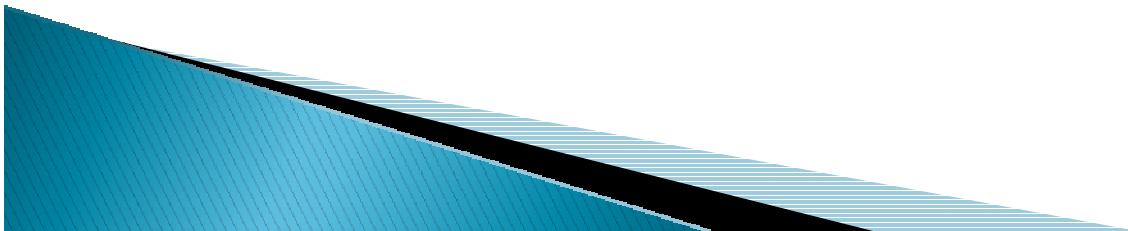


Competition Concerns in Concession Agreements in Infrastructure Sectors

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Understanding Concession Agreements

- ▶ Concession agreements are contracts between a Government authority and a private entity, which vests a public facility or service of specified standards on the private entity
- ▶ Concession agreements are Government sanctioned monopolies to set up, operate and maintain such facility/ service for a fixed duration
- ▶ Therefore they result in the creation of a dominant private player
- ▶ Main sectors in which Concessions are offered: National Highways, Roads, Airports, Railways, Ports, Telecom, Energy Generation and Distribution
- ▶ Each of these sectors have sector-specific regulatory frameworks governing the nature of Concessions that can be granted

Identification of Key Sectors and Focus States for the Study

Using the Competition Assessment Framework, is the Sector:

- Important to the economy?
 - Important for consumer welfare?
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- For infrastructure sectors, which have been public monopolies, this first step of Inquiry most critical for identifying sectors. Any infrastructure sector will fall within this purview.
 - We will assess Concessions granted by Government of India, and Governments of key states: identified on basis of stage of economic development

Key Sectors and Focus States for the Study

▶ **Key Sectors for the Study:**

- Transportation:
 - Roads
 - National Highways
 - Ports
 - Airports
 - Ports
- Energy:
 - Natural Gas [Exploration and Production, Pipelines and LNG]
 - Electricity [Generation, Transmission and Distribution]

▶ **Focus Areas for the Study:** Concessions granted by:

- Central Government, and
- State Governments of Gujarat, Maharashtra, Tamil Nadu and Bihar

Objectives: Overview

- I. Analysis of the Legal framework relating to Grant of Concessions in the key sectors
- II. Analysis of a few sample Concession agreements to identify elements that safeguard principles of competition once the Concession is granted
- III. Assessment of the experience of other jurisdictions in dealing with competition concerns in the context of concessions granted in infrastructure sectors
- IV. Analysis of the Competition Act, 2002, and identification of principles relevant for addressing competition concerns in Concession Agreements.
- V. Suggestions for a framework for addressing competition concerns in Concession Agreements

I. Analysis of the Legal framework relating to Grant of Concessions in Infrastructure sectors

- Assessment of the sector specific legal framework for grant of concessions
- Assess the process of Selection of Concessionaire: Design of the Bidding process & Principles for Bid evaluation
- Assessment of case laws: Major Supreme Court and High Court decisions that provide the basic principles applicable to grant of concession agreements to private entities. The focus will be on case laws that deal with principles of competition
- Ascertain if this framework/ government policies limits or promotes competition
- Assess the benefits of the framework on the economy/ consumers

II. Analysis of elements in sample Concession Agreements that safeguard principles of competition once the Concession is granted

Focus will be on how concession agreements are structured in relation to elements such as:

- Duration;
- Service delivery criteria;
- Determination and collection of tolls and fees;
- Any non-compete provisions or provisions regulating establishment of competing facilities;
- Regulation of Access to the facility;
- Monitoring of implementation; and
- Dispute settlement.

III. Assessment of the experience of other jurisdictions in dealing with competition concerns in concessions granted in infrastructure sectors

- Experiences from jurisdictions like the US, EU, UK, Australia, Canada, Brazil and Mexico will be studied. Secondary research based on available information.
- Preliminary research– main issue seems to have been defining access to the facility. Assessment of how the Essential Facilities principle has been applied in some of these jurisdictions.
 - Essential Facilities doctrine holds that a firm may incur liability under competition law if it does not provide access to its unique facilities on a non-discriminatory basis where sharing is feasible. It has been used mainly in the context of access to competitors.
- Assessment of any other competition related concerns that have arisen, and how they have been addressed.

IV. Analysis of the Competition Act, 2002, and identification of principles relevant for addressing competition concerns in Concession Agreements.

- ▶ The Act does not penalize ‘Dominance’
- ▶ It however frowns upon ‘Abuse of Dominance’:
 - **Unfair of Discriminatory conditions in Price**
 - Limiting or restricting production of goods or provision of services
 - Limiting or restricting technical/ scientific development
 - **Denial of market access**
 - **Making contracts subject to supplementary conditions which have no connection with main subject matter**
 - **Using dominant position in one market to enter into another**

[The highlighted elements are most relevant for the present study]

Principles on Abuse of Dominance from India's Competition Act

Our preliminary analysis is that broadly 2 types of conduct by a Concessionaire will come within the purview of the Competition Act:

- ▶ Exploitative Conduct –
 - Unfair or Discriminatory pricing
 - Making contracts subject to supplementary conditions which have no connection with main subject matter
 - Using dominant position in one market to enter into another
- ▶ Exclusionary Conduct– e.g.: denial of access to the infrastructure facility

The principles of the Act relating to Abuse of Dominance will be assessed in order to determine the framework within which such conduct will need to be addressed.

V. Suggestions for a framework for addressing competition concerns in Concession Agreements

- Assessment of the interface between the Sectoral Regulator and the Competition Commission:
 - Most sectoral regulations have as a function of the regulator the promotion of competition in that sector. Ambit of power differs from sector to sector.
 - E.g.: Electricity Act: Direct intervention on Competition issues
 - E.g.: Petroleum and Natural Gas Regulatory Board Act: Regulation and promotion of 'fair competition' and prevention of 'restrictive trade practice'.
 - E.g.: Airport Economic Regulatory Authority Bill, 2007: Clear deference to CCI on any issue relating to competition.
- Identification of principles for addressing Competition concerns in infrastructure concessions under the Competition Act & Role of the Competition Commission of India.

Examples of Competition Principles in Sectoral Regulation

- ▶ Electricity Act: CERC may issue directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry
- ▶ PNGRB Act: PNGRB has a role to ensure fair competition and promote efficiency; and take measures against 'restrictive trade practice'.
- ▶ AERA Bill, 2007: Specifically excludes matters which are within the purview of the Competition Act, 2002 from the jurisdiction of the Airports Economic Regulatory Authority Appellate Tribunal.

THANK YOU