

Ukrainian ports in a legal straitjacket*

The Ukrainian port sector and, in particular, the Ukrainian public port authorities such as the Odessa and Ilyichevsk commercial sea ports, are rapidly losing private sector interest. The Ukrainian central government in Kiev has proved unable to create a sustainable, stable and competitive port business environment for private entrepreneurs to invest in.

The main reasons for this are considered to be Resolutions 530 and 703 (R530, R703), which have caused major disturbances amongst private investors active, or planning to invest, in the Ukraine, to say nothing of political issues connected with presidential elections in 2010.

Apart from private initiatives in Yuzhny (TIS) and Odessa (CMA CGM), no new significant investments have been made by private companies in public ports in the past two years.

Moreover, a number of disputes regarding managing and setting up public private partnerships have come to the fore: NCC affiliate Ukrtranscontainer was "asked to leave" Ilyichevsk after a bitter and very public dispute, while APM Terminals could make no headway in the same port; Odessa has had trouble attracting private interest for its Quarantine Mole project, and so on.

In April last year the government, through R530 (as amended in July 2009), finally specified the investment process to be followed in the Ukrainian public sector.

As you were

The new procedure sets out tenders (auctions) for attracting investors, thus maintaining the earlier thrust of the now notorious R703 of May 2008. So, the procedure stayed equal in terms of joint activity, commission, agency, property management contracts (all forms of PPP), while the regulation of investment agreements changed materially.

Official maze

Under the new procedure, the Cabinet of Ministers rules on an investment decision after its prior approval by a "regulatory body," that is the ministry covering the sector of the economy concerned, and the opinions of the State Property Fund, the Ministry for Finance, and the Ministry for Economy are heard. The tender is

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held only after the Cabinet of Ministers has taken a positive decision.

The fact that, at last, there is official regulation of procedures in setting up public private partnerships in ports ("4Ps") might have reassured potential investors. R530, however, had precisely the opposite effect. There are several key issues.

- The timing for decisions by the Cabinet of Ministers is not fixed.
- Although the tender principle provides for selling property on a competitive basis, it is not an investment agreement that is sold; only the right to reach such an agreement.
- Although the tender is usually to be held in the presence of at least two participants, if only one tender participant has registered, the tender commission set up by the regulatory body may recognise this single participant as successful buyer. However, the terms and conditions for arranging this have not been set up.

Lack of certainty

In short, after passing the entire approval procedure, starting with the public company, through four ministries, to the Cabinet of Ministers, the investor has no certainty on timing and other important issues, even though terms and conditions had already been approved at an earlier stage in the already extensive and hardly transparent process. R530 could thus be set to have significant consequences for the public port sector.

- Investors might be unwilling to invest in the ports on such terms.
- Development institutions and banks providing soft loans, which constitute the majority of debt financing in the Ukraine, will hardly find this investment procedure to be in line with international best practice (IBP), rules and logic.
- Private investors might eventually ignore and leave public ports such as Odessa and Ilyichevsk in favour of fully private port initia-

tives in the Yuzhny and Nikolayev regions. These entities are less hampered by unfavourable state interference and can therefore offer private investors, as well as development banks, a safer haven when it comes to investment in the Ukrainian port sector.

• Tender procedures are generally designed with the goal of selecting the most suitable investor for a specific project. In the Ukrainian case, the authorities are in the position to alter the project's characteristics through various approval and "expertise" sessions.

Not the best

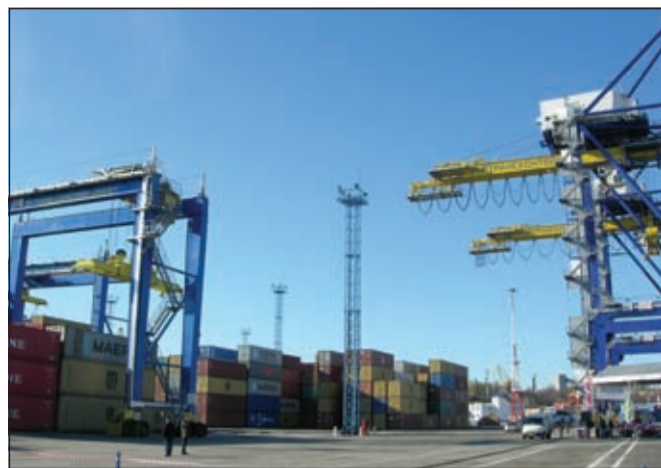
Besides the general deterrence effect of government intervention on private investors, the complex procedures might also result in the preferred bidder in the tender not being the most suitable investor to sign the final contract. This can seriously hamper the country's economy and the financial strength of the ports themselves.

In the international market for ports and terminal investments, IBP has been developed and up-

dated over the years, and not only in developed countries.

Taking into account the lessons of international tenders in the port and terminal sector, the main consequences for public and private participants are as follows:

- Increased market appetite: by offering transparent, predictable and finite tender procedures, the number of relevant bidders has significantly increased.
- Optimised strategic alignment: through a structured tender process, the authorities can usually ensure that the contract is awarded to the most suitable investor.
- Increased financial value: the increase in private sector interest of itself enhanced the competitiveness of the process and therewith the resulting deal, based on sharper financial bids and stringent investment and traffic commitments.
- Increased economic value: competition has positive economic effects on price levels and the overall quality of goods and services. In the port sector, this means that local producers and consumers benefit from competitive trans-



The very public row between NCC's UkrtransContainer affiliate and the port authority of Ilyichevsk turned out to be particularly bitter

port, storage and transit rates as well as short transit times and reliable cargo handling.

Badly hampered

The 18 public port authorities in the Ukraine are all but prevented by the new legislation from effectively managing their ports. On one side they are confronted with a collapse in private interest in terminal (re)development and from the central government's side they are paralysed when it comes to

organising fair, transparent and value-driven tender procedures.

The global economic, financial and gas crises have already left their marks on the Ukrainian economy and the port sector in particular. In January this year the Cabinet of Ministers approved the list of 42 investment projects in Ukrainian public ports for 2010-2015, worth around €2B. However, the current institutional and legal framework could bring the port sector to a grinding halt. □

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