

I_{26b}/1/07 COMPETITION IN INTERCITY PASSENGER TRANSPORT BY BUS IN SPAIN

1. INTRODUCTION

1.1. Purpose of study

Among the functions of the National Competition Commission (Comisión Nacional de la Competencia, hereinafter "CNC"), as provided in article 26(1) (b) of Competition Act (Ley de Defensa de la Competencia) 15/2007 of 3 July 2007, is the promotion of effective competition in the markets, in particular by means of "drafting general reports on sectors, as the case may be, with proposals for liberalisation, deregulation or regulatory amendment". Thus the function of promotion of competition involves regulatory activities of the Public Administrations guided by principles seeking effective competition in the markets, as well as making society aware of the advantages deriving therefrom.

The purpose of this study, in accordance with the Report on the concentration operation in question (Case C 106/07, National Express/Continental Auto/Movelvia), approved by Resolution of the Council of Ministers of 28 September 2007 (BOE of 23 October 2007), is to analyse the regulatory framework for access to the market for regular and ongoing passenger transport by bus, and propose a series of improvements allowing achievement of real and effective competition in this market.

Promotion of competition in transport has already been addressed by the former Competition Court. Thus, in both its 1993 and 1995 reports recommendations were made designed to ensure competition in the framework of the concession system, and for adoption of measures for deregulation of bidding procedures.

It is clear that the Ministry of Development has promoted a certain degree of deregulation. But various factors counsel a re-examination at this point to determine if that process is advancing in the right direction and with the required intensity. First, because at the community level Regulation 1370/2007 on Public Passenger Transport Services by Rail and by Road has been approved. Second, because within a relatively short period of time practically all of the State concessions shall be renewed. And third,

and intimately related to the foregoing, because the general guidelines that shall govern bidding for renewal of concessions have been agreed in a Protocol by the Ministry of Development with spokesmen in the sector. This naturally deserves careful analysis given the implications for development of competition.

Under Inland Transport Development Act 16/1987 of 30 July 1987 (Ley de Ordenación de los Transportes Terrestres, or "LOTT"), regular and ongoing general public transport of passengers by road is defined as follows: it is public because it is provided by a third party for consideration; it is regular because it is provided on preestablished routes subject to dates and times fixed in advance; the regular services are ongoing because they are provided on a continuous basis to meet steady needs; and finally the ongoing regular services are general because they are not limited to a specific group of users.

In any event we are dealing with transport of persons and their luggage by bus between city centres in various municipalities in Spain, for which reason the scope of the study reaches both State and regional levels.

The LOTT in its articles 5 to 8 governs the system of jurisdiction and coordination between the State and the Autonomous Communities. It provides that traffic between towns in different Autonomous Communities is within the jurisdiction of the Ministry of Development, whereas traffic between two towns in the same Autonomous Community is within its jurisdiction.

Excluded from this Report is study of other kinds of transport such as urban passenger transport, that is, transport fully within urban or developable areas, or connecting various centres located within a given municipality; private transport; mixed transport (for joint transportation of persons and goods); discretionary transport (not subject to preestablished routes, days or hours); special transport (exclusively for a specific and homogeneous group of users, such as students or workers); and temporary transport (to cover unusual or interim volumes of limited duration).

Nor shall this study consider the various alternative forms of organising public passenger transport by bus. Therefore it shall not deal with more direct formulas of competition, or systems based on the highest intervention.

The type of transport to be analysed is a public service of the government, provided by being allocated to an undertaking by public bid for the corresponding exclusive

governmental concession. The concession system makes competition "in the market" impossible, because there is a single service provider and the price of the service is conditioned by the governmental concession. There can only be competition "for the market", in the form of the public bids for award of the concessions. This competition "for the market" in turn is diminished by the existing barriers to access to the concession market. These include, inter alia, the lengthy concession terms, asymmetrical information, the possibility that the regulator may be "captured" by the concessionaire undertakings, the preferential treatment received by prior concessionaires when a new bid is held, etc.

What is involved therefore is analysing the possibilities of greater openness in the bids by which access to the market is granted, which generally is referred to as "competition for the market, controlled or regulated competition, or competition before the fact or discontinuous competition". This access, which occurs only at the time of the bid, allows competition as regards the various parameters, such as price and quality, which receive the weighting established in the bid conditions. The conditions therefore are a part of the corresponding regulation. Within this context, it is particularly important to ensure maximum transfer of efficiencies to the end user by decreasing costs and improving the quality of the service, with no diminishment of the competition, that is, without closed markets or obstacles to access to markets in favour of the "incumbent" operator or prior concessionaire or others.

Regarding the advisable scope of proposals for regulatory improvement, Report C 106/07 National Express / Continental Auto / Movelia concluded that, when commencing the process of renewal of governmental concessions, the key question is "ensuring that bids occur and are appropriately designed, based on proper regulations and pursuing the possibility of introducing additional elements of competition in the bid conditions and the structure of the process". In particular, we shall analyse the so-called "Support Protocol setting the criteria for concession bidding procedures for public services of general regular passenger transport, within the jurisdiction of the Ministry of Development, which expire starting in 2007", signed 24 April 2007 among the Secretary General for Transport of the Ministry of Development and union representatives and bus transport businesses, manufacturers and importers of vehicles, the handicapped and users and consumers¹. The Protocol sets a series of criteria for preparation of future bid conditions for bids called by the State that affect competition in the market.

¹ The signatories of the Protocol are the Ministry of Development, the National Committee for Transport by Road (the Full Committee and the Regular Transport Section), Fenebús, Asintra, UGT, CC.OO. CERMI, the

In any event, in this analysis it must always be borne in mind that transport, in general, plays a strategic role in the economy and is an essential factor in the interconnection of territories of countries. In addition, transport of passengers by road, as a service indispensable to meeting the basic travel need of the Spanish population, must to the maximum extent possible approach conditions of free competition, which is desirable and consistent with the deregulation process promoted by both the European Community and the individual countries.

1.2. Importance of sector

According to data published by Eurostat in January 2007, bus transport of passengers by road in 15 countries of the European Union (EU) increased from 1970 to 1999 by around 50%, reaching a total of more than 400 billion passenger-kilometres² in 2003. In absolute terms, Italy is the leader, followed by Germany, Spain, the United Kingdom and France, in that order. But in terms relative to population, it is Luxembourgers, Greeks and Austrians that are the heaviest users. The former travelled more than 6 km per person per day by bus in 2003. Spain is above the average, and significantly higher than France, the United Kingdom and Germany, which show the least use per person with the exception of Holland.

Table No. 1. Transport of Passengers by Bus (millions of passenger-km).

Years	1995	2003	Change from 1995 to 2003	2003 population (millions of inhab.)	Km per person per day in 2003
Ireland	5,150	6,500	20.8%	3.96	4.49
Spain	39,600	49,300	19.7%	41.66	3.24
Sweden	8,500	10,500	19.0%	8.94	3.22
Italy	87,147	97,601	10.7%	57.32	4.66
Greece	20,221	22,500	10.1%	11.01	5.60
Luxembourg	950	1,030	7.8%	0.45	6.29
United	44,300	47,000	5.7%	59.44	2.17

Council of Consumers and Users, ASCABUS, ANFAC and ANIACAM.

² The unit of passenger transport is the passenger-km. It is calculated for each means of transport as the product of the number of passengers and the kilometres travelled by each of them. Ultimately this unit of measurement is the equivalent of a person travelling a kilometre, in a manner analogous to the tonne-km in the transport of goods.

Kingdom					
Belgium	13,070	13,700	4.6%	10.36	3.62
France	41,600	42,700	2.6%	61.83	1.89
Austria	14,837	14,753	-0.6%	8.10	4.99
Germany	68,500	67,500	-1.5%	82.54	2.24
Finland	8,000	7,670	-4.3%	5.21	4.04
Portugal	11,300	10,500	-7.6%	10.41	2.76
Holland	8,000	7,400	-8.1%	16.19	1.25
Denmark	10,610	9,000	-17.9%	5.38	4.58
EU (15 countries)	381,785	407,654	6.3%	382.80	2.92

Source: Eurostat and internal CNC.

Regarding market growth, from 1995 to 2003 the countries in which this mode of transport showed greatest growth were Ireland (20.8%), Spain (19.7%) and Sweden (19%). These three were much above the 15 country EU average of 6.3%. There has been a degree of stagnation in the latter figure for more than 10 years, reflecting reduced GDP growth in some of the larger continental economies.

Regarding the significance of such transport in the context of the national economy, according to INE (National Statistics Institute) data for 2005, it is notable that gross value added at market prices of urban and intercity transport by bus was 2,421,750,000 euros, and the turnover of transport in general was 4,433,690,000 euros (of which 1,153,550,000 was urban transport, 1,337,127,000 regular and 997,160,000 discretionary).

Based on all the foregoing, the Spanish potential is obvious, as regards both the absolute and relative significance of this market, and its growth associated with that of its population, income and prices. It is also necessary to note the particular interest raised by Spanish undertakings, in general, for European investment in this sector, risk capital funds and Spanish companies coming from other sectors of the economy. Thus, given the potential growth and possibility of entry of new operators in the sector, the purpose of this study is to contribute to the introduction of greater competition being accomplished in the best manner possible.

In addition, the fragmentation of the structure of companies, which has been a notable characteristic in the road transport sector in Spain, has reduced over the last decade. In

2007 there were 3963 authorised companies in the public service of passenger transport by bus. This represented a reduction of 19.5% by comparison with 1998.

The distribution of companies by size of their authorised bus fleets also has changed significantly in recent years. In fact, while in 1998 35% of the companies had five or more buses, now the percentage has grown to nearly 58%³. On 1 January 2007 the average number of authorised buses per company in the public service amounted to 10.1. Ten years ago it was only 6.4. In 2007 there were 403 companies with more than 20 buses authorised for public service, and 76 companies with more than 60 buses. In 1998 the respective figures were only 269 and 54.

2. CONCESSIONS

2.1. Introduction

In the market for access to concessions for general, ongoing, regular passenger transport by road, demand is represented by the competent governmental authority, which takes bids for provision of a service considered to be of public interest, using the mechanism of indirect management. In turn, supply is represented by those participating in the bid.

The governmental authority in each case awarding the concession depends on the location of the origin or destination points of the route in question. Thus, in the case of intercity concessions between towns in different Autonomous Communities, jurisdiction is in the Ministry of Development. If the towns are in a single Autonomous Community, it has jurisdiction. In the case of urban concessions jurisdiction is in the respective local authorities, who award the concessions in accordance with the corresponding applicable autonomous legislation.

Regarding possible distinction among various markets depending on the granting authority, the basis is that market access conditions and competition may be very different depending upon the granting authority, because the Autonomous Communities can establish their own rules. Nevertheless the regulations are relatively homogeneous. Only some of the Communities have specific legislation regarding the subject matter

³ Since the deregulation, on 1 July 1998, the regulations have required having a minimum number of buses, generally five, and two in exceptional cases of limited area. Companies that had less than five buses prior to 1 July 1998 could continue to do so.

(the others apply State regulations). That legislation is not significantly different as regards regulation of bidding, except on matters such as conditions for management of the concession, extensions and unifications. In addition the specific characteristics of the various bids (operating revenue, dedicated fleet, etc.) are independent of whether the grantor is the State or an Autonomous Community.

The inputs the operators need to provide the service in State and autonomous concessions do not differ substantially. This means that the operators can participate in both State and autonomous bids without distinction. In fact, according to the available information, of the 30 largest business groups by sales, 23 simultaneously hold State and autonomous concessions.

2.2. Characteristics of State and autonomous intercity concessions

At the State level, until recently there were 108 regular passenger transport concessions⁴. The number at the Autonomous Community level was 1335. The majority of the State concessions awarded over recent years arose from confirmation of services that were in effect prior to the effective date of the LOTT. Most of the confirmation process occurred from 1992 to 1995.

Table No. 2 shows the difference between autonomous and State concessions, since the distribution of concessions by number of annual passenger-km varies. Thus, while 85% of autonomous concessions transport fewer than 6 million passenger-km per annum, only 37% of State concessions are below this threshold⁵.

⁴ Currently there are only 103, because five minor concessions have disappeared or are about to disappear. Nevertheless, throughout this study the 108 concessions figure is maintained, because the available data are for the period when there were 108 concessions.

⁵ Of the 1335 autonomous concessions, information regarding passenger-km is available for only 1065. Thus the autonomous total in the table.

Table No. 2. Distribution of concessions by number of annual passenger-km in 2006

INTERVAL (PASSENGER-KM) IN 2006	AUTONOMOUS CONCESSIONS		STATE CONCESSIONS	
	Count	Percentage	Count	Percentage
Less than 1 million	656	62%	18	17%
Between 1 and 6 million	243	23%	22	20%
Between 6 and 30 million	126	12%	19	18%
Between 30 and 100 million	32	3%	26	24%
More than 100 million	8	1%	23	21%
TOTAL	1065	100%	108	100%

Source: Internal, based on data from the General Transport Offices of the Autonomous Communities and Ministry of Development.

One can also see that there are broad differences among autonomous concessions as regards the amount of traffic transported by the various concessions. This results in very diverse business situations. There are some concessions that transport many passengers and, therefore, have good prospects for profitability of the business. On the other hand many concessions at the autonomous level have very limited demand. This would make it difficult for them to survive absent the subsidies they receive. It must also be noted that, according to the available information, subsidies are broadly used. They do not appear to be limited to low-demand routes. Rather some having very high levels of passenger-km receive substantial subsidies.

Table No. 3 shows information regarding the number of concessions, overall revenue and vehicles assigned to the various geographical areas. This allows clearer identification of the differences, not only between autonomous and State concessions, but also among the various autonomous concessions, due to demographic and geographical factors. Autonomous concessions represent approximately 75% of total revenue of this sector. State concessions account for the remaining 25%. With this information we can also obtain indicators of the order of magnitude of average revenue and profitability of the routes by Autonomous Community. A “No. of Observations” column has been included. It indicates those available by Community. Thus to some extent the quality of the information can be evaluated.

Table No. 3. Annual revenues and bus fleets of concessions in 2006

AUTONOMOUS COMMUNITY	No. Conc. in Sample	REVENUE (euros)			FLEET (no. of buses)			
		TOTAL REVENUE	No. of observations	% of sample covered	TOTAL FLEET of buses	No. of observations	% of sample covered	Revenue per Bus
ANDALUCIA	166	155,452,289	149	90%	1,379	163	98%	112,728
ARAGÓN	58	14,495,040	57	98%	215	56	97%	67,419
ASTURIAS (PRINCIPALITY OF)	75	19,406,205	75	100%	307	75	100%	63,212
BALEARIC ISLANDS	22	18,388,715	22	100%	235	22	100%	78,250
CANARY ISLANDS	8	53,752,223	7	88%	382	8	100%	140,713
CANTABRIA	29	8,387,614	29	100%	102	29	100%	82,232
CASTILLA Y LEÓN	255	28,519,687	143	56%	909	255	100%	31,375
CASTILLA-LA MANCHA	132	10,434,979	62	47%	583	130	98%	17,899
CATALONIA	166	80,483,868	158	95%	872	153	92%	92,298
COMMUNITY OF VALENCIA	72	32,559,744	63	88%	494	72	100%	65,910
EXTREMADURA	24	3,435,984	16	67%	79	23	96%	43,493
GALICIA	154	44,692	138	90%	955	138	90%	46,79

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MADRID (COMMUNITY OF)	37	270,213,605	36	97%	1,743	34	92%	155,028
MURCIA (REGION OF)	35	40,230,149	30	86%	303	34	97%	132,773
NAVARRA (AUTONOMOUS COMMUNITY OF)	37	12,481,561	35	95%	94	35	95%	132,783
BASQUE COUNTRY (*)	49	22,956,322	16	33%	220	27	55%	NR
RIOJA (LA)	16	1,562,108	15	94%	60	16	100%	26,035
<i>AUTONOMOUS REGION TOTAL</i>	<i>1,335</i>	<i>817,452,474</i>	<i>1,051</i>	<i>79%</i>	<i>8,932</i>	<i>1,270</i>	95%	<i>91,520</i>
NATIONAL(*)	108	387,939,656	108	100%	1,009	43	40%	NR
AUTONOMOUS REGION AND STATE TOTAL	1,443	1,205,392,130	1,159	80%	9,941	1,313	91%	121,255

Source: Internal, based on data from the General Transport Offices of the Autonomous Communities and Ministry of Development.

*) In the Basque Country revenue is available only for Guipúzcoa and the number of buses for Guipúzcoa and Álava. At the State level information is available only for 43 concessions. Thus in both cases revenue per bus is not representative.

Table 4 provides information on the passenger-km for all concessions. Also indicated in the “No. of Observations” column is the number of observations available by Autonomous Community, and in total, in order to a certain degree to evaluate the quality of the information. Thus, based on the available information, the number of passenger-km for State concessions and that for autonomous concessions are very similar figures. This result, when compared with the result of Table 3 (which shows that autonomous routes collect 75% of the total) shows a pronounced difference among revenue per passenger and kilometre of the various concessions. For this reason it has been deemed to be appropriate to calculate Revenue per Passenger and kilometre, and include it in the analysis. It must be noted that data is not available for the Community of Madrid. This makes it relatively smaller than it actually is and distorts the autonomous total of passenger-km.

Table No. 4. Passenger-km in 2006

AUTONOMOUS COMMUNITY	No. Conc. in Sample	Passenger-km			
		TOTAL Passenger-km	No. of observations	% of sample covered	REVENUE / Passenger-Km (€)
ANDALUCIA	166	2,372,310,985	149	90%	0.066
ARAGÓN	58	208,273,898	57	98%	0.070
ASTURIAS (PRINCIPALITY OF)	75	262,362,379	65	87%	0.074
BALEARIC ISLANDS	22	93,947,625	15	68%	0.196
CANARY ISLANDS	8	533,556,483	8	100%	0.101
CANTABRIA	29	110,680,469	29	100%	0.076
CASTILLA Y LEÓN (1)	255	430,084,816	143	56%	0.066
CASTILLA-LA MANCHA	132	96,950,938	125	95%	0.108
CATALONIA	166	479,320,574	160	96%	0.168
COMMUNITY OF VALENCIA	72	482,851,909	63	88%	0.067
EXTREMADURA	24	59,382,502	18	75%	0.058
GALICIA	154	537,135,995	138	90%	0.083
MADRID	37	0	0	0%	NA

(COMMUNITY OF)*					
MURCIA (REGION OF)	35	353,397,463	27	77%	0.114
NAVARRA (AUTONOMOUS COMMUNITY OF)	37	182,272,464	35	95%	0.068
BASQUE COUNTRY	49	62,487,566	17	35%	NR
RIOJA (LA)	16	29,134,998	16	100%	0.054
<i>AUTONOMOUS REGION TOTAL</i>	<i>1,335</i>	<i>6,294,151,064</i>	<i>1,065</i>	<i>80%</i>	<i>0.130</i>
STATE	108	7,744,442,713	108	100%	0.050
AUTONOMOUS REGION AND STATE TOTAL	1,443	14,038,593,777	1,173	81%	0.086

Source: Internal, based on data from the General Transport Offices of the Autonomous Communities and Ministry of Development.

(*) Data are not available for the Community of Madrid, since it has abandoned computation of this figure because of the special characteristics of the existing zone fare system.

If we break down the data even further, within each Autonomous Community we find a pronounced difference among concessions. By way of example we have calculated the means and standard deviations of the two variables giving us the level of revenue per bus and per passenger-kilometre, for two Autonomous Communities with notable differences in geography and population, and for the State. The results in Table 5 show that the dispersion among concessions of a given autonomous community is greater than the dispersion over all State concessions. In the set of state concessions we find concessions having values very near those of the autonomous concessions, although, as would be expected, they are few. Similarly there are some concessions in the Autonomous Communities analysed with values comparable to those of State concessions, but as in the case of State concessions they represent a minority of the sample. From these results one may infer a matter already stated above regarding variations over concessions being such that there is no justification for all of them being operated under the same economic system, since not all require the same regulatory

parameters. In addition, this difference appears not only between all autonomous concessions, on the one hand, and State concessions, on the other, but also within each Autonomous Community, and even within the group of State concessions.

Table No. 5

	Revenue-Bus (€)		Revenue Passenger-Km (€)	
	Mean	Standard Deviation	Mean	Standard Deviation
Galicia	24,677	39,690	0.099	0.081
Andalucia	55,153	61,620	0.068	0.018
State	306,995	274,025	0.055	0.016

Source: Internal CNC based on information from Autonomous Communities and Central Government

Table 6 shows data on changes in ownership and unifications of routes. In principal changes in ownership may be interpreted as an indicator of changes in those awarded the various concessions. But this data must be read against the process of concentration experienced in the sector over recent years, which in part is covered by Table 6. Thus, in 1999 Alianza Bus (Grupo ALSA) acquired the public company ENATCAR; in 2000 in the Autonomous Community of the Canary Islands there was a merger of SACAI and UTINSA, the two largest operators; and in 2007 National Express Group (which previously had acquired Grupo ALSA) acquired Continental Auto. In addition, these changes of ownership also include transfers and acquisitions of routes being operated. Therefore they do not imply that the new owners participated in a bid to award them. Regarding unifications, it is clear that they limit competition, since they reduce the number of concessions that may be let for bids. They are authorised for reasons of public interest on the request of the companies, with the possibility of setting new terms of duration. At the end of 1999, according to available information⁶, the number of state concessions for regular transport of passengers by bus was 120. Of these only 15 corresponded to the original result of a bid process. 12 were the result of unifications. The remaining 93 resulted from confirmations of concessions pre-existing the LOTT.

Standing out in Table 6 is the high proportion of Catalanian concessions having changed ownership. The same can be said of concessions in the Canary Islands and

⁶ Competition Court concentration proceedings C45/99 ALIANZA BUS / ENATCAR

Navarra. Regarding unifications, they have been most used (relative to the number of concessions) in the Community of Madrid. Nevertheless we must note the dissimilarity of the concessioned routes, their very different profitability, the differing capacity to cover them and the other factors affecting profitability (and therefore viability). This in certain cases may justify unification of certain routes. Since unification results in restriction in the offer of concession routes, its use must be strongly justified on the basis of viability considerations.

Table No. 6. Change of ownership and unifications (1976-2006)

	No. Conc. in Sample	Changes in Ownership			Unification of concessions		
		TOTAL Changes in Ownership	No. of observations	% of sample covered	No. of Unifications	No. of observations	% of sample covered
ANDALUCIA	166	1	164	99%	8	166	100%
ARAGÓN	58	15	58	100%	2	58	100%
ASTURIAS (PRINCIPALITY OF)	75	36	75	100%	1	75	100%
BALEARIC ISLANDS	22	7	22	100%	6	22	100%
CANARY ISLANDS	8	7	8	100%	1	8	100%
CANTABRIA*	29	NA	0	0%	NA	0	0%
CASTILLA Y LEÓN	255	74	255	100%	2	255	100%
CASTILLA-LA MANCHA*	132	25	132	100%	NA	0	0%

CATALONIA	166	107	166	100%	25	166	100%
COMMUNITY OF VALENCIA	72	8	72	100%	7	72	100%
EXTREMADURA	24	7	24	100%	5	24	100%
GALICIA	154	28	154	100%	25	154	100%
MADRID (COMMUNITY OF)	37	2	36	97%	15	36	97%
MURCIA (REGION OF)	35	6	35	100%	6	35	100%
NAVARRA (AUTONOMOUS COMMUNITY OF)	37	20	33	89%	10	37	100%
BASQUE COUNTRY	49	28	49	100%	11	34	69%
RIOJA (LA)	16	5	16	100%	4	16	100%
<i>AUTONOMOUS REGION TOTAL</i>	<i>1,335</i>	<i>376</i>	<i>1,299</i>	<i>97%</i>	<i>128</i>	<i>1,158</i>	<i>87%</i>
NATIONAL	108	28	108	100%	16	108	100%
AUTONOMOUS REGION AND STATE TOTAL	1,443	404	1,407	98%	144	1,266	88%

Source: Internal, based on data from the General Transport Offices of the Autonomous Communities and Ministry of Development.

(*) Change in Ownership data are not available for Cantabria. Similarly, unification data are not available for Cantabria and Castilla la Mancha.

Nevertheless, in accordance with the recent amendment of article 92(1) of the ROTT (Inland Transport Regulation), unifications of two or more concessions now are possible only if three years of their terms have elapsed, and are no longer possible when less than two years remain until the end of the term. This provision substantially decreases the risk of use of this mechanism for the sole purpose of the owner achieving both a longer term for management of the concession and the advantage it could have by being the owner at the time of a future bid in respect thereof.

In any event, based on the information received, the frequency of use of unification has decreased over the last two years, especially in the area of State concessions. According to information from the Ministry of Development, only three unifications have

been approved since 2004. Since the effectiveness of Royal Decree 1225/2006 no extension whatever has been approved.

Table No. 7 shows the distribution of aging of changes in ownership and unifications at the autonomous and State levels. As may be seen, the majority of them occurred relatively recently, particularly changes in ownership. So much so that reviewing the table allows one to verify that half of changes in ownership that have occurred over the last three decades occurred during the five-year period from 2001 to 2005, as regards both State and autonomous concessions. As indicated in earlier paragraphs, the processes of concentration of undertakings in those years explains a significant part of these data.

Table No. 7. Distribution of changes in ownership and unifications by aging

YEARS	AUTONOMOUS CONCESSIONS				STATE CONCESSIONS			
	Changes in Ownership		Unifications		Changes in Ownership		Unifications	
	Number	%	Number	%	Number	%	Number	%
1976-1980	2	1%	0	0%	0	0%	0	0%
1981-1985	11	4%	7	6%	0	0%	0	0%
1986-1990	17	6%	19	17%	0	0%	0	0%
1991-1995	31	11%	16	14%	0	0%	0	0%
1996-2000	58	20%	36	31%	7	25%	7	44%
2001-2005	144	49%	26	23%	15	54%	8	50%
2006 and following	32	11%	11	10%	6	21%	1	6%
TOTAL (*)	295	100%	115	100%	28	100%	16	100%

Source: Internal, based on data from the General Transport Offices of the Autonomous Communities and Ministry of Development. For concessions that have undergone multiple changes in ownership or unifications the date of the most recent has been used.

(*) For some autonomous concessions that have undergone changes in ownership or unifications the dates thereof are not available, for which reason the totals do not coincide with those in other tables.

Tables 8 and 9 give an idea of the next concession expiration dates (which is not fully complete regarding the Autonomous Communities) and, therefore, a forecast of the dates of the next bids, as well as the expiration dates of concessions having numbers of buses in excess of 20.

Table No. 8. Distribution of expiration of autonomous and national concessions.

Expiration date	2007-2008		2009-2010		2011-2012		2013-2014		2015 and Following		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Autonomous concessions	233	19.9	134	11.4	304	26.0	265	22.6	235	20.1	1171	100
National concessions	19	17.6	3	2.8	21	19.4	52	48.1	13	12.0	108	100
Total	252	19.7	137	10.7	325	25.4	317	24.8	248	19.4	1279	100

Table No. 9. Distribution of expiration of autonomous and national concessions with more than 20 buses

Expiration date	2007-2008		2009-2010		2011-2012		2013-2014		2015 and Following		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Autonomous concessions	6	7.7	3	3.8	10	12.8	30	38.5	29	37.2	78	100
National concessions	0	0.0	1	5.0	1	5.0	15	75.0	3	15.0	20	100
Total	6	6.1	4	4.1	11	11.2	45	45.9	32	32.7	98	100

Source: Internal, based on data from the General Transport Offices of the Autonomous Communities and Ministry of Development. 164 concessions have been excluded from the sample because expiration dates are not available or are erroneous.

In 2007 and 2008 it appears that, although around 20% of concessions expire, almost all of them are rather small, in the sense that the number of vehicles in the fleet is less than 20. In 2009 and 2010 about 11% of concessions expire, but again almost all are small. Although 25% expire in 2011 and 2012, again they are small companies. The majority of large concessions shall expire in 2013, 2014 and beyond. All of this data must be qualified, as we shall discuss below, because certain Autonomous Communities recently have extended or are considering extending the concessions

expiring in 2007 and 2008 by around five years, in order to be in a position to restructure the sector in 2012-2013.

From the probable absence of bids for new routes because of the high density of the existing network, and from the data indicated above, it can be concluded that, if the Autonomous Communities continue to approve extensions, it shall be difficult for the sector to undergo introduction of significantly greater competition in concessions

3. REGULATORY FRAMEWORK

Below we briefly describe some of the aspects of European, State and autonomous regulation, also covering the Support Protocol because of its importance in State bids.

3.1. European Union regulation

Published on 3 December 2007, after a decade of consideration, was Regulation No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on Public Passenger Transport Services by Rail and by Road, repealing and replacing Council Regulations (EEC) Nos. 1191/69⁷ and 1107/70 (13736/1/2006 – C6-0042/2007), applicable to national and international operation of public passenger transport services by rail and other track-based modes, and by road.

The new Regulation addresses the differing procedures applied in the various Member States, enhancing legal certainty and introducing regulated competition allowing the competent authorities "to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed" (article 1), all in accordance with a fair bidding procedure.

⁷ Council Regulation 1191/69 of 26 June 1969 dealt with action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway and 1107/70 referred to transport sector aid. In addition, when a public authority decides to entrust a service of general interest to a third party, it must choose the operator of the public service strictly in accordance with the requirements of community law regarding public procurement and concessions, as provided in articles 43 to 49 of the EC Treaty, with the principles of transparency and equal treatment, and with the directives approved for that purpose: Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, which directives followed the case law of the European Court of Justice.

In this regard, the Regulation allows the setting of maximum tariffs (article 3) and limits the duration of public service contracts to a maximum of 10 years (article 4) for public service bus or coach contracts. But thereafter it establishes the possibility of extending such contracts for up to a maximum of half of the original duration, if the grant of the extension is justified by amortisation of the assets used or the costs deriving from an extreme outlying geographical situation. In cases of exceptional investment in infrastructure, to support viable amortisation thereof, the Regulation opens the possibility that there may be contracts with longer durations, without specifying the limit. To guarantee transparency in the latter case, the competent authority must send the contract to the Commission within the term of one year after execution thereof, with details of the factors justifying its longer duration.

On the other hand, in its Transitional provisions (article 8), the new Regulation contemplates recognition of longer concession terms granted prior to its effective date, but always subject to a series of time limitations based on the procedure and year of the award, in order to avoid serious structural problems. Finally, the effective date is set at 3 December 2009

3.2. State regulation

The regulatory framework for passenger transport by rail in Spain basically is in LOTT⁸ 16/1987 of 30 July 1987, developed by Royal Decree 1211/1990 of 28 September 1990, which approved its Regulation⁹. This regulatory framework has undergone various amendments. The most recent were introduced by Act 29/2003 on the improvement of conditions of competition and safety in the market for transport by road, which amends the LOTT, and Royal Decree 1225/2006, which amends the ROTT to adapt it to the new draft of the LOTT. These amendments were guided by the Strategic Plan for Transport of Goods by Rail (Plan Estratégico para el Transporte de Mercancías por Carretera, or "PETRA") and the Action Plan for Transport by Bus (Plan de Líneas de Actuación para el Transporte en Autobús, or "PLATA"), respectively, approved in 2001 and 2002.

⁸ Partially amended by Act 13/1996 of 30 December 1996, Act 66/1997 of 30 December 1997, Royal Decree Law 4/2000 of 23 June, 2000, Act 14/2000 of 29 December 2000, Act 24/2001 of 27 December 2001 on Tax, Administrative and Social Matters, and Act 29/2003 of 8 October 2003 on improvement of conditions of competition and safety in the market for transport by road.

⁹ Partially amended by Royal Decree 858/1994 of 29 April 1994, Royal Decree 1772/1994 of 5 August 1994, Royal Decree 1136/1997 of 11 July 1997, which repealed the systems for quotas and mandatory tariffs long regulated by Royal Decree 927/1998 of 4 May 1998, and Royal Decree 1225/2006 of 27 October 2006.

In order to engage in any business related to public transport of passengers by rail one must first achieve status as an authorised transport undertaking. In addition, depending on the kind of transport provided, a license is required, as is a governmental concession or authorisation.

These concessions, which are granted to undertakings, are exclusively for services on predetermined routes¹⁰. They may be services connecting cities located in different Autonomous Communities or services connecting cities within a single Autonomous Community or services in a metropolitan or urban area.

Low-use general regular public transport, special regular transport and temporary regular transport require special governmental authorisation. For its part, discretionary public transport of passengers is subject to the legal system of government authorisation.

On the other hand, discretionary international transport has been deregulated, requiring only a community license¹¹. And regular international transport is not defined to be a public service. For this reason no concession is required. But conditions of passage through the countries the route traverses must be satisfied.

The terms of State concessions under article 72 of the LOTT are established in accordance with the characteristics and needs of the service, based on the terms for amortisation of vehicles and facilities. They may not be less than 6 nor greater than 15 years. Article 67 of the ROTT adds that these terms take into account the level of traffic, potential profit and other circumstances deriving from the economic study of the operation.

Finally, it is worth noting that the LOTT and the ROTT as a general rule make it mandatory for transport undertakings to use the bus stations¹², for all intercity transport services. In their use there can be no discrimination or favourable treatment of any

¹⁰ Nevertheless, it is also contemplated that concessions may be granted on an area-wide basis for all general ongoing or temporary regular services to be provided in a given area.

¹¹ The Community rules regarding international transport of passengers are set forth in Regulation 684/92, amended by Regulation 11/98. It on the one hand distinguishes between regular services under the authorisation system and special regular and discretionary services not requiring authorisation, in addition to self-provided services, and creates the community license for conduct of international transport.

¹² The authority authorising the service, after a report from the town hall where the station is located, may only authorise other stopping points in the case of companies having their own facilities with appropriate conditions, or in objective cases by reason of public interest.

undertakings. Management of bus stations is a regulated business. Jurisdiction is shared at local and autonomous levels. Direct and indirect management models are used for their construction and/or operation. Indirect management is subject to concession or equivalent authorisation, and an Operating Regulation. The agency competent to decide on establishment of the station has authority to set mandatory rates for services to be provided within the station. The internal Regulation sets the operating regime for the station (system for assignment of bays, hours, public or private security systems, offices, points of sale, etc.). These are proposed by the concessionaire company to the competent authority for approval.

3.3. Regional regulations of Autonomous Communities

The regulatory framework in the Autonomous Communities is not uniform. Various Autonomous Communities not having their own regulations are governed by State legislation (LOTT), while others have established their own regulations.

Thus, the Autonomous Communities of Catalonia, the Basque Country, La Rioja, the Canary Islands, Castilla-La Mancha and Aragón¹³ by their own laws have regulated both intercity transport within the Autonomous Community and urban and/or metropolitan transport. For their part, the Autonomous Communities of Galicia, Andalucía, Navarra, Valencia, Madrid and Castilla y León by law have regulated urban and/or metropolitan transport. The others, according to the available information, do not have their own legislation and are governed by the LOTT as a supplemental rule.

In any event the Autonomous Communities follow the structure of the concession model, as contemplated in the regulation of the LOTT, on a so-called general basis. Nevertheless it must be noted that this "general" nature was corrected by Constitutional Court Judgment 118/1996 of 27 June 1996, which establishes the territorial criterion as one limiting jurisdiction regarding the matter, in such manner that the national authorities only have jurisdiction to regulate transport between autonomous regions. It is up to the Autonomous Communities to regulate and perform both autonomous and urban transport undertaken within their territories.

This criterion is adjusted based on State jurisdiction regarding basic government contract and concession legislation (article 149(1)(18) of the Spanish Constitution).

¹³ In the area of intercity transport by law adopting urgent measures, regulating specific matters, including extension of concessions. Regulatory development of this law is in process.

Thus, certain provisions of the LOTT regarding concessions of transport services are basic legislation: establishment of the concession system and its exclusive nature, which includes exceptions (article 71(2), except for its final paragraph, and article 72(1), second paragraph), the power to amend concessions (article 75(3), first paragraph, of the LOTT) and the confirmation and change of licenses (second transitional provision, section 5, and fifth transitional provision, sections 1, 4 and 9; although the legal system is autonomous if the transport occurs fully and exclusively within an autonomous region).

In the Autonomous Communities having their own regulation of intercity transport, in any case the terms of the concessions are from 6 to 15 years, as in the case of State concessions.

Finally, in the majority of the Autonomous Communities rules of lesser hierarchy govern some aspects of regular passenger transport by road, such as extensions, subsidies¹⁴, tariffs and special transport, among others, coordination of which is necessary because the constitutional principle of the unity of the market must always be respected (articles 2 and 139 of the Spanish Constitution).

3.4 The Support Protocol

Concessions of public services for regular transport of passengers by road under Ministry of Development jurisdiction shall expire from 2007 to 2018. The General Office for Transport by Road of that Ministry is responsible for holding the bids for award of these public services to the service providers. In order to determine criteria to guide preparation and holding of the bids, the Ministry of Development and various operators in the sector agreed a Protocol, signed on 24 April 2007.

In its preparation, certain objectives to be achieved served as the basis. Some of them were already set forth in the plans previously approved by the government (particularly the PEIT, the National Reform Plan, the National Allocation Plan, the E4 Plan for energy efficiency, the Road Safety Plan) and others identified during drafting of the Protocol. Notable among them are improvement of productivity of undertakings, improvement of efficiency and quality of public services, promotion of safety, promotion of public

¹⁴ As has already been mentioned in section 2.2, many routes in autonomous regions are unprofitable. Although explicit compensation by route generally is not paid under autonomous concessions, in less affluent regions some revenue generally is guaranteed in the form of tacit compensation or inclusion of special services contracts for transport of students.

transport, handicapped accessibility, continuity of services during the processing of new bids, with no disruption by reason of the transition from the old concession to the new one, incentives for investments made in prior periods, stability of employment, modernisation of services and respect for the environment.

After preparation of the Protocol seven bids were awarded in 2007. They basically follow the criteria of the Protocol.

The LOTT and the ROTT do not contain specific evaluation criteria for bid conditions. Rather they only establish a series of very general specifications for them. In particular, under article 73(2) of the LOTT and 68(3) of the ROTT, the bid conditions must incorporate a series of minimum conditions. Among them are indication of the traffic and routes defined for the roads to be used in the service, the schedule for providing the service, which must indicate the minimum number of trips and the complementary ones, the minimum number of vehicles and the characteristics thereof, the tariff system and the term of the concession, among others. Under article 69 of the ROTT these conditions are of three types:

- Essential: they must be respected by bids. Variations thereof may not be introduced (for example those related to traffic or the term of the concession).
- Minimum: they also are mandatory, but if they are respected the bids may improve upon them (such as those related to the number and characteristics of vehicles, the number of trips and the schedule).
- By way of guidance: these are conditions that may be freely changed by the bidders (among them are tariffs, terms for amortisation and hours of service).

Given the generic nature of these conditions, the bid conditions for renewal of concessions have been established based on criteria of administrative evaluation. In this context, the governmental agency that is to decide regarding grant of a concession ends up with an excessive degree of discretion, as regards both establishment of criteria and their application.

Based on the fact that the unit of passenger transport is the passenger-km, the Protocol established some intervals on the basis of which certain fundamental variables are to be determined, such as the terms of concession contracts, the maximum age of the vehicles in each fleet, establishment of the concession tariffs and the technical competence of the bidding companies.

The following table sets forth the allowable concession terms for each of the various intervals of passenger-km. Establishment of concession tariffs and technical competence of the bidding companies also are based on these intervals, but using more complex criteria that are discussed below.

Table No. 10. Concession terms

INTERVAL (PASSENGER-KM)	MAXIMUM CONCESSION TERM (YEARS)	MAXIMUM AGE OF VEHICLES IN FLEET (YEARS)
Less than 1 million	11/12	12/14
Between 1 and 6 million	10/11	10/12
Between 6 and 30 million	10	8/10
Between 30 and 100 million	9	6
More than 100 million	8	4

- Regarding the terms of the contracts the Protocol by way of exception provides that those specified in the foregoing table may be increased when necessary to recover investment in the infrastructure necessary for the service.
- Regarding the maximum age of vehicles it is stated that in concessions operating vehicles of a basic type¹⁵, the age thereof may be increased by two years over those set forth in the table. In addition, the Protocol allows vehicles used in a concession that has expired to be used under the new concession until reaching the maximum age permitted for the new concession, provided that the time elapsed after award of the new contract is not in excess of three years.
- Regarding the establishment of tariffs, the Protocol requires that the bid conditions establish a bid tariff, calculated based on the tariffs in effect for concessions within the same interval of annual passenger-km. For that purpose, within each interval, the weighted average based on passenger-km shall be taken. That average, adjusted for quality improvements¹⁶, shall serve as the bid tariff for a concession that is expiring and

¹⁵ Vehicles providing basic services, which only may be used in metropolitan or regional transport on trips the length of which is not in excess of 75 kilometres.

¹⁶ The Protocol finds it necessary to adjust tariffs so that companies may make the service quality

shall be let to bid, provided that the tariff in effect up to that date, also adjusted, is less than that average. When evaluating the proposed tariffs points shall be awarded only up to the tariff of the prior concession adjusted for quality. If the tariff of the expired concession as adjusted is greater than that average, weighted and adjusted to the same quality, the bid tariff shall be the adjusted tariff of the expired concession. Improvements of the bid tariff shall only be valued in the amount of the lesser of the following two expressions: the weighted and adjusted average of the interval, or up to 10% of the reduction of the adjusted tariff of the expired concession.

- Demonstration of technical competence of bidding companies is to be adapted to each concession, in accordance with the interval of annual passenger-km. In any event, ownership (or possession pursuant to a financial lease) of a number of buses that must be at least 50% of those the bid conditions estimate to be necessary for the concession must be included, as must a showing of at least five years of experience in providing regular passenger transport services by road¹⁷ using a number of buses not less than 50% of those estimated by the bid conditions to be necessary for the concession. Nonetheless, in this regard it must be noted that the bid conditions published subsequent to the Protocol reduce the experience requirement to three years.

To summarise, bids presented by companies participating in the bid process shall be evaluated in accordance with the items in the following table. Each of them is susceptible of achieving the indicated score¹⁸.

improvements imposed by the bid conditions.

¹⁷ It is defined as the business of intercity transport by road, with regular schedules, established hours and fixed stops.

¹⁸ Later we shall analyse the weighting structure for a specific bid.

Table No. 11. Criteria for evaluating concession bids

FACTOR	POINTS
1. Technical characteristics of vehicles	38
-Safety and comfort	26
- Energy efficiency, environmental protection (efficient driving courses, compliance with UNE EN ISO 14001 standard, consumption, etc.)	8
- Lesser age of vehicles (below the limits indicated in Table 9)	4
2. Customer service and marketing	13
- Special customer service and marketing measures (reservation and sale of tickets by Internet or telephone, 24 hours per day, SMS information to users, free newspapers and beverages on board, indemnification for delays, trip insurance)	8
- Accessibility for those with reduced mobility	5
3. Working conditions of drivers (training, stability and employment of women)	4
4. Measures to ensure continuity of public service	24
- Facilities (bus stations, parking facilities held by bidding companies. The companies must provide evidence of availability of the facilities throughout the life of the concession).	4
- Commitment to absorb personnel of former concession holder on the same conditions as under the replaced concession	20
5. Measures to improve quality of service	9
- Number of trips (only a maximum of 5% over those authorised upon expiration of the prior concession shall be taken into account, unless that concession was authorised to make trips having different qualities ¹⁹ , in which case increases of up to 10% may be taken into account)	5
- Quality of service (UNE EN 13816 standard). This standard combines the ratings of quality service by the customer and the supplier. It evaluates aspects such as compliance with commitments; capacity to adapt service to changing demand; security, competence, credibility and kindness evidenced by the supplier; supplier's capacity to communicate with the customer, etc. It also takes tangible matters such as maintenance of facilities and equipment	4

¹⁹ Concessions authorised to provide different levels of quality when providing the service (buses of a basic type and of a better type, additional services, etc.)

and health and cleanliness into account.	
6. Price	10
- Tariffs	10
7. Other improvements	2
TOTAL	100

4. EVALUATION OF PROTOCOL AND PROPOSALS TO IMPROVE COMPETITION IN BIDDING

4.1 Introduction

Having discussed the general characteristics of the current regulatory framework, we shall state some general considerations in respect thereof. Then we shall go into greater detail regarding those aspects of the Protocol that may affect competition for concessions over coming years. This is important both by reason of the high number of bids to be held and the high level of total traffic covered, and because, although the Protocol is at the State level, it may influence the design of the autonomous bids to be held.

4.2 Bidding framework

Although the LOTT leaves open the possibility of using other systems, the truth is that, for historical and economic reasons, a concession scheme has been chosen that grants exclusivity in a route for provision of passenger transport services by road.

A concession is a form of indirect management of a public service whereby the government grants **a monopoly** to an individual or legal person for management of a service of an economic nature through a government contract. From an economic point of view this system is only justifiable if two requirements are satisfied. First, there must be sound economic reasons for concluding that monopolistic operation is more efficient. This generally is the case when the activity is subject to such conditions or requires such investments as make it profitable only if the operator is guaranteed exclusive operation of the business. Second, the efficiency of the system is only justified if, as has already been stated by the Competition Court, there is real competition "for the market", in such manner that barriers to entry thereto are eliminated and there is competitive pressure at the time of the bid.

These circumstances may exist in the case of transport of passengers by road. On certain routes it may be that provision of quality services is only profitable if the operator is assured exclusive operation. Nevertheless, the diversity of existing routes shown in section 2 suggests that this need not be true in all cases. Some routes, given their size, could be submitted to intra-route competition, by opening them up to two or more operators, albeit on an experimental basis. Alternatively, if there are operators willing to do so, it may be viable to open new routes serving as alternatives for existing high-volume routes, in such manner that competition arises, whether actual or referential. The growth of new population centres near traditional cities without doubt may support opening alternative routes.

Ultimately concession is not the only possible alternative. But when to introduce "in the market" competition and not just "for the market" competition is to be determined on a case-by-case basis. We must not forget that in other perhaps more complex activities, requiring greater and more specific investment, such as baggage handling, competition has been introduced within a single airport, certainly for shorter concession terms.

There is another aspect that profoundly influences the competition framework in the sector. This is the design of concessions based on the principle of cross subsidies. The LOTT clearly is designed to interconnect the national territory. Transport of passengers by road assures connection of municipalities not reached by other means of transportation. Fulfilling this objective requires a solution to the problem that many such routes are not profitable. Over time this has resulted in such routes being incorporated, by unification or annexation, into other profitable routes, in such manner that concessionaires take responsibility for deficit routes in exchange for operating others that are profitable. Thus, today a concession is not just a route between two towns. Rather it generally includes other less profitable or deficit traffic.

This scheme based on cross subsidies is not without problems. The unification of profitable and unprofitable routes means that travellers on one route have to subsidise other routes. This unification of routes leads to loss of transparency in route information. We do not know the true cost of providing service on the deficit route. Furthermore travellers on the profitable route are paying to support the service provided on other routes. When this cross subsidy scheme becomes generalised, loss of information is truly significant. It prevents us from knowing how serious the market distortion is. It therefore may be preferable to independently establish the concessions for the routes. In this way, the cost of the unprofitable routes is made explicit. The competent authority

can make the decision whether it is socially desirable to subsidise a route, with full knowledge of the reason. At the same time, on those routes that are profitable passengers can benefit from better conditions. Clearly it must be borne in mind that there are other alternatives for providing services on unprofitable routes, without having to distort competitive conditions.

In any event, the concession still remains a temporary monopoly, and as such if the concession scheme is chosen it requires strengthening of the measures to foster competition in bidding. In this regard, as we shall discuss below, the philosophy of the Protocol in some respects is deficient. On a general basis, for all routes, regardless of profitability, through the bidding it attempts to ensure very high service quality levels at the cost of restricting competition regarding other basic variables, such as price and frequency. This results in excessive interference with development of market conditions. Having assured minimum levels of quality and, of course, safety, competition should be allowed to function in all of its dimensions. It should be the market that determines the characteristics of the bid based on user preferences and competitive pressure.

4.3 Duration of concessions

The long terms of concessions are one of the most significant regulatory barriers. They act as time limits on competition for access to the business of regular passenger transport by bus.

Logically, the term should strike a balance between recovery of investment and the guarantee of provision of services which, in an environment of free competition, may prove to be unprofitable. Nevertheless, the principal assets for operation of the service are mobile and divisible, and the costs that have to be incurred are relatively recoverable. Therefore the excessive durations of concessions in this sector, which occasionally have been in excess of 20 years, are not justified. Because the concession holder during the term of the concession acts as a monopolist, if the term is excessively long it may reduce the incentive to incorporate improvements in the productive process that reduce costs and improve service, and also increase the risk that there may be a "capture of the regulator".

Regarding current State legislation, the LOTT, as has been indicated, allows a duration of between 6 and 15 years²⁰. Nevertheless, as regards State concessions, the Protocol described above requires that the duration of the concession be between 8 and 12 years, depending on the size of the concession and the term necessary to recover investments. These terms may be increased in exceptional circumstances, up to the maximum of 15 years permitted by law, if required for amortisation of investments.

The terms appearing in the Protocol depart from the minimum established in the LOTT, and the maximum specified in the new Community rules. They do not appear to be justified because there are no hidden costs, assets are re-assignable and the term need not necessarily be conditioned on the term for amortisation of the vehicles. This is particularly true when the Protocol also permits vehicles assigned to a concession that has expired to continue to be used under the new concession.

The situation is even more worrisome at the autonomous level. Various Autonomous Communities have granted more extended concession terms, on some occasions up to 25 years, under their own legislation, in general as a result of extensions of the original term of the concession²¹. In any event, the possible discrepancies in maximum terms of duration, in accordance with the possibilities afforded by the legislation of certain Autonomous Communities, should be lessened upon effectiveness of the new Community Regulation referred to above. Nevertheless this shall not occur until 3 December 2009.

One of the specific ways a concession operator may seek amendment of the original time conditions of the concession is by an application for extension. Thus it may prevent opening of the concession to competition, which the CNC in recent Report C 106/07 characterised as being particularly dangerous, since it may become a mechanism of unreasonable closing. The CNC therefore proposed eliminating any current instance thereof.

²⁰ It is so provided in Royal Decree 1225/2006 of 27 October 2006, which amends the LOTT. Specifically, this specification of the durations is established in the amendment of article 67 of the LOTT. Act 10/2003 of 20 May 2003, on Urgent Measures for Deregulation of the Real Estate and Transport Sector, shortened the maximum term of duration of regular transport concessions that, in principle, could extend to 20 years.

²¹ This is the case, for example, of Catalonia, whose law allows extension of concessions, although the total term cannot exceed 99 years (article 16 of Act 12/1987 of 28 May 1987, on regulation of transport of passengers by road using motor vehicles). In 2003 it extended the term of certain concessions until 2028.

At the State level the current legislation since the effective date of the LOTT does not contemplate the possibility of authorising extensions of concession terms. Nevertheless, in the past exceptions to this rule have been introduced by regulations having the hierarchy of laws. In fact a provision in the Act Accompanying the General State Budget for 1997²² allowed companies holding concessions for regular public transport services of passengers by road, under exceptional economic circumstances, not justified from a competition point of view, to request extension of their concessions in exchange for waiver of application of higher tariffs and improvement of their vehicle fleets. According to the Ministry of Development, that extension was requested by the majority of the companies, and was granted in a large part of the cases on the terms contemplated, that is, adding five years to the term of the concession from the expiration date established for each of them.

Over recent years some Autonomous Communities also have approved extensions (for example, Catalonia, Castilla-La Mancha, the Canary Islands, La Rioja, Aragón, Asturias and Castilla y León, which just so resolved, on a general basis, for five years for those applying, with concession terms expiring in 2007-2008). And one cannot discount the possibility that other Autonomous Communities shall approve extensions in the future. In fact, in Extremadura extension of existing concessions is being studied.

In Table No. 12 one can see the favourable trend of average duration of extensions authorised over the last 12 years in the 10 Autonomous Communities for which data are available. In fact there is a marked decrease in the average number of years of the extensions, particularly over the most recent four years. This decrease is significant to the introduction of competition in renewal of concessions. The exception in 2003 is the result of Catalonia extending 147 concessions for 25 years. In addition, the moderate standard deviations of those average durations show a high concentration of the variable around the average value, which makes the averages very representative.

Table No. 12. Trend in average duration of extensions of autonomous concessions

²² Act 13/1996 of 30 December 1996 on Tax, Administrative and Social Order Measures (BOE of 31-12-1996), in its article 9, established that: "As an exception to the provisions of article 72(3) of Act 16/1987 of 30 July 1987 on Development of Inland Transport, for a term of two months after effectiveness of this Act, holders of concessions for general ongoing regular services for transport of passengers by road may request an extension of up to five years of their concession terms. For the grant of this extension by the competent authority it shall be necessary for the concession holder to expressly waive any increase of tariffs during 1997 and 1998, and at the same time to present a proposal for modernisation of its fleet. Based on that proposal the authority shall decide on the propriety of the extension and its duration, which in no case shall exceed the indicated term."

Year of authorisation of extension	No. of concessions extended	Average duration (years)	Standard deviation
1996-1997	226	16.5	2.0
1998-1999	9	15.6	2.1
2000-2001	69	11.9	1.4
2002-2003	163	23.5	4.4
2004-2005	0	-	-
2006-2007	73	4.9	0.6

Source: Internal, based on data of the General Transport Offices of the following Autonomous Communities: Andalucía, Aragón, Asturias, the Balearic Islands, Castilla y León, Catalonia, the Community of Valencia, Extremadura, Navarra and La Rioja.

The expectations created by approval of new Community Regulation 1370/2007 could have been the reason for the decrease. It on an exceptional basis contemplates the possibility of extension for a maximum term of half of the original term if necessary based on conditions for amortisation of significant assets, and if justified by the costs deriving from a particular geographical situation of remote regions. The extension is also available if amortisation of an exceptional investment in infrastructure or vehicles is demonstrated to the European Commission and the concession was granted by way of a fair bid (article 4(4)).

In any event, in the judgment of this CNC Council, both the excessive duration that at times may be achieved by concessions, and the remaining possibility of extension, are contrary to the premise justifying adoption of this market organisation model: the required systematic, periodic and non-discriminatory opening of the market for the various concessions to competition, with the advantages deriving from competition. Thus, it is debatable whether it is necessary temporarily to close access to third party operators to achieve the aforesaid purposes of innovation and improvements for the consumer, with the improvements not being achievable by way of competitive bids.

The criterion adopted in the aforesaid Protocol for concessions expiring starting in 2007 deserves more detailed analysis. It indicates that bid conditions shall establish terms in years, based on the levels or intervals of passenger-kilometres of the concessions. The Protocol also states as follows:

"The bid conditions shall establish a variation from 8 to 10 years. Only concessions for less than 6 million passenger-kilometres may extend for 12 years, as the time allowing them to amortise the vehicles".

This statement is not consistent with the content of Table 9, which establishes a period of 12 years only for concessions for less than one million passenger-kilometres.

It is more important to emphasise the following exception set forth later in the Protocol:

"By way of exception, the terms indicated in the foregoing table may be increased when necessary for appropriate recovery of investment in infrastructure required for the service, always within the limits established by Spanish and European legislation in effect from time to time".

The CNC Council cannot question the scope underlying the exception so established in the Protocol. But it must insist that, because somewhat shorter terms of concessions result in clear advantages for competition, such a generic exception is not justified. The factors associated with the asserted minimum profitability requiring a longer term for recovery of investment must be specified.

Furthermore, we cannot ignore the reference to a limit of 10 years specified in new Community Regulation 1370/2007, although it shall not become effective until December 2009. Nor can we forget that the draft of that Regulation attempted to limit the maximum duration to eight years. This was all in the context of the deregulation promoted by the European Union as a result of its experience and the new socio-economic trends in the most developed countries. That eight year limit in addition apparently was not shared by the PLATA Plan.

Finally, it is appropriate to add that concentration Report C 45/99 in this regard cited a study of the European Union Commission that, based on the experience of certain member countries, such as Holland, advised setting the maximum term of duration of concessions at five years, except in cases based on extreme circumstances of amortisation of investments, which term was included in the first draft of the Regulation.

To conclude, the duration of concessions is a key element in preserving market competition. Although at the State level shorter durations have been proposed, what is clear is that the Protocol does not take advantage of the entire possible margin of

reduction. It maintains terms that are little justified from the point of view of the investments required by this business.

4.4 Scoring criteria in bid conditions

4.4.1 Experience required of bidders to show technical competence.

Although it has improved since five years were required at the beginning, the requirement remains that, if the service subject to bid has not theretofore been provided, it be shown that the bidder has three years of experience immediately prior to the call of the bid, providing a service that is at least regular transport of passengers by road, special or general, requiring the use of a number of buses not less than 50% of the number that is to be used in the concession.

This requirement of experience in regular transport results in unjustified exclusion of discretionary transport companies, the volume of business of which, according to National Statistical Institute data, is 22.5% of the total volume of urban and intercity transport of passengers by bus. Discretionary transport has a multitude of enterprises that are small and even medium-sized. But they have sufficient experience and demonstrated competence. Thus this experience requirement is discriminatory and nonproportional. It is an insurmountable entry barrier, contrary to the guarantee of equal treatment of all capable candidates not affected by any grounds for prohibition, as was stated by the Supreme Court in its Judgment of 19 September 2000, following the case law of the European Court of Justice.

4.4.2 Preferential right of concession holder in renewal of concession.

A possible disincentive to entry of third party operators that remains today and operates as a decisive barrier to access to the market is the preferential right the current concession holder enjoys, other conditions being equal, upon renewal of the concession. Under the provisions of article 74(2) of the LOTT, that right shall apply if the score of the bid presented by it is similar to the score of the best bid. Article 73(3) of the ROTT (applicable in many Autonomous Communities and copied in some autonomous regulations as regards this point) provides that a "similar score" is a 5% departure from the most competitive bid. For their part, some autonomous laws (for example that of Catalonia) copy this provision.

But the possible benefits that may be brought by continuity of service, presumably satisfactory, or the savings of change costs for the government and consumers that possibly may result from continuing with the prior concession holder, do not outweigh the advantages that would result from suppression of this kind of clause:

- In the first place, in bids for renewal there would be greater assurance of transfer of possible competitive advantage from the existing concession holder to the consumer when presenting the offer, because the concession holder, not being able to rely on its preferential right to win the award, would be required to compete more vigorously for that award.
- In the second place, it would eliminate the appearance of a possible "closing" of the concession to other competitors, thus providing incentive for the presentation of competitive bids from those inclined to confront the current concession holder.

The same regulatory rule provides that, in order to apply the preference, the service must have been provided under satisfactory conditions, that meaning that the contract did not end by lapsing or waiver and the concession holder, over the most recent three years, was not sanctioned more than three times for very serious infringement or more than seven times for serious infringement.

Another preference given by the Protocol to concession holders is the exemption of their vehicles from the age requirements during the first three years of the new concession. This is a clear additional advantage as against other bidders that is not justified by the general interest.

Because all operators participating in a bid logically try to comply with the qualitative or non-economic requirements (because otherwise they would lose), and the margin for price competition barely exists, the preferential right becomes the determining factor in the result of the bid.

4.4.3 Low weighting of tariffs and frequency.

In the scoring established in the Support Protocol for the elements of the bid²³, what stands out is the low weight given to economic factors by comparison with the weight given to technical characteristics and the commitment to absorb the former concession holder's personnel.

²³ See detailed table in section 3.4

The reason for this approach appears to reside in the fact that the Support Protocol bases the setting of tariffs on the objectives of "narrowing tariff differences among similar concessions" and "not causing current tariffs to fall dangerously" in order to improve quality and workers' rights. But those objectives are not justified from the competition point of view, or at least do not have the appropriate priority.

From the point of view of competition law, which must prevail, it must be noted that, given the prohibition in the ROTT of making reckless offers, and the standard requiring that bids made must not be exclusively on the basis of economics (article 73), it is not appropriate to give a matter as decisive as tariffs and frequency of trips no more than 15 percentage points out of 100, 10 for tariffs and 5 for frequency (of normal trips). In fact any additional improvement is limited to that total. No additional points can be obtained by better offers as regards tariffs or frequency of trips. Greater than 10% tariff reductions earn no additional points. Nor does an increase in trips by more than 5%.

These criteria make the scale in the Protocol a rigid and very dangerous minimum price mechanism. It removes it from the concept of the best economic offer, and the need to use efficiency criteria in public contracting. In this regard it is necessary to note that greater weighting of tariffs could foster the entry of operators from outside the sector, whereas if (as clearly occurs) there is greater weighting of conditions of service, current operators may have certain size and economy advantages by reason of experience on the routes.

But furthermore, when analysed in detail the design specified in the Protocol gives tariff improvements an even lesser role, as a practical matter none at all. Thus, it starts by grouping concessions in intervals of passenger-kilometres, thereafter taking the weighted average tariff by interval. This tariff is improved by the required quality, adjusted and taken as the base tariff for bids for all concessions that are to expire and be rebid, for which the tariff, also adjusted for the required quality, is less than the average. When scoring the proposed tariffs points are awarded only up to the tariff of the expired concession, after adjustment for quality.

By contrast, if the tariff of the expired interval, weighted and adjusted to the same quality, is greater than the average for the interval, weighted and adjusted for quality, that tariff, adjusted for quality, is the bid tariff for the expired concession. When scoring improvements resulting from a tariff reduction, the bid conditions take into account only

the lesser of the following expressions: up to 10% of the adjusted tariff reduction by comparison with the prior concession, and the weighted and adjusted average of the interval to which it belongs.

Therefore, what is clear is that the design, with so little play for improvements, results in all bids seeking the award to be presented at an identical minimum price, in order to obtain the maximum number of the scarce points in play. Thus price competition for the concession is limited and equalised by this determinative and most original mechanism. That is, the minimum price for the service is being fixed, directly or indirectly, by the design agreed in the Support Protocol, basically between the Ministry of Development and the most representative business organisations in the sector. This results in conduct favouring coordination of prices among competitors, prohibited by articles 1(1) (a) and (c) of the Competition Act²⁴ and 81(1) of the EC Treaty, because not afforded the legal protection contemplated in article 4 of the Competition Act.

This manner of controlling bids, in addition to promoting the aforesaid standardisation objectives of "narrowing tariff differences" and "not causing current tariffs to fall dangerously", thus also has the purpose and effect of preventing price competition, benefiting concession holders, who also enjoy the decisive preferences for continuing the service as described above, with the typical effects on economic efficiency and service quality, against the general interest and, in particular, the interest of the users of that means of transport, who would remain captives of a more closed and shared market, which would operate on a monopolistic basis fitting the market situation that the case law calls "capture of the regulator", whereby regulation ends up promoting benefits for the regulated industry more than those deriving for the general public.

By departing from the basis of the market economy, this interventionism has an important consequence, which is the following: instead of competition with no entry barriers allowing price to be determined at the lowest possible cost (because unrestricted undertakings tend to reach the optimum size or maximum efficiency by taking advantage of economies of scale and scope), the mechanism for improvement of the tariff under the Protocol can only hope for that objective, without ever reaching it,

²⁴ Article 1(1) (a) and (c) of the Competition Act provides as follows: "*Collusive conduct. - 1. All agreements, collective decisions or recommendations, or concerted or consciously parallel practices are prohibited, which have as their object, produce or may produce the effect of prevention, restriction or distortion of competition in all or part of the national market and, in particular, those which consist of: a) The direct or indirect fixing of prices or any other trading or service conditions... c) The share-out of the market or sources of supply..*"

because it is impossible to replace the market or use such economies outside of it, as explained by the most elementary economic analysis²⁵.

As regards frequency, it seems clear that the fact that points are awarded only to increases of up to 5% over the number of trips authorised at the time of expiration of the concession (except for trips of different qualities, as shown by Table No. 11, for which increases of up to 10% of trips authorised upon expiration are taken into account) significantly interferes with competition regarding this important factor. This in practice results in clear harm to consumers, for whom it is difficult to benefit from substantial increases in frequency, because the improvements of this factor have so little incentive in the scale established in the Protocol to guide bidding procedures.

4.4.4 Takeover of personnel by new concessionaires.

The Support Protocol and the bid conditions for bids called in September 2007 assign a high level of 20 points to takeover of staff of the expiring concession. This is the equivalent of making it absolutely mandatory if one wishes to win the bid. But such takeover should not be a part of the Protocol or the bid conditions, for the following reasons.

The inclusion of this clause goes beyond the appropriate content of conditions establishing administrative clauses because from a subjective point of view it affects third parties other than the parties to the agreement (the government and the contractor), the workers of the prior concession holder providing the services that are the subject matter of the agreement. And from an objective point of view because the subject matter of the clause is purely of an employment nature. It is a part of the status of the worker, the propriety or impropriety of which is not within the jurisdiction of the contracting authority or the disputed administrative courts, but rather belongs to the agencies having employment jurisdiction.

Furthermore the unilateral imposition by the governmental authority of a clause requiring takeover of employees results in a change in the employment situation of the workers, without respecting the course of union negotiations, by way of an instrument that under article 3 of the Workers Statute in no case can be considered to be a source

²⁵ Regarding this point it is appropriate to recall that in this sector in Spain there is an automatic annual price adjustment system, designed by the General State Administration and the sector itself. It combines inflation rates and improvements in productivity by the companies. The system was implemented in 2002.

of the employment relationship. These assertions have been made in judgments of the Supreme Court, including those of 13 February 2001 and 11 June 2004. It also has been so held by the Government Contracting Consultative Board. In its Report 31/99 of 30 June 1999 it states that the takeover by an undertaking of the employment relationships of another is a matter the possibility of which must be resolved in accordance with applicable employment legislation, specifically determining whether the factual situation contemplated in article 44 of the Workers Statute or, if applicable, the respective collective bargaining agreements exists, it not being necessary for governmental bid condition clauses to establish anything in this regard.

In conclusion it can be stated that takeover of employees in cases of change of concession holders cannot be covered by bid conditions. Therefore, it also should not have been covered by the protocol, because it is a matter beyond the proper purpose of government contracts.

The foregoing conclusion is not affected by article 104 of Government Contract Act 30/2007 of 30 October 2007, which establishes that "in those contracts that impose on the awardee the obligation to assume the position of employer as regards certain employment relationships, the contracting agency..." This is because it refers to circumstances in which the takeover is imposed by employment agreements by virtue of the provisions of the Act or the corresponding collective bargaining agreements, and not by virtue of clauses in bid conditions. It therefore is a provision addressed to those cases in which, by legal mandate or by reason of employment negotiation, the awardee is required to assume the staff of the undertaking ceasing to provide the service. The bid conditions establishing administrative clauses may not determine or influence the decision regarding the takeover.

All of the foregoing leads to the conclusion that in bid conditions there should be no reference to the takeover, as either an obligation or a condition upon the basis of which points are awarded. This is without prejudice to the fact that such takeover may occur in those cases in which it is required by law or a collective bargaining agreement, in which case the provisions of the aforesaid article 104 must be applied.

4.4.5 Scoring of facilities of bidding companies

The LOTT and the ROTT as a general rule make it mandatory for transport undertakings to use the bus stations for all intercity transport services. In their use there

can be no discrimination or favourable treatment of any undertakings. Management of bus stations is a regulated business. Jurisdiction is shared at local and autonomous levels. Direct and indirect management models are used for their construction and/or operation. Indirect management is subject to concession or equivalent authorisation, and an operating regulation. The agency competent to decide on establishment of the station has authority to set mandatory rates for services to be provided within the station. Regarding the Operating Regulation governing the internal operating regime for the station (system for assignment of bays, hours, public or private security systems, offices, points of sale, etc.), they are proposed by the concessionaire company to the competent authority for approval.

Nevertheless, the Protocol assigns 4 points to the facilities held by the bidding companies for the provision of their services. The Protocol in particular refers to bus stations and parking, as basic facilities that must be held by the companies, and requires them to provide evidence of their availability over the life of the concession.

But as has already been indicated, the current legislation provides that there may be no discrimination against possible undertakings as regards use of bus stations. Therefore the Protocol again is scoring a factor foreign to the concession. The LOTT and the ROTT guarantee operators use of existing facilities on a non-discriminatory basis. Also taking into account that, obviously, existing operators (in particular the large ones) have more facilities than new entrants, we are faced by another factor unnecessarily complicating the entrance of new operators, above all the smaller ones and those newly entering the business.

4.4.6 Scoring of safety and comfort

We must emphasise the excessive discretion the Protocol gives to some factors. This results in each set of bid conditions adapting the subfactors based on non-objective criteria. An example of this is the "Safety and comfort of vehicles" factor. It is assigned 26 of the 100 points. The Protocol provides no specific guidelines on how to distribute these points over the various aspects thereof. This may result in bid conditions assigning points to characteristics that are not particularly relevant or necessary. Given this discretion, it seems clear that it would be beneficial to competition "for the market" to have more specificity in the list of factors in the Protocol. In any event it would be beneficial to assign fewer points.

We furthermore believe that qualitative aspects should appear in the Technical Specifications for the bid, that not all routes have the same quality and comfort requirements, and that imposing excessive requirements may provide disincentives to entry of new operators for routes that already are not very profitable.

An example comes from one of the sets of bid conditions²⁶. In it points are assigned to factors such as structural safety upon rollover of a vehicle with seatbelts (2.5 points), the antiskid system (ASR type) (1.3 points), having two fire extinguishers onboard (0.90 points), a second space for wheelchairs in addition to the mandatory one (4 points), a restraint system for the second wheelchair and its occupant (3 points), to name only some of the requirements.

4.5 Amendments, transfers and unifications of concessions.

The ROTT authorises the government, ex officio or upon request of a party, to amend concessions by way of expansion and annexation²⁷. The LOTT in turn provides that amendments of concessions that result in expansion of routes or annexations shall only be approved when they constitute mere adjuncts to the principal service, which must be provided as a part of the same operation as the latter, or when they are not of sufficient size for independent economic operation²⁸. These provisions may restrict access to the market. They should be treated as exceptions, subject to more strict criteria, in order to the limit the government's margin for review and decision.

The LOTT in its article 52 contemplates the possibility of transfers of concessions, which must be the subject matter of reports of the Ministry of Development. In addition, article 81 of the LOTT and article 92 of the ROTT allow the government to order unification of concessions. But these amendments, transfers and unifications may result in increases in market share distorting market conditions, without the changes having been analysed from a purely competition point of view. In the future it would be appropriate for both the Ministry of Development and the competent autonomous authorities to request a report from the competition authorities on the possible impact on competition conditions of modifications, transfers or unifications of concessions.

5. RECAP

²⁶ Specifically, the one for the route between Puerta de Segura (Jaén) and Hellín (Albacete)

²⁷ Article 77 of the ROTT, amended by Royal Decree 1225/2006 of 27 October 2006.

²⁸ Article 75(3) of the LOTT.

Long before preparation of this study the TDC's competition promotion activities, already set forth in its 1993 Report on "Political remedies that may foster free competition in services and reduce the damage caused by monopolies", recommended maintaining the concession system for this kind of transport. But it believed that the system must satisfy certain requirements:

- The existence of real competition "for the market".
- A maximum 10 year time limit on the term of concessions.
- Flexibility regarding vehicles, frequencies, hours and stops, with appropriate mechanisms to compensate for variations, controlled by the granting authority.

It also suggested other changes, including:

- Strengthening inspections to avoid unfair behaviour.
- For trips over long distances, permission to board passengers en route up to a given percentage of the capacity of the vehicle, always guaranteeing that that would not result in disappearance of nearby routes.
- On an experimental basis, opening a regular line to multiple operators.
- Elimination of the system of maximum numbers of vehicles in discretionary passenger transport by bus.

The later 1995 TDC report, "Competition in Spain: Status and new proposals", insisted that it would be appropriate to deregulate this area, emphasising the importance in bids of tariffs and the number of trips, nonetheless indicating that awarding too many points to tariffs could result in the presentation of reckless bids and the consequent grant of concessions to certain proposals of very doubtful economic viability.

As has been said herein, within the process of deregulation of transport of passengers by road, promoted at both Community and national levels, the mechanisms leading to awards upon renewal of national concessions play an absolutely essential role.

Fifteen years have passed since the Competition Court in 1993 proposed maintenance of the concession system for this transport, but guaranteeing competition in access to bids. And when the concession renewal process finally begins it should introduce effective competition for the market, with the resulting transfer of efficiencies to end

users, who would obtain better services and better prices. But the design prepared and implemented for that purpose has serious limitations. From careful analysis of the Protocol it can be concluded that it is a mechanism that facilitates continuation of the current concession holders, with a long-lasting and extremely serious monopolistic tendency.

But not many years ago new concessions were awarded based on a model in which the weighting of better tariffs was around 40%, the weighting of frequency of trips reached 20% and, nonetheless, the bids did not become fire sale auctions. Although in those cases there obviously was no preference for concession holders, nor were there takeovers of personnel, nor was actual demand known, because they were new concessions, the root problem was similar to that currently posed by renewal of the concessions. The experience thus should be taken into account.

The CNC Council in this study has shown that certain described actions of the public authorities, for example publication of bid conditions with the aforesaid weighting criteria or insufficiently justified changes in the terms or conditions for operation of the concessions, may result in obstacles to maintenance of effective competition in the market for access to concessions of regular passenger transport by road. Therefore, those acts may be susceptible to challenge in disputed administrative proceedings, in accordance with article 12(3) of Competition Act 15/2007 of 3 July 2007, which provides as follows:

"The National Competition Commission is legally authorised to bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived".

The same authority is held by the Autonomous Authorities charged with oversight of free competition, since article 13(2) of the LDC provides that:

"Without prejudice to the competences of the National Competition Commission, the competent bodies of the Autonomous Communities are legally authorised to bring actions before the competent jurisdiction against administrative acts and regulations issued by the autonomous or local Public Administrations of their region from which obstacles to the maintenance of effective competition in the markets are derived".

It is clear that this would be the last resort in the case of bids, a challenge that must be avoided when it is possible to correct the conditions thereof. It must not be forgotten that Regulation 1370/2007 of the European Parliament and of the Council, following the Community Directives and case law on public contracting, require that the award of concessions guarantee application of the principles of transparency, equal treatment of competing operators, and proportionality, all to achieve "the provision of the most frequent, safest, highest quality and cheapest services, as would be allowed by simple operation of the market" (article 1).

6. CONCLUSIONS

ONE. The promotion of competition in transport has already been addressed by the former Competition Court. Thus, in both its 1993 and 1995 reports recommendations were made designed to ensure competition in the framework of the concession system, and for adoption of measures for deregulation of bidding procedures. It is true that the Ministry of Development has promoted a degree of deregulation, but it is necessary to evaluate the situation to see if it is progressing on the right path, particularly when there is to be a renewal of all of the State concessions.

TWO. The market for regular and ongoing intercity transport of passengers by road is characterised by a highly fragmented structure, although over recent years there have been a high number of transfers of ownership of concessions, and significant acquisitions and mergers of undertakings, particularly by reason of the entrance of large foreign groups. This, on the one hand, is reducing the aforesaid fragmentation and, on the other, accentuates the asymmetry of the Spanish market structure. But in any event it contributes economies of scale.

THREE. Although the LOTT leaves open the possibility of using other systems, the truth is that, for historical and economic reasons a concession scheme has been chosen that grants exclusivity in a route for provision of passenger transport services by road. From a theoretical point of view there are alternatives to the concession system. In fact air transport of passengers and international passenger transport by bus operate on the basis of authorising licences. The routes affected by the concessions are very different. The concession model need not necessarily be the only one, nor

need it be based on cross subsidies. In fact, this system is only justified if market access barriers are eliminated and, as has been stated by the Competition Court, there is real competition "for the market". Nevertheless, that does not mean that other objectively justifiable alternatives cannot be considered. Nor does it mean that it is the system best suited to all cases. On some routes, by reason of their size, it may be that there can be intra-route competition, by way of opening, albeit experimental, to two or more operators. In any event, the concession still remains a temporary monopoly, and as such requires strengthening of the measures to foster competitive functioning of the market.

FOUR. For route concession bids, the Ministry of Development has agreed with union representatives and bus transport companies, vehicle manufacturers and importers, the handicapped and users and consumers on the so-called "Support Protocol setting the criteria for concession bidding procedures for public services of general regular passenger transport, within the jurisdiction of the Ministry of Development, which expire starting in 2007".

FIVE. Allowing competitors to come into the market is the best means of ensuring that the market cannot be taken by storm, introducing effective competition to ensure efficiency gains are passed on to end users to the utmost, and the most innovative services. In this regard, the experience required by the Support Protocol of bidders for regular transport as a criterion of competence could unjustifiably exclude some of the smaller enterprises in the European Union engaged in discretionary transport of passengers by road, who nonetheless have demonstrated competence equal to or greater than that of the regular transport undertakings that are included.

SIX. The Protocol is a framework that does not sufficiently promote competition in the bids that are to be called. Among other barriers, the Protocol, in addition to low weighting of the tariff, contains a system for its determination in bid conditions that leads to conduct favouring coordination of prices, prohibited by the LDC and the EC Treaty. Having no legal backing, this restriction on competition is not protected by article 4 of the LDC.

SEVEN. In the same sense, the aforesaid bid conditions and Protocol also suffer, on the one hand, from limited weighting of improvements in the number of trips and, on the other, the award of points for takeover of the staff of the existing concession holder, which is not appropriate, and the scoring of which could be used to the detriment of current tariffs and frequencies. In addition, the preferential right of the current concession holder, established in the LOTT as a preference for its bid in the event of similar bids (which "similarity" is set in the ROTT at 5%) could be determinative in award of a bid to it, constituting a barrier to entry of other competitors. This is reinforced by the advantage of the permissible age of its vehicles, although limited to three years, which does not apply to other bidders, and by scoring for availability of facilities.

EIGHT. The long terms of concessions, as well as the extensions thereof that have been approved, are delaying the possibilities of introducing significant competition in the corresponding bids. The terms should be reduced along the lines of community policy, in bids also taking into account the minimum period established in article 72 of the LOTT. In addition, extensions no longer should be granted. To the contrary, we must take advantage of the opportunities in this regard offered by the expirations now occurring, beginning the process of renewal of the State concessions and strengthening the possibility that that process shall be repeated for autonomous concessions.

NINE In addition, the authorisation of transfers, amendments and unifications without taking competition into account may result in unnecessary distortions of market conditions. That would mean breaching the obligation to see to the efficiency and free competition that justify public intervention in passenger transport by road, established in Community law (article 86 of the EC Treaty). Therefore, when such actions are proposed it would be appropriate for them to be submitted to a report of the competition authorities.

TEN There is broad administrative discretion in establishment of bid conditions, and excessive scoring of non-economic factors. We believe that a part of what is scored therein should be in requirements in the Technical

Specifications. This would allow better weighting of tariffs and frequencies. In any event, it is important to bear in mind that, certain basic quality requirements having been satisfied, this variable also should be determined by the play of market forces.

ELEVEN. The CNC Council believes that, if bid conditions include conditions from which obstacles may arise to maintenance of effective competition in the market for access to concessions of regular passenger transport by road, such acts could be challenged in disputed administrative proceedings, in accordance with article 12(3) of Competition Act 15/2007 of 3 July 2007. It is clear that this should be a last resort; it would be more desirable for the bid conditions to be drafted taking into account the observations made in this report of the National Competition Commission on the conditions contemplated in the Protocol.

Madrid, 14 July 2008.