditors, or in the event that any proceedings shall be commenced by or against the developer under any bankruptcy or insolvency laws, or proceedings for the appointment of a receiver or any other official with similar powers are commenced;
- b. It is discovered that there has been material changes in the business being carried out or that the concessionaire made a false or fraudulent declaration or provided false information,
- c. In the case of winding- up, and or
- d. If the concessionaire commits a material breach of the terms and conditions of the incentives and if such breach (if capable of being remedied) remains un-remedied for thirty days after notice has been given.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Concessions are granted to "approved enterprises" within the various sectors. These sectors identified are recognized for their potential positive impact they can have on the economy.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

Approved enterprises which receive concessions can contribute to the following:

- capital formation
- foreign exchange savings/ earnings
- transfer of skills
- job creation

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

Yes, there are evidence as seen in the higher quality of manufactured products and processing plants, which results in greater cost savings and prices to consumer and improved hotel restaurant infrastructure.

Hungary

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

There are no available statistics on the number of granted concessions. Their number varies over time: some concessions' contractually guaranteed exclusivity has already expired, the market is liberalized, and the market entry is bound to the fulfillment of objective conditions.

Since the democratic transformation of Hungary, the state attempted to develop several sectors by involvement of the private capital and granted concessions.

The most peculiar examples were:

- wired telecommunication,
- mobile telecommunication,
- broadcasting
- highway construction,
- bus transport,
- drinking-water service,
- research on natural gas exploitation.

Practically all telecommunication concessions were in force for 15 years, the wired telecommunication providers were guaranteed an 8-year long exclusivity.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

The concessions' legal institution in Hungary was established by the Act No. XVI. of 1991, to provide a potential method for the effective operation of the state's and local authorities' absolute property; and also a possible way of carrying out the authorities' exclusive jurisdiction.

In accordance with the above mentioned, the law describes:

- the assets representing the state's and/or the local authorities' absolute property:
 - national public roads and their structures, pipelines, regional public utilities,
 - local public roads and their structures functioning of local public utilities;
- the functions carried out in the state's and local authorities' exclusive jurisdiction:
 - mining engineering research and extraction, and their supplementary functions;
 - storage and transportation of goods through pipelines;

- production and distribution of fissile and radiating materials;
- organization and operation of gambling;
- public passenger transport by trolley buses carried out according to the timetable in public traffic.

This list contains the exclusive rights in accordance with the operative law. In 1991 the electric power stations, the distributive and service networks, the gas service's public utility network, the telecommunication's radiofrequencies, the entire telecommunication network and the national railway network were exclusive state property. The operation of the different networks and the public services were carried out exclusively by the state.

Following the democratic transformation, the scope of the law begun to narrow step by step in relation with the progress of the privatization and liberalization.

The law on concession decrees that the above detailed functions may be carried out by the state (local authorities)

- by a budgetary institution founded for that specific aim or by a business company if the state or the local authorities have a majority ownership and the majority of votes in that company, or
- by temporarily abandoning the right to exercise that function by a concession.

The principal rule according to the law, is that a public tender and the responsible economic chamber's preliminary evaluation has to precede the selection of the concession's obtainer. (The requirement for a public tender does not stand if it would be contradictory to national security and this risk is confirmed by the Parliament's responsible committee. In this case a non-public tender shall be conducted.)

The call for tenders shall contain the following:

- the judgments criterions,
- the concession's and the related functions exact definition,
- the concession's duration,
- the concession's geographic area,
- the legal and financial criterions,
- the clauses for the contracts cessation before its expiration,
- the contract's supervision's rights,
- information on other possible calls for tenders during the concessions durations (the prospect of new competitor's entry),
- the concession fee's minimum,
- the pricing rules of the functions comprised in the concession (methods and principles of the determination and change of prices and fees).

The concessions duration is maximised in 35 years. The contract may be prolonged once without a new call for tenders by the half of the originally agreed duration. The law guarantees the state's right to terminate unilaterally the contract in the following cases:

- the concession's winner does not apply the contractual requirements in the articles of foundation of the business company;

- it does not found the required domestic business company within 90 days;
- if the company's license to practice is withdrawn and it does not receive a new authorization within 6 months.

With Hungary's accession to the European Union (after 01.05.2004) new instruments have been established in the concessions' regulation, as the result of the harmonization of laws. With the amendment of the law on public procurement (No. CXXVIX of 2003) the concept of "construction concession" has been introduced to the concession's legal institution for the public procurements in the value above the given threshold. As a result it is possible to grant concessions for highway or even a sports hall constructions and facility management.

Above this, in cases over the national value limit the Hungarian public procurement act defines the "service concessions".

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Before granting the first concessions there were professional discussions between the ministry supervising telecommunications and the competition authority. It was decided that time that not only the incumbent provider would receive the wired telecommunication's service rights, but several other, regional providers would be allowed to enter the market. Although this way regional monopolies have been established, but this provided the basis for a competing market in the future. This situation was constantly criticized because of the difficulties to achieve economies of scale, efficient operation. As the providers held excessive rights in a certain geographical area, their prices were capped by the contracts, in order to avoid the abuse of their dominant position and to incite them to increase efficiency.

At the market entry of the first GSM providers there was no debate about the fact that at least two providers were needed and after a few years – as announced in the call for tenders – a third provider may enter the market as well. The three mobile concession owners had been competitors, but as the consumer prices had not decrease as expected, the Hungarian Competition Authority initiated a cartel investigation.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

Exempted from competition law are the public education and the public health services financed by the state budget, thus not the entire education and health sector is exempted. Special regulation is applied in the telecommunication and energy sector, but it does their complete exemption from the competition law. In order to prevent their abusive behaviour, stricter conditions are applied for service providers with

“significant market share - this assessment is annually made by the regulatory authority.

New concessions will be not granted in the future in the above-mentioned sectors. The market entry is regulated by the licensing conditions.

Generally the principal rule is that concession’s winner is not exempted from competition law. The contract however may contain special behavioural rules, which may limit the companies scope for action, independence in taking decision, but these options have to be examined case by case.

5. Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?

The telecommunication concessions may be considered as good examples. As a result, the telecommunication infrastructure and service quality improved fast and significantly, and the lack of offers ended. The telecommunication sector’s improvement encouraged the investors’ appearance in other segments. However, the decrease of service prices could have been more intense than experienced, if the state would have taken more distinct actions, applied the price regulation more consequently.

Indonesia

6. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

The right to procure concessions in Indonesia was given to public utility sectors, which included all natural resources management sectors, such as water supply, electricity, geothermal, forestry, oil and natural gas, minerals, coal, etc. The average duration for each concession revolve around 20 to 30 years, it depends on the agreement that was agreed beforehand between the government and the private company.

7. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

The selection process of the private company that will co-operate with the government in the concession was determined through public offering/tender. Through this kind of method, the government would be able to obtain the most efficient private company as a partner, which offered the lowest production rate and gave the best service. The conduct of the tender implementation was arranged in the Presidential Regulation No. 67 Year 2005 concerning "Cooperation between the Government and the Private Company in the Infrastructure Procurement" and Presidential Decision No. 80 Year 2003 concerning "The Implementation Guide of the Procurement of Government's Products and Services". As for the conduct to create a concession agreement was arranged in each related sectors regulation. For example, the concession establishment in oil and natural gas sector was determined through Law No. 22 Year 2001 concerning "Oil and Natural Gas", especially in Chapter IV (Upstream Activities) and Chapter V (Downstream Activities). If there was a violation occurred against the agreement provisions that were stated before in the concession agreement, the government then had the right to carry out re-negotiation with the related company. If the violation continued to happen after the re-negotiation process, the government then had the right to terminate the concession agreement. For example, article 25 Law No. 22 Year 2001 concerning Oil and Natural Gas states that:

- The Government could send a written warning, postponed the activity, freezing up the activity, or pulled out the Business Permit based on:
 - The violation of one of the provisions that was stated in the Business Permit.
 - The repetition of violation on the Business Permit provisions.
 - Did not meet the provisions that were approved based on these regulations.
- Before carrying out the Business Permit withdrawal as being meant in the article (1), the government should gave the opportunity for a certain period to the private company to abolish the violation or fulfill the provisions that was approved before.

8. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Yes. Through the Presidential Regulation No. 67 Year 2005 concerning the “Cooperation between the Government and the Private Company in the Infrastructure Procurement” was arranged about competition in each process of the making of concession agreement. This regulation arranged the tender implementation as a method to choose the private sector that will get the right of concession. This regulation also arranges the ban of collusive tender and abuse of monopoly tender.

9. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

Law No. 5/1999 Article 50 state that excluded from the provisions of this law shall be the following:

- a) actions and or agreements intended to implement applicable laws and regulations; or
- b) agreements related to intellectual property rights, such as licenses, patents, trademarks, copyright, industrial product design, integrated electronic circuits, and trade secrets as well as agreements related to franchise; or
- c) agreements for the stipulation of technical standards of goods and or services which do not inhibit, and or impede competition; or
- d) agency agreements which do not stipulate the resupply of goods and or services at a price level lower than the contracted price; or
- e) cooperation agreements in the field of research for the upgrading or improvement of the living standard of society at large; or
- f) international agreements ratified by the Government of the Republic of Indonesia; or
- g) export-oriented agreements and or actions not disrupting domestic needs and or supplies; or
- h) business actors of the small-scale group; or
- i) activities of cooperatives aimed specifically at serving their members.

Article 51 stated that monopoly and or concentration of activities related to the production and or marketing of goods and or services affecting the livelihood of society at large and branches of production of a strategic nature for the state shall be stipulated in a law and shall be implemented by State-Owned Enterprises and or institutions formed or appointed by the Government.

There is no specific sector that exempted by the Law No. 5/1999. Exemption regulated by Article 50 and 51 above tends to be general and did not define a certain sector to be exempted. Under those circumstances, an exemption is only provided to

certain market structure and agreement, and not to certain behavior or to any sector in Indonesia. Which means, this condition also valid for concession.

10. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

Not yet. Up to now, KPPU already carried out some studies toward several concessions in Indonesia from the aspect of product price and quality that was produced. From the studies could be concluded that there were no direct proof which could showed that the existence of the concession increased the welfare of Indonesia consumer.

Japan

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*
 - a) In Japan, most of infrastructures such as electricity, gas, fixed-line telecommunication and railway are owned by private firms. The so-called scheme of concessions, that is, to grant private firms rights to operate and manage infrastructures owned by the government and to receive fees for usage, are not often used.
 - b) The Private Finance Initiative (PFI) is a similar scheme to Concessions. It utilizes private sector capital, management skills and technical capabilities in the sector of construction, maintenance and management of public facilities, etc.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

N/A

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

N/A

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*
 - a) In Japan, the exemptions to competition law are based on the provisions of the Antimonopoly Act (AMA) itself or on the provisions in other individual laws.
 - b) Exemptions under the AMA itself are stipulated in Article 21 (Exercise of intellectual property rights), Article 22 (Acts of a partnership which conforms to the requirements such as the purpose of the partnership in mutual support among small-scale entrepreneurs or consumers) and Article 23 (Resale price maintenance (RPM) contracts on a commodity designated by the Japan Fair Trade Commission (JFTC) and the copyrighted works).
 - c) Provisions for the JFTC's involvement are stipulated regarding exempted cartels based on individual laws. In general, the formation of

such cartels requires an approval by the relevant minister subject to an agreement with the JFTC or a consultation/notification to the JFTC. As of the end of FY2007, there are 14 such individual laws, e.g. the Insurance Business Law.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

N/A

Korea

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

Most of the Private Participation in Infrastructure (PPI) projects in Korea come in a BTO(Build-Transfer-Operate) or a BTL(Build-Transfer-Lease) type, and their average duration is 20 to 30 years.

Current Status of BTO Projects (as of late May 2008): State or local government-managed project

	Total	Conclusion of Concession Agreement		
		Projects completed	Projects underway	Projects in preparation
No. of projects	63	19	36	8
Amount (trillion KRW)	43.3	9.6	29.0	4.7

Current Status of BTL Projects (as of late June 2008): State or local government-managed project

	2005	2006	2007	2008
	(trillion KRW, No. of projects)			
▪Announcing RFPs	3.8/ 86	7.2/ 127	5.5/ 77	0.7/ 2
▪Completed agreement	3.7/ 82	6.5/ 108	1.9/ 41	-
▪Under construction	3.7/ 82	4.8/ 84	1.4/ 31	-
▪Under operation	1.4/ 40	1.1/ 28	-	-

< Method of Conducting Private Investment Project >

BTO(Build-Transfer-Operate) type: Ownership of the infrastructure facilities shall be transferred to the State or a local government upon the completion of construction, and the concessionaire shall have the right to operate the infrastructure facilities for a specified period of time;

BTL(Build-Transfer-Lease) type: Upon the completion of an infrastructure facility, the ownership of the concerned infrastructure is transferred to the State or local governments and the operational rights are granted to a concessionaire for a set period of time, but the concessionaire leases the facility to use or benefit from it for a period set out in the agreement by the State or local governments.

BOT(Build-Operate-Transfer) type: The concessionaire shall assume ownership of the infrastructure facilities for a specified period of time after the completion of construction, and the ownership shall be transferred to the State or a local government upon the termination of the concession period;

BOO(Build-Own-Operate) type: The concessionaire shall operate and control the infrastructure upon the completion of construction.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

Request for proposals by the competent authority Submission of project proposals by the private sector Evaluation by the competent authority Selection of preferred bidder by the competent authority Negotiation Contract award (between the competent authority and the designated concessionaire) Approval of detailed engineering and design plan by the competent authority

Through approval of concession agreement and engineering & design plan, the operational rights (total cost of the project, duration period, rate of return, toll, etc.) are to be bestowed upon the designated concessionaire.

<Act on Private Participation in Infrastructure >

Article 13 of the Act on Private Participation in Infrastructure (Designation of Concessionaire)

(1) A legal entity who intends to conduct a PPI Project shall prepare a project proposal as specified by the Presidential Decree, pursuant to the Request for Proposal publicly announced under Article 10 (3), and submit it to the Competent Authority.

(2) The Competent Authority shall designate one of those who have submitted the project proposal as a potential concessionaire after reviewing and evaluating the project proposal under the conditions as prescribed by the Presidential Decree which was submitted under paragraph (1) above. In this case, a legal entity who has submitted a project proposal which contains the terms suitable for the Competent Authority's smooth project implementation, such as provision of the long-term investment fund that serves greater public interests, may be given preferential treatment at the stage of review and evaluation of the project proposals. <Amended by Act No. 7386, Jan. 27, 2005>

(3) The Competent Authority shall designate the Concessionaire by closing a Concession Agreement with the potential concessionaire as designated under paragraph (2) above, which Concession Agreement shall include the conditions for project implementation such as total project cost (referring to the amount adding up each item of cost as prescribed by the Presidential Decree, which is the cost necessary for the Infrastructure Facilities) and the concession period. Matters regarding the designation of a Concessionaire who meets the requirements determined by the Presidential Decree shall undergo a prior deliberation by the Committee. <Amended by Act No. 7386, Jan. 27, 2005>

(4) A legal entity designated as a Concessionaire as prescribed in paragraph (3) above shall be deemed a Concessionaire under the Applicable Laws.

(5) A legal entity designated as a Concessionaire shall apply for approval of a Detailed Engineering and Design Plan for Implementation (DEDPI) as prescribed in Article 15 (1) within the period specified by the Presidential Decree from the date of its designation, and if the Concessionaire fails to apply within the given period, the designation of Concessionaire shall become ineffective. Provided when deemed inevitable, the Competent Authority may grant an extension of the said period only once within the scope of one year.

< Grant of buyout right and termination of agreement >

Where a concessionaire requests the competent authority to purchase the project, the competition authority should examine the request to determine whether to grant the concessionaire buyout right through deliberation by the PPI Project Board and notify the concessionaire of the result within 60 days after the request was made.

Article 59 of the Act on Private Participation in Infrastructure (Grant of Buyout Right)

If a Concessionaire of a Revertible Facility is unable to construct, manage, or operate Infrastructure Facilities due to inevitable circumstances as determined by the Presidential Decree including natural calamities, it may request the State or a local government to purchase the project (including Supplementary Projects) concerned under the conditions as prescribed by the Presidential Decree. <Amended by Act No. 7386, Jan. 27, 2005>

Article 39 of the Enforcement Decree of the Act on Private Participation in Infrastructure (Grounds for Grant of Buyout)

A Concessionaire of a Revertible Facility may request the State or local government to buyout the project (including Supplementary Project) pursuant to the provisions of Article 59 of the Act in the event that any of the following cases occurs:

1. Natural disasters, war, and other cases of force majeure by which the construction is suspended for six months or longer or the total project cost increases by 50% or more;
2. Natural disasters, war, and other cases of force majeure by which the operation of the facility is suspended for six months or longer, or where the repair cost or reconstruction cost exceeds 50% of the total project cost originally planned;
3. Where the State or a local government has failed without justifiable cause to perform its duties under the Concession Agreement for a year or longer subsequent to the receipt of the notice requesting for performance of the said duties, or where the construction or operation of the facility has been delayed or suspended for six months or longer because the State or a local government failed to perform its duty under the Concession Agreement without justifiable cause; or
4. Where a cause, which the Competent Authority deemed proper, hence stated in the Concession Agreement as a cause to grant buy out, takes place.

The competent authority and the concessionaire shall make best endeavors to continue the concerned project before grant of buyout right or termination of the concession agreement.

They shall consult with each other to address risks to implementing the concession agreement and come up with ways to select a substitute for the current concessionaire.

The competent authority shall set out clearly in the concession agreement the consultation procedure in case risks to implementing the concession agreement occur, along with the period of time necessary for addressing such risks.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Items with which to examine and evaluate proposed PPI projects are explicitly stipulated by the Act on Private Participation in Infrastructure.

Article 13 of the Enforcement Decree of the Act on Private Participation in Infrastructure (Examination and Evaluation of Project Proposal)

(1) When the Competent Authority examines and evaluates the submitted project proposal pursuant to Article 13 (2) of the Act, it shall focus on the following matters:

1. Matters regarding the composition of the parties implementing the project, including the form of composition of the Concessionaires and the relationship between the equity investors and the Concessionaire;
2. Matters regarding the feasibility of the project proposal, including total project cost, construction period, location, and content of construction;
3. Financing plan including equity and loan procurement capability;
4. Matters regarding the economic feasibility of the project, including user fees, volume of use, free use period, ownership and profitable use period, discount rate, and scale of any Supplementary Project;
5. Land purchase plan, including details such as the area of land already acquired and the feasibility of the purchase plan;
6. Matters regarding the applicable technology for construction, including details such as whether the minimum technology requirements have been secured and whether the latest technology shall be used;
7. Matters regarding management ability, including the reasonability of any repair and management and operation plan;
8. Matters regarding the service to the public interest such as the provision of convenience to the facility users; and
9. Other matters which the Competent Authority deems necessary.

In evaluating a project proposal, the competent authority may prefer proposals that are more conducive to a smooth progress of its project such as the one containing a long-term investment fund potentially beneficial to public good.

In project examination and evaluation, the competent authority may adjust items depending on the characteristics of the proposed project and give more weight to some items than to the others.

The points allocated to each evaluation item are reasonably distributed between technical and cost items in consideration of the level of sophistication required for construction and operation of the concerned project and its characteristics.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

Korea's competition law is applied to all industrial sectors. However, a concessionaire's acts deemed legitimate pursuant to other laws and regulations are exempted from antitrust application.

Private Participation in Infrastructure (PPI) projects are subject to the Act on Private Participation in Infrastructure, and private investment projects involving facilities other than infrastructure are conducted pursuant to the relevant laws and regulations governing the concerned facilities.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

Through prior feasibility study, a project verified to have passed the VFM(Value for Money) test is to be granted as a qualified PPI project.

Total welfare effect (for both consumers and producers) should be higher than that of a public project.

However, there is no need to prove that a PPI project has the higher consumer welfare effect.

As the PPI scheme has a relatively short history, a body of evidence to verify whether PPI projects have enhanced consumer welfare or not has yet to be accumulated. (Enactment of the Private Capital Inducement Promotion Act in 1994)

It is generally recognized that in terms of service quality, PPI projects are better than public projects, but costs of PPI projects are higher as well.

Latvia

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

Presently in Latvia's Register of Concessions are registered 26 concession contracts. The great parts of those contracts are concluded in Public utilities and transport sectors. The typical/average duration of a concession agreement is 15-20 years. There is no yet register for Partnerships procurement contracts. Now we are elaborating a new PPP law, there will be provided PPP contract register.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

At this moment, public and private entities can enter into PPP projects either by concluding concession contract up to 30 years under the Law on Concessions, or under any Partnership procurement contract agreement up to 30 by way of Public procurement law.

It is possible to create joint venture. When forming a joint venture entity with private partner, public partner shall comply with the basic principles or the EU Treaty, - Equality of treatment, Transparency, Proportionality and Mutual recognition. Although, currently there is no special regulation on how to select a private partner in institutional PPP, number of laws shall be taken into account:

- a) Law "On prevention of squandering state and municipal financial resources and property". The objective of the Law is to prevent illegal and unsuitable use of state and municipal financial resources and property;
- b) Law "On state and municipal capital (common) stock and capital companies" and Commercial Law sets procedures on how joint-ventures are established, how they are managed, etc.

Concession contract- The modalities for creating concession are public offering/tenders and auction. It is regulated by Concession law. The Concession Law sets the concession award procedure, and provides for basic principles of concession agreement. According to the definition set by the Law, concession is the delegation of rights to exploit public service or the transfer of concession resources.

The Law indicates two types of contracting authorities (public partners) – authorized ministry (in the name of the state) or the local government.

In order to initiate the procedure for the award of concession, the Cabinet of Ministers or local government approves the Conditions for granting concession and/or the list of concession resources (if such exists).

Partnership procurement contract - Public procurement law Section 67, 3rd paragraph, stipulates that „service agreements in case of public-private partnership, can be

concluded for a period up to 30 years if the time period is crucial for the existence of the agreement, and if on every case Cabinet of Ministers have decided upon it”.

Herein, Cabinet of Ministers decides on every single case, whenever, service agreement is deemed to be longer than 5 years, and evaluated whether justification for the long-term contract is feasible.

After the consent from the Cabinet of Ministers, contracting authority according to the Section 8 of the Law can decide on the most efficient procedure, open or restricted.

The major difference between two legal acts:

Public Procurement Law regulates contracts where the payment is envisaged from the contracting authority for a period up to 30 years.

Concessions Law regulates contracts where the payment is envisaged from the end-user for a period up to 30 years.

Now we are elaborating PPP law - we would like to establish one single address for contracting authorities willing to pursue PPP procurement. That law would regulate both contractual and institutionalized PPPs.

More information you can find in web page- <http://www.ppp.gov.lv/en/>

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

See answer for question 2.

The method for granting a Concession agreement is an auction or a competition or for Partnership procurement contract there are the following types of procurement procedures:

- a) Open competition;
- b) Restricted competition;
- c) Price inquiry;
- d) Negotiated procedure;
- e) Design contest.

The relevant Ministry or local government shall prepare regulations and organize the auction or competition on the basis of unrestricted competition, equal and non-discriminatory treatment. There is also prior publication in the official journal „Latvijas Vestnesis” or in the Official Journal of European Union.

There is no special regulation on evaluation of how concession will affect competition. Competition authority on its own initiative or on request from relevant municipality or institution may give acknowledgement to concession project. Also if

decision on concession had to be adopted by Cabinet of Ministers evaluation of such decision will be done during legislative process of its adoption.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

Authority is not subject to the Competition law.

There are no sectors exempted from Competition Law. But concerning the regulated sector for example, the Competition Council will not evaluate regulated tariffs and other issues which are under the competence of Public Utilities Commission (the Regulator) but will deal with the abuse of dominant position or possible cartel agreements.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

These principles have to be recommendable included in Conditions for granting concession and in completion rules.

PPP is comparatively new financial instrument for the funding of public sector projects in Latvia. For that reason there is no evidence about these benefits.

But in order to initiate the procedure for the award of concession, the Cabinet of Ministers or local government approves the Conditions for granting concession and/or the list of concession resources (if such exists) eliminating a possibility that concession agreement do not bring the benefits for consumers.

Similar is with Partnership procurement agreement.

There also need to take into account other legal acts as Law “On prevention of squandering state and municipal financial resources and property”. The objective of the Law is to prevent illegal and unsuitable use of state and municipal financial resources and property. Legal usage means that the action shall be in accordance with the respective normative acts, not allowing the approach “what is not forbidden is allowed”.

Principle of suitability incorporates three components:

- action shall be driven to achieve the objective using less state and/or municipal financial resources and property;
- selling of property should be done for the possible highest price;
- property can be purchased or used for the possible lowest price.

Madagascar

1. *Prière d'indiquer le nombre et le type de concessions qui ont été accordés par votre pays. Veuillez aussi indiquer la durée habituelle et moyenne dévolue aux concessions?*

Hydelec Madagascar est une société privée concessionnaire dans le secteur de l'énergie avec la mise en place et la gestion d'une centrale thermique d'appoint qui assure le complément d'énergie indispensable aux heures de pointe pour la zone interconnectée d'Antananarivo. HYDELEC MADAGASCAR a obtenu de la part du Gouvernement malgache plusieurs contrats de concession. Plusieurs contrats d'achat d'énergie ont également été signés avec la Jiro sy Rano Malagasy, JIRAMA, la compagnie nationale d'eau et d'électricité de Madagascar qui est une société anonyme de droit commun détenue entièrement par l'Etat Malagasy.

Une concession a été attribuée à la Société Australe d'Exploitation d'Energie, SAEE, pour l'aménagement et l'exploitation d'une centrale hydroélectrique de 3500 kW sur la rivière de Lily (site de Lily).

L'exploitation commerciale des ports est régie par des autorisations délivrées à des sociétés privées sous forme de concession de service public ou de permission d'outillage privé. Le contrat de concession du Terminal à Conteneurs du Port de Toamasina, TAC, est attribué à Madagascar International Container Terminal Service Ltd., MICTSL, et la Société de Manutention des Marchandises Conventionnelle, SMMC, est titulaire du contrat de concession de la manutention des marchandises conventionnelles.

La gestion, l'entretien et l'exploitation des infrastructures des 12 aéroports principaux de Madagascar sont mis en concession pour 15 ans à la société ADEMA SA. ADEMA est une société anonyme de droit privé créée sur la base d'un protocole d'accord signé entre le ministère en charge du Transport et la société française Aéroport de Paris-Management, ADPM.

La Société MADARAIL a obtenu la concession de l'exploitation du réseau des chemins de fer Réseau Nord (Antananarivo-Toamasina) pour 25 ans.

Les autorités malgaches ont mis en place un réseau d'aires protégées afin de protéger et de préserver les écosystèmes naturels. Il y a environ une cinquantaine de parcs nationaux et de réserves dont la gestion a été confiée par mise en concession à l'Association Nationale pour la Gestion des Aires Protégées, ANGAP. L'ANGAP est une association dont la mission principale est de gérer au mieux l'ensemble des aires protégées à Madagascar. Compte tenu de sa mission de service public environnemental axé sur le développement durable, elle est reconnue d'utilité publique.

2. *Quelles sont les modalités pour accorder des concessions (offres publiques, adjudication publique, décrets, etc.)? Veuillez indiquer s'il existe des lois dans votre pays qui régissent des concessions ? Existe-t-il des dispositions dans les*

contrats de concessions qui autorisent le gouvernement à mettre fin à une concession?

La loi n° 2003-051 du 30 janvier 2004 portant refonte de la loi n° 96-011 du 03 août 1996 portant désengagement de l'Etat des entreprises du secteur public et la loi n° 96-012 du 03 août 1996 portant statut et règlement d'arbitrage constituent les textes de base relatifs à l'octroi de concession à des organismes à statuts divers, chargés de prérogatives publiques mais exerçant sous statut de droit privé. La loi n°96-011 comble des lacunes passées soit sur l'étendue de la notion de participations de l'Etat, soit sur la méthodologie, soit sur le renforcement des dispositions pénales en intégrant la notion de délit d'initiés, soit sur le monopole, etc. Selon son article 9, le désengagement de l'Etat peut s'effectuer par cession de titres, échange de titre, renonciation au droit préférentiel, augmentation du capital, fusion ou scission, émission de titre financier ou de valeur mobilière, cession d'actifs, dissolution ou liquidation, mandat de gestion ou de location avec promesse de vente, concession et affermage.

L'octroi d'une concession peut s'accompagner d'une réglementation. Dès lors, l'instance de réglementation est mise en place avant l'octroi de la concession afin de réduire l'incertitude pour les soumissionnaires. Les éléments qui affectent la rentabilité, comme des obligations de service universel, sont spécifiés par avance, de sorte que les candidats concessionnaires puissent préparer leurs soumissions ou leurs stratégies de négociation. S'il doit y avoir une réglementation des prix, les arbitrages entre les différentes méthodologies, comme le plafonnement des prix ou la réglementation des taux de rendement, sont indiqués.

De façon générale, les procédures d'octroi de concession font suite à un appel d'offres et un cahier de charges est annexé au décret de concession ou au contrat passé entre l'autorité concédante et le titulaire de concession globale de gestion et d'exploitation, avec obligation de service public.

L'autorité octroyant la concession ne peut pas exclure la possibilité de renégociations. Le cahier des charges détermine notamment :

- l'obligation du concessionnaire de continuer le service public et de se conformer aux règlements existants ou à venir, particulièrement en ce qui concerne la salubrité et la sécurité publique et la protection de l'environnement ;
- les droits à la gestion et à l'exploitation, les permissions et les autorisations d'occupation du domaine public et les modalités d'approbation des tarifs pratiqués par les concessionnaires ;
- les cas où l'autorité concédante a la faculté de se substituer au concessionnaire, en cas de rachat, de déchéance ou à l'expiration de la concession ;
- le droit d'occuper les terrains compris dans le périmètre de la concession nécessaires à l'établissement des ouvrages et, si l'entreprise assure un service public, elle bénéficiera des droits prévus en matière de travaux d'utilité publique ;
- les conditions et les formes dans lesquelles la déchéance peut être prononcée pour inobservation des obligations imposées au concessionnaire ;

- les conditions dans lesquelles, en cas de rachat ou de déchéance, l'Etat est substitué à tous les droits et obligations du concessionnaire.

3. *Des considérations relatives à la concurrence ont-elles été prises en compte au moment d'accorder la concession? Dans l'affirmative, préciser lesquelles. Prière également d'indiquer si des dispositions spéciales sont contenues dans les contrats de concession pour prévenir l'abus de position dominante, contrôler l'entrée ou les prix*

L'attribution de la concession, moment où intervient la concurrence pour le marché, est une phase essentielle qui repose sur les principes suivants :

- l'introduction de la concurrence à moyen et long terme est visée par la séparation verticale des activités (production, transport, distribution et commercialisation) ;
- les activités de service public sont soumises à la surveillance d'un organisme régulateur indépendant ;
- le système des prix est basé sur les principes suivants : les prix à la production sont déterminés par un processus concurrentiel et au niveau du transport, de la distribution et de la commercialisation, les prix sont réglementés et ont un caractère de prix plafond.

Une autre considération importante est de veiller à ce que des procédures transparentes soient appliquées lors de leur exécution, et surtout d'éviter les ententes collusoires par l'examen des prix anormalement bas et anormalement élevés proposés par les soumissionnaires.

L'objectif est de doter le pays d'un système d'approvisionnement efficient, afin de :

- assurer l'égalité d'accès de tous les consommateurs à des produits et à des services de qualité dans les meilleures conditions de prix ;
- établir un marché libre et compétitif et éliminer toute forme de discrimination et de traitement préférentiel ;
- créer des conditions favorables à l'entrée de nouveaux opérateurs et investisseurs afin de développer et diversifier les infrastructures d'approvisionnement.

4. Prière d'indiquer les secteurs qui sont exemptés des lois de la concurrence. Quels secteurs ou type de concessions sont soumis à des réglementations sectorielles spécifiques? Les concessions sont-elles soumises à la loi de la concurrence?

Les dispositions de la loi sur la concurrence s'appliquent à toutes les activités économiques exercées de manière permanente ou occasionnelle dans les secteurs public et privé, qui ont lieu sur le territoire national. Elles concernent toutes les transactions portant sur des biens et des services relevant de tous les secteurs d'activité et ne dérogent pas aux protections reconnues ou accordées par les lois particulières. Elles visent toutes entreprises quelles que soient les parties intervenant dans les transactions, tous actes, comportements, dès lors que ceux-ci ont pour objet, ou peuvent avoir pour effet, de restreindre la concurrence.

Si on se réfère à la loi n° 99-018 du 2 août 1999 relative au statut de commerçant à Madagascar, le monopole de l'Etat ne s'exerce plus que sur un seul secteur d'activité qu'est le tabac. Aujourd'hui, il ne reste plus que le tabac qui constitue le seul domaine où s'applique le monopole de l'Etat, l'Office Malgache du Tabac, OFMATA, un établissement public d'intérêt industriel et commercial (EPIC) est l'acteur étatique de la filière tabac à Madagascar. Pourtant, depuis l'année 2001, ce système de monopole ne s'observe que sur papier. En 1987, à la suite d'une crise qui a frappé le marché du tabac à Madagascar, les décideurs politiques malgaches ont fait appel au groupe Bolloré afin de booster le secteur. En 2001, Bolloré a cédé ses parts dans la Holding Coralma au groupe britannique Imperial Tobacco qui ratisse ses réseaux avec ses quatre sociétés qui couvrent les segments-clés de la filière tabac à Madagascar (à savoir SOCTAM, SITAM, SACIMEM et PROMODIM). La transformation du tabac est assurée par la SITAM pour le traitement des tabacs blonds afin de les rendre exportables. Quant à la fabrication de cigarettes, le secteur a été départagé entre SACIMEM et FOCUS du groupe SIPROMAD.

5. *Prière de citer des exemples dans lesquels les concessions dans votre pays ont apporté des bénéfices aux consommateurs tels que l'accès élargi à une infrastructure, la diversification de la production, l'amélioration de la qualité des produits, la diminution des prix et, en général, le bien-être des consommateurs*

Depuis la prise en main de la destinée du Terminal à Conteneurs du Port de Toamasina, TAC, par Madagascar International Container Terminal Service Ltd., MICTSL, des grands changements tant sur l'aspect administratif qu'opérationnel ont été palpables au niveau de la manutention de conteneurs. Cette entreprise d'origine philippine a su vite maîtriser la situation après une phase d'adaptation au système malgache. De nombreux hommes d'affaires, à savoir importateurs-exportateurs et professionnels de transit, ont souligné que depuis sa mise en concession, une célérité de l'opération est acquise au niveau du TAC.

Malawi

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

Since inception, the Privatization Commission (PC) has given out 10 concessions to date. Out of the 10 concessions, 9 are operational and 1 has been terminated. The duration for the concessions ranges from 15 to 30 years. Some of the concessions that PC has facilitated to the Private sector:

- Chitheche Inn Concession
- Kasungu Inn; initially concessioned for two years before being sold outright
- Government Hostel, initially concessioned for two years before being sold outright
- Railway Concession between CEAR and GoM
- Malawi Lake Service Concession between Glens waterways and GoM (The agreement has since been terminated)
 - Forestry Plantation Concession between TS Rai and the Department of Forestry

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

The PC creates concessions through a tendering process whereby PC advertises for expression of interest in the local and sometimes international press and PC website. PC then prepares request for proposal and evaluates the submitted proposal. The criteria for evaluating proposals are made available to bidders.

The granting of concessions is governed by the Public Enterprises (Privatisation) Act of 1996. The Concession agreement contains termination clauses which provide for compensation to the aggrieved party. The laws provide for termination of concession where there are serious breaches in the agreement and where issues cannot be reviewed. There is a process however, that is laid out before termination i.e. (i) sit and talk (ii) mediation/arbitration.

Currently, a new Public Private Partnership Bill has been prepared in order to strengthen private sector participation and minimize disputes.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Competition concerns were not taken into account during the initial process of privatisation. However, not much competition concerns arose from the concession agreements because the Public Enterprises (Privatisation) Act to some extent took into account issues of competition i.e. the concession agreements were constructed in such a way that government could bring in new players. The PC is obliged by law to ensure that privatization is undertaken in a manner that promotes competition and reduces monopoly and currently PC often consults the Competition and Fair Trading Commission when competition issues arise in privatisation. Where there are natural monopolies, the Commission promotes the establishment of an independent regulator to regulate private sector operators against market abuse.

No special protection is granted at the time of granting concessions. However, in granting concessions in the transport sector, the concessionaire was given a subsidy to cater for uneconomical routes.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

There is no sector that is exempted from competition law. Natural monopolies exist in energy, water and telecommunication sectors and they are regulated by sector regulators especially established to provide technical and economic regulations. The Competition and Fair Trading Commission in some cases liaise with these sector regulators when competition concerns arise.

The competition Act, however, mentions the following as non-application to the Act:

- Activities of employees for their own reasonable protection as employees;
- Activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;
- Elements of any agreement which relate exclusively to the use, licence or assignment of rights under, or existing by virtue of, any copyright, patent or trademark;
- Activities expressly approved or required under a treaty or agreement to which Malawi is a party;
- Activities of professional associations which relate exclusively to the development and enforcement of professional standards of competence reasonably necessary for the protection of the public;
- Business or activity as the Minister may, by notice published in the Gazette, specify

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

The concessions of tourist facilities are for all intents and purpose insignificant. There is evidence that infrastructure in these facilities has been improved. However concessions in the rail and lake services have been negatively affected by poor

regulations in the transport sector. The concession agreement appears not to have been tight enough. These agreements are being renegotiated (rail) and in the case of lake services another operator is being sought.

Findings of the Impact Assessment Study conducted in 2006 showed the positive results with regard to the privatisation process which has resulted into consumer welfare in overall. Specifically, most of the privatised enterprises are doing better in that the companies have improved their operating and financial performance, increased range of products; and some have become significant foreign exchange earners. Secondly, through privatisation, Government subsidies to public enterprises have been eliminated which has led in turn to "opportunity gains" in the form of savings. Other notable gains include the fact that privatised entities are paying higher income and PAYE taxes. There are also proceeds that continue to accrue to the Government of Malawi through annual fees paid by concessionaires.

Mauritius

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

There is no provision in the Competition Act 2007 for special protection from competition law being granted to specific concessions.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

There is no provision in the Competition Act 2007 for special protection from competition law being granted to specific concessions. As discussed below, the Minister of Business, Enterprise and Co-operatives can exempt products and entire industries from the Act, but not a specific enterprise. Consequently, special protection from competition law will not normally be possible (the Act will only shortly come into force, so there is no specific experience to draw on in this case).

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

See answer 4.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

Petroleum products and LPG are exempted from Competition Act 2007, which defines the competition regime in Mauritius. Other products and industries can be added to the schedule of exemptions by Ministerial regulations. Several sectors are subject to special regulatory oversight, including financial services, banking, telecoms and media (and a regulator is currently being established), but the existence of sector-specific regulations does not exempt these sectors from normal competition law applied by the Competition Commission of Mauritius (the CCM). The 2007 Act requires the CCM to sign Memorandum of Understanding (MOUs) with sector regulators, to ensure that information is exchanged and that the separate roles of the CCM and the sector regulators do not create unnecessary complexity or uncertainty. These MOUs will be drafted shortly (the 2007 Act has yet to come fully into effect).

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

Not applicable

México

1. *¿Cuántas concesiones, y de qué tipo, se han otorgado en el país? ¿Cuál es la duración habitual o media de una concesión?*

La Comisión Federal de Competencia (CFC o Comisión) tiene conocimiento de que en el sector portuario el gobierno federal ha entregado 24 concesiones portuarias a igual número de empresas estatales. Del total de concesiones, solo una ha sido privatizada.

En el sector aeroportuario, se han otorgado 34 concesiones aeroportuarias a tres grupos aeroportuarios.

En el sector ferroviario se han otorgado 6 concesiones, tres corresponden a los ferrocarriles denominados regionales y tres de rutas cortas.

De acuerdo a la ley del sector correspondiente, las concesiones portuarias, aeroportuarias y ferroviarias, se otorgaron por un período de 50 años, con posibilidad de prórroga hasta por un período igual.

2. *¿Cuáles fueron las modalidades empleadas para otorgar concesiones (oferta, licitación pública, decreto, etc.)? ¿Hay en el país alguna ley que rija el otorgamiento y la rescisión de concesiones? ¿En los acuerdos de concesión se incluyen disposiciones que permitan la rescisión por parte del Gobierno?*

Licitación pública en el caso de aeropuertos y ferrocarriles, así como de la única administración portuaria privada. Existen diversas leyes sectoriales, por ejemplo, Ley de Puertos, Ley de Aeropuerto, Ley Reglamentaria del Servicio Ferroviario, en las cuales se establecen las normas para el otorgamiento de concesiones, así como la rescisión de los mismos.

Del mismo modo, y en cada caso en específico, las bases, contratos y demás documentos relativos a las licitaciones, contienen condiciones y cláusulas particulares para la rescisión de la concesión por parte del Gobierno Federal.

3. *¿Se han tomado en cuenta las consideraciones relativas a la competencia en el otorgamiento de concesiones? ¿Qué nuevas consideraciones o cuestiones se han planteado como consecuencia de las concesiones otorgadas en el país? ¿Se ha dado a los concesionarios protección especial con respecto al abuso de posición de dominio, la entrada o el control de los precios al otorgárseles una concesión?*

La Ley Federal de Competencia Económica (LFCE o la Ley) establece procedimientos para la intervención de la Comisión Federal de Competencia en los procesos de licitación pública en aquellos sectores en que su legislación lo establece. Esta intervención consiste en la revisión de los documentos del proceso de licitación y en la opinión respecto a los participantes en la licitación.

En relación con los documentos de la licitación, la Comisión ha recomendado que las bases del concurso no establezcan medidas tendientes a limitar la participación de las empresas en la licitación, como por ejemplo requisitos no vinculados al objeto de la licitación, condicionar la utilización de ciertos servicios a ciertos agentes económicos y una clara información para elegir al ganador de una licitación.

Por otro lado, la Comisión a través de las opiniones a los participantes pretende impedir la participación de empresas que, de resultar ganadores de una licitación, no pudieran favorecer a la competencia, cuando ésta sea posible.

En casos en que, por las características específicas de la licitación, sea notorio que no se puede promover la competencia, las diversas leyes sectoriales (puertos, ferrocarriles y aeropuertos) prevén una regulación de precios y obligación de prestar los servicios.

4. *¿Qué sectores de la economía están exentos de la aplicación del derecho sobre la competencia? ¿Qué sectores o qué tipo de concesiones son objeto de una reglamentación específica? ¿Las concesiones están sujetas al derecho nacional sobre la competencia?*

La LFCE establece en su artículo 1, que la misma “es de observancia general en toda la República y aplicable a todas las áreas de la actividad económica.” Así que, en principio, la ley es aplicable a la totalidad de los sectores productivos de país, con excepción de las actividades estratégicas que realiza el Estado en materia de hidrocarburos y energéticos.

En concordancia con la LFCE, muchas leyes sectoriales se han ajustado para considerar aspectos específicos en materia de competencia y particularmente, la intervención de la CFC. Los sectores que son objeto de una regulación específica son: portuario, ferroviario y aeroportuario.

5. *¿Hay pruebas de que las concesiones hayan aportado beneficios a los consumidores del país en términos de infraestructura, diversificación, calidad, precios o bienestar general del consumidor?*

En general se puede afirmar que las concesiones que se han otorgado por medio de licitaciones públicas, han contribuido al incremento de la infraestructura del país, así como incidir sobre la calidad y precio. Sin embargo, no se tiene estudios sobre la materia.

Morocco

I – Introduction

Le Maroc a depuis les années 80 engagé un certain nombre de réformes économiques pour construire les bases d'une économie de marché. C'est ainsi qu'il a entrepris un ajustement structurel, une politique de libéralisation de son commerce extérieur, un vaste programme de privatisation et de concession, une politique de libéralisation des prix en vue de s'intégrer avec un certain degré de succès dans l'économie mondiale.

Le Maroc a adhéré au GATT en 1987 comme il en a abrité l'acte final en Avril 1994 à Marrakech qui a vu la naissance de l'OMC dont il est membre depuis 1995.

Cette politique de désengagement public de l'économie, de libéralisation, de privatisation, de concession...a donné lieu à des monopoles privés, des cartels, des pratiques abusives et restrictives ainsi qu'à des tendances de domination et de restructuration dans le sens de concentration de secteurs notoires.

Face à cette situation, le gouvernement a présenté un projet de loi sur la concurrence dont le premier draft a été élaboré en 1989, en parallèle avec la fin des économies dirigées.

En 1999, la loi 06/99 sur la liberté des prix et de la concurrence a été adoptée suivie par un texte régissant les marchés publics et une loi cadre relative aux concessions en vue de promouvoir sur tous les marchés et secteurs économiques, une concurrence saine et loyale.

Cette contribution se propose de présenter l'expérience marocaine, relativement jeune, en matière de concurrence, de concession et de régulation des monopoles ainsi concédés.

II – Droit et politique de concurrence

Pour nous, le droit de la concurrence est un levier, l'un des leviers, sans doute le meilleur pour générer plus d'efficacité, de productivité, d'émulation, d'innovation et de progrès.

La loi 06/99 sur la concurrence permet de réguler les libertés économiques (liberté d'accès à toutes les activités sans entrave ni discrimination, liberté des prix et leur formation par le libre jeu de la concurrence, liberté de commerce ...) dans le sens d'une optimisation de l'efficacité productive et distributive.

Ses dispositions principales permettent d'ouvrir les monopoles, de lutter contre les cartels, les ententes, les abus de domination, et de suivre l'évolution des structures des marchés et secteurs par le contrôle des concentrations et acquisitions au-delà d'un seuil de vigilance très conciliant de 40%.

Pour les secteurs spéciaux (banques, assurances, télécoms, audiovisuel...) existent des organes spécialisés (Banque Centrale, ANRT, Conseil de L'Audiovisuel ...) dont la mission est de veiller à assurer un accès équitable et une tarification compétitive dans ces secteurs .

L'ouverture de ces monopoles naturels à la concurrence a permis un développement rapide, une baisse spectaculaire des tarifs et une amélioration notoire de la qualité des services dont les usagers ont tiré d'immenses avantages ainsi que la création de milliers d'emplois et de revenus.

Le recours systématique à la concurrence dans la passation des marchés publics a nettement amélioré la politique de la commande publique dans le sens de plus de transparence et de moins de collusion, de rotation, d'entente ,de duplicité et de corruption.

A cet égard, la politique de concurrence mise en œuvre a largement contribué à la création d'un environnement des affaires favorable à l'investissement et protecteur des pme. En 2008, le Maroc fut le 2ème récepteur des IDE en Afrique et dans le Monde Arabe.

De même pour la compétitivité. Il a réalisé un taux de croissance de plus de 8% en 2007 et 6,4% en 2008. La croissance prévue en ces temps de crise se situe entre 5% et 6% au titre de 2009

III – Droit et politique de concession

La gestion des services publics (transports, gares, parcs mètres, abattoirs, décharges, nettoyage, assainissement, production et distribution d'eau, d'électricité...) est une attribution des collectivités locales lesquelles peuvent l'externaliser sous forme de gestion déléguée ou concession.

Le taux de participation aux élections communales du 14 juillet 2009 a été de 52% signifiant que la majorité des marocains portent un intérêt à la gestion de la chose publique dans leur ville, village et commune dans le cadre de la nouvelle politique contractuelle et participative.

Avec la politique de promotion de la déconcentration et de la régionalisation, la commune est devenue un levier fondamental de développement économique et social sur fond d'une vision nouvelle ayant pour objectif la consécration d'une gouvernance locale capable d'assimiler la politique du gouvernement et de la mettre en œuvre.

Ces élections ont vu l'émergence de femmes, jeunes et compétentes, à la tête de grandes villes en tant que maires, à Marrakech, Essaouira...et l'effectif de 3000 élues qu'il faut mesurer avec les 26 femmes élues d'il y a 6 ans.

Historiquement, le Maroc avait une tradition d'une certaine pratique de la concession des Souks ou marchés tribaux, de la gestion de l'eau (puits, retenues ...)

pour le ravitaillement et l'irrigation petite et collective. Toutefois, le premier contrat de concession moderne a vu le jour en 1906 avec l'acte d'Algésiras.

En 1924, la première cession au privé a concerné la distribution de l'eau et de l'électricité à la Société Marocaine de Distribution (SMD).

En 1956, juste après l'indépendance, l'Etat a procédé au rachat de toutes les concessions et a créé un réseau de régies et d'offices.

A partir de 1982, début de la libéralisation et du désengagement de l'état, plusieurs concessions des transports (Autobus..) publics ont été opérées. 1997 a vu l'octroi de la concession la plus importante à savoir la gestion déléguée de l'eau et de l'électricité de la grande ville de Casablanca à la lyonnaise des Eaux ; puis en 2002 Rabat, la capitale, à la Redal (Société hispano – portugaise) puis Tanger et Tétouan à Amendis (Fance).

En 2005, fut promulguée la loi n° 54-05 relative à la gestion déléguée des services publics.

Ce texte s'articule autour des axes ci-après :

- La relation contractuelle et responsable dans la gestion du service public : principe d'égalité des usagers, de continuité du service et son adaptation aux évolutions technologiques, économiques et sociales au moindre coût et dans les meilleures conditions de qualité, de sécurité et de respect de la ressource et de l'environnement.
- l'équilibre financier du contrat : droit de percevoir une rémunération sur les usagers, de réaliser des bénéfices ... ce qui pose la cruciale question de la tarification.
- L'appel à la concurrence (Art 5) : égalité entre les candidats, objectivité des critères de sélection, transparence, impartialité des décisions...
- La concession de gré à gré ou par voie de négociation ne peut intervenir qu'exceptionnellement, en cas d'urgence, ou pour des raisons de défense nationale ou de sécurité publique, ou lorsque l'appel à la concurrence s'avère infructueux.
- La procédure dérogatoire est entourée de mesures prudentielles : un rapport motivé est soumis à l'appréciation de l'autorité de régulation qui dispose du pouvoir du control économique et financier.

IV- Bilan des pratiques de la concession

Il serait instructif de rappeler les péripéties d'octroi de la concession de distribution de l'eau et de l'électricité à la Lyonnaise des Eaux par la Commune de Casablanca en 1996. La passation s'est déroulée en l'absence d'un cadre juridique formel. Ainsi l'opération a été conduite sur fond de négociations directes.

La CGEM (confédération des entreprises au Maroc), relayée par les médias spécialisés a vigoureusement mis en cause la procédure de gré à gré, quoique la CGEM n'est pas pro concurrentielle, elle s'était rendue compte que le droit de la concurrence a des vertus tangibles.

Mais pour nous département des Affaires Economiques, le point le plus controversé fut celui du régime tarifaire, la production et la distribution de l'eau et de l'électricité étant encore des monopoles naturels légalisés par un contrat de gestion déléguée pour 30 ans, il est tout aussi naturel que le prix soit encadré.

Le Premier Ministre avait adopté une position ferme. La Lyonnaise a menacé de partir et finalement la conclusion a été soumise à l'arbitrage politique.

Une « cote mal taillée » a été arrangée autour de trois systèmes :

- _ prix moyens
- _ réajustement indexé
- _ révision ni gain ni perte

Avec une condition préalable ; la réalisation de l'investissement convenu.

La mise en œuvre s'est traduite par des révisions à dose de cheval dans certaines villes comme Tanger et Tétuan ; ce qui a donné lieu à des descentes dans la rue. De plus , il s'est avéré que des transferts disproportionnés (assistance technique, salaires, études...) ont été opérés.

Il est apparu clair que l'entreprise délégataire est souvent en position de force, face à des collectivités en situation d'urgence : déficits énormes en services publics, besoins colossaux en investissement et financement, faiblesse du cadre juridique et institutionnel, duplicité et connivence sinon corruption.

Toutes ces considérations font que les pays en développement sont captifs en raison de l'asymétrie des rapports de force et de compétence ; c'est le délégataire qui prépare les données et fournit les informations, c'est lui qui présente le modèle d'équilibre qui par la nature et la force des choses, est à son avantage sauf pour les naïfs crédules.

Ceci étant, le recours à la concurrence est systématique dans les pays développés ainsi que le suivi par des régulateurs spécialisés et indépendants.

Enseignement : l'existence d'un cadre juridique claire et d'une instrumentation efficace sont les garants d'un équilibre bon pour la collectivité (investissement, emploi, équipement) et pour l'utilisateur (tarifs, qualité).

V- Options d'amélioration

A la lumière de l'expérience de 13 ans , au vu des premiers effets et résultats et en considération des meilleures pratiques ,il est légitime de poser le problème réglementaire : quelle méthode, quel modèle d'équilibre, quel arbitrage...c'est-à-dire

comment assurer un service public universel efficace (meilleure qualité au moindre cout) et équité (accessibilité sans discrimination).

Le contexte actuel est plus favorable :effet expérience, noyaux d'expertise, cadre juridique, participation du privé, des élus , de la société civile ; mais les taches sont mal coordonnées ; le Ministère de l'Intérieur ,tutelle des collectivités, fait fonction de régulateur.

Une politique de régulation innovante est requise car le pays a ouvert de grands chantiers :

- _libération du marché de l'énergie,
- _libération du marché du transport aérien, maritime, routier.. .
- _contractualisation avec les régies, l'ONE, l'ONEP.

La régulation est une sorte de gambling; elle requiert de l'agilité pour déjouer la manipulation, les collusions, et dénicher les rentes et les inefficiences. C'est une exigence de vigilance, de subtilité contre les surcouts, une combinaison du contractuel et du relationnel.

VI –CONCLUSION

L'on peut dire à la lumière de ce qui précède, que la concession classique a montré ses limites, il serait bénéfique de clarifier les règles, de mettre en place des régulateurs spécialisés indépendants en vue d'enraciner une vraie intelligence dans le champ économique, tant attendue par les populations qui vont, malgré un certain scepticisme réticent, aux urnes pour élire les gestionnaires de leurs villes et leurs communes.

Nicaragua

1. *¿Cuántas concesiones, y de qué tipo, se han otorgado en el país? ¿Cuál es la duración habitual o media de una concesión?*

En Nicaragua las concesiones se otorgan a través del procedimiento establecido en la Ley de Contrataciones del Estado y en las Leyes Sectoriales que regulan los Recursos Naturales y del Ambiente y los Servicios de Infraestructura, por lo que los períodos de tiempo asignados a cada concesión varían según el sector; no hay un organismo o autoridad en el país que lleve un registro estadístico del número de concesiones otorgadas anualmente.

De acuerdo a la Ley 286 “Ley Especial de Exploración y Explotación de Hidrocarburos”, el período de exploración es por 6 años a partir de la firma del contrato y el período de explotación, si hay descubrimiento comercial, será de 30 años, contados a partir de la suscripción del contrato.

Las concesiones mineras tienen una duración de 25 años, lo cual está definido en la Ley Especial de Exploración y Explotación de Minas. Actualmente existen 217 concesiones mineras vigentes en el país.

Las concesiones mineras se otorgan mediante un Acuerdo Ministerial que firma el Ministro de Energía y Minas. Existen disposiciones en la Ley Especial de Exploración y Explotación de Minas que señalan las causales de cancelación de las concesiones mineras, entre ellas está la falta de pago de los cánones correspondientes. Específicamente en el Acuerdo Ministerial de otorgamiento se señala que el incumplimiento de las obligaciones relacionadas en el Acuerdo y las demás establecidas en las leyes vigentes faculta al Ministerio de Energía y Minas a cancelar la concesión otorgada

En el sector energético nacional y bajo el marco legal establecido por la Ley No. 272, Ley de la Industria Eléctrica, El Reglamento a la Ley de la Industria eléctrica decreto 48-92 y las Normativas que regulan la actividades de la Industria eléctrica, se definen los siguientes términos: Licencia Provisional; Licencia de Generación Eléctrica; Licencia de Transmisión Eléctrica; Concesión de Distribución Eléctrica y Comercialización de Energía la cual otorga al beneficiario el derecho exclusivo a desarrollar la actividad de distribución en un área geográfica determinada, identificada en la correspondiente Concesión, y la obligación de suministrar energía a los clientes y a los grandes consumidores que lo requieran. La Concesión de Distribución Eléctrica y Comercialización de Energía puede ser únicamente de dos tipos, siendo la primera la antes mencionada con la particularidad que el Concesionario no goza de un sistema de generación propio que le suministre la energía para operar su concesión y la segunda se denomina Concesión de Distribución Eléctrica con Generación Propia, la cual es aplicada en las zonas donde los beneficiarios hacen uso de propia fuente de generación para distribuir la energía a los usuarios finales. Cabe señalar que éste último tipo de Concesión se aplica en las zonas rurales que no tiene acceso al conjunto de redes y equipos que componen el Sistema Interconectado Nacional.

Las Licencias Provisionales son otorgadas por un plazo máximo hasta de 2 años. Las concesiones de Distribución y las Licencias de Generación y licencias de Transmisión pueden ser otorgadas por un plazo de hasta de 30 años, prorrogables

2. *¿Cuáles fueron las modalidades empleadas para otorgar concesiones (oferta, licitación pública, decreto, etc.)? ¿Hay en el país alguna ley que rija el otorgamiento y la rescisión de concesiones? ¿En los acuerdos de concesión se incluyen disposiciones que permitan la rescisión por parte del Gobierno?*

Las concesiones son otorgadas por concurrencia de oferta (licitación pública). La Ley 286 en su Capítulo XI establece las causales de terminación de los contratos de exploración y explotación; así como el contrato suscrito.

La exploración y explotación petrolera no tiene competencia en el país; por lo que, lo que se toma en cuenta son las prácticas aplicadas dentro de la industria petrolera internacional

La Ley 272, su Reglamento y la Normativa de Licencias y Concesiones, establece que para el otorgamiento de las Licencias, los interesados deberán completar los requisitos determinados conforme al marco legal anteriormente mencionado. No obstante para licencias de Generación de Proyectos Hidroeléctricos mayores a 30 MW, se requiere de una Ley especial que permita la aprobación del mismo. Para las Concesiones para distribuir energía eléctrica serán otorgadas mediante dos únicas formas: *Licitación o Negociación Directa*.

El Reglamento a la Ley 272, decreto 42-98 establece los procedimientos específicos para cada caso. En dicho reglamento se establece que para el caso de la *Licitación*, ésta deberá ser de carácter Pública, en este caso el ente regulador deberá emitir una Resolución al respecto que determine el área geográfica de la concesión y los criterios generales que regirán el procedimiento de licitación. Cuando se trate de *Negociación Directa* el interesado en obtener una concesión deberá presentar su solicitud ante las autoridades energéticas nacionales (MEM e INE en común armonía), la cual deberá contener la información correspondiente al formato de concesión elaborado y proporcionado por el MEM. En particular identificará el área y plazo de concesión requerido.

Las disposiciones y acuerdos existentes que permitan la terminación de una Concesión o Licencia están enlistadas tanto en la Ley, su reglamento, Normativa de Licencias y Concesiones y Normativa de Multas y Sanciones. Todas estas disposiciones son por carácter de “Incumplimiento” a todas las obligaciones concernientes a los Licenciarios y Concesionarios, o bien por renuncia de los mismos. La terminación de una Licencia o Concesión puede aplicarse por iniciativa propia del MEM ante la verificación de los causales pertinentes o bien por recomendaciones del INE ante el MEM.

3. *¿Se han tomado en cuenta las consideraciones relativas a la competencia en el otorgamiento de concesiones? ¿Qué nuevas consideraciones o cuestiones se han planteado como consecuencia de las concesiones otorgadas en el país?*

¿Se ha dado a los concesionarios protección especial con respecto al abuso de posición de dominio, la entrada o el control de los precios al otorgárseles una concesión?

Las leyes nicaragüenses relativas al otorgamiento de las concesiones reconocen los principios de la libre competencia y evitar el abuso de una Posición de Dominio.

La exploración y explotación petrolera no tiene competencia en el país; por lo que, lo que se toma en cuenta son las prácticas aplicadas dentro de la industria petrolera internacional

Las concesiones mineras se otorgan basadas en una Ley Especial aprobada en el año 2001, la cual define los requisitos para el otorgamiento de dichos derechos. En ese momento no se incluyeron aspectos relacionados con el tema de competencia.

4. *¿Qué sectores de la economía están exentos de la aplicación del derecho sobre la competencia? ¿Qué sectores o qué tipo de concesiones son objeto de una reglamentación específica? ¿Las concesiones están sujetas al derecho nacional sobre la competencia?*

No hay en Nicaragua sectores económicos excluidos de la aplicación de la Ley de Promoción de la Competencia.

De acuerdo a la Ley de la Industria Eléctrica, los sectores que están bajo supervisión regulatoria específica son: Generación, Distribución y Transmisión de energía. La acción de regulación está a cargo del Instituto Nicaragüense de Energía (INE).

5. *¿Hay pruebas de que las concesiones hayan aportado beneficios a los consumidores del país en términos de infraestructura, diversificación, calidad, precios o bienestar general del consumidor?*

La exploración petrolera es una actividad incipiente en Nicaragua y los resultados se verán hasta que haya un descubrimiento comercial. Los beneficios petroleros son de la competencia del Gobierno.

Existen ejemplos positivos, como el caso de la concesión de telefonía celular, que era un Monopolio hasta el año 2000, una vez que la concesión fue abierta a la competencia los precios del minuto de teléfono celular bajaron en un 50%.

Los beneficios que han sido obtenidos a través del otorgamiento de las Licencias y Concesiones de Distribución Eléctrica, han sido orientados hacia el crecimiento del parque de generación y el correspondiente cambio de la matriz energética de Nicaragua, así como la elevación de los índices de “Electrificación Rural”. Este beneficio nace a raíz de la existencia de redes de distribución eléctrica que son mantenidas y operadas por los diferentes concesionarios aunados al esfuerzo del Gobierno y los países cooperantes para realizar las labores de electrificación. Una de

las evidencias se muestra entre los años 2007-2008 en el cual se electrificaron 19, 606 viviendas, con una población aproximada de 115,681 habitantes²⁹.

En términos de infraestructura, el solo hecho de la culminación de los racionamientos y cortes de suministro de energía, ha provocado un crecimiento sostenido en los sectores de la construcción, industria y comercio, gracias al servicio operativo y cualitativo de la energía eléctrica.

En las zonas rurales ha permitido en cierta forma el elevar la producción de los sectores agroindustriales nicaragüenses por medio de la implementación de las pequeñas Concesionarias de Distribución así como la ejecución de proyectos de Generación de energía y la electrificación rural.

²⁹ Ministerio de Energía y Minas. Logros 2007-2008.

Pakistan

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

A multitude of selective tariff and tax exemptions/concessions, mainly on raw materials, intermediate inputs, plant, and equipment, are aimed at improving international competitiveness of export-oriented firms.³⁰ Briefly, Pakistan grants three types of concessions, namely, tariff exemptions, tariff concessions and sales tax exemptions as under:

- a. Concessions on imports of machinery and equipment not manufactured locally;
- b. Concessions on imports of raw materials and components;
- c. Concessions on some other products such as copper cathodes, aluminium ingots, wheat, haemodialysis machines, goods for manufacture of leather made-ups, ships for scrapping.

Most concessions are open ended, however, for some the duration is wide-ranging between 1-10 years³¹.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

Concessions are granted through ‘Statutory Regulatory Orders’ (SRO). The terms and duration of the concession are explicitly elaborated in the SRO. Government can alter or terminate the concession as it may consider necessary.³²

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Competition Ordinance was promulgated in 2007. Enforcement of this wide-ranging, all encompassing competition regime is at the early stage. Interaction between Competition Commission and other governmental organs and aspects like protection

³⁰ For example, in 2005/06 tariffs were removed and sales tax zero-rated on machinery and raw materials for priority sectors with export potential, including marble and granite, poultry and meat, gems and jewellery; these concessions also apply to domestic sales. The Government zero-rated the sales tax on five major export categories in 2005/06 for imported inputs not made domestically; cotton ginning is also zero-rated. Tariff concessions via repayment of tariffs up to specified limits (expressed mainly as a percentage of the f.o.b. value of exports) were introduced or extended in August 2006 on many raw materials for specified export products. The 2007/08 Budget zero-rated the sales tax on utility charges paid by rice exporters.

³¹ A list of concessions for various items along with types of concessions and duration is available on request from: kkhan@cc.gov.pk.

³² Previously any SRO notification would expire at the end of the financial year in which it was issued unless repealed earlier. Government also provides certain incentives to foreign investors, for details see: <http://www.pakboi.gov.pk/invest.pack.htm>.

with reference to dominance, entry or price control granted to concessionaires are yet to be considered.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

Competition law does not exclude any specific sector. It seeks to provide free competition in all spheres of commercial and economic activity. It applies to all undertakings and all actions or matters that take place in Pakistan and distort competition within Pakistan.

However, as per Section 52 of the Competition Ordinance, 2007, power to exempt is vested with the Federal Government. It may, by notification in the Official Gazette, exempt from the application of this law or any provision thereof and for such period as it may specify in such notification:

- (a) any class of undertaking if such exemption is necessary in the interest of security of the State or public interest;
- (b) any practice or agreement arising out of and in accordance with any obligation assumed by Pakistan under any treaty, agreement or convention with any other State or States; or
- (c) any undertaking which performs a sovereign function on behalf of the Federal Government or a Provincial Government.

Competition Commission of Pakistan (CCP) can address matters relating to concessions under the provisions relating to Competition advocacy. Under Section 29 of the Law, CCP can review policy frameworks and make suitable recommendations and give (non-binding) opinions to make policies competition friendly.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

In order to promote exports of Pakistani goods, Government takes various steps such as financing and tariff concessions on imported inputs, income and sales tax concessions. Evidence of trickle down effect of such concessions to the national consumers is not readily available since these are export targeted. Some studies conducted in past show either mixed or inconclusive results – reason being structural bottlenecks and infrastructure related problems.

Government of Pakistan grants sector-specific duty exemptions and concessions under Statutory Regulatory Orders (SROs). For instance in 2006, the Government exempted all domestically-produced and imported pharmaceutical-related inputs from its General Sales Tax. Though in recent years, the use of SROs has decreased but such exemptions do bring benefits for consumers³³. A systematic study to assess the

³³ SROs, trade policy and regulatory documents are available on the Federal Board of Revenues website: <http://www.fbr.gov.pk>.

incidence/ benefits is hindered by the difficulty to gauge which concessions/exemptions still operate and the extent to which new exemptions/concessions extend, replace or duplicate previous ones. Though SROs on exemptions/concessions are published in the official Gazette and simultaneously posted on the FBR website, no integrated schedule or publication of current concessions/exemptions exists³⁴.

³⁴ Noted in the WTO Trade Policy Review of Pakistan.
For details see: http://www.wto-pakistan.org/documents/tpr/TPR_14-11-08.doc and
http://www.wto.org/english/tratop_e/tpr_e/tp293_e.htm.

Panamá

1. *¿Cuántas concesiones, y de qué tipo, se han otorgado en el país? ¿Cuál es la duración habitual o media de una concesión?*

SECTOR ELECTRICIDAD

La legislación panameña establece el otorgamiento de concesiones para la construcción y explotación de plantas de generación hidroeléctrica y geotermoeléctrica, para las actividades de transmisión y distribución de energía eléctrica para el servicio público. Además, establece el otorgamiento de licencias para la construcción y explotación de plantas de generación eléctrica distintas a las hidroeléctricas y geotermoeléctricas.

A la fecha, han sido otorgadas cuarenta y seis (46) concesiones, distribuidas en la siguiente forma: cuarenta y un (41) concesiones para construcción y explotación de plantas de generación hidroeléctrica, dos (2) concesiones para la actividad de transmisión de energía eléctrica y tres (3) concesiones para la actividad de distribución de energía eléctrica. Adicionalmente, han sido otorgadas veintiséis (26) licencias definitivas para la construcción y explotación de plantas de generación de energía eléctrica, distintas a las hidroeléctricas y geotermoeléctricas, destinadas al servicio público de electricidad.

Con relación a la vigencia máxima, para las concesiones de generación hidroeléctrica y geotermoeléctrica, la misma es de cincuenta (50) años, para la actividad de transmisión es de veinticinco (25) años y para la de distribución es de quince (15) años. Las licencias son otorgadas por un período máximo de cuarenta (40) años.

SECTOR AGUA POTABLE Y ALCANTARILLADO SANITARIO

En materia de agua potable y alcantarillado sanitario, las concesiones son otorgadas por el Instituto de Acueductos y Alcantarillados Nacionales (IDAAN).

La Autoridad Nacional de los Servicios Públicos (ASEP) únicamente otorga licencias temporales para la prestación de cualquiera de las actividades relacionadas con los servicios de abastecimiento de agua potable y alcantarillado sanitario, en los casos y lugares en los que el IDAAN no esté en capacidad en ese momento de ofrecer dichos servicios.

A la fecha, el IDAAN únicamente ha otorgado una (1) concesión para la construcción, financiamiento, operación y administración del sistema de agua potable de Laguna Alta, para abastecer a los distritos de La Chorrera, Arraiján y Capira.

En cuanto a las licencias, la Autoridad Nacional de los Servicios Públicos ha concedido nueve (9) licencias, desglosadas así: una (1) para la actividad de producción de agua potable, siete (7) para producción y distribución de agua potable y una (1) para tratamiento de aguas residuales.

El período máximo para las concesiones de producción, distribución y tratamiento de aguas residuales es de treinta (30) años. En cuanto a las licencias, el término es establecido discrecionalmente por el IDAAN.

SECTOR DE TELECOMUNICACIONES

De conformidad con lo establecido en la Ley Sectorial, las concesiones para la prestación de servicios de telecomunicaciones se clasifican así:

Concesiones tipo A: Las que se requieren para prestar los servicios que, por razones técnicas o económicas, deban otorgarse en régimen de exclusividad temporal, o a un número limitado de concesionarios. Son otorgadas por el Consejo de Gabinete previo concepto favorable de la Autoridad Nacional de los Servicios Públicos.

Concesiones tipo B: Las que se requieren para prestar los demás servicios de telecomunicaciones no comprendidos en los supuestos anteriores. Son otorgadas por la Autoridad Nacional de los Servicios Públicos.

Por disposición legal, las concesiones para operar los servicios de telecomunicaciones son otorgadas por un periodo de veinte (20) años y sus renovaciones no pueden exceder dicho término.

Los servicios de telecomunicaciones son autorizados para ser explotados de manera comercial o para fines propios. El siguiente cuadro muestra las concesiones otorgadas y que se encuentran vigentes al 17 de diciembre de 2008.

Servicio	Descripción	Tipo	Comercial	Propio	Total
101	SERVICIO DE TELECOMUNICACION BASICA LOCAL	B	44	0	44
102	SERVICIO DE TELECOMUNICACION BASICA NACIONAL	B	34	0	34
103	SERVICIO DE TELECOMUNICACION BASICA INTERNACIONAL	B	44	0	44
104	SERVICIO DE TERMINALES PUBLICOS Y SEMIPUBLICOS	B	18	0	18
106	SERVICIO DE COMUNICACIONES PERSONALES	A	2	0	2
107	SERVICIO DE TELEFONIA MOVIL CELULAR, BANDAS A Y B	A	2	0	2
200	SERVICIO DE TRANSPORTE DE TELECOMUNICACIONES	B	178	71	249
201	SERVICIO DE SISTEMAS TRONCALES CONVENCIONALES PARA USO PUBLICO O PRIVADO	B	19	49	68
202	SERVICIO DE RADIOCOMUNICACION FIJA Y MOVIL	B	19	490	509
210	SERVICIO DE BUSCA PERSONAS	B	3	3	6
211	SERVICIO INTERNET PARA USO PUBLICO	B	88	0	88
212	SERVICIO DE RETRASMISION DE FACSIMIL	B	13	0	13
213	SERVICIO DE COMUNICACION MOVIL MARITIMA	B	1	34	35
214	SERVICIO DE COMUNICACIÓN MÓVIL AERONÁUTICA	B	0	18	18
217	SERVICIO DE TELECOMUNICACION POR SATELITES DE BAJA ORBITA	B	3	0	3
218	SERVICIO DE ENLACE PARA ESTACIONES DE RADIODIFUSION	B	0	123	123
221	SERVICIO DE TRANSMISIONES PERMANENTES U OCASIONALES DE RADIO O TELEVISION VIA SATELITE	B	4	2	6
223	SERVICIO DE CENTRO DE LLAMADAS PARA USO COMERCIAL (CALL CENTERS)	B	84	0	84
300	SERVICIO DE TELEVISION INTERACTIVA CON O SIN USO DEL ESPECTRO RADIOELECTRICO.	B	6	0	6
400	SERVICIO DE VALOR AGREGADO DE TELECOMUNICACIONES	B	69	0	69
500	SERVICIO DE REVENTA DE SERVICIOS DE TELECOMUNICACIONES	B	89	0	89

SECTOR DE RADIO Y TELEVISIÓN

Actualmente, esta Autoridad tiene registrada 174 concesiones para los servicios de Radio y Televisión, las cuales tienen una duración de 25 años. Dichas concesiones se distribuyen de la siguiente manera:

No. de Servicio	Descripción del Servicio o Concesión	Cantidad	Observaciones
801	Servicio de Radio Abierta Tipo A	131	Las concesiones Tipo A son aquellas que requieren del uso de una frecuencia para brindar el servicio y se explotan con fines comerciales; emisoras de radio AM y FM, estaciones de televisión y TV pagada por recepción de antena como Cable Onda.
802	Servicio de Televisión Abierta Tipo A	11	
803	Radio Pagada Tipo A	0	
804	Televisión Pagada Tipo A	1	
901	Radio Abierta Tipo B	9	Las concesiones Tipo B son aquellas que no requieren del uso de una frecuencia para brindar el servicio, y son explotadas con o sin fines de lucro.
902	Televisión Abierta Tipo B	4	
903	Radio Pagada Tipo B	2	
904	Televisión Pagada Tipo B	16	También se incluyen aquellas concesiones que utilizan frecuencias pero que son explotadas sin fines comerciales, como por ejemplo Radio María y FETV Canal 5.

De igual forma se han otorgado 123 concesiones para el servicio No 218, denominado Servicio de enlace y 10 transporte para estaciones de radiodifusión o televisión, que es un servicio de telecomunicaciones donde se autorizan las frecuencias de enlaces utilizadas por los concesionarios de Radio y Televisión. Estas concesiones, de acuerdo a la Ley No. 31 de 8 de febrero de 1996, que regula los servicios de telecomunicaciones, tienen una duración de 20 años

- ¿Cuáles fueron las modalidades empleadas para otorgar concesiones (oferta, licitación pública, decreto, etc.)? ¿Hay en el país alguna ley que rija el otorgamiento y la rescisión de concesiones? ¿En los acuerdos de concesión se incluyen disposiciones que permitan la rescisión por parte del Gobierno?*

SECTOR ELECTRICIDAD

Con base en la Ley No.6 de 3 de febrero de 1997, por la cual se dicta el Marco Regulatorio e Institucional para la prestación del Servicio Público de Electricidad, reglamentada por el Decreto Ejecutivo No.22 de 19 de junio de 1998, las concesiones para generación, transmisión y distribución de energía eléctrica son otorgadas mediante resolución motivada y formalizadas a través de un contrato, previa selección del concesionario, a través del procedimiento correspondiente al tipo de actividad otorgado en concesión, el cual asegura la libre competencia.

Al entrar en vigencia la Ley No.6 de 1997, aquellas empresas que ya operaban plantas o prestaban servicios sujetos al régimen de concesiones, o que realizaban actividades de transmisión y distribución de energía eléctrica, se les otorgó la concesión sin el requisito de la competencia.

En cuanto a aquellas empresas que se encontraban operando plantas de generación de energía eléctrica sujetas al régimen de licencias, se les otorgó la misma, previo el cumplimiento de los requisitos establecidos en la Resolución No. JD-110 de 14 de octubre de 1997

El otorgamiento de concesiones de generación, transmisión y distribución de energía eléctrica está regulado por la Ley No.6 de 3 de febrero de 1997, el Decreto Ejecutivo No.22 de 19 de junio de 1998 y la Resolución No. JD-3460 de 19 de agosto de 2002 y sus modificaciones.

Las licencias se encuentran reguladas por la referida Ley No.6 de 1997, el Decreto Ejecutivo No.22 de 1998 y la Resolución AN No. 102 1 -Elec de 19 de julio de 2007.

Ahora bien, en los contratos de concesiones de generación, transmisión y distribución de energía eléctrica se incluyen las siguientes cláusulas, las cuales permiten que el Estado, previo el cumplimiento del respectivo procedimiento, termine la concesión:

- a) Resolución administrativa del contrato de concesión por incumplimiento de las obligaciones pactadas.
- b) Rescate administrativo por razones de guerra, grave perturbación del orden público o de interés social urgente.
- c) Terminación anticipada por declaración de quiebra, concurso de acreedores, disolución o suspensión de pagos

En materia de licencias, el Estado la podrá declarar cancelada en los siguientes casos:

- a) Falta de cumplimiento no autorizado de los plazos para inicio de construcción, terminación de obra e inicio de operación de la planta.
- b) Cualquier otra causa que se establezca en la Resolución que otorga la licencia.

SECTOR AGUA POTABLE Y ALCANTARILLADO SANITARIO

Con base en el Decreto Ley No.2 de 7 de enero de 1997, la única concesión otorgada para la para la producción de agua potable fue formalizada a través de un contrato, previa selección del concesionario, a través del procedimiento establecido en la Ley No.5 de 15 de abril de 1988, por la cual se establece y regula el sistema de ejecución de obras por el sistema de concesión administrativa y se adoptan otras disposiciones.

Con fundamento en la Resolución No.JD-3286 de 22 de abril de 2002, las licencias concedidas por la Autoridad Nacional de los Servicios Públicos para las actividades del servicio público abastecimiento de agua potable y10 alcantarillado sanitario son otorgadas mediante resolución motivada.

Al entrar en vigencia la Ley No.77 de 2001, aquellas personas naturales o jurídicas que ya prestaban o estaban en condiciones de prestar cualquiera de las actividades del servicio público abastecimiento de agua potable y10 alcantarillado sanitario, se les otorgó la respectiva licencia, mediante resolución motivada, previo el cumplimiento de los requisitos establecidos en la referida Resolución No.JD-3286 de 2002.

Ahora bien, la Ley No.5 de 15 de abril de 1988 regula la concesión otorgada para la producción de agua potable, mientras que las licencias otorgadas son reguladas por la Resolución No.JD-3286 de 22 de abril de 2002. Cabe advertir que en los contratos de concesión se incluyen las siguientes cláusulas, las cuales permiten que el Estado, previo el cumplimiento del respectivo procedimiento, termine la concesión:

- a) Caducidad de la concesión administrativa, la cual es declarada por el Consejo de Gabinete, a solicitud del Estado.
- b) Rescate administrativo por razones de interés público, previa autorización del Consejo de Gabinete.

En cuanto a las licencias, en las resoluciones que las conceden, se incluye el procedimiento de resolución administrativa por incumplimiento de las obligaciones, quiebra del licenciario y modificación, cesión, transferencia o disposición total o parcial de la licencia sin autorización de la Autoridad Reguladora.

SECTOR DE TELECOMUNICACIONES

La Ley 3 1 de 1996 y el Decreto Ejecutivo No. 73 de 1997 establecen procedimientos tanto para el otorgamiento como para la terminación de las concesiones de telecomunicaciones.

De acuerdo con lo establecido en el Artículo 27 de la Ley 3 1 de 8 de febrero de 1996, las Concesiones Tipo A son otorgadas por el Consejo de Gabinete, previo concepto favorable de la Autoridad Nacional de los Servicios Públicos, mediante Proceso de Licitación Pública, de conformidad con los procedimientos, formalidades y requisitos establecidos en dicha Ley y su Reglamentación, mientras que las Concesiones Tipo B son otorgadas por la Autoridad Reguladora a través de Resolución y sin la formalidad de Licitación Pública, a todo el que cumpla con los requisitos y trámites establecidos en el Reglamento de Telecomunicaciones y en las Resoluciones que emita la Entidad.

Con respecto a la Terminación de las Concesiones de Telecomunicaciones, la Ley 3 1 de 1996 establece la potestad del Estado de Resolver Administrativamente una concesión por incumplimiento del concesionario de acuerdo con las causales y procedimientos consignados en la Ley Sectorial. De igual forma se reconoce la facultad del Estado de Rescatar Administrativamente las Concesiones Tipo A, previo el pago a los concesionarios de las indemnizaciones correspondientes y de acuerdo a los mecanismos establecidos en los respectivos Contratos de Concesión.

SECTOR DE RADIO Y TELEVISIÓN

De acuerdo con lo establecido en el Artículo 12 de la Ley No. 24 de 1999, las concesiones para la prestación de los servicios públicos de radio y televisión Tipo A, son otorgadas por la Autoridad Nacional de los Servicios Públicos, mediante resolución motivada, previa celebración de un proceso de licitación pública, conforme a los requisitos establecidos en dicha Ley, sus reglamentos o las resoluciones que, para tal efecto, adopte la Autoridad Reguladora.

Las concesiones para la prestación de los servicios públicos de radio y televisión Tipo B, son otorgadas por la Autoridad Nacional de los Servicios Públicos mediante

resolución motivada, siempre que sean oportuna y debidamente presentadas y que el solicitante cumpla con todos los requisitos que, a este efecto, se establecen en la presente Ley, en sus reglamentos y en las resoluciones que emita la Autoridad Reguladora.

Con relación a la Terminación de las Concesiones de Radio y Televisión, en el Artículo 22 de la mencionada Ley Sectorial se establece la potestad del Órgano Ejecutivo, a través de la Autoridad Nacional de los Servicios Públicos para declarar la resolución administrativa de una concesión, de conformidad con el procedimiento y las causales indicadas en el Capítulo 111 "Terminación del Contrato" de la Ley 24 de 1999 y en su reglamentación.

3. *¿Se han tomado en cuenta las consideraciones relativas a la competencia en el otorgamiento de concesiones? ¿Qué nuevas consideraciones o cuestiones se han planteado como consecuencia de las concesiones otorgadas en el país? ¿Se ha dado a los concesionarios protección especial con respecto al abuso de posición de dominio, la entrada o el control de los precios al otorgárseles una concesión?*

SECTOR ELECTRICIDAD

Al momento de otorgar concesiones de generación, transmisión y distribución de energía eléctrica y licencias de generación, se toman en consideración aspectos de competencia, los cuales ya se encuentran contemplados en los referidos procedimientos para otorgarlas.

Entre los aspectos de competencia más relevantes podemos señalar:

- a) Reglas que hacen posible el acceso a nuevos competidores en las actividades de generación, transmisión y distribución de energía eléctrica (libre competencia).
- b) Acceso a las redes de distribución.
- c) Prohibición de fijación de precios de venta (prohibición de prácticas monopolísticas).
- d) Restricciones en la participación, directa o indirectamente, en control de plantas de generación, cuando la capacidad agregada equivalente exceda el quince por ciento (15%) de la demanda atendida en su zona de concesión.
- e) Restricciones para solicitar nuevas concesiones, si al hacerlo atienden, directa o indirectamente, a través del control accionario de otras empresas de distribución u otros medios, más del cincuenta por ciento (50%) del número de clientes totales en el mercado nacional. La Autoridad podrá autorizar que se exceda ese porcentaje cuando a juicio de la entidad sea necesario para permitir la expansión de la concesión a la zona de influencia, o la expansión del sistema eléctrico del país.

En cuanto a las protecciones especiales otorgadas a los concesionarios y licenciarios, el Artículo 122 de la Ley No.6 de 1997 establece que todos los bienes inmuebles y sus mejoras, que sean necesarios, convenientes, útiles o usualmente empleados para las obras, instalaciones y actividades de generación, interconexión, transmisión y distribución de electricidad destinadas al servicio público, se declaran de utilidad pública.

SECTOR AGUA POTABLE Y ALCANTARILLADO SANITARIO

Al momento de otorgar concesiones y licencias de actividades relacionadas con la prestación de los servicios de agua potable y10 alcantarillado sanitario no se han tomado en consideración aspectos de competencia.

Tanto la Ley No.5 de 1988 como la Resolución No.JD-3286 de 2002, establecen que se declaran de utilidad pública todos los bienes inmuebles y sus mejoras, que sean necesarios, convenientes, útiles o usualmente empleados para las obras, instalaciones y actividades de prestación de los servicios de agua potable y10 alcantarillado sanitario destinada al servicio público.

SECTOR DE TELECOMUNICACIONES

En relación al otorgamiento de las concesiones las normas que regulan los servicios de telecomunicaciones establecen las siguientes restricciones:

-El numeral 9 del Artículo 47 de la Ley 31 de 8 de febrero de 1996, prohíbe la participación del concesionario, del socio operador o de cualquiera de los accionistas o socio del concesionario, de sus empresas afiliadas o subsidiarias, que tengan acciones o participaciones por sí o por medio de otra persona, en el capital de sociedades o consorcios a los que se le hubiese otorgado otras concesiones para los mismos servicios de telecomunicación. Igualmente, prohíbe al socio operador o a cualquiera de sus accionistas, socios directos o indirectos, y a empresas afiliadas o subsidiarias a participar en licitaciones públicas que tengan por objeto otorgar una concesión o contrato para la prestación de un servicio de telecomunicaciones, cuando a cualquiera de éstos se le hubiera otorgado una concesión o contrato para prestar un servicio de telecomunicación similar.

-El Artículo 25 de la Ley 24 de 30 de junio de 1999, prohíbe a cualquier concesionario de servicios públicos de telecomunicaciones y a sus subsidiarias o filiales, operar servicios públicos de radio o televisión, mientras operen servicios públicos de telecomunicaciones en régimen de exclusividad temporal.

En relación al dominio de las concesiones, debemos señalar que el Estado otorgó a la empresa INTEL, S.A., ahora CABLE & WIRELESS PANAMÁ, S.A., mediante Contrato No. 134 de 29 de mayo de 1997, concesión para operar los servicios básicos de telecomunicaciones (1 01, 102, 103, 104 y 105), en régimen de exclusividad temporal por un periodo de cinco (5) años que finalizó el lo de enero de 2003.

En relación a los servicios de telefonía móvil (106 y 107), éstos se encuentran bajo el régimen de limitación numérica de concesionarios (hasta dos concesionarios por servicio), otorgándose mediante los Contratos No. 30-A de 5 de febrero de 1996 y No. 309 de 24 de octubre de 1997, a las empresas BSC de Panamá, S.A. (ahora TELEFONICA MÓVILES PANAMÁ, S.A.) y CABLE & WIRELESS PANAMA, S.A., respectivamente, las concesiones para operar y explotar comercialmente el Servicio de Telefonía Móvil Celular (No. 107).

A través de la Resolución No. JD-080 de 10 de abril de 1997, el entonces Ente Regulador de los Servicios Públicos estableció que a partir del decimoprimer año desde la fecha de otorgamiento a Cable & Wireless Panama, S.A., de la Concesión de

Telefonía Móvil Celular para la Banda B, se podrían licitar hasta dos (2) concesiones para prestar el Servicio de Comunicaciones Personales (PCS). Dicho periodo concluyó el 24 de octubre de 2007, por lo que el Estado Panameño, previo proceso de Licitación Pública y a través de los Contratos No. 10-08 y 11-08 ambos de de 27 de mayo de 2008, otorgó a las empresas DIGICEL (PANAMÁ), S.A. y CLARO PANAMÁ, S.A., respectivamente, las concesiones para la operación y explotación comercial, en régimen de competencia, de este servicio de telefonía móvil.

En la actualidad, todos los servicios de telecomunicaciones son brindados en régimen de competencia y sus precios son fijados libremente por los concesionarios, tal como lo dispone el Artículo 37 de la Ley 3 1 de 1996, salvo el caso del operador establecido con posición dominante en la prestación del Servicio de Telecomunicación Básica Local (No. 101), el cual debe someter a la revisión y aprobación de la ASEP, las modificaciones a sus planes tarifarios para dicho servicio de telefonía básica local, tal como lo dispone la Resolución No. JD-4392 de 17 de diciembre de 2003.

Finalmente, con respecto a los temas de competencia que se han presentado en nuestro país, debemos destacar que la ASEP, con el propósito de promover y mantener la competencia en el sector de las telecomunicaciones en la República de Panamá, ha adoptado normas y medidas relacionadas entre otros, con los temas de Interconexión, Acceso a Redes y a elementos de Red, Uso de Infraestructura Compartida, Coubicación, Facilidades Esenciales, Trato Equitativo y No Discriminatorio, Activación de Recurso Numérico, Desagregación de Bucle de Abonado, Reventa de Servicios, Posición Dominante y Portabilidad Numérica. De igual forma inició procesos en contra de concesionarios por la realización de conductas tendientes a dilatar las interconexiones o la apertura de puntos de interconexión, a denegar la activación de recurso numérico, códigos de acceso y de marcación abreviada de otros concesionarios, a denegar el acceso a infraestructura o a desagregar el bucle de abonado. Sin embargo, en virtud de lo dispuesto en el Decreto Ley 10 de 2006, corresponde actualmente a la Autoridad de Protección al Consumidor y Defensa de la Competencia la investigación y10 verificación de conductas que puedan de alguna forma afectar la competencia en el sector de las telecomunicaciones.

SECTOR DE RADIO Y TELEVISIÓN

La Ley No. 24 de 30 de junio de 1999, que regula los servicios de radio y televisión, tiene como objeto, entre otros:

- Promover la competencia leal y libre entre los concesionarios, estableciéndose para tal fin, medidas técnicas para que los servicios se presten en forma eficiente, libres de interferencias y en igualdad de condiciones. Del mismo modo, al momento de otorgar una concesión se establecen los derechos y obligaciones que rigen para todos los concesionario.

En cuanto a los temas de competencia y protecciones especiales la Ley No. 24, estableció lo siguiente:

- Prohibiciones a empresas y a sus subsidiaria o filiales operar servicios de radio o televisión, si dichas empresas operaban servicios públicos de telecomunicaciones en régimen de exclusividad temporal.

- Prohibiciones a los concesionarios de los servicios públicos de radio o televisión abierta, controlar, en forma directa o indirecta, un periódico de circulación diaria, si el Área de cobertura de la estación de radio o televisión abierta cubre, por lo menos, el cincuenta por ciento (50%) del área geográfica en donde el periódico es distribuido o vendido.

- Que los concesionarios de servicios públicos de radio o televisión abierta, no podrán ser controlados, por un periódico de circulación diaria, si el periódico es distribuido o vendido en un área geográfica que cubre, por lo menos, el cincuenta por ciento (50%) del Área de cobertura de la estación de radio o televisión.

- Con el propósito de promover y proteger la inversión privada, y garantizar la leal y libre competencia en la prestación de los servicios públicos de radio y televisión, en el Título VI "De la Competencia Leal y Libre" del Decreto Ejecutivo No. 189 de 1999 se establecen disposiciones especiales y restricciones con el propósito de regular los temas de niveles de sintonía, limitación del control de las frecuencias de Radio y Televisión Abierta y Posición Dominante.

4. *¿Qué sectores de la economía están exentos de la aplicación del derecho sobre la competencia? ¿Qué sectores o qué tipo de concesiones son objeto de una reglamentación específica? ¿Las concesiones están sujetas al derecho nacional sobre la competencia?*

SECTOR ELECTRICIDAD

En virtud del Numeral 8 del Artículo 15 de la Ley No.6 de 1997, los usuarios del servicio público de electricidad recurrirán ante la Autoridad Nacional de los Servicios Públicos, cuando los niveles de servicio sean inferiores a los establecidos, y el prestador no hubiera atendido su reclamación en tiempo oportuno, ya que esta es la entidad competente para ordenar la adecuación del servicio. Por consiguiente, la atención de dichas reclamaciones se encuentra exenta de la aplicación de la ley de competencia.

Las actividades de generación, transmisión y distribución de energía eléctrica, destinadas a la prestación del servicio público de electricidad se encuentran sujetas a las normas contempladas en la Ley No.6 de 1997, Decreto Ejecutivo No.22 de 1998 y leyes sectoriales del sector eléctrico.

Conforme al Numeral 16 del Artículo 86 de la Ley No.45 de 2007, a las actividades de generación, transmisión y distribución de energía eléctrica les son aplicables las normas relacionadas con la comisión de prácticas monopolísticas, anticompetitivas o discriminatorias, contenidas en la referida ley de competencia. Dicho Artículo establece taxativamente lo siguiente:

"Funciones de la Autoridad. La Autoridad tendrá las siguientes funciones y atribuciones:

- Investigar, conocer y verificar la comisión de prácticas monopolísticas, anticompetitivas o discriminatorias por las empresas o entidades que prestan servicios públicos, de acuerdo con lo establecido en la presente

Ley y en concordancia con las reglamentaciones y leyes sectoriales aplicables al servicio público de que se trate. Para ello, la Autoridad solicitará el apoyo y la colaboración del personal técnico de la Autoridad Nacional de los Servicios Públicos."Las actividades de generación, transmisión y distribución de energía eléctrica están sujetas a la ley de competencia.

SECTOR AGUA POTABLE Y ALCANTARILLADO SANITARIO

El objetivo de la Ley No.77 de 28 de diciembre de 2001, por la cual se reorganiza y moderniza el Instituto de Acueductos y Alcantarillados Nacionales, no fue la promoción de la competencia, en virtud de la connotación social intrínseca al servicio público de agua potable y alcantarillado sanitario.

Por consiguiente, todas las actividades relacionadas con la prestación de los servicios de agua potable y alcantarillado sanitario se encuentran exentas de la ley de competencia toda vez que, el Instituto de Acueductos y Alcantarillados Nacionales mantiene un monopolio en toda la República de Panamá, permitiéndose la participación de personas naturales o jurídicas cuando dicha entidad lo autoriza.

SECTOR DE TELECOMUNICACIONES

Actualmente todas las concesiones para operar y explotar comercialmente los servicios de telecomunicaciones han sido otorgadas en Régimen de Competencia, se encuentran bajo el control y fiscalización de la Autoridad Nacional de los Servicios Públicos y están sujetas a la ley de competencia, en virtud de lo establecido en la Ley 45 de 31 de octubre de 2007.

SECTOR DE RADIO Y TELEVISIÓN

En la actualidad, todas las concesiones para operar y explotar comercialmente los servicios de Radio y Televisión han sido otorgadas en Régimen de Competencia, se encuentran bajo el control y fiscalización de la Autoridad Nacional de los Servicios Públicos y están sujetas a la ley de competencia, en virtud de lo establecido en la Ley 45 de 31 de octubre de 2007.

5. *¿Hay pruebas de que las concesiones hayan aportado beneficios a los consumidores del país en términos de infraestructura, diversificación, calidad, precios o bienestar general del consumidor?*

SECTOR ELECTRICIDAD

Existe evidencia indicando que los consumidores se han beneficiado con el otorgamiento de concesiones y licencias.

Entre los beneficios podemos citar las grandes inversiones en infraestructura que se han hecho hasta la fecha y mayor calidad en la prestación del servicio de energía eléctrica (disminución de las interrupciones, disminución de tiempo de respuesta para

restablecimiento de fluido eléctrico cuando hay apagones programados, entre otros), lo que se traduce en un mejor bienestar para los consumidores.

SECTOR AGUA POTABLE Y ALCANTARILLADO SANITARIO

En atención al tipo de servicio público, el consumidor no ha obtenido mayores beneficios, ya que no se observan grandes inversiones.

SECTOR DE TELECOMUNICACIONES

El otorgamiento de concesiones para operar y explotar comercialmente los servicios de telecomunicaciones ha conllevado grandes beneficios para el desarrollo del país y sobre todo para los clientes y usuarios de estos servicios.

Durante el periodo de exclusividad otorgado a Cable & Wireless Panama, S.A. fueron realizadas grandes inversiones con el propósito de expandir y modernizar la Red Pública Conmutada en todo el territorio nacional, sustituyendo la tecnología análoga por la digital y mejorando el acceso y la calidad de los servicios básicos prestados.

Con la apertura del sector de las telecomunicaciones, de un sólo operador de servicios básicos que había en el país, ahora existen un gran número de concesionarios que activamente están brindando dichos servicios, garantizando con ello una pluralidad en la oferta que le permite ejercer, a los usuarios y clientes, su derecho a elegir el prestador y la oferta que más le convenga.

Tras seis (6) años de haberse liberalizado el sector, se han incrementado el número de líneas en el país, se ha mejorado los niveles de penetración y se han reducido considerablemente los precios de los servicios, sobre todo los de larga distancia nacional e internacional. De igual forma, la competencia en el sector ha propiciado que los concesionarios inviertan en el desarrollo de infraestructura que les permite proveer una multiplicidad de servicios de alta calidad sobre redes robustas y la diversificación e innovación de la oferta, incorporando nuevos modelos como lo son el servicio fijo prepagado que se ha popularizado en los últimos años o el empaquetamiento de servicios o servicios integrados (telefonía fija, Internet y televisión pagada).

En lo que respecta a la telefonía móvil, el panorama no es distinto, los beneficios obtenidos con el otorgamiento de concesiones para brindar este servicio se han traducido en mejores precios, mayor penetración e innovación en la tecnología que les permite a los usuarios recibir una variada gama de servicios añadidos o de valor agregado a través de sus teléfonos celulares. Además se han realizado grandes inversiones para aumentar la cobertura y ampliar las plataformas para satisfacer a la creciente demanda. Cabe destacar que, según las estadísticas el número de abonados del servicio celular ha rebasado al de la telefonía fija.

Dicho crecimiento se ha reflejado sobre todo en la modalidad prepagada, que representa más del 90% de los teléfonos celulares activos y cuyos usuarios se han visto favorecidos con las promociones ofrecidas por los operadores, a través de las cuales se duplica, triplica y hasta cuadriplica los minutos celulares que reducen el costo de la llamada

Asimismo, el incremento en el número de prestadores, ya ha representado grandes mejoras en la oferta ya que se están ofreciendo reducciones de precios, extensiones de la vigencia de las tarjetas prepagadas de 60 a 365 días y tasaciones del servicio en tiempo real de consumo.

En general, a pesar de que Panamá cuenta con un mercado pequeño en comparación al de otros países de la región, las telecomunicaciones representan una actividad de constante crecimiento, que se ha beneficiado con el incremento en el número de prestadores que ofrecen una diversificación de productos y servicios de mayor calidad y mejores precios.

SECTOR DE RADIO Y TELEVISIÓN

Considerando los servicios de Radio y Televisión Abierta, se puede decir que el amparo de las concesiones bajo la Ley No. 24 han traído beneficio a los consumidores considerando que las empresas han mejorado la calidad del servicio mediante la adquisición y renovación de equipos, incrementándose la competencia comercial para la captación de un mayor público.

Por otro lado, en cuanto a servicios de Televisión Pagada, ha habido un incremento de concesiones para brindar este servicio, lo cual beneficiará al consumidor con mayores alternativas en el mercado y mejores precios, sobre todo en sistemas que ofrecen paquetes de servicios (Televisión, Internet y Telefonía).

Perú

1. *¿Cuántas concesiones, y de qué tipo, se han otorgado en el país? ¿Cuál es la duración habitual o media de una concesión?*

Sin respuesta

2. *¿Cuáles fueron las modalidades empleadas para otorgar concesiones (oferta, licitación pública, decreto, etc.)? ¿Hay en el país alguna ley que rija el otorgamiento y la rescisión de concesiones? ¿En los acuerdos de concesión se incluyen disposiciones que permitan la rescisión por parte del Gobierno?*

Sin respuesta

3. *¿Se han tomado en cuenta las consideraciones relativas a la competencia en el otorgamiento de concesiones? ¿Qué nuevas consideraciones o cuestiones se han planteado como consecuencia de las concesiones otorgadas en el país? ¿Se ha dado a los concesionarios protección especial con respecto al abuso de posición de dominio, la entrada o el control de los precios al otorgárseles una concesión?*

Sobre los temas de competencia que se han presentado en las concesiones en el Perú, corresponde destacar que se ha tramitado ante la comisión de Defensa de la Libre Competencia (en adelante, CLC) y la Sala de Defensa de la Competencia del Tribunal del INDECOPI (en adelante, SDC) un procedimiento contra el operador de una concesión de transporte ferroviario de carga y pasajeros.

El caso fue iniciado de oficio y por denuncia de Ferrocarril Santuario Inca Machupicchu S.A.C. contra Ferrocarril Transadino S.S. (en adelante, Fetrans), concesionario de la infraestructura del Ferrocarril Sur Oriente, tramo Cusco - Machupicchu - Hidroeléctrica, por un abuso de posición de dominio consistente en la negativa injustificada de alquiler del material tractivo y rodante que le fue entregado con la concesión otorgada por el Estado Peruano.

Conforme al contrato de concesión, el concesionario tenía a su disposición la totalidad del material tractivo y rodante que el Estado le otorgó sin contraprestación. Fetrans arrendó el referido material en su integridad a Perurail S.A., su operador vinculado para la prestación del servicio de transporte de carga y pasajeros, y argumentó la existencia de esta relación contractual como justificación para negar el alquileres a otros potenciales entrantes.

Mediante Resolución 1122-2007/TDC-INDECOPI del 2 de julio de 2007 expedida por la SDC, se declaró fundada la denuncia por considerar que el operador ostentaba posición dominante y que el Contrato de concesión suscrito con el Estado Peruano no amparaba la posibilidad de rechazar las solicitudes de operadores no vinculados reaccionar al material y, por el contrario, le imponía un deber de no discriminación, por lo que la negativa de trato resultaba injustificada.

Por otro lado, se debe señalar que en el Perú, la Ley 26876 - Ley Antimonopolio y Antioligopolio del Sector Eléctrico regula las operaciones de concentración empresarial que involucren a las empresas que participen en las actividades de generación, transmisión y distribución eléctrica conforme a los umbrales que se establecen en la citada norma para concentraciones verticales u horizontales. En la experiencia del Indecopi, se han presentado solicitudes de autorización previa para operaciones de concentración en el sector eléctrico que involucran a empresas concesionarias de las actividades de transmisión o distribución eléctrica.

4. *¿Qué sectores de la economía están exentos de la aplicación del derecho sobre la competencia? ¿Qué sectores o qué tipo de concesiones son objeto de una reglamentación específica? ¿Las concesiones están sujetas al derecho nacional sobre la competencia?*

En el Perú no existen sectores exentos de la ley de competencia, por lo que el Decreto Legislativo 1034- Ley de Represión de conductas Anticompetitivas se aplica a todos los sectores de la economía.

Sin embargo, existen actividades que se encuentran bajo regulación específica en las que la ley de competencia se aplica supletoriamente (aquellos sectores vinculados a la existencia de monopolios naturales o facilidades esenciales). Así existe regulación específica para los mercados de energía, telecomunicaciones, agua y saneamiento, e infraestructura de transporte de uso público (aeropuertos, vías férreas, entre otros).

Finalmente, corresponde señalar que las concesiones también están sujetas a la ley de competencia salvo en aquello que esté sometido a la regulación sectorial específica.

5. *¿Hay pruebas de que las concesiones hayan aportado beneficios a los consumidores del país en términos de infraestructura, diversificación, calidad, precios o bienestar general del consumidor?*

Sin respuesta.

PNG

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

TELECOMMUNICATIONS

The current ICT Policy of the Government of PNG (GoPNG) allows for only one licensed General Carrier in the Telecommunication industry. Telikom (PNG) Limited, the domicile incumbent is the only General Carrier licensee. The licence was issued in 2002 for duration of 10 years with a 7 year renewal option although current government policy prevents further issuance of a General Carrier Licence? Until such policy is changed, the Competition Authority cannot issue a licence. There are two public mobile licensed operators competing in the mobile telecommunications market. A third operator is soon to commence.

ELECTRICITY

A concession currently exists for the current government owned electricity monopoly to be the only retailer of electricity services. The Concession is for the duration of the monopoly's electricity retail licence which is 10 years with a 7 year renewal. The licence was issued in 2002.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

Concessions are usually time-limited and are generally created by the Government of PNG through the issuance of a Government Policy. Government Policy that formalises the concession/s are required to be consistent with the provisions of that particular industry specific legislation and the regulatory contract signed between the Regulator ("the PNG ICCC") and the utility service provider. The current monopolies in the PNG context are granted by Government Policy and the Government of PNG. Amendments to and or termination of existing policies can be undertaken by the Government of PNG, on consideration such as the need to introduce competition into a specific sector or segment of that market.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Although competition concerns were present, the decision to grant concessions were largely driven by the Government's intention then to rehabilitate the utility service

providers up to a stage where they can be attractive for public private partnerships in the ownership and operation of these government utilities.

The major concerns arising from continued concessions are the unreliability of services and the high charges applied. Competition in the mobile telecommunications which was introduced in 2007 has resulted in very significant benefits to the country. The Government of PNG announced in its 2008 budget documents that mobile competition alone has resulted in a 0.7% growth in GDP.

Special protection was related to entry of competition. In doing so, price regulation was also introduced to ensure these utilities do not price for inefficiencies. Dominance of public monopolies is subject to the competition law of PNG, the Independent Consumer and Competition Act 2002 (ICCC Act).

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

All sectors of the economy are subject to the competition. There is a range of exceptions contained in the Act (to sections 65 and 66) which remove particular types of conduct or arrangements from the application of Part VI of the ICCC Act. Included in these exceptions are, for example, an exception for acts or things specifically authorised by other legislation; intellectual property agreements; and employment agreements. The sorts of things exempted in the ICCC Act, of which these are only examples, are typical of the exemptions in other competition laws around the world.

There are some sectors that are under specific regulatory oversight, mainly declared goods and services such as the telecommunications, third party motor vehicle insurance, electricity, water and sewerage, postal services and harbours.

Concessions given for industries may be subjected to the national competition law unless exempted or an exception is granted, in which case it may not be subject to the national competition law.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

The evidence to date has been that concessions have not resulted in the desired public benefits through affordable prices and quality of service. For example, the entry of competition in the mobile telecommunications industry has resulted in the growth of telecommunications from less than 2% in 2006 to about 20% currently. The government of PNG acknowledged the contribution of such competition in its budgetary documentary about the impact of competition on the GDP which indicates the potential benefits of open market competition.

Poland

Concessions (licences) shall be granted in the case of activities which are of particular importance due to the security of state or citizens or other public interest. The concession is a manifestation of the regulation of economic activities carried out by the state. Concession is the act of consent by the public authority to undertake and conduct particular business by particular enterprise. The types of activities which need to be licensed are listed exhaustively in the Act on Freedom of Business Activity. These are:

- searching, discernment of depositions of minerals
- manufacturing and trading of explosives, firearms and ammunition
- manufacturing, processing, storage, transmission, distribution and trading of fuels and energy
- safeguarding of persons and property
- dissemination of television and radio programmes
- air carriage

All the licensed activities are specifically regulated by the relevant laws. The concession is granted for a specific period, but not less than 5 years and not more than 50 years. The Act on Freedom of Business Activity says that the competent Minister grants, modifies and withdraws the concessions. However, there are numerous exemptions from this rule, giving these powers to other entities (e.g. the President of the Energy Regulatory Office).

When the number of concessions is lower than the number of applicants, after the announcement in “Monitor Polski” a tender is carried out.

The Office of Competition and Consumer Protection (OCCP) is not responsible for granting concessions or licenses. Nevertheless, the Office takes the appropriate measures (i.e. detecting and combating anticompetitive practices) aiming at creating competitive environment, if possible, in regulated sectors. For instance, in 2004, the President of the Office acknowledged that the PKP Cargo company abused its dominant market position in the scope of rail transport of goods and ordered discontinuation of that practice. A fine in the amount of PLN 20 million was imposed on the company.

There are three sector regulators: the Office for Electronic Communication (UKE), the Office for Energy Regulation (URE), and the Office for Rail Transport (UTK). The sector regulators possess regulatory powers, which are aimed at contributing to the process of market liberalization, as well as at helping in the creation of competitive markets. The regulators are also responsible for supplementing the market mechanisms with their regulatory powers, whenever the need for such support arises due to the natural discrepancies of the markets within their sectors. The competences of each institution are separate and complementary.

República Dominicana

1. *¿Cuántas y qué tipo de concesiones han sido otorgadas en su país? ¿Cuál es la duración típica/promedio de una concesión?*
 - a. Construcción de autovías (3) por 20-25 años
 - b. Manejo de Aeropuertos (6) por 20 años
 - c. Manejo de Puertos (3)
 - d. Explotación de loterías (2)
 - e. Concesiones Mineras (4) 20-30 años
 - f. Hoteles del Estado (3)

2. *¿Cuáles fueron las modalidades empleadas para otorgar concesiones (oferta, licitación pública, decreto, etc.)? ¿Hay en el país alguna ley que rija el otorgamiento y la rescisión de concesiones? ¿En los acuerdos de concesión se incluyen disposiciones que permitan la rescisión por parte del Gobierno?*

Se han usado varias modalidades: concurso por invitación, licitación pública con requerimiento de Joint Venture y decretos del Ejecutivo.

3. *¿Se han tomado en cuenta las consideraciones relativas a la competencia en el otorgamiento de concesiones? ¿Qué nuevas consideraciones o cuestiones se han planteado como consecuencia de las concesiones otorgadas en el país? ¿Se ha dado a los concesionarios protección especial con respecto al abuso de posición de dominio, la entrada o el control de los precios al otorgárseles una concesión?*

Se presentó un incidente de competencia en el caso de la concesión estatal para operar loterías electrónicas que fue llevada ante la Suprema Corte de Justicia, quien apoyándose en la disposición constitucional de que solo se permiten monopolios en beneficio del Estado, permitió el establecimiento de otra operadora de loterías electrónicas

4. *¿Qué sectores de la economía están exentos de la aplicación del derecho sobre la competencia? ¿Qué sectores o qué tipo de concesiones son objeto de una reglamentación específica? ¿Las concesiones están sujetas al derecho nacional sobre la competencia?*

Los sectores financieros, las telecomunicaciones y las concesiones del sector eléctrico/energético están reguladas por leyes especiales con disposiciones de competencia y bajo la supervisión de una superintendencia sectorial.

La ley de competencia prevé que todas las concesiones y licitaciones se ajusten a las disposiciones legales de competencia.

5. *¿Hay pruebas de que las concesiones hayan aportado beneficios a los consumidores del país en términos de infraestructura, diversificación, calidad, precios o bienestar general del consumidor?*

Información no disponible.

Russia

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

Currently in the Russian Federation there are implemented concessions in the sphere of road building – construction of new gate to the Moscow ring road from the federal road M-1 “Belarus” Moscow-Minsk, construction of high way Moscow-Saint-Petersburg from 15th km to 58th km, construction of Orel tunnel in Saint-Petersburg connecting two banks of Neva river. The medium duration of concessions is 3-5 years.

There are some attempts in a number of regions of the Russian Federation to use the concession mechanism to attract investments to the sphere of public utilities (for instance, in Kaliningrad property of Municipal Unitary Undertaking (MUU) “Kaliningrdteploset” and MUU “Chistota” were granted as concession).

The scheme close to classic concession is widely implemented in the public utilities: investor (or operator on behalf of the investor) to ensure payback and return on investment concludes with the state or local authorities the contract of long-term tenancy (for a period of 5-15 years with investing) on electric, heat and water-supply networks. After that the investor’s company runs the maintenance of public utilities infrastructure, sells public utilities resources and services to consumers. The rented property can be improved, and given to the ownership of the renter after return on investment.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

The procedure on making concessions is set forth by the Federal Law of 21.07.2005 №115-FZ «On Concessions» (hereinafter referred to as the Law). According to this procedure the party granting concession (the Russian Federation, region of the Russian Federation, municipal authority) owning the object for the concession (like: roads, waterworks, objects on production, delivery and distribution of power and heat energy, systems of public utilities, including objects of water-, heat-, gas- and power supply, water drain) holds a tender on a right to conclude the concession basing on the decision of the owner on concluding such a concession (the Government of the Russian Federation, state and local authorities). The winner of the tender is the one who offered the best terms. Concessions are concluded in the written form with the winner should he submit all the documents envisaged by the tender documentation and confirming the fulfillment of commitments under concession. The concession enters into force from the moment of its signature.

Concessionaires, including foreign legal persons, are guaranteed with equal rights set forth by the Russian legislation, legal regime of activity excluding discriminatory actions and other actions preventing concessionaires from freely managing of the

investments and the products and income gained as a result of an activity envisaged by the concession. The Law also envisaged other guarantees to concessionaires.

The period of validity of the concession is set by the concession itself taking into consideration the period of creation and (or) reconstruction of the object of concession, scope of investments into creation and (or) reconstruction of this object and period of return on investment, other commitments of the concessionaire under concession. The concession may be changed under the agreement of all its parties. The terms of concession determined under the decision on conclusion of concession and tender proposal, can not be changed by the agreement of the parties, except for a case when during the period of validity of a concession the new regulations worsening the position of the concessionaire (he is deprived of what he had a right on under conclusion of a concession) come into force. The Parties to the concession change the terms of the concession in order to ensure property interests of the concessionaire that existed on the day of its signature. The order of introducing such changes is set forth by the concession itself.

Thus, the Law does not envisage provisions that may terminate concession unilaterally or that may worsen the terms of concession. Generally the scheme of concession is the following: the private investor builds an object, places it under the state ownership and returns the investments thanks to maintenance.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

The FAS Russia controls over observance of antimonopoly requirements to the auctions under conducting tenders for a right to conclude concessions, moreover it suppresses the monopolistic activity and unfair competition on the product markets. Currently the threats to competition development as a result of concession granting on the product markets are absent due to the relatively low spreading of concessions. The issues of the special position of the concessionaire on the market, including dominance, entry to market, are presently being discussed. With regard to price (tariff) control they are regulated by the recent amendments to the Law: if the concessionaire sells its services on regulated prices and tariffs than state (local authority) should take into account the investments of the concessionaire into creation or reconstruction of the object. Concessionaires can avoid the concession payment given the concession terms provide for the concession granter taking upon himself part of expenses on creation and (or) reconstruction, maintenance of the object of concession.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

According to the part 1 of the Article 2 of the Law “On Protection of Competition” the antimonopoly legislation is based on the Constitution of the Russian Federation and Civil Code of the Russian Federation and does not envisage sectors of economy exempted from this law and from setting special regimes of regulations. Concessions also fall under the competition legislation.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

Taking into consideration the fact that concession mechanisms are only beginning to be used in Russia, so far there are no examples reflecting their explicit benefits. At the same time we should underline the great interest both of foreign and Russian potential investors to concession, as well as interest of state in the effective development of this type of economic activity.

Serbia

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

There are five agreements on concessions, four in the field of mining and one in the area of infrastructure. According to The Law on Concessions, concession could be given for a period of 30 years. The existing concession agreements are given the right to exercise the exploitation for a period of 25 years.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

Concession contracts are concluded after the tender procedures are conducted. Yes, we have The Law on Concessions. Yes, there are provision in concession agreements which allow the Government to terminate the concession.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

All five concessions were created in accordance with the principle of free market competition, which includes the prohibition of restriction on competition between the participants and the obligation of accepting all the participants whose bids meet the conditions prescribed by The Law on Concessions. There are no competition concerns or issues that arose from concluded contracts on concessions.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

In our country, there are no exceptions other than those provided by The Competition Law (block exemptions and individual exemptions), and they are arranged in the same way as the Article 81 of the Roman Treaty. Regardless of which in certain sectors, there are separate regulatory bodies, (telecommunications, energetics, banking, financial sector) and they, as well as concessions, are not exempt from general regulations of the competition.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

No, there are no such results, until now.

Seychelles

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

Fiscal concessions are the most common type of concessions available to companies in Seychelles. These fiscal concessions (which are basically fiscal incentives) are provided to companies in particular sectors, to generate growth and enhance competitively. The sectors in which fiscal concessions are available are:

- The fisheries and agricultural sector under the Fisheries & Agriculture Incentive Act,
- The tourism sector under the Tourism Incentive Act
- And in the off-shore sector under Seychelles International Trade Zone Regulations.

The average duration of a certificate to access these concession is between 5 to 10 years.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

The concessions are created by law and the law makes for provisions for the government to terminate the concessions.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

The concessions are purely fiscal and all licensees under the covered sectors are offered the same concessions. The competition concerns are the uncompetitive practices of businesses which occur as a result of mergers and acquisitions. Therefore, a policy regulating vertical and horizontal integration was drafted.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

Being a small island state Seychelles is categorised by a significant number of monopolies in the field of utilities, petroleum, public transport etc. As such by law, government allows monopolies to operate without competition. There is no regulatory oversight for competition in Seychelles. There are no concessions subject to

competition law, since we do not have a competition law in place. By the end of March, a Fair Trade law (which is in essence a competition law will be table in Parliament.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

There are evidence that concessions have brought about benefits for the consumers. There are better tourism infrastructures, greater choices for the consumers and in Seychelles more and higher quality service in the tourism sector is being established.

Sri Lanka

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

The restructuring of the downstream petroleum industry by way of privatization and liberalization of the operations of the state owned Ceylon Petroleum Corporation since 1994 entailed the granting of concessions primarily in the form of market exclusivities (monopolies and oligopolies) and price control as well as tax concessions and duty protections. In four transactions (two privatizations and two part-liberalizations) carried out in the lubricant, liquefied petroleum gas and petroleum fuel markets, the typical duration of market exclusivity and price control concessions granted has been five (5) years.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

Privatization and part-liberalization by way of public offering/tender was the modality for creating the aforementioned concessions. These transactions were carried out by the Public Enterprise Reforms Commission in terms of the Act, No. 1 of 1996. There are no specific laws for the granting/termination of such concessions other than the provisions available in the Board of Investment Act, No. 4 of 1978 dealing with tax concessions. In one out of the four transactions mentioned above, the privatization agreements entered into with the parties concerned allowed the government of Sri Lanka to terminate the concession relating to market exclusivity.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?

Competition concerns were taken into account in the part-liberalization transactions and not the privatization transactions. The absence of competition regulator resulted in issues relating to pricing (price increases and collusive price fixing) and access to essential infrastructure facilities. Special protection was granted in the form of price formulas and entry restrictions.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

The sector specific regulatory bodies such as Public Utilities Commission of Sri Lanka, Telecommunications Regulatory Commission, National Transport Commission, Insurance Board of Sri Lanka envisage the regulation of competition in the respective industries they are required to regulate. The draft legislation pertaining to the regulation of the downstream petroleum industry envisages the regulation of all petroleum product markets as well as market exclusivities and pricing concessions granted within such markets. However, all the above mentioned concessions, except for tax related concessions, have lapsed by now. The said draft industry statute envisages the granting of exemptions from the requirement of obtaining a license for the import, export, refine, blend, store, distribute, transport, wholesale or retail of petroleum resources or products as decided by the regulatory body concerned. There is no specific national competition law/authority in Sri Lanka yet.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

Concessions granted in the privatization of liquefied petroleum gas operations have resulted in greater infrastructure and enhanced safety of operations. The part liberalization of the petroleum fuel market has resulted in the upgrading of fuel filling stations, storage and terminal facilities as well as higher quality products. The part liberalization of the lubricant market has resulted in higher quality, better choice and competition in pricing.

Sweden

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

The term “concession” covers a vast range of sole rights granted by authorities. There exists no general definition of the term concession or statistics regarding concessions granted. For example, there are concessions in the mining industry, in aviation and related markets, in infrastructure such as telecommunication and in the energy market. It is difficult to approximate the number of granted concessions, since the supervision of the granted concessions is divided among several authorities. It is also difficult to say anything about the typical duration of a concession since this depends on the type of concession granted. Concessions for the construction and use of electric grids may, for example, be granted for a period of up to 40 years.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

Concessions may be created through the modalities mentioned in the question (public offering/tender, decrees, etc). There is no specific law that covers all types of concessions. However, the legal framework covering markets or industries in which concessions are possible, contain their own rules on concessions, i.e. under what circumstances they may be granted or terminated.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Since a concession generally grants the actor a de facto monopoly position on the market in question, competition concerns are regularly taken into account at the time of granting a concession, regardless of type of concession. This is specifically so when it comes to concessions granted through public offerings/tenders.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

In general, competition law applies to all sectors of the economy. There are sectors that have been regulated in a special way, aiming at other objectives than competition. One such example is the agricultural sector, which has been regulated at the EU-level through the Common Agricultural Policy (CAP).

The exemplified markets mentioned under question 1) are also under a specific regulatory oversight by different State authorities.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

In principle the answer would be yes, and the general idea of granting a concession, either through public offering/tender or a decree, is that it aims to benefit consumer welfare in all the ways indicated by the question.

Switzerland

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

In Switzerland, two types of concessions can be found: On the one hand concessions conferring a right to exercise a restricted or monopolised economic activity (e.g. railways infrastructure, transportation of passengers, the majority of postal services, TV and radio programmes, gambling houses), and on the other hand concessions conferring a right to make a special use of a public good (e.g. concession to use hydraulic energy, radio communication).

Due to the federal system, concessions can be granted at the federal (e.g. telecommunications), cantonal (e.g. use of hydraulic energy) or communal level. The concession is normally granted for a limited period of time, which is set by the competent authority and which varies depending on the concession concerned. Certain laws set a maximum duration for the concession (e.g. a maximum duration of 50 years is set in the Federal Law on railways, a maximum duration of 80 years is set in the Federal Law on the use of hydraulic energy, and a maximum duration of 25 years is set in the Federal Law on transportation of passengers). In the field of telecommunications, GSM concessions were granted for a duration of 10 years. Renewal is usually possible.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

There is no law generally regulating the creation, granting and termination of concessions. The modalities and requirements to be fulfilled are set in specific laws and ordinances as well as by the concession agreement concerned. Grounds for termination are usually set in the specific laws, and include expiration of the duration, withdrawal (if the concessionaire violates its obligations), renunciation by the concessionaire, or expropriation (for reasons of public interest).

According to the Federal Law on the internal market, concessions concerning a cantonal or communal monopoly must be granted through a tendering process and cannot discriminate between persons established or having their registered office in Switzerland.

This obligation does not apply to federal concessions. Here again, the modalities are set in the specific laws. For instance, the Federal Law on radio and television directly designates a concessionaire for broadcasting of radio and TV programmes. However, certain federal laws explicitly provide for a tendering process (e.g. Federal Law on telecommunications). Moreover, the principles set in the Federal Constitution, such as equality before the law and economic freedom, may in practice imply that concessions be granted via a tendering process.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

How competition concerns are taken into account at the time of granting of a concession depends on the specific law at stake. Competition concerns are for instance addressed in the Federal law on telecommunications. The law provides that the granting of a concession for radio communication should not seriously prevent effective competition, except if justified on grounds of economic efficiency.

Competition concerns are also addressed in the Federal law on transportation of passengers in relation to the granting of concessions: the enterprise requesting a concession must prove that it can supply transportation services adequately and in an economic manner.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

No sector is generally exempted from the Cartel Act. However, Article 3 (1) of the Cartel Act reserves provisions that exclude certain goods or services from competition on a market, in particular provisions that establish an official market or price system and provisions that entrust certain enterprises with the performance of public interest tasks, granting them special rights.

Thus, the Cartel Act applies in principle to activities subject to concessions, to the extent compatible with the regime provided for in the special law concerned.

Sectoral regulators exist in the field of telecommunications, radio and television, railways, civil aviation, energy and postal services.

The law may provide that the sectoral regulator shall consult the Competition Commission if a specific competition issue arises. This is the case for the Federal Law on radio and television, that states that the Competition Commission is consulted in order to determine whether an enterprise has a dominant position. Article 47 of the Cartel Act also states that the Competition Commission may provide advisory opinions to other authorities on issues of principle related to competition. It may do so on request or spontaneously.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?*

There is no general data available on the benefits brought about by concessions. It is assumed that concessions contribute to the general welfare, especially if they are linked to an obligation of universal service.

Thailand

- *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

Thailand has granted several types of concessions, namely the BOO (Build-Own-Operate), BOT (Build-Operate-Transfer) and BTO (Build-Transfer-Operate). The type of concession granted depended on the industry as well as legal constraints. However, the most common type of concession issued in Thailand is BOT. Normally, the duration of concession ranges from 15 – 25 years.

- *What were the modalities for creating a concession (public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

When the government decided to allow private sector to participate in protected industry¹, such PPP (Public Private Participation) process has to follow the 1992 Joint Venture Act (B.E. 2535). The act outlines the detailed selection procedure, the duty of the state in examining the private operations, as well as the causes to terminate the concession.

The most common method to award a concession was through the bidding process. The operator, who offered the highest revenue/profit sharing to the state and passed all technical requirements, was usually awarded the concession.

However, since the concession is a legalised contract, the termination or alternation of concession arrangements can be made only in the cases that there is an infringement of the 1992 Joint Venture Act or there is a mutual agreement between the two counterparties.

- *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

Competition was taken into consideration at the time of granting a concession. Even though concessions were usually embedded with some anti-competition characteristics (e.g. exclusive rights), the Thai government granted concessions mostly in the services that were associated with monopolistic characteristics (e.g. economy of scale or natural monopoly), which as a consequence, it was economically reasonable to have a sole operator in such service.

However, the government also granted concessions in some industries where the state operation could not effectively serve social demand (e.g. telecommunications or bus transportation). In order to prevent market domination, the government tried to create competition among concessionaires. For example, the state enterprises continued to provide their normal services. Also concessions were usually granted to several operators in particular services with a certain degree of price control.

After all, the arrival of globalization forced Thailand to reform a number of industries (e.g. banking, telecommunications, energy, etc.). Monopoly has to be replaced with competition and the industry has to be regulated by an independent regulatory body.

There are clear evidences of the benefit of concessions for Thai consumers. Concessions in telecommunication (e.g. fixed line, mobile, and internet) and transportation industries (e.g. land transportation, subway, and toll road) can be explicit examples.

Before the issuance of the concessions, these services were usually insufficient, inefficient, and expensive. The participation of private sector via concessions brought about a number of benefits for consumers as well as the country (economically and socially).

In the telecommunication industry, consumers do not have to wait for years to get telephone lines connected. The variety and quality of services have increased dramatically. Also, the prices have gone down considerably so that Thailand has become one of the countries with the cheapest service fees. As for the transportation industry, a number of mass transportation infrastructures (e.g. toll road, bus, subway, and sky train) were built under the PPP scheme, which as a result improved the quality and availability of services nationwide.

Trinidad and Tobago

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

Concessions have been granted to 37 persons for the provision of FM radio broadcasting services, 11 persons authorized to provide international telecommunications services and/or networks, 2 domestic mobile telecommunications network/service providers, 8 persons authorized to provide a subscription broadcasting services, 2 persons authorized to provide a television service via a subscription broadcasting network, 9 persons authorized to provide a free to air television broadcasting service, and 7 fixed telecommunications network and service providers. The current list of concessions granted can be viewed at http://tatt.org.tt/ddocs/Concessions_Feb09.htm. It should be noted that some of the services provided require more than one concession.

2. *What were the modalities for creating a concession (public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the Government to terminate the concession?*

LEGAL FRAMEWORK

Concessions are granted pursuant to section 21 of the Telecommunications Act 2001 (as amended by the Telecommunications (Amendment) Act 2004), and are required by any person who wishes to operate a public telecommunications network or provide a public telecommunications or broadcasting service. The concession is contained in a comprehensive document containing various conditions with which the provider must comply.

It should be noted that the Authority is also responsible for the grant of licenses for the use of the radiofrequency spectrum, pursuant to section 36 of the Act.

Application for a concession is made to the Telecommunications Authority in the prescribed form, and the concessions are granted by the Minister responsible for telecommunications, currently the Minister of Public Administration upon the recommendation of the Authority. The Authority considers applications for concessions in either of two ways, either first come first served, or via a competitive process. The Authority's processes for the consideration of applications for concessions and licenses are set out in the Authorisation Framework for the Telecommunications and Broadcasting Sectors in Trinidad and Tobago, available for viewing at <http://tatt.org.tt/ddocs/AuthorisationFramework.pdf>.

COMPETITIVE PROCESS

Where the Authority determines that the operation of a particular network or provision of a particular service requires scarce spectrum resources or should for some other reason (such as an assessment of competition, or the public interest) be

limited to a number of persons which is less than the number of persons interested in providing the service or operating that type of network, applications for concession are made via a competitive process. A competitive process may include an auction or comparative evaluation (“beauty contest”) or a combination of the two. For example, the policy decision made by cabinet on the advice of the Authority (based on viable competition) was that there should be a total of three mobile providers in Trinidad and Tobago. Spectrum scarcity also limited the number of mobile providers that could be accommodated in Trinidad and Tobago. As a result a hybrid process comprising a comparative evaluation and an auction was held in 2005 which resulted in the grant of concessions to Digicel and Laqtel to provide mobile services (in addition to TSTT). Similarly, the Authority is currently engaged in a process to select via auction, persons for the grant of licenses to use spectrum in certain bands for the provision of broadband wireless access services. Television and FM Radio services are also currently authorized via competitive processes, the most recent being the grant of two new television concessions in early 2008.

FIRST COME FIRST SERVED

Where there are no issues of scarcity or limitations due to competition, the FCFS process is used in which persons may apply at any time for concessions, and evaluation is by objective scoring, in which a participant must achieve a score of 70% overall in criteria which assess technical and financial competence of the applicant.

TERMINATION

The Telecommunications Act 2001 contains provisions for termination of concessions by the Minister, for a material breach of the concession or the Act.

- 3. Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

As noted above, the number of mobile providers permitted to operate in the Trinidad and Tobago market was determined based in part on the level of competition that was felt to be sustainable in the market. For other sectors, though there are considerations regarding competition at the time that any market is opened up there have not been limitations based on competition. However, in evaluation of an application, the Authority considers the competition benefits likely to be derived by the public from the provision by the new applicant of its services.

In relation to price controls, section 29 of the Act provides the ability for the Authority to regulate the prices of a concessionaire where it detects acts of unfair competition, where a provider is dominant and has been declared as such by the Authority, or where there is a monopoly provider. The Authority has commenced a procedure to consider whether any provider in the fixed telecommunications services market is dominant, and if so, to address the regulation of prices in that sector. Due to

a lack of comprehensive regulations to address price regulation, the process for doing so is long and cumbersome.

The concessions granted by the Authority prohibit anticompetitive behavior (Condition A23, of the general concession document) and the Authority has intervened in the market on occasions in the past to prevent anti-competitive behavior.

4. *Which sectors from your country are exempted from competition law?
According to Section 3 of the Fair Trading Act 2006, the telecommunications sector, the banking and non banking sector are exempt from the provisions of the Act.*

Matters related to competition in the telecommunications sector are to be dealt with by the Telecommunications Authority under the Telecommunications Act of 2001. In respect of service providers in the regulated industries sector, Section 3(2) of the Fair Trading Act provides that the Act would apply to this sector, however enforcement would lie with the Regulated Industries Commission which is governed by the Regulated Industries Act No. 26 of 1998.

Concessions are not subject to the national competition law.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices or overall consumer welfare?*

In respect of benefits regarding consumers based on concessions in the telecommunications sector, references have been made to the Annual Market Report published by the Authority for the years 2006 (http://tatt.org.tt/ddocs/Market_Report_2006.pdf) and 2007 (http://tatt.org.tt/ddocs/Market_Report_2007.pdf). They both indicate some of the benefits that competition has brought to the market. The Authority has also commissioned a Digital Divide Survey (http://tatt.org.tt/ddocs/Digital_Divide_Report.pdf) which indicates advances in relation to the availability of ICTs, and the improvement experienced since the onset of competition.

Tunisia

1. *Prière d'indiquer le nombre et le type de concessions qui ont été accordées dans votre pays. Veuillez aussi indiquer la durée habituelle/moyenne d'une concession.*

Dans le cadre du désengagement de l'Etat de l'activité économique, la formule de concession a été adoptée comme un moyen de libéralisation et de renforcement du rôle du secteur privé. Les concessions ont concerné certains services d'intérêt général qui sont habituellement assurés par l'administration ou les entreprises publiques

Depuis 1989 et jusqu'à l'année 2009, 63 opérations de concession ont été réalisées dans divers domaines tels que : la gestion des autoroutes, la construction de ports et d'aéroport, l'énergie, la construction de complexe sportifs, l'exploitation des zones franches mais aussi d'autres secteurs tels que les services portuaires, le gardiennage, l'assainissement, la gestion des parkings...

L'octroi de ces concessions se fait par appel à la concurrence ou de gré à gré selon des conditions fixées par cahier de charges.

La durée de ces concessions peut varier de 5 à 30 ans selon l'importance du projet ou de l'opération.

Pour les investissements d'infrastructure, les modalités de gestion de la concession se fait selon plusieurs formules :

- réalisation, propriété, gestion puis transfert : BOOT
- réalisation, gestion puis transfert : BOT ;
- réalisation et gestion : BO ;

Plusieurs investissements ont été réalisés par le biais d'opération de concession dans différents secteurs :

L'énergie:

a- Production d'électricité :

La production de l'électricité a été le monopole d'une entreprise publique (STEG). En 1996, une loi a été promulguée permettant la possibilité de l'octroi aux privés de concession pour la production de l'électricité. A partir de l'année 2000 plusieurs concessions ont été réalisées dans ce domaine dont les plus importantes sont la construction de deux centrales électriques à cycle combiné : Rades II et Zarzis (centrale el Bibane).

Ces concessions ont été accordées en deux phases :

- une phase de présélection, puis
- appel d'offres restreint

-Centrale Rades II : le consortium américano-japonais composé de PSEG (60 %) et de Marubeni (40 %) a remporté pour 250M\$US la construction de la centrale de Rades

premier projet BOOT tunisien et d'une puissance de (471 MW) et dont la durée est de vingt ans.

- Centrale el Bibane : le groupe Centurion (50 %) et Caterpillar (50 %) a obtenu la construction de la centrale d'une puissance de 27 MW pour 29 M\$US selon la formule BOOT, la centrale est entrée en service en 2002.

Cette production privée de l'électricité a permis de couvrir 24% des besoins du pays.

b- Construction d'une raffinerie (Skhira):

Dans le cadre du développement des capacités de raffinage, la construction et l'exploitation d'une nouvelle raffinerie a été confiée à Qatar Petroleum Refinery pour 2 milliards de dollars US. La raffinerie sera opérationnelle en 2011 et aura une capacité de 120.000 barils par jour. La durée de la concession est de 30 ans.

c- Télécommunications:

Le nouveau code des télécommunications qui date de 2001 et ayant pour objet l'organisation du secteur des télécommunications a consacré l'ouverture du secteur à l'initiative privée.

- Téléphonie mobile:

La téléphonie mobile a connu en Tunisie une évolution vertigineuse suite à l'ouverture du secteur à l'initiative privée et à l'octroi d'une concession à un deuxième opérateur. Actuellement le marché est réparti presque en égalité entre les deux opérateurs: Tunisie-Télécom, l'opérateur historique et national, et l'entreprise Egyptienne Orascom Telecom Tunisie. L'opérateur privé qui est entré en activité en 2002. Une concession est en cours pour l'introduction d'un troisième opérateur troisième génération il est attendu que ce nouveau entrant opérera dans les segments mobile, fixe et internet.

d- Transport : le secteur du transport a été ouvert à la concurrence par le biais des concessions, et ce pour les différents modes.

- Transport urbain:

Le transport urbain a été ouvert à l'initiative privée depuis 1989. La Société de Transport de Tunis, opérateur public exploite le réseau du métro de Tunis et 1200 bus. Quatre opérateurs privés ont été introduits dans le secteur du transport urbain exploitant actuellement 38 lignes dans le Grand Tunis.

-Transport aérien :

La stratégie du gouvernement dans le secteur du transport aérien consiste à encourager la participation privée dans les activités d'aviation civile. Depuis 1996, les activités de fret aérien et de transport de passagers non réguliers ont été ouvertes à l'initiative privée, depuis les activités suivantes ont été concédées :

- les activités aéronautiques :

- * les activités au sol (traitement des avions, passagers et bagages)
- * le catering
- les activités extra- aéronautiques :
 - * le commerce dans les zones sous douane
 - * le commerce dans les zones hors douane
 - * la gestion des publiphones
 - * la
- Construction de l'Aéroport d'Enfidha:

La compagnie turque TAV a remporté un appel d'offres pour la construction de l'Aéroport d'Enfidha, la concession porte aussi sur l'exploitation de l'aéroport de Monastir pour une période de 40 ans et pour un montant global de 400 millions d'euros.

C'est la première opération de concession d'aéroports en Tunisie, gérés jusqu'ici par l'Office public de l'aviation civile et des aéroports (OACA).

Le nouvel aéroport d'Enfidha qui aura une capacité initiale de 5 millions de voyageurs devrait être opérationnel en 2009, selon les prévisions. Tandis que L'aéroport international de Monastir dessert quelque 200 aéroports notamment européens et a une capacité de 3,5 millions de passagers par an et des recettes estimées à 50 millions d'euros par an.

Transport maritime:

- Construction d'un port en eau profonde à Enfidha:

La construction du Port d'Enfidha a été concédée selon la technique de BOT (Build-Operate-Transfer) à travers un appel d'offres. Ce projet estimé à 1.4 milliards d'euro est composé de :

- Un port en eau profonde, ayant pour la première étape 800 m de quais, pour atteindre 1,5 km dans la 2ème étape.
- une zone d'activité économique et logistique de 2000 hectares
- Terminal pour navires « croisiéristes » au port de la Goulette :

Dans le cadre du renforcement de l'infrastructure touristique et suite à l'augmentation du nombre de croisiéristes (qui atteindrait 1 million de croisiéristes à très court terme). Une concession a été accordée pour la construction d'un quai supplémentaire et d'une structure d'accueil pour la réception des navires croisiéristes sous le régime de B.O.T pour un investissement de 38 MD.

Concessions des autoroutes :

La construction du réseau autoroutier tunisien a débuté dans les années 80 avec l'ouverture d'un premier tronçon de 30 kilomètres en 1981 puis prolongé jusqu'à 51 kilomètres en 1986 le réseau est actuellement de 360 Km.

Dans le cadre de la réalisation de la Transmagrèbine, plusieurs autres projets sont en voie de réalisation notamment ceux en Algérie (fin 2009) et au Maroc prévue en 2010.

La gestion de ce réseau a été confiée à la société Tunisie autoroute par la technique de concession sur une période qui varie entre 35 et 40 ans.

2. *Quelles sont les modalités qui régissent l'octroi d'une concession (offre/adjudication publique, décrets, etc.) ? existe-t-il dans votre pays des lois qui régissent l'octroi/la résiliation d'une concession ? les contrats de concession comportent-ils des dispositions autorisant le gouvernement à résilier une concession ?*

a- Les modalités régissant l'octroi d'une concession :

Le régime juridique des concessions et les principes fondamentaux relatifs à leur octroi, exécution, suivi et contrôle sont définis par la loi N°2008-23 du 1er avril 2008 relative au régime des concessions. Selon cette loi, l'octroi de la concession est régi par la procédure d'appel offre publique avec appel à la concurrence. Toutefois il y a des spécificités sectorielles (Renégociation possible parfois obligatoire, Gré à gré en cas d'absence de candidat ou de concurrence) .

b- La résiliation d'une concession :

Le contrat de concession comporte, outre les dispositions relatives à la fin normale de la concession, des dispositions relatives à sa fin anticipée notamment dans les cas suivants

- 1- le rachat de la concession par le concédant après l'expiration d'une période déterminée dans le contrat.
- 2- La déchéance du concessionnaire prononcée par le concédant en cas de manquement grave à l'une de ses obligations substantielles
- 3- La résiliation du contrat par le concessionnaire en cas de non respect du concédant de l'une de ses obligations contractuelles substantielles
- 4- La résiliation du contrat en cas de force majeure.

3. *Veillez indiquer si les problèmes de concurrence sont pris en compte au moment d'accorder une concession. Quels problèmes de concurrence les concessions accordées dans votre pays ont –elles engendrées ? Une protection particulière est –elle accordée aux concessionnaires au moment de l'octroi de la concession pour prévenir l'abus de position dominante ainsi que le contrôle des entrées ou des prix ?*

Pour le choix du concessionnaire, le concédant est tenu de faire appel à la concurrence en vue d'assurer l'égalité des chances, la transparence et le respect des procédures et la garantie de l'obtention des meilleures offres possibles.

Lors de l'octroi d'une concession, plusieurs paramètres sont pris en considération comme la révision des tarifs, les conflits et abus éventuels des parties, le rôle du régulateur, l'ouverture du marché, le respect des normes de qualité, la continuité et l'universalité du service public, les engagements du concédant en matière d'investissement, le respect de la protection du consommateur.

Pour protéger la concurrence pendant la concession et afin de prévenir les abus, les autorités chargées de la concurrence jouent un rôle important ;

- Les concessions sont soumises à la réglementation de la concurrence (article 5 de la loi 64- 91 relative à la concurrence et aux prix interdisant les abus de position dominante, de dépendance économique)
- 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 à l'octroi de concession.
- L'autorité de la concurrence a toujours la possibilité d'intervenir par sa propre initiative (suite aux informations reçues, enquête...) pour réprimer et empêcher toute pratique anticoncurrentielle.

En outre certaines législations sectorielles relatives à des concessions, prévoient un système de fixation des prix pour assurer le meilleur rapport qualité /prix pour l'utilisateur et éviter toute exploitation de monopole pour l'augmentation abusive des prix.

4. *Prière d'indiquer les secteurs économiques qui ne sont pas assujettis au droit de la concurrence. Quels secteurs ou types de concessions sont soumis à des contrôles réglementaires spécifiques? les concessions sont –elles assujetties à la législation nationale en matière de concurrence ?*

Aucun secteur économique n'est exclu expressément du champ d'application de la loi tunisienne sur la concurrence. Les opérations de concessions sont soumises à un triple contrôle par:

- l'administration concédante, lors de l'octroi de la concession, en veillant à garantir l'égalité des chances, à l'accès au marché et au respect des réglementations sectorielles,
- les autorités de régulation qui veillent au respect du bon fonctionnement du secteur
- les autorités de concurrence qui veillent au respect des mécanismes du marché pour sanctionner tout comportement nuisible à la concurrence.

5. *Certains éléments indiquent-ils que les concessions accordées dans votre pays ont permis aux consommateurs d'en retirer certains avantages, tels que l'accès élargi à l'infrastructure, la diversification de la production, l'amélioration de la qualité des produits, la diminution des prix ou le bien être global des consommateurs?*

Le consommateur tunisien a tiré des avantages de l'introduction de la concurrence, par le biais des concessions dans plusieurs secteurs qui étaient autrefois en situation de monopole. Ces avantages sont principalement des prix plus concurrentiels, un meilleur choix et une meilleure qualité des services rendus. A titre d'exemple :

Le secteur du transport:

L'ouverture du secteur du transport à l'initiative privée a permis d'augmenter la part des investissements privés dans le secteur qui est passée de 26% durant la période 1997-2001 à 53% durant la période 2002-2006.

Dans le secteur du transport routier des voyageurs en milieu urbain, 4 opérateurs privés sont introduits sur le marché à côté d'une société publique qui était en situation de monopole qui a duré 30 ans.

Cette ouverture a permis d'atteindre plusieurs résultats positifs, notamment sur l'usager, notamment :

- plus de concurrence dans le secteur
- une meilleure qualité de service
- une maîtrise des coûts

Le secteur des télécommunications:

Les réformes engagées dans le secteur des télécommunications, en particulier sur le segment mobile, ont eu un impact énorme sur les performances du secteur. Elles ont permis d'augmenter considérablement la capacité du réseau, la satisfaction de la demande, la baisse des tarifs et l'introduction d'une dynamique de concurrence dans le secteur, un accès aisé aux services...

En quatre ans, le nombre d'abonnés à la téléphonie mobile est passé de 562 000 à 6 478 000 en 2006. Les tarifs d'accès sont passés de 150 dt avant l'entrée du 2ème opérateur à 10 Dt pour l'opérateur historique et à 5 dt pour le 2ème opérateur en 2005.

Les tarifs des communications ont baissé de 0.250 dt avant l'entrée du 2ème opérateur à 0.180 dt pour l'opérateur historique en mars 2005 et 0.224 dt en mai 2005 pour le 2ème opérateur.

L'augmentation rapide de la téléphonie mobile n'est pas seulement la conséquence de la performance du nouvel entrant, l'opérateur historique s'est également adapté à l'environnement plus libéral et a ajusté sa stratégie pour relever le défi de la concurrence.

Ukraine

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

The main principles of industry development in Ukraine are determined in the Concept of the State Industrial Policy approved by the President of Ukraine Order dd. February 12, 2003 No. 102/2003 and the State Program for Industry Development for 2003-2011 approved by the Cabinet of Ministers of Ukraine Resolution dd. July 28, 2003 No. 1174 (hereinafter referred to as “the Program”).

The said Program determines a complex of measures and tasks for development individually for each of the main industry sectors, including:

- machine building;
- rocket-and-space complex;
- ferrous and non-ferrous metallurgy;
- chemical and oil-chemical industry;
- light industry;
- production of wood and manufacture of wooden products;
- fuel and energy complex;
- fuel and energy complex;
- industry of construction materials;
- food industry.

The Program sets out its objective as creation of competitive industrial complex capable of solving the main tasks of social and economic development and establishment of Ukraine as a high-technology state in conditions of integration and globalization.

According to the Program, one of the industry development areas is increasing the competitive capabilities of industry.

Increase in the competitiveness of industrial production is viewed as a comprehensive category depending, on the one hand, on increase in the efficiency of the industrial complex, and on the other hand, on further liberalization of economy, formation of full-scale competitive environment and creation of equal conditions for business activity.

Even after establishment of Ukraine as a country with market economy and its entering the WTO, the second aspect remains especially relevant in the framework of the measures to be taken for acquisition of fully legitimate membership of the EU.

Creating conditions for the industry’s competitive capabilities growth and subsequent acceleration of its integration into the global economic system is provided for by way of reforming of the industry management system and acceleration of institutional transformations, and by way of increasing the efficiency of the state property management and development of competitive environment.

One of the main tasks of the Program aimed at increasing the efficiency of industrial production, expanding the volume of state-of-the-art competitive industrial products manufacture, establishing the grounds for formation of progressive export structure, and contributing to development of the internal market, constitutes in improvement of the industrial complex structure.

Development of competitive environment is a logical follow-up of economy reforming and development of the market relations. Its essence is in formation of full-rate competitive environment in the commodity markets, creation of equal conditions for business operation.

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

The Program recognizes the fact that in spite of enterprises of various branches having declared themselves (due to many types of industrial products) as competitive entities of the external market, however, their positions are not sufficiently stable because of internal problems, specifically, lack of investment resources and fluctuations of the global market conditions. These problems aggravated in conditions of the current global financial and economic crisis.

To support such enterprises, the main efforts shall be taken in the framework of pursuing the industrial policy. Performance of the set tasks shall be ensured through the system of branch development programs.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

N/A

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

Documents determining the grounds for industrial policy in Ukraine presently do not contain any provisions corresponding to the concept of "national champions".

In accordance with the legislation of Ukraine on protection of economic competition, the coordinated actions of business entities, which caused or may cause non-admission, removal, or limitation of competition, may be allowed by the relevant bodies of the Antimonopoly Committee of Ukraine, if their participants prove that such actions contribute to:

- improvement of production, purchase, or sale of goods;
- technical, process, and economic development;
- development of small or medium entrepreneurs;
- optimization of export or import of goods;
- development and use of unified technical conditions or standards for goods;
- production rationalization.

Such permit cannot be issued by bodies of the Antimonopoly Committee of Ukraine, if competition is considerably limited in the entire market or in any considerable part thereof.

Also, the legislation of Ukraine provides for an opportunity of the Cabinet of Ministers of Ukraine granting a permit for concentration, which was not permitted by the Antimonopoly Committee of Ukraine with the view of its leading to monopolization or considerable limitation of competition in the entire market or in any considerable part thereof, if positive effect for public interests of the said concentration prevails over the negative consequences of limitation of competition (if limitation of competition predetermined by concentration is required for achievement of the objective of concentration and poses no threat to the market economy system).

5. Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices; overall consumer welfare?

The competition legislation of Ukraine contains no provisions implying incentives to business entities in any area of economy. At the same time, the competition legislation of Ukraine contains a number of exceptions in respect of imposing responsibility on business entities provided for performance of anti-competitive coordinated actions, specifically:

a) any voluntary coordinated actions of small or medium entrepreneurs in respect of joint purchase of goods, which do not lead to considerable limitation of competition and contribute to increase in the competitiveness of small or medium entrepreneurs;

b) coordinated actions in respect of supply or use of goods (excluding cases, when they cause considerable limitation of competition, limit access to the market for other business entities, cause economically unreasonable increase in prices or lack of goods), of a participant of the coordinated actions sets the limit for another participant of the coordinated actions on:

- use of their supplied goods or goods of other suppliers;
- purchase from other business entities or sale to other business entities or consumers of other goods;
- purchase of goods being by their nature or under trade and other fair practices in business operation beyond the scope of the subject of the agreement;
- formation of prices or other terms of agreement on sales of supplied goods to other business entities or consumers;

c) agreements on transfer of intellectual property rights or use of the intellectual property to the extent they limit the economic operation of the party to the agreement, to which the right is transferred, if such limitation do not go beyond the legal rights of the subject of intellectual property right.

Uruguay

1. *¿Cuántas concesiones, y de qué tipo, se han otorgado en el país? ¿Cuál es la duración habitual o media de una concesión?*

No se dispone de información respecto al número de concesiones. Las concesiones incluyen aeropuertos, terminales portuarias de contenedores, autopistas, hoteles propiedad de los municipios, algunas centrales térmicas, etc. No se dispone de información general respecto de la duración, pero puede ser por 20 años o más.

2. *¿Cuáles fueron las modalidades empleadas para otorgar concesiones (oferta, licitación pública, decreto, etc.)? ¿Hay en el país alguna ley que rija el otorgamiento y la rescisión de concesiones? ¿En los acuerdos de concesión se incluyen disposiciones que permitan la rescisión por parte del Gobierno?*

En general son por concurso o licitación pública. Existen normas generales para otorgar o terminar una licitación, las que se determinan en los pliegos o en los correspondientes contratos. Hay disposiciones que permiten al gobierno terminar una concesión.

3. *¿Se han tomado en cuenta las consideraciones relativas a la competencia en el otorgamiento de concesiones? ¿Qué nuevas consideraciones o cuestiones se han planteado como consecuencia de las concesiones otorgadas en el país? ¿Se ha dado a los concesionarios protección especial con respecto al abuso de posición de dominio, la entrada o el control de los precios al otorgárseles una concesión?*

En general no está explícita en los llamados. No hay reglas generales de competencia en los mismos. Existe un problema puntual con una licitación de terminal portuaria, donde una empresa tiene el monopolio y se está evaluando licitar otra terminal portuaria con otro participante para garantizar un marco competitivo.

En general las licitaciones incluyen un pago al Estado por concepto de canon o un precio a cobrar a los agentes por el uso de la misma, o en su defecto un mecanismo para el establecimiento de las tarifas.

4. *¿Qué sectores de la economía están exentos de la aplicación del derecho sobre la competencia? ¿Qué sectores o qué tipo de concesiones son objeto de una reglamentación específica? ¿Las concesiones están sujetas al derecho nacional sobre la competencia?*

Sólo el Estado está exento de la ley de competencia, pero después todos los agentes económicos, independientemente de si son públicos o privados, con o sin fines de lucro, están alcanzados por las normas de competencia.

El sector transporte y portuario está bajo regulación específica.

En principio las concesiones están sujetas a las normas de competencia.

5. *¿Hay pruebas de que las concesiones hayan aportado beneficios a los consumidores del país en términos de infraestructura, diversificación, calidad, precios o bienestar general del consumidor?*

No hay estudios científicos respecto de tales beneficios.

USA

1. *How many and what type of concessions have been granted in your country? What is the typical/average duration of a concession?*

Because of the differing nature of concessions and the fact that many are quite local, it would be difficult to even estimate the number of concessions operating in the United States. Concessions in the United States generally fall into three categories.

First, many are small or localized concessions, such as those to provide food, lodging or similar services to tourists and visitors to public parks and other facilities. For example, the National Park Service of the U.S. Department of the Interior grants or maintains several hundred such arrangements annually.³⁵ Concessions are also routinely granted by state and local airport authorities to firms to provide a variety of airport services, ranging from fixed-base operator services to operation of airport restaurants.

Second, other concessions take the form of arrangements by which governments, typically at the state and local level, contract with private entities for the provision of government services for which fees are charged. These concessions might include water supply,³⁶ trash removal, toll roads, ferry services, and the operation of cable television systems.

Third, the more significant concessions are those by which the government allocates rights to commercialize scarce resources to the private sector. For example, the Federal Communications Commission allocates segments of the radio spectrum to the exclusive use of telecommunications providers. The Federal government allocates landings slots at a handful of congested airports to particular airlines.³⁷

2. *What were the modalities for creating a concession (Public offering/tender, decree, etc.)? Is there a law in your country for the granting/termination of concessions? Are there provisions in concession agreements which allow the government to terminate the concession?*

State, local, and Federal government entities grant concessions for a variety of purposes under their own statutory authority. Apart from cases where a governmental unit contracts with a private party for the performance of public services and federal or state public procurement laws apply, there is no

³⁵ These can be seen on the Park Service's web site, <http://concessions.nps.gov/>. The Park Service's concessions are governed by its own statute and agency regulations. National Parks Omnibus Management Act of 1998, Public Law 105-391, Title IV, and 36 CFR 51.

³⁶ See United States submission to 2004 OECD Roundtable on Competition and Regulation in the Water Sector, available at <http://www.ftc.gov/bc/international/docs/compcomm/2004--Roundtable%20on%20Competition%20and%20Regulation.pdf>.

³⁷ This system is discussed in the United States' submissions to two OECD meetings. See the United States Submission to the 2006 OECD Global Forum on Competition Roundtable on Concessions, <http://www.oecd.org/dataoecd/10/27/35892640.pdf>, Roundtable Discussion on Competition Issues in the Allocation of Airport Take-off, Landing Slots and Ground Handling Services, available at <http://www.ftc.gov/bc/international/docs/compcomm/1997--Roundtable%20Discussion%20on%20Comp.%20Issues.pdf>.

Note that there is a distinction between services which are inherently governmental and those that are not. Allocation of airwaves or airport slots relates to services that are not inherently governmental in nature, as opposed to trash collection and park services, which normally are.

comprehensive statutory basis for the creating of concessions. Different statutory enactments apply to different sectors in different jurisdictions.

3. *Were competition concerns taken into account at the time of granting a concession? What are the competition concerns or issues that have arose from concessions in your country? Was special protection in regard to dominance, entry or price control granted to concessionaires at the time of granting a concession?*

The principal competition issue surrounding concessions in the United States may be the extent to which competition concerns are taken into account in the granting of the concession. Governmental activity in granting concessions usually is outside of the scope of the United States' antitrust laws because those laws do not apply to the sovereign acts of governmental units that grant concessions. Accordingly, the granting of concessions is essentially a policy issue, not an enforcement issue.

The United States has recognized the value of competition as a tool for allocating public resources in the concession-granting process. In the 2006 OECD Global Forum on Competition, the United States submitted a paper detailing its experiences with the granting and operations of airport take-off and landing "slots." As the paper stated, "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."³⁸ The United States' paper discussed the utility of allowing "secondary markets" that buy and sell slots, the relative merits of "congestion pricing fees" versus slot auctions, and recurring issues regarding incumbent carriers with market power at particular airports.³⁹

Similarly, the Justice Department's Antitrust Division filed comments in 2006 with the Federal Communications Commission regarding its auction for advanced wireless services. The Department supported the FCC's proposal not to disclose the identities of bidders making provisionally winning bids until the close of the auction, arguing that non-disclosure would reduce opportunities for tacit collusion among bidders and thus would preserve competition in the auction.⁴⁰

Perhaps the most vexing challenge in dealing with competition problems in the concessions area is recognizing the existence of a competition issue. In many cases, the concession-granting agency has no institutional familiarity with competition issues, and may over- or under-regulate the sector involved. The Justice Department and the Federal Trade Commission maintain competition advocacy programs that often address such regulatory regimes.⁴¹

³⁸ See <http://www.oecd.org/dataoecd/10/27/35892640.pdf> at paragraph 1.

³⁹ See also "Proposal for a Market-Based Solution to Airport Delays," U.S. Department of Justice, Antitrust Division, Economic Analysis Group Discussion Paper, Regulation (Spring 2008) at p. 30, available at www.cato.org/pubs/regulation/regv31n1/v31n1-5.pdf.

⁴⁰ Ex Parte Submission of the Department of Justice, In the Matter of the Auction for Advanced Wireless Services, March 3, 2006, available at <http://www.usdoj.gov/atr/public/comments/215087.htm>.

⁴¹ See International Competition Network, Antitrust Enforcement in Regulated Sectors Working Group, Subgroup 3: Interrelations between Antitrust and Regulatory Authorities, Report to the Third ICN Annual Conference (2004), and Submission by the United States in the Annex at 100, available at http://www.internationalcompetitionnetwork.org/media/library/conference_3rd_seoul_2004/aers_sg3_seoul.pdf?bcsi_scan_129F6A3CDB83467E=0&bcsi_scan_filename=aers_sg3_seoul.pdf.

In many cases where services provided by concession holders are not subject to significant competition and where the concession creates market power in a significant market, regulatory programs are maintained to ensure that the concession holder provides the desired level of service at reasonable rates. Stated otherwise, this may be appropriate when consumers are not free to react to high prices or poor service by taking their business elsewhere. Regulation typically takes place at the state or local level.⁴² Thus, for example, local telecommunications regulators oversee local cable television franchises, local transport regulators oversee toll road concessions, and so forth. Many concessions, however, require no regulatory oversight at all, either because (as in the case of airport restaurants or National Park campgrounds) they do not involve grants of market power in any relevant antitrust market, or because whatever competition concerns might exist have been addressed in the course of the concession-granting process.

4. *Which sectors from your economy are exempted from competition law? Which sectors or what type of concessions are under a specific regulatory oversight? Are concessions subject to the national competition law?*

As is the case in many countries, a limited number of industries have obtained exemptions from the antitrust laws through the political process. Among others, these include certain aspects of the business of insurance, ocean shipping, and freight railroads.⁴³ As the United States Antitrust Modernization Commission recently recommended: “Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability and is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.”⁴⁴ United States antitrust exemptions were also discussed in the 2008 WTO Trade Policy Review of the United States, which noted that “Federal antitrust legislation covers all sectors and interstate and foreign commerce, subject to some exceptions.”⁴⁵ There is no antitrust exemption for “concessions” as such.

While actions of governmental units in granting concessions usually are outside the scope of the United States’ competition legislation, anticompetitive acts by firms seeking concessions, such as bid-rigging, are fully subject to national (or sometimes state) competition laws. Anticompetitive conduct in the operation of a concession often would be subject to competition laws too, depending on the role of regulation in the particular context. It is relatively unusual, however, for competition law enforcement issues to arise from the operation of concessions. Local concessions of the first sort described above would not normally enjoy significant market power or raise unusual competition concerns. In cases where a concession does confer market

⁴² The interrelationship between competition and regulatory authorities in the United States is described in more detail in a 2005 U.S. Submission to the OECD Global Forum on Competition, available at <http://www.ftc.gov/bc/international/docs/compcomm/2005--The%20Relationship%20Between%20Competition%20Authorities.pdf>.

⁴³ A list of exemptions to the United States’ antitrust laws can be found in Annex A of the 2007 United States Antitrust Modernization Commission report, p. 378, available at http://govinfo.library.unt.edu/amc/report_recommendation/chapter4.pdf.

⁴⁴ *Id.*, p. 335.

⁴⁵ WTO Trade Policy Review of the United States, Secretariat Report Paras. 19 and 216, at pages x and 66, WT/TPR/S/200 (2008), available at <http://docsonline.wto.org>.

power and some kind of intervention is needed in the absence of effective competition, the normal approach is to impose regulatory oversight. Regulatory oversight exists in several sectors in which concessions are typically granted, including energy, communications, and transportation.

5. *Is there evidence in your country that concessions have brought about benefits for consumers in terms of greater infrastructure, diversification, higher quality, better prices, overall consumer welfare?*

Concessions appear to have brought consumer benefits of the type described. Experienced private sector providers should be able to offer higher quality and more efficient services in many cases than a government would be able to do directly, if it did so at all. In many cases, the grant of concessions leads to public benefits that would not otherwise have come about. A U.S. General Accounting Office report on highway construction, for example, found that when private sector concessions were employed to build highways, “major projects were built sooner than if the private sector had not become actively involved.”⁴⁶ In connection with the National Park Service’s “concessions” program described above, it was stated that “[t]he present day concession program ... ensur[es] that park users have access to high quality commercial visitor services at reasonable prices.” Moreover, resources such as the telecommunications spectrum and airline landing slots subject to concessions are effectively and efficiently utilized by the private sector so long as transparent and pro-competitive procedures are used to allocate those resources.

⁴⁶ See United States General Accounting Office, *Highways and Transit, Private Sector Sponsorship of and Investment in Major Projects Has Been Limited* (March 2004) at 15, available at <http://www.gao.gov/new.items/d04419.pdf>.