

ART Seminar

“Yardstick Competition in Transport”

Benchmarking in competition policy:

**looking at yardstick competition
within a broader regulatory strategy**

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Outline

- 1. Role of benchmarking in competition policy: three scenarios**
- 2. Competition in the market**
- 3. Competition for the market**
- 4. Absence of competition, either in or for the market**
- 5. Some remarks**

I. Role of benchmarking in competition policy: three scenarios

Three scenarios in a context of imperfect information

- **Competition in the market:** companies are incentivized to look for efficiency, better products and contain prices on a continuous basis
- **Competition for the market:** if the tender is properly designed, potential competitors will reveal information on the best price/quality combination they are able to offer at the time of the tender. We lose the incentives which competition in the market provides on a continuous basis: importance of a proper contract/regulation
- **No competition, either in or for the market:** how do we collect the information needed to ensure the right incentives by means of an appropriate contract/regulation?

A pro-competitive regulatory strategy

- There is an order of preferences with respect to the 3 scenarios, which depends on their different effectiveness in extracting information in a dynamic context and aligning the incentives of companies in the ultimate interest of consumers and taxpayers. The reduction of unjustified barriers to entry is usually a first best strategy
- Which of the three scenario should be pursued in specific cases depends on feasibility: market studies are of the utmost importance to understand what kind of competition, or simulated competition, is feasible in a market (in some sectors, e.g. airports, there may be competition in the market also for infrastructures)

Benchmarking

Benchmarking, broadly defined as “the use of something as a standard in order to improve performance levels” can play a role in each of the 3 scenarios

2. Benchmarking and competition in the market

With competition in the market ...

- it is in the interest of companies to take into account what more efficient competitors do and adapt their business strategies (*market led benchmarking*)
- comparison of different offers may also be used as a marketing tool (comparative advertising based on objective criteria is compatible with EU law)

Caveat: if companies collude, the virtuous mechanism is blocked

Competition with significant market power

- What if a company, although not a monopolist, is not significantly constrained by competitors (dominant position)?
- In the absence of proper regulation, Art. 102 TFEU may be used by competition authorities to prohibit the abusive exploitation of dominance. In order to assess, for instance, whether prices are excessive, the case law makes reference to benchmarking
- With competition in the market, before using Art. 102 or regulation to directly constrain market power, alternatives should be considered. Some authors suggest that one might start with the threat of monitoring/ benchmarking

3. Benchmarking and competition for the market

Optimal management areas and incentives to efficiency/effectiveness

- The analysis of costs (economies of scale and scope) is useful to properly design the scope of tenders: not only static efficiency, also promotion of competition by comparison (see Art. 37.2.a Decree Law 201/2011 and decision ART 70/2016 on toll motorways)
- Benchmarking may be used to promote proper incentives in terms of efficiency and effectiveness, by means of contract and/or regulation (see competences of ART with respect to the award of exclusive contracts for transport services Art. 37.2.f)
- Is the current legislative framework sufficient to support competition for the market with appropriate benchmarking in all areas in which it may be relevant?

Still on competition for the market

- Collusion would eliminate the incentive to submit competitive bids, and therefore the efficiency enhancing role of tenders
- In State aid control of services of general economic interest, including transport services, competition for the market leads to presumption of no overcompensation (*Altmark*)

**4. Benchmarking
in the absence of competition,
either in or for the market**

The challenge for public decision makers

- Public authorities have to collect information in order to attain a proper contract/regulation, with the aim to avoid inefficiencies and undue exploitation of power (poor quality, excessive prices or subsidies), since no information or incentive is provided by the operation of the market
- E.g. ART has been given the task to promote efficiency and effectiveness with respect to in house or direct award of contracts in local transport services (Art. 37.2.f as revised by decree law 50/2017)
- In State aid law, in the absence of a tender, benchmarking is required to exclude existence of overcompensation of public services obligations

Tools available to public decision makers

- **Some benchmarking is essential**
- **Yardstick competition is one of the regulatory tools** which can be used

Main challenges to be addressed. comparability, collusion (role for the competition authority), impact on incentives

Each regulatory tool should be compared to alternatives

- Not only costs: benchmarking should also take into account **output/quality**

See , for instance, the system of benchmarking for performance assessment in the area of public health services promoted by Laboratorio MeS of the Scuola Superiore S. Anna, Pisa

5. Some remarks

Looking at the Italian framework (a)

Rebus sic stantibus

Within the current Italian legislative framework, situations of absence of competition either in or for the market are still common in the transport sector => need to provide proper incentives to avoid inefficiencies, undue exploitation of market power, ineffective use of public resources => importance of effectively promoting competition by comparison

Looking at the Italian framework (b)

Still a role for competition advocacy

We should not lose sight of the reasons why competition in the market and for the market, when feasible, may be superior alternatives in terms of ensuring proper incentives to the parties

⇒ public decision makers at all levels (from legislator to authorities in charge of the award of public contracts) should make a more systematic use of checklists aimed to ensure that public choices do not unduly restrict competition with a negative impact on users and taxpayers (see, for instance, OECD Competition Assessment Toolkit)

❖ This is important also for transparency and accountability