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ROUNDTABLE ON CONCESSIONS

Contribution from Turkey

-- Session I --

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ROUNDTABLE ON CONCESSIONS

1. İzmir, Mersin, İskenderun, Derince, Bandırma and Samsun ports[1] operated by TCDD (The State Railway Company, General Directorate of the State Railway Administration of Turkey) have been included in the privatisation programme by the Privatisation High Council (PHC)[2] in 2004. Their privileged geographical location, their connection to highways and railways unlike other ports, the size of investments they have concerning infrastructure and superstructure and largeness of their back spaces bring these ports to a position that has de facto concession. Moreover, Mersin, İskenderun and Bandırma ports have legal concessions to offer pilotage and towage to neighbouring ports. Privatisation in Turkey with respect to ports is a partial privatisation (landlord port model) in the sense that at the end of the bidding process a contract to transfer the right to operate the port is signed and this contract is a concession contract whereby the government transfers operating rights to private parties while keeping the ownership of the assets including the land.

2. The basic targets in privatisation of ports via contracts to transfer the right to operate the ports are that the projects including necessary investments could not be realised due to various reasons such as absence of bidders in tenders for projects regarding specific ports, delays in tenders, court decisions etc, that the ports became far from being functional in the face of increasing volume of trade due to deficiencies[3] in the management of TCDD. Therefore, privatisation has been seen as an opportunity to realise necessary investments. For instance, the contract to transfer the right to operate Mersin port requires the operator to realise compulsory investments within the first five years. As a result, the main objectives regarding privatisation of ports are to realise the investments, bring efficiency and provide rapid high quality service.

3. With respect to supervision, TCDD tries to carry out all operational activities and managerial transactions and it is known that they can not be done in an efficient manner.[4] It is not realistic to expect a single unit to assume performance of various and different duties. There is not a central body to provide supervision and regulation of ports or a port authority to oversee public benefits specifically for ports. General Directorate for Construction of Railways, Ports and Airports under Ministry of Transport (DLHİ), Ministry of Transport, State Planning Organisation and Ministry of Finance have powers regarding investments, Undersecretariat for Maritime Affairs regarding maritime services, Ministry of Public Works and Settlement and municipalities regarding development of ports. For instance, with respect to İzmir port, infrastructure is carried out by DLHİ, superstructure and tariff setting by TCDD, pilotage and towage services by Turkish Maritime Organisation Inc (TDİ), services for ship and freight by Directorate of Port within TCDD. Tariff settings, services for ships and freight that can be subject to competition are performed by TCDD and Directorate of Port within TCDD.

4. With respect to privatisations, the Competition Board, the decision taking body of the Turkish Competition Authority (TCA), has a dual function that can be summarised by citing Articles 3 and 6 Communiqué Regarding the Methods and Principles to be Pursued During the Course of Pre-Notifications and Applications for Authorization Made to the Competition Authority in order to Acquisitions via Privatization to Judicially be Valid Communiqué No: 1998/4 (the Communiqué).

5. Article 3 provides that “For procedures of acquisition via privatization under the scope of this Communiqué, in the case where the market share of the undertaking to be privatized or the unit aiming at producing goods and services at the relevant market exceed 20% or where the turnover of the same undertaking or unit exceed 20 trillion Turkish Liras or even though the aforesaid limits are not exceeded, but where the undertaking to be privatized does have judicial or de facto privileges, it is necessary to make

a pre-notification to the Competition Authority before tender conditions are announced to the public **in order to evaluate the results of such privatization in the relevant market, the condition of judicial or de facto privileges –if any- of the undertaking to be privatized after privatization** and it is necessary to take the view of the Competition Board which shall be taken as the basis in the preparation of tender conditions document."

6. Article 6 provides that "Application for Authorization to the Competition Authority shall be after the tender procedure is finalized and but before the decision of Privatization High Council, regarding the final acquisition procedures of the undertaking or the unit (aiming at the production of goods and services) to be privatized, in the form of independent files for each bidder taking part in draft resolution of the Privatization High Council submitted by Privatization Administration to Privatization High Council. To such an extend that, in case the number of bidders in draft resolution is more than three, authorization application for other bidders cannot be made before Competition Board Resolutions regarding the first three bidders' acquisition procedures are not notified to Privatization Administration."

7. For the sake of convenience, pre-notification stage can be called as Phase I, whereas second stage as regulated in Article 6 may be named Phase II.

1. Phase I

8. It is compulsory to mention following explanations to explain the position of the Competition Board in the privatisation of the ports.

9. While operated by TCDD, the ports are structured as state service port or tool port. They will become landlord ports after transfer of the right to operate. TCDD performs its transactions without the need for any regulations due to its monopoly right under current structure and in previous periods competition infringements are known issues due to the operation of private undertakings in handling in port quays and absence of supervision in TCDD contracts for the purchase of service the subject of which is only to carry out the service for the purpose of carrying freight inside the port (limbo). In the next step to liberalise the mentioned service, that is the landlord model, the state transfers all commercial activities to private undertakings with the exception of ownership. The need for necessity of regulation will be more obvious at this stage.

10. In the absence of a port authority responsible for supervision and regulation of port services after privatisation the responsibilities and powers of which are defined and officials of which are determined, establishing intra-port competition via dividing on the basis of terminal becomes a necessity because inter-port competition is absent due to absence of short and medium term alternatives for some ports in geographic regions that these ports are located, whereas there is no need for any structural regulations for some other ports after taking into account the geographical market conditions (inter-port competition, existence of alternative supply resources, regional investments towards ports that can be realised by private sector initiative).

11. Having taken into account these explanations regarding Phase I for privatisation of ports operated by TCDD as a monopoly, the Competition Board formed its opinion regarding İzmir, Mersin, İskenderun, Samsun, İzmit Derince and Bandırma ports and sent it to Privatisation Administration. The Opinion can be summarised as follows.

1.1 Concerning the privatisation of İzmir port

- With the aim to avoid creation of dominant position after privatisation in the field of provision of container handling service in the port, to assist in formation of prices of

services in market conditions with competition it will create and to provide efficiency of services; the area used for container handling and the back space should be privatised by splitting them into two in a form that the area consisting of three quays and 10 terminals (4-3-3) should not violate the totality of the other two quays and that two separate undertakings would be enabled to provide services through offering one quay to operation by a separate undertaking.

- There is no disadvantage in offering the operation of the quay reserved for handling conventional cargo and its back space with the quay for passenger ship and its facilities to the same undertaking and/or association of undertakings and therefore the quays, back space and facilities under consideration can be privatised together.

1.2 Concerning the privatisation of Mersin port

- To ensure that the quays reserved for container handling and their back spaces are not within the control of a single undertaking; quays numbered 7-8-9-10-11 with quays numbered 12-13 should be privatised as a package with their back spaces in a way that totality of the container quays are not violated; and quays numbered 20-21 and their back spaces with the quay adjacent to the area used by Coast Guard concreting and dredging of which have been completed should be privatised as a separate package to put them under operation of two different undertakings and/or association of undertakings.

- There is no disadvantage in offering the operation of the quays reserved for handling conventional cargo and their back spaces with the quay for passenger ships and its related facilities to the same undertaking and/or association of undertakings and therefore they can be privatised together.

1.3 Concerning the privatisation of İzmir and Mersin ports

- In the privatisation of container handling areas in İzmir and Mersin ports, because if the right to operate container quays is acquired by the same undertaking (or by the undertaking that is within the same economic group) and/or associations of undertakings, a dominant position would have been created in favour of the mentioned undertaking and/or association of undertakings in the market of Republic of Turkey, İzmir and Mersin ports should not be given under the operation of an undertaking in the same economic group and/or associations of undertakings.

- However, regarding the sections for container handling to be formed by dividing İzmir port into sections, there is no disadvantage in

  - acquisition of the rights to operate the quays terminal number of which is relatively little among container handling sections already set up in Mersin port by the undertaking and/or associations of undertakings who acquired the rights to operate the quays terminal number of which is relatively more among sections to be formed for container handling in İzmir port

  - acquisition of the rights to operate the quays terminal number of which is relatively more among container handling sections already set up in Mersin port by the undertaking and/or association of undertakings who acquired the rights to operate the quays terminal number of which is relatively little in sections to be formed for container handling İzmir port

- acquisition of the rights to operate quays in both ports terminal number of which is relatively little by the undertaking that is within the same economic group and/or association of undertakings

- In case there are shipping agencies and/or liners and those that are in the same economic group with them among each of undertaking and/or associations of undertakings that will acquire the right of operation of the quays terminal number of which is relatively more in container handling units set up in İzmir and Mersin ports, the undertakings of the mentioned nature should not either alone or together have the instruments that provide direct or indirect control of undertaking/associations of undertakings that will acquire the rights to operate.

1.4 Concerning the privatisation of İskenderun, Bandırma and Derince port

12. There was nothing to mention at the stage of pre-notification according to Article 3 of the Communiqué No: 1998/4.

1.5 Concerning the privatisation of İskenderun and Mersin ports

13. There is no disadvantage in acquisition of the right to operate İskenderun port by undertaking and/or associations of undertakings that will acquire the right to operate anyone of the container handling units divided into sections in Mersin port.

1.6 Concerning the privatisation of Samsun port

- To avoid a vertical integration that has the potential to prevent competition;

  - the right to operate Samsun port should not be transferred to

  - undertaking and/or associations of undertakings that deal in ro-ro liner any consortium in which undertaking and/or association of undertakings that deal in ro-ro liner have instruments that directly or indirectly provide the right to control.

2. Phase II

14. Phase II has been complete only for Mersin and İskenderun ports. Before granting the decision of the Board in Phase II regarding Mersin and İskenderun ports, following explanations should be given.

15. Regarding transfer of the right to operate Mersin and İskenderun ports, the contract for the transfer provides that price tariffs should be those currently applied by TCDD till the end of the next three years beginning from the date of signature of the contract. Other matters should be under the control of the prospective port operator. However, after three years, due to absence of port authorities in Turkey to supervise port services and pricing, there are concerns that conduct that may be subject of Article 4 regarding agreements, concerted practices and decisions limiting competition and Article 6 concerning abuse of dominant position of the Law on the Protection of Competition No 4054 (Competition Law/Law No 4054) may occur. Therefore, there are fears that the parameters which are main subjects to competition will not totally be determined under free market conditions after privatisation.

16. In the contract to transfer the right to operate Mersin port following privatisation, there is a provision aiming to prevent abuse of dominant position (prohibition of discrimination, excessive price and limitation of supply) that is very important both for undertakings operating in the relevant and neighbouring markets and for the security of the sectors benefiting from externality of port services. The

authority mainly responsible to supervise the provision is TCDD. However, the problem is that the boundaries of the powers assigned to TCDD via such contracts are not clear. For instance, it is emphasised that the level of TCDD official to conduct the examinations regarding subjects that TCDD are responsible for, their powers to intervene immediately against the prospective operator of the port and to stop the act or acts contrary to the Law (for instance violation of non-discrimination obligations by port operator through favouring some groups for approaching the quay without following the ship waiting order) should be clarified.[5] Moreover, that the section to be allocated to the officials and the administrative costs are being provided by the port operator does not seem to be measures to remove the concerns regarding the existence of the state in the ports for the purpose of supervision. Although Law No 4054 can be seen as a precaution against such conduct, the market is dynamic and requires immediate intervention against anti-competitive conduct that can not be satisfied by long periods for finalisation of administrative transactions in the Law No 4054. Therefore, unambiguous ex-ante determinations may be more meaningful than ex-post interventions.

17. With these explanations in mind, when successful bidders were sent to the Competition Board, it ruled that anyone of the successful bidders could acquire the right to operate Mersin port for 36 years and as a result the bidder, PSA-AKFEN Joint Venture, who offered the highest bid, would acquire that right after the transaction is realised. The Competition Board, in contrast to its Opinion requiring privatisation disallowing a single undertaking to obtain the right to operate Mersin port, allowed acquisition of the right by PSA-AKFEN Joint Venture. The permission was granted by the Competition Board because of the existence of provisions in the contract for transfer of the right to operate Mersin port including compulsory investments within the first 5 years that will increase container handling performance 2.25-3.2 times, performance criteria to be satisfied while compulsory investments are done in order to avoid failure in services given in the port, provisions prohibiting abusive practices such as discrimination, excessive prices and limitation of supply, reporting of port activities annually by separation of costs, responsibility given mainly to TCDD to oversee compliance with these obligations which gives the impression that a structure similar to a port authority is tried to be set up. Moreover, the contract includes provisions regarding quality of the service, its duration, criteria to assess the efficiency, and minimum amount of handling that will be controlled by TCDD and other governmental bodies.[6] The Competition Board was convinced that these provisions in the contract would substitute the expected benefits of establishing intra-port competition as foreseen in its Opinion in Phase I. Actually the Opinion of the Competition Board in Phase I favouring creation of intra-port competition was due to the initial strict attitude of the Privatisation Administration that no regulatory arrangements could be done in ports.

18. However, when PSA-AKFEN Joint Venture submitted the highest bid for the right to operate İskenderun port, the Competition Board has decided that transfer of the right to operate İskenderun port which is within the same geographic market and shared back spaces with Mersin port should not be permitted because it would strengthen PSA-AKFEN Joint Venture's dominant position if it would acquire Mersin port. The basic concern of the Competition Board which also constitutes the reasoning of its decision is to create inter-port competition after privatisation of Mersin port in favour of a single undertaking due to its medium-scale and other reasons. Tender procedure for İzmir, Derince, Bandırma and Samsun ports has not been finalised yet.

19. Generally, the Competition Board, to form its Opinion in Phase I, benefited from some works such as World Bank Port Reform Tool Kit of 2001 and UNCTAD's Anlayses of Port Privatisations published in various dates, 8th Five-Year Development Plan by State Planning Organisation. The Competition Board, in the absence of a Port Authority to ensure supervision and regulation after privatisation era, aimed to bring some structural measures such as operation of some ports by at least two separate undertakings (to ensure intra-port competition) where there is no prospect for inter-port competition and prevention of vertical integration that has the potential to prevent competition, to be taken into account before the tenders to ensure a certain level of competition. In Phase II, the Competition Board

takes into account the behavioural measures provided in the contract to transfer the right to operate Mersin port and the role of TCDD in overseeing that the behavioural measures are obeyed and deems them sufficient enough to avoid competition concerns that it raised in its Opinion in which it has proposed privatisation of quays separately to enable intra-port competition. Moreover, the Competition Board, regarding İskenderun port, aims to avoid acquisition of it by the same JV who will acquire the right to operate Mersin port in order to ensure inter-port competition between these two ports that are located in the same geographic region. Therefore, it can be said that the Competition Board takes into account both behavioural and structural measures in both phases and tries to ensure competition by taking into account the effects of both measures before forming its Opinion or final decision.

NOTES

1. Haydarpaşa is another port operated by TCDD and it will be closed and therefore it is excluded from the privatisation coverage.

2. The decisions of Privatisation High Council are executed by Privatisation Administration.

3. Due to deficiencies in TCDD management, congestion has been experienced in İzmir port which complicated the realisation of port operations. As a result of congestion, congestion premium began to be implemented for shipments to Northern Europe, Ireland, Scandinavia and England that was expanded to America with increase in freight. It was suggested by International Freight Forwarders Association of Turkey that the congestion premium would create an additional €38 million cost for Turkish import and export if the congestion would continue in İzmir port. Although these problems are partially caused by lack of investments, the functionality of the port decreases day by day due to inefficient management of TCDD and absence of necessary computer systems and computer programs.

4. Port activities can be examined under two headings that are public and commercial and subtitles cover ownership (administration of immovable properties within the port, development in the long term, maintenance etc.), planning (preparing master plan and improving the initial project, expansion, new projects/terminals etc.), marketing and promotion (commercial duties, attracting new customers to the port etc.), provision of freight handling service (storage, distribution etc.), provision of ancillary services (fuel supply, information system, insurance, banking etc.), regulatory activities (regulations and their implementation, monitoring compliance with regulations, security, environment, safety etc.), supply of maritime services (duties of harbour master, coordination of maritime services etc.).

5. It is expected that such ambiguities will be clarified for prospective privatisations in the short term.

6. Contract may be terminated in case the port operations are not carried out wholly or significantly, port services do not satisfy the service quality. To ensure efficiency of the port after compulsory investments are made, the average length of time of service to ships should not fall below the average length of time in 10 Mediterranean ports with highest traffic.