Comments on ACM – Predatory bidding for the Limburg rail concession

Germain Gaudin

Copenhagen Business School

November 15, 2019

ToH

- ACM's ToH relies on
  - NS dominance on market for MRN
  - Competition winning *this precise* Limburg concession would raise probability of potential competition on MRN
  - Predatory behaviour to defend the dominant position on MRN

ToH

- Why is the "prey" exiting/not entering the market? (McGee, JLE 1958)
  - Same information as NS about the "rules" of the game (probability of future MRN competition)
  - No apparent "deep pocket" asymmetries (Arve, JPubE 2014)
  - Incumbency in Limburg concession: What else to learn from *this precise* concession? (test-market, signaling)
  - Reputation for aggressiveness: Few (same) firms, Staggered contracts, etc.
  - Leveraging dominance on MRN?
    - Role of Economies of scale and scope (Fumagalli-Motta, JLE 2013), Network effects, etc.
    - NS may have more to lose than *a given* competitor may have to win, from being awarded the Limburg concession
  - What are the specifics of the procurement market in this case?
    - "One-shot" game? Secret bid? etc.
    - Could the "prey" wait for the predatory attack to end? Would a predatory price be common knowledge (Could competitors "anticipate" such price)?

About the links between markets

- ToH builds on uncertainty
  - Rationale for NS' alleged behaviour
  - How important should experiences with co-servicing be?
  - Court: Experience with overlapping services just one factor in government decision-making
  - Not a 1-to-1 link (No Limburg $\Rightarrow$ no MRN)
  - Economics could work with such uncertainty, but what is the legal threshold ? ("more likely than not," etc)
- Should *we* take the institutional framework as given?
  - What about a change of gov't policy? (Long time-frame)
  - Strategic reaction by the gov't: What about "backfiring effects" of predation? ("Look, we really need to introduce competition on MRN!")
  - Gov't statements made at time where Veolia was the incumbent in Limburg: Statements made in expectation that NS wouldn't win? Void if it does?
- Frontier between firms' beliefs about the rules of the game, intent, and likely effects on future entry

Price-cost test and Winner's curse

- Price-cost test
  - Relevance of starting from NS' business case
  - Firms should have the right to make a bad decision / to fail to max. profits:
    - Also why we rely on price-cost tests (defining a "grey zone")
    - Importance of internal documents in order to show that intent is exclusionary
  - (Crocioni, JCLE 2018: Discussion on forward-looking predation test (duration), *ex post* vs. *ex ante* costs)

- Winner's curse (adverse selection): more likely to win when rivals have discouraging information about the value of the prize, thus leading to more cautious bids
  - Private values vs. Common values (or affiliated priv.)?
  - Could NS have overly optimistic information about value of concession?
    - Veolia was the Limburg incumbent, NS serves other markets
    - Use of Veolia's confidential information
  - Competition effects do not "disappear" (e.g. simulations in Hong-Shum (REStud 2002): optimal number of bidders for highway-work auctions is 3)

Conclusion

A priori no reason for a weaker antitrust enforcement in bidding/procurement markets than in other markets.

Predatory pricing complex to demonstrate (price-cost test, intent, etc), even more so if ToH relies on some uncertainty wrt recoupment, potentially even more so in procurement/bidding markets.

Beware of the 3 "Klemperer's fallacies" (Ho Ant. Eco. 2006; JCLE 2007):

- "**Consultant fallacy**": no market power in bidding markets, and the existence of two firms is enough to imply (perfect) competition, or even that just one firm is enough.
- "**Academic fallacy**": market power does not matter in an auction, because auctions and bidding processes are often used precisely because different market participants have different, and poor, information (winner's curse).
- "**(De)regulator fallacy**": intervention against pernicious market power is unnecessary, because the bid-takers have the power to set the rules and procedures in a way that resolves competitive problems.