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The awarding of seaport terminals to private operators: European practices and policy implications

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Abstract

The awarding of port services to private operators has become one of the most important tools for port authorities to retain some control on the organization and structure of the supply side of the terminal market. This paper discusses the awarding of terminals in European ports from an EU legal and policy context. It also seeks to provide in-depth information on current practices and perceptions of port authorities around Europe on tendering and contractual arrangements linked to the awarding of terminals. The relevant issues relate to the terminal awarding processes, the duration of the terminal award contract and the contract stipulations. The paper also seeks to understand whether the practices are influenced by factors such as terminal size, the competitive environment in which the port operates and the geographical location.

Keywords: Concessions; Terminal; Seaport; Legal system; Governance; European Union.

1. Introduction

The awarding of port services to private operators has become one of the most important tools for port authorities to influence the prosperity of the port community (Notteboom, 2007; Pallis et al., 2008). Through the awarding procedures and the contract, port authorities can in principle retain some control on the organization and structure of the supply side of the terminal market, while optimizing the use of scarce resources such as land. This paper contains the main findings of a survey on the awarding of terminals in Europe. The survey was commissioned by the European Sea Ports Organisation (ESPO) in response to the European Commission's ports policy communication which was published in October 2007. With this paper, we aim to provide a better understanding of current practices of port authorities in Europe.

In a first part, the paper discusses the EU legal and policy context governing the awarding of terminals in European ports. The remaining sections of the paper seek to

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provide in-depth information on current practices and perceptions of port authorities around Europe on tendering and contractual arrangements linked to the awarding of terminals. The paper also seeks to understand whether practices are influenced by factors such as terminal size, the competitive environment in which the port operates and the geographical location. Due to confidentially reasons, this paper only contains aggregated results grouping terminal projects and ports considered.

2. The EU context: rules on service concessions and the European ports policy communication

2.1. The uncertain status of terminal awarding regimes under EU law

The granting of rights of use to ships, goods and terminal operators is subject to the general rules of the EU Treaty, such as the provisions regarding freedom to provide services and the prohibition of abuse of a dominant position. The awarding of long-term rights of use to port service providers, especially in cargo-handling, can be governed by a number of legal constructions (Van Hooydonk, 2002), including the rather rigid EU Directives on public procurement and the more flexible regime governing service concessions which seems to be the preferred option for port authorities. Essential elements of service concessions include the transfer of responsibilities to the concessionaire and the fact that a significant risk inherent in the delivery of the services lies with the concessionaire (Petschke, 2008).

The granting of service concessions is subject to general EU legal principles of equality of treatment, transparency, proportionality and mutual recognition which the European Commission clarified in a horizontal interpretative communication (European Commission, 2000). It was however for a long time unclear to what extent these principles were applicable to the variety of terminal awarding regimes existing in Member States (Van Hooydonk, 2002). Whereas in some countries these are governed by public law and take the form of public service contracts or public domain concessions, in others these are governed by private law and take the shape of ordinary lease agreements. In yet other cases a variety of unilateral permits, authorisations and licenses exists, whereas some countries or ports do not seem to have any particular regime or form whatsoever (ESPO, 2005). Also, the notion ‘services’ caused considerable confusion since service concessions would normally concern activities whose nature and purpose, as well as the rules to which they are subject, are likely to be the State's responsibility and may be subject to exclusive or special rights (European Commission, 2000). Privatisation processes have however more or less liberalised cargo handling services in most Member States and the European Court of Justice even ruled that these services are of a commercial nature and not different from any other economic activities (European Court of Justice, 1991).

2.2. The port services’ Directive: a failed attempt to provide legal certainty

The European Commission published in 2001 a Directive proposal on market access to port services (European Commission, 2001). The aim of the proposal was to establish rules for market access to port services including the use of transparent selection procedures. The political debate, animated by aggressive trade union protests, focused

on labour-related aspects of the proposal. The essence of the Directive was however about the way in which port authorities would use terminal awarding agreements to regulate market access for potential service providers, thus ensuring market contestability and intra-port competition (De Langen and Pallis, 2006; Verhoeven, 2006; Pallis, 2007). The Directive proposal also set rules to avoid discriminatory behaviour of port authorities that were directly or indirectly engaged in the provision of port services themselves.

Although the Commission's initial proposal was quite dogmatic, the compromise that was painstakingly devised afterwards by Council and Parliament did acknowledge the strategic role of port authorities and took into account the need to ensure continuity of investments and legal certainty for existing agreements. Influenced by continued labour unrest as well as internal political meddling, the European Parliament however rejected the final compromise on the Directive proposal in November 2003. In 2004 a second version was published (European Commission, 2004) which also failed to find political support, mainly because some of its key features did not respect the compromises already reached on the first proposal (Verhoeven, 2006). The uncertainty regarding the status of terminal awarding regimes under EU law therefore continued to exist.

2.3. The soft law approach of the European Ports Policy Communication

Following the rather traumatic double failure of the port services' Directive, the European Commission took its recourse to 'soft law' and published, after an extensive process of consultation, a Communication on a European Ports Policy (European Commission, 2007) which contained a chapter with guidance on the use of port concessions. The Commission confirms that terminal awarding agreements granted by a public port authority are to be considered as service concessions under EU law, regardless what their status is under national law (public or private law, contract or unilateral measure etc.). The key element is not the actual cargo handling service itself which – as explained above – is a normal commercial service, but the fact that access to port land is a precondition for providing this service. The granting of the use of a piece of port land would thus be a measure through which the port authority disposes of a public good of which the availability is limited and which allows the performance of the commercial cargo handling activity which would not be possible without the availability of this public good. The public aspect would even be stronger in case port infrastructure is financed by public means. Only if the port and its real estate would be fully private, run as private companies and if all its components would be fully financed by private means an exemption from the rules governing service concessions would seem to be feasible (European Commission, 2008).

The application of EC Treaty rules and principles on service concessions is elaborated in the above-mentioned horizontal interpretative communication of the Commission (European Commission, 2000). This guidance has now been specifically applied to the port sector through the concessions chapter of the European Ports Policy Communication. The Commission first of all identifies the basic principle that public authorities granting a concession are bound by a transparency obligation, implying that their initiative must be adequately advertised, that the procedure must be fair and non-discriminatory and that it can be reviewed. Such obligation of transparency consists in ensuring, for the benefit of any potential candidate, a degree of advertising sufficient to enable the concession to be opened up to competition and the impartiality of the selection procedure to be reviewed. The transparency obligation would not only apply

to concessions involving cargo handling services, but also those concerning technical-nautical services (pilotage, towage and mooring). Here the Commission is more precise about the use of selection procedures, stipulating that these must be given 'adequate, European-wide publicity'.

Seen from a port governance point of view, the Commission clarifies some important additional points. First it says that the transparency obligation does not hinder port authorities from setting selection criteria which reflect the commercial strategy and development policy of a given port that will be the basis for granting the concession. This is an important recognition of the discretionary power of port authorities, which was a crucial issue during the debate on the port services' Directive. In addition, the transparency obligation would only apply to contract awards having a sufficient connection with the functioning of the internal market, excluding for instance cases of very modest economic interest which would make contract awards of no interest to economic operators located in other Member States. The second important point relates to the length of concessions. According to the Commission, durations must be set so that these do not limit open competition beyond what is required to ensure that the investment is paid off and there is a reasonable return on invested capital, whilst maintaining a risk inherent in exploitation by the concessionaire. This again corresponds with the perspective of the port authority, wishing to ensure a balance between a reasonable payback period for the investments made by terminal operators, on the one hand, and a maximum entry to potential newcomers, on the other (Notteboom, 2007). The Commission adds that, when a concession expires, renewal is considered equivalent to granting a new concession and is therefore bound by the above-mentioned transparency obligation. This raises an important question regarding the common practice of prolongations whereby a concessionaire makes additional investments before the expiry of his concession. Also, it is not clear to what extent clauses on possible prolongations can already be included in the initial concession agreement. A third point is that the Commission accepts provisions in concession agreements which aim at ensuring that the terms of the concession are respected and at protecting the legitimate interests of ports and local communities, notably with regard to overall quality and performance of port services. A condition is that these provisions do not infringe Treaty rules or Community legislation. The Commission would thus allow the active use of concessions as intelligent governance tools, an issue which is elaborated further in this paper. The final point relates to the safeguarding of rights of workers in case of transfer of activity further to a selection procedure. This would mean that, subject to conditions, new concessionaires may be obliged to take over staff employed by the previous concessionaire. It remains to be seen to what extent this may impose an entry barrier to new operators and thus reduce market contestability.

2.4. Further initiatives

It is important to underline again that most of what is explained above is based on the interpretation of the European Commission and has therefore the status of 'soft law'. For the time being there is no secondary legislation in place which confirms these principles although the Commission is considering the development of a horizontal Directive on concessions (Petschke, 2008). Neither is there solid jurisprudence of the European Court of Justice available in the field of port concessions. Port authorities could therefore choose to take the risk of ignoring the principles that the Commission set out in its ports policy communication. This hardly seems a responsible strategy

however. Leaving aside the possibility that a legislative approach may still be forthcoming, it would be unwise to ignore the above-cited principles simply because it is likely to incite litigation from operators who were not granted a concession in a given port. The question should therefore rather be whether the guidance provided by the Commission provides sufficient legal certainty for port authorities and recognises and empowers their strategic role of port authorities.

The Commission's guidance can be qualified as being very supportive to the position of the port authority, confirming its discretionary power in the selection of operators and the setting of concession conditions. Apart from specific questions already raised above, such as the prolongations of concessions and take-over of personnel, two fundamental problems however remain which are inherent to the 'soft law' nature of the Commission's communication. First, contrary to for instance the port services Directive, the communication does not foresee transitional rules for existing agreements since it is not introducing new legislation but simply giving an overview of principles based on the fundamental rules of the Treaty. It is however common knowledge that many concessions in European ports were not granted on the basis of the transparency obligation required by the Commission. This leaves a great deal of uncertainty as regards existing agreements. Second, it could be argued that the interpretative guidance of the Commission may not be sufficient to empower the position of port authorities and ensure a level playing field among them that would match the bargaining power of terminal operators as well as political influence often exercised in the granting of concessions (Verhoeven, 2008).

It is obvious that these concerns could have been more adequately addressed through legislation which would undisputedly have created greater legal certainty. The future will demonstrate how effective the soft law approach will be. In this respect, two pending issues should be noted. First, there is the already mentioned possibility that secondary legislation on concessions may still be forthcoming, but then at a more horizontal, cross-sector level. This is however not certain and in any case not expected to happen before 2010. Second, there is the survey on current practices regarding the awarding of seaport terminal contracts in Europe which the European Sea Ports Organisaton (ESPO) commissioned in 2008 and of which the results are summarised in this paper. The survey is a first step towards the publication of a code of good governance on port concessions which ESPO is preparing to complement the soft law guidance provided by the Commission. It is hoped that in this way a number of the unanswered questions may be solved in a practical manner.

3. Set-up of the survey

In order to shed light on terminal awarding practices in Europe, the first part of the survey contained questions related to the situation in Europe. In total about 80 port authorities around Europe received the survey. Answers were obtained for 43 terminal projects in European seaports, resulting in a response rate of 54%. Two thirds of these projects relate to greenfield developments (i.e. the terminal site is either reclaimed from the sea or encompasses land not previously used for port or industrial activities), while the remaining cases relate to brownfield sites (i.e. site has been used before for other port or industrial activities). About 44% of the terminals considered started operations recently. For about a quarter of the projects, the awarding and contracting procedures

are already completed, but the terminal has not started up operations yet. In 13% of the cases the awarding procedure is completed, but the contract with the future operator is not finalized yet. For the remaining cases the awarding procedure has not been started up yet or the awarding procedure is ongoing.

Table 1: Distribution of responses to the survey (43 terminal projects in Europe).

Terminal Size	*No.*		*No.*
0-5 ha	4	Hamburg-Le Havre range	12
5-50 ha	17	Scandinavia/Baltic	10
50-100 ha	6	Mediterranean	12
>100 ha	9	Atlantic range	5
Not indicated	7	United Kingdom/Ireland	0
TOTAL	43	Black Sea	3
		Other	1
		TOTAL	43

Table 1 depicts the distribution of responses to the survey. Large, medium-sized as well as small terminal projects are represented in the survey. About 61% of all responses relate to container terminal projects (26 in total). We estimate that this represents about 35 to 40% of all container terminals in Europe that have started/will start operations or have been/will be awarded in the period 2003-2010. The survey results are mainly providing a good representation of the current situation in the European container terminal industry.

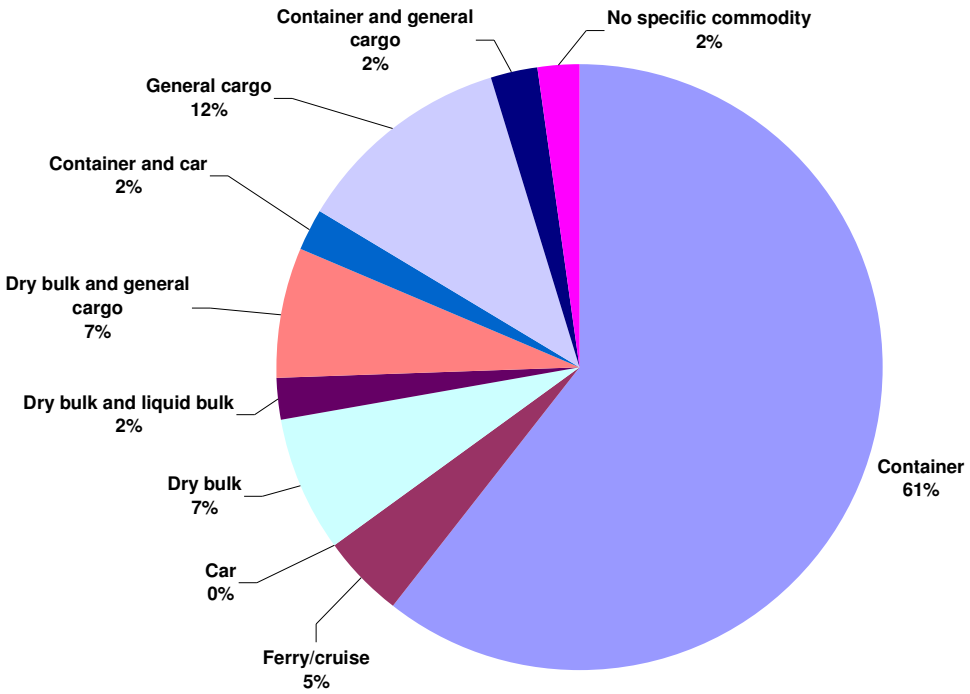

Figure 1: Distribution of responses according to terminal type.

Some important remarks should be made with respect to the terminal projects considered in the survey. First and foremost, port management systems differ significantly in Europe. The survey was mainly relevant for 'landlord' ports in Europe, thereby excluding quite a number of European ports mainly situated in the United Kingdom, Scandinavia but also elsewhere. Second, ongoing port reform programs imply that quite a number of European ports are in a transition phase. Newer EU Member States such as Poland, Bulgaria and Romania have recently witnessed a shift from state-owned and state-operated ports to a landlord-type of port management system. For example, the Polish 'Law Act on ports and harbours' demands from port authorities to execute privatization of port terminals/operators which formerly were state-owned companies. Such activities are in progress in Gdynia since 2001 and up to now two of the four terminals have been privatized, while the other two are still owned and controlled by the State. Countries like France and Spain are presently undergoing major changes in their respective national port policies.

4. Survey results: the terminal award process

4.1. A classification of awarding procedures

Terminals may be awarded by several methods, including without limitation, by direct appointment, private negotiation from a qualified pool, or using a competitive process. The survey revealed that, for the given port project sample, competitive bidding is the most common procedure used in concession granting today (table 2). Quite remarkably, direct appointment seems to be more common among larger terminals. Processes of private negotiation from a qualified pool are mainly used for smaller terminals. Mediterranean ports massively opt for competitive bidding processes, while the Baltic ports show the largest diversity in awarding methods. It is difficult to quantify to what extent national and supranational legislation, port privatization schemes and legal disputes have contributed to this situation. Any competitive bidding should comply with the principle of equality, which states that every candidate should be equally treated and compared and that there will be no favoritism in the awarding of the concession or no substantial reduction of competition.

Table 2: The type of awarding process used.

	ALL	*Size of terminal*			*Region*			
		<50 ha	50-100 ha	>100 ha	Baltic	H-LH range	Med	Other
Type of awarding process for the specific terminal prjects								
Awarding by direct appointment or direct adjudication	**14%**	5%	17%	22%	33%	15%	0%	11%
Awarding through a process of private and bilateral negotiations from a qualified pool of market players	**11%**	19%	0%	0%	22%	23%	0%	0%
Awarding through a competitive process (including public tendering or competitive bidding)	**75%**	76%	83%	78%	44%	62%	100%	89%
	100%	100%	100%	100%	100%	100%	100%	100%

In only 21% of the projects following a competitive bidding process, potential candidates were invited by the port authority. In 83% of the cases, the port authority published an open call for tender. It has to be stressed that such an open call in quite of number of cases does not involve a public tendering procedure. It often involved an open assessment procedure with room for negotiations and the submission of improved proposals during the process. In 68% of the 'open call for tender' cases the terminal is awarded on the basis of the offers of the eligible candidates, followed by one or more negotiation rounds. In the remaining cases the terminal is awarded on the basis of the offers of the eligible candidates without any negotiations or the possibility for candidates to submit a revised proposal during the awarding process. Some ports use different types of tendering procedures depending on specific criteria: for example, a limited or 'light' version for smaller facilities and a full version for larger terminals.

In the cases where terminals were directly appointed, port authorities did so mainly for strategic reasons (e.g. the creation of intra-port competition or the securing of further expansion possibilities for efficient incumbent firms) or because the terminal project represented a marginal extension of an existing facility (for instance the extension of an existing container terminal with one berth).

Table 3: The geographical and market scope of the awarding process.

	ALL	*Size of terminal*			*Region*			
		<50 ha	50-100 ha	>100 ha	Baltic	H-LH range	Med	Other
Regarding the awarding process, how extensive was the related publicity?								
Announced on a national scale	**17%**	18%	25%	11%	33%	0%	11%	40%
Announced on a European scale	**38%**	64%	0%	0%	33%	33%	33%	40%
Announced on an international scale	**46%**	18%	75%	89%	33%	67%	56%	20%
	100%	100%	100%	100%	100%	100%	100%	100%
What kind of terminal operators are involved in the awarding process?								
Local operators	**12%**	19%	0%	11%	20%	17%	0%	13%
Local and national operators	**16%**	19%	20%	0%	10%	8%	17%	38%
Local, national and foreign operators	**72%**	62%	80%	89%	70%	75%	83%	50%
	100%	100%	100%	100%	100%	100%	100%	100%

In case of a competitive bidding process, in almost half of the cases the port authority announced the awarding process on an international scale, 35% on a European scale and only 17% on a national scale (table 3). Not surprisingly, larger terminals show the most international focus. The awarding process for Baltic ports tends to be much more locally-oriented than the Hamburg-Le Havre range and the Med range. A possible explanation lies in the lower direct liner connectivity of the Baltic region to the international trade routes. Hence, Baltic ports are typically focused on intra-Baltic trade, shortsea services from the rest of Europe and feeder services in relation to the mainports in the Hamburg-Le Havre range. When asking about the kind of terminal operators

involved in the awarding process, 72% of the respondents pointed out that the bidding process involved local, national and foreign operators, whereas the remainder only included local and or national operators. Also here, large terminals have the widest coverage (table 3).

In case the awarding of the terminal takes place via a competitive process, a wide diversity exists in stages/rounds included in the awarding process (table 4). In about 38% of the cases, the terminal is awarded to one of the candidates in only one round. One third of the projects considered involves the reduction of the number of candidates in a first round (via a qualification/eligibility stage or selection stage). The remaining candidates take part in a second round (for example they get an invitation to tender). The final awarding is made in the second stage. Almost equally important is an awarding process covering more than two rounds, typically including a selection stage and two or more rounds to narrow down the number of candidates. Large terminals are characterized by more complex awarding processes, while an awarding process of only one round is frequently used for small and medium-sized terminals. The Mediterranean ports generally opt for a one-round process, while northern European ports often opt for several rounds.

Table 4: The stages in the awarding process.

	ALL	*Size of terminal*			*Region*			
		<50 ha	50-100 ha	>100 ha	Baltic	H-LH range	Med	Other
In case of awarding of the terminal via a competitive process, what kind of stages/rounds does the awarding process include?								
The terminal is awarded to one of the candidates in only one round	**38%**	41%	60%	0%	0%	22%	64%	43%
In a first round the number of candidates is reduced via a selection stage. The remaining candidates take part in a second round (for example they get an invitation to tender). The final awarding is made in the second stage	**32%**	29%	40%	20%	50%	33%	18%	43%
The terminal is awarded in more than two rounds, typically including a selection stage and two or more rounds to narrow down the number of candidates	**29%**	29%	0%	80%	50%	44%	18%	14%
	100%	100%	100%	100%	100%	100%	100%	100%

The survey also gives insight into the methodology used to award terminals. In about 48% of the terminal projects, the port authorities used some sort of uniform awarding formula or system for all terminals in the port. For large terminals of more than 100ha this figure amounts to 75%. In the remaining 52% of the cases the method was determined ad hoc based on the specificities of the terminal project under consideration (only 25% for large terminals).

4.2. Competitive bidding: the selection phase

Table 4 revealed that in almost two thirds of the cases, the competitive bidding procedure consists of two or more stages. The first phase typically involves a selection or qualification stage based on experience and financial strength of the candidates. The first stage in the bidding procedure reduces the number of potential bidders thereby avoiding the risks of non-compliance by unreliable bidders. In approximately 86% of the competitive bidding procedures considered, the selection stage includes minimum requirements related to the financial strength of the candidates. The most commonly-used financial parameters relate to a threshold value for the turnover of the candidate (mentioned by 38% of the respondents who use minimum requirements related to the financial strength of the candidates), a threshold value for the cash flow of the candidate (22%) and a maximum value for the ratio between the amount to be invested by the company and the turnover or net accruals of the company (28%).

In approximately 92% of the competitive bidding procedures considered, the selection stage included minimum requirements related to the relevant experience of the candidates. The experience of the candidate can for instance be demonstrated by the management of facilities for similar cargo in the same or other ports. The candidate thus has to credit his experience in the activities related to the project by giving proof of specific antecedents in the exploitation of terminals. The most common ways for port authorities to ask proof of relevant experience relate to:

- Experience in any part of the world in the operation of terminals of the same kind as the terminal that is being awarded (mentioned by 62% of the respondents who use minimum requirements related to the relevant experience of the candidates);
- A minimum worldwide terminal throughput (in tons, TEU, number of passengers, etc..) required to be eligible as a candidate (24%);
- Experience in any cargo handling operations in ports located in any part of the world (24%);
- Experience in the operation of terminals of the same kind and in the same region as the terminal that is being awarded (6%);
- Experience in any cargo handling operations in the same region as the terminal that is being awarded (3%).

4.3. Competitive bidding: the final awarding phase

Table 5 gives an idea of which documents and plans candidates have to submit to the port authority in view of the final awarding of the terminal. A technical implementation plan is compulsory in nearly all terminal projects under consideration, while requesting a financial plan and a marketing plan is a very common practice as well.

In about 70% of the terminal projects, each bidder had to quantify the staff requirements and also had to present studies of environmental and territorial impact covering aspects such as the impact of the terminal operations on the environment and the alternatives to eliminate, reduce or mitigate certain effects.

When asking about whether or not the port authority uses a formalized system in the final awarding stage, 41% of the respondents indicated they have no specific quantitative mechanism in place, but make a final choice based on a qualitative overall appreciation of the proposals. In 59% of the cases, the respective port authorities use some sort of scorecard system: various aspects of the proposal are rated and the results

are added up to a weighted or unweighted score, based on a score for each of the evaluation criteria related to the elements in the proposal.

Table 5: Components to be included by the candidate in view of the final awarding stage.

	ALL	*Size of terminal*			*Region*			
		<50 ha	50-100 ha	>100 ha	Baltic	H-LH range	Med	Other
Share of cases that incorporate the following elements in the documentation candidates have to prepare in view of the final awarding stage(s)								
Technical implementation plan of the terminal ordered by stages according to the growth of the traffic	**98%**	95%	100%	100%	90%	100%	100%	100%
Financial plan, including:	**78%**	75%	83%	88%	30%	91%	100%	86%
Expected cash low	**46%**	40%	67%	63%	20%	55%	67%	43%
Expected prices and maximum charges the operator expects to charge	**32%**	35%	50%	25%	10%	18%	58%	43%
Costs of the operation (including manpower, equipment, fuels and other inputs and supplies)	**37%**	35%	50%	50%	20%	27%	50%	43%
Marketing plan that defines the demand of services for the terminal and justifies the prevision about the magnitude and requirements of the installations, including projections of yearly throughput for a number of years	**76%**	80%	67%	75%	60%	73%	92%	71%
Employment impact: requirements of staff	**71%**	75%	83%	50%	30%	82%	83%	86%
Environmental plan covering aspects such as the impact of the terminal operations on the environment and the alternatives to eliminate, reduce or mitigate certain effects	**73%**	65%	100%	63%	60%	73%	75%	86%

The survey also contained a section on the importance of the various criteria used in the final awarding of the terminal (see figure 2). The overall results show that the expected throughput is considered as the most important criterion in about 50% of the terminal projects considered. In about 23% of the cases, the port authorities attributed the second highest priority to the throughput criterion. Price bids play an important role as well, but in 30% of the terminal projects the price bid was not part of the awarding process due to the specificities of the pricing system used by the port authority (see next section for a more detailed analysis). Other important criteria used in view of the final awarding stage of a terminal include the contribution to the economic development of the region/country, the financial proposal (others than the price bid) and the technical proposal for the terminal. It is interesting to observe that in about three quarters of the terminal cases, the respective port authority explicitly or implicitly includes criteria

related to the preservation or introduction of intra-port competition in the port. Other factors related to the market structure within the port (such as whether the candidate is an incumbent firm or not) are less frequently used as criteria in the final awarding phase. Other factors that were occasionally mentioned by respondents relate to the expected time gap between the awarding of the terminal and the start of the operations, the inland transport issue, the feeder network concept and the risk profile of the candidate (loyalty concerns).

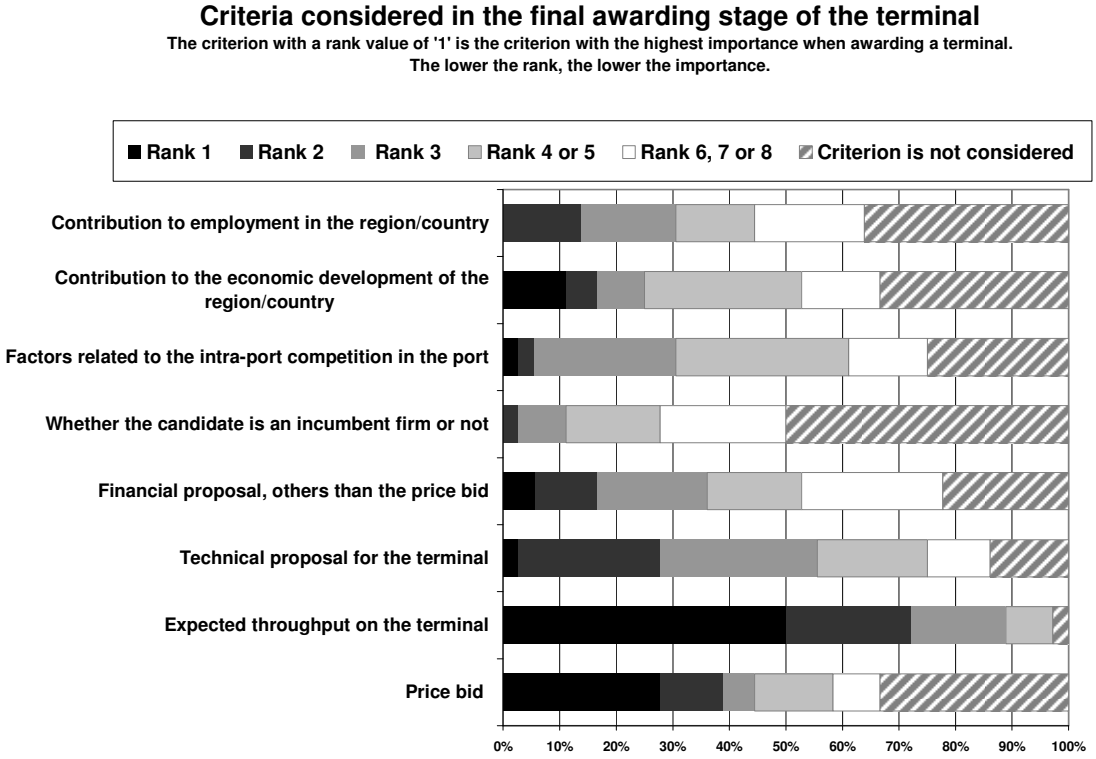

Figure 2: Criteria used in the final awarding stage – all terminals.

The throughput criterion is an important issue, also for smaller terminals. Port authorities seem to attach greater value to whether or not the candidate is an incumbent firm in case the awarding process concerns a smaller facility. Safeguarding intra-port competition and the contribution to the economy are higher for large terminals. In 30 to 35% of the cases involving smaller facilities, the latter factors are not even considered in the final awarding stage.

5. Survey results: the duration of the terminal contract

An internal survey by the European Sea Ports Organization (ESPO) held a few years ago (ESPO 2005) revealed a big variety in terminal contract durations in European ports. It is not in line with reality in the port sector to try to fit everything in one set of average durations. The existence of a wide variation in durations is confirmed in the survey (table 6). Contract durations in the sample ranged from 4 to 65 years. Two thirds

of all terminal contracts have a term of 21 to 40 years. Not surprisingly, larger facilities tend to have longer contract durations.

In 58% of the terminal award procedures included in the survey, existing laws impose minimum and or maximum limits on the duration of the terminal award contract. Legislators have developed thresholds on concession durations in view of safeguarding free and fair competition in the port sector.

Table 6: The term of the terminal award.

Duration of the contract	*ALL*	*Size of terminal*		
		<50 ha	50-100 ha	>100 ha
Less than 10 years	**6%**	7%	0%	0%
11-20 years	**18%**	33%	17%	0%
21-30 years	**38%**	47%	50%	13%
31-40 years	**24%**	0%	33%	63%
More than 40 years	**15%**	13%	0%	25%
	100%	100%	100%	100%

About 59% of the port authorities in the survey sample point out that the duration is determined ad hoc based on the specificities of the terminal under consideration. The remaining respondents underline they deploy some kind of uniform formula or system to determine the contract durations for all terminals in the port.

Table 7: Criteria used for the determination of the contract term.

Duration of the contract	*ALL*	*Size of terminal*		
		<50 ha	50-100 ha	>100 ha
Factors that play a role in the determination of the duration af the contract. Share of cases that consider the specified factor				
Investment levels by the terminal operator	**75%**	79%	50%	75%
Investment levels by the managing body of the port or the government	**38%**	37%	50%	50%
Level of dedicated layout/equipment at the terminal versus level of multifunctional use of the terminal	**15%**	5%	17%	25%
Type of terminal/commodity handled on terminal	**15%**	5%	33%	38%
Location of the terminal in the port (for example a strategic deepwater location)	**10%**	5%	17%	25%
The status of the terminal site (greenfield site versus brownfield site)	**13%**	11%	0%	38%
The existing and expected future level of competition between market players in the port	**8%**	5%	0%	13%

While clear rules of thumb on the determination of the contract duration seem hard to find, the survey clearly indicates the duration mainly varies with the amount of the initial investment required both from the terminal operator and the port authority. Many of the other factors considered in table 7 have direct implications on the required investment levels, e.g. the type of terminal/commodity handled on the terminal, the level of dedicated layout/equipment at the terminal, the location of the terminal in the

port and the status of the terminal site (greenfield site versus brownfield site). These other factors do not play a strong role in case of smaller terminals. Surprisingly, port authorities in the sample generally seem not to take into account the existing and expected future level of competition between market players in the port (intra-port competition) when deciding on the contract duration. In other words, the number of players in one specific terminal market segment inside the port area does not seem to have an impact on the contract term (the figures for large terminals are significantly higher though). Other factors that can play a role in the setting of the contract duration relate to the compliance with the development policy of the port, land lease and other easement rights and the refurbishment of historical sites within the concession area.

In 61% of the terminal projects the term of the contract was or is preset by the port authority. In the remaining cases, the term is the result of a negotiation between terminal operator and the port authority. Occasionally, the port authority might opt to leave it up to the bidder to indicate the term in years that he requires.

The duration of the agreement is of crucial importance both to terminal operators and port authorities. In general, long-term agreements allow private port operators to benefit from learning-by-doing processes and to achieve a reasonable ROI. Port authorities try to find a balance between a reasonable payback period for the investments made by terminal operators on the one hand and a maximum entry to potential newcomers on the other (Notteboom, 2007). As long-term agreements limit market entry, intra-port competition will only take place among the existing local port operators. As discussed in the next section, port authorities can include safety valves in the contract, so as to make the terminal available to other candidates in case the existing operator does not meet specific performance thresholds.

6. The survey results: contract stipulations

6.1. General overview

Once the terminal has been awarded, the port authority and the terminal operator draw up a contract. The contract typically stipulates that a private company is allowed to operate a specified terminal for a given duration. The design of the contract, starting with the rights and obligations of both parties involved is a key element. In principle, the port authority has no guarantee that the terminal operator will meet its objectives. As such, contracts often take the form of performance-based agreements to create incentives for the terminal operator to meet the objectives of the port authority. The results allow to identify key elements in terminal contracts (table 8).

The most commonly used clauses relate to minimum throughput requirements, environmental clauses and clauses with regard to changes in the ownership structure of the terminal (present in over 80% of the contracts). Slightly less widely used are renewal or extension clauses and stipulations that empower the port authority to end the contract. In about 40% of the cases the contract contains clauses on minimum investment levels required, modal split and or clauses referring to what happens if the contract is not extended after the end of the regular contract term. Clauses with respect to the conditions that allow for a renegotiation of the terms of the contract are not widely used (mentioned in only 25% of the cases). The sections below zoom into the

various clauses. The inclusion and enforcement of specific clauses depends partly on the existing balance of power between the port authority and the terminal operator.

Table 8: 'As is' survey: clauses in a terminal contract.

	ALL	*Size of terminal*		
		<50 ha	50-100 ha	>100 ha
Clauses included in the award contract between the managing body of the port and the terminal operator (as share of all projects)				
Throughput guarantees	**93%**	84%	100%	100%
Environmental clauses	**85%**	89%	67%	75%
Modal split clauses for hinterland transportation	**35%**	26%	50%	38%
Renewal clauses or extension clauses	**58%**	63%	50%	63%
Clauses with respect to the conditions that allow for a renegotiation of the terms of the contract	**25%**	32%	17%	38%
Clauses referring to what happens if the contract is not extended after the end of the reguar contract term	**40%**	42%	17%	63%
A minimum investment clause of x Euros over the total duration	**40%**	42%	33%	38%
Clauses with regard to what happens if the terminal ends up under a different ownership structure	**80%**	74%	67%	88%
Clauses that empower the managing body of the port to (unilaterally) end the contract	**70%**	74%	67%	88%

6.2. Throughput guarantees

Table 8 reveals throughput guarantees are included in more than 90% of the sample of terminal contracts. The port authority generally indicates upfront a minimum throughput to be guaranteed by the terminal operator. This should encourage the operator to market the port services to attract maritime trade and to optimize terminal and land usage. The survey results show that in 67% of the contracts with throughput guarantees, contract clauses explicitly mention that the terminal operator has to achieve a minimum cargo volume for the terminal as a whole. In only few cases port authorities put forward a minimum cargo volume to be handled per hectare of terminal area or per meter of quay.

The survey results made it clear that the threshold values in the throughput clauses are often determined via negotiations between terminal operator and the port authority (mentioned by respondents in 46% of the terminal cases). Also quite common is the fixing of the throughput guarantees by the port authority based on port benchmarking exercises (32%). The involvement of a public/government body, other than the port authority, in the setting of the minimum throughput requirements is far less likely to take place (mentioned in only 14% of the cases). One of the respondents referred to a system of minimal threshold values determined by the port authority based on port benchmarking exercises and final threshold values in the throughput clauses determined by the results from the awarding process.

The contracts typically contain provisions in view of protecting the terminal operator and the port authority against arbitrary and early cancellation. However, about 70% of the contracts also contain clauses that empower the port authority to (unilaterally) end the contract in case the terminal operator does not meet certain preset performance

indicators. In case the terminal operator does not meet the throughput guarantees as set in the agreement, 68% of the contracts in the sample explicitly refer to the payment of a penalty to port authority (e.g. a fixed amount per ton or TEU short) or, in the most extreme case, the terminal will be taken away from the operator. One of the respondents clarified the port uses a sanctioning system based on a fee to be paid by the terminal operator as a percentage of the amount of a year's lease payment. In only 3% of the analyzed terminal projects, the port authority leaves room for negotiations to determine the real fee to be paid. Quite a number of port authorities (i.e. 22%) use throughput clauses as a soft objective (an intention) and consequently do not impose a sanction in case the throughput figures are not reached.

6.3. Environmental clauses

Table 8 demonstrated that environmental clauses appear in 85% of all terminal contracts of the survey. In about 30% of these cases, the environmental clauses refer to the compulsory use of some sort of environmental management/reporting system, while maximum emission levels are included in 18% of the contracts. About 9% of the contracts only refer to specific technical equipment to be used to limit emissions (for example coldironing for vessels, electric yard equipment, etc..). About one fourth of all contracts combine several of the above environmental clauses. Occasionally, ports include clauses on existing or future contamination of the terminal site. Quite a number of respondents who do not include specific environmental clauses in the contract added that the terminal operations should comply with national environmental standards stipulated by the law.

6.4. Modal split clauses for hinterland transportation

Recent terminal contracts increasingly adopt modal split specifications, particularly in a container terminal context. The results point to the inclusion of modal split clauses in 35% of all contracts considered (table 8). In half of these cases, the contract elaborates on some technical specifications and compulsory investments to be done by the terminal operator in hinterland transport infrastructures on the terminal site. In only 21% of the cases, the modal split clauses explicitly impose a specific modal split on the terminal operator to be reached by a certain year (for example: 40% road, 40% barge and shortsea and 20% rail by 2010). In about 14% of the cases, the modal split to be reached is specified for each year of operation. The modal split target is often formulated as a soft objective (an intention).

6.5. Renewal clauses or extension clauses

Many terminal award contracts (nearly 60% in the survey sample) contain stipulations on a possible prolongation of the terminal award beyond the official term. The most popular contracts arrangements are:

- Clauses referring to the conditions for renewal of the terminal use after the end of the regular contract term (mentioned by 39% of the respondents who included renewal or extension clauses in the contract);
- Clauses referring to an extension of the contract term if the terminal operator makes additional investments during the regular contract term (18%);

- Clauses referring to interim evaluations (for example every five years) during the contract term. The continuation of the terminal use is subject to a positive evaluation during the interim evaluations (18%).

Furthermore, many port authorities make a possible extension of the contract term subject to a direct negotiation between terminal operator and the port authority at the end of the regular term (38% of the cases). Port authorities opt for a public procedure in 30% of the cases. In some ports, the terminal operator can request a prolongation of the terminal contract based on major investments made by the operator throughout the contract term or in the last years of the contract term. Such request is then examined by the port authority.

6.6. Clauses referring to what happens if the contract is not extended after the end of the regular contract term

Some 40% of the contracts considered contain clauses referring to what happens if the contract is not extended after the end of the regular contract term. In 63% of these cases, the clauses explicitly refer to financial compensations for the value-added linked to investments made by the terminal operator in a specified period prior to the end of the contract term. In less than 7% of the sample, the port authority included clauses referring to arrangements with respect to employees/personnel linked to the terminal operations once the contract term ended.

Port authorities in Europe seem to follow different paths when it comes to dealing with the terminal superstructure at the end of the contract. In 30% of the cases under consideration, the port authority decides at the end of the contract term on what to do with the superstructure. Common approaches also include the removal/destruction of the superstructure by the terminal operator at the end of the contract term (28%) or the transfer of the assets to the port authority without any form of compensation (26%). The survey further revealed that it is not common practice for the port authority to financially compensate the terminal operator for the superstructure that was transferred at the end of the contract term (15%).

7. Discussion and conclusions

The European Commission has confirmed in its recent European Ports Policy Communication that terminal awarding agreements granted by public port authorities are to be considered as service concessions under EU law, regardless what their status is under national law of Member States. This means that terminal awarding agreements are subject to a number of basic principles with regard to equality of treatment, transparency, proportionality and mutual recognition. The guidance of the Commission however still raises a number of unanswered questions which need follow-up.

The survey made clear that a large diversity exists among European ports, particularly in terms of the specificities of the awarding procedures deployed. The survey results mainly capture current practices in ‘landlord’ ports in Europe, thereby excluding quite a number of European ports. Hence, the issue discussed in the report is not relevant for highly integrated ports. While performing the survey and analyzing the results, it became clear that the observed diversity is to a large extent the consequence of:

- The range of and priorities in objectives followed by the respective port authorities (e.g. micro-economic objectives such as profit maximization or throughput maximization and macro-economic objectives such as the creation of value-added for the community and employment);
- The specific local situations and markets the ports are operating in;
- The size difference among the terminals considered.

In other words, the specific design of the contract, its regulatory regime, the pricing regime and the way the terminal is awarded reveal the priorities of individual port authorities and as such play an important role in local port governance.

Notwithstanding existing differences, the terminal awarding practices in European ports seem to be converging with respect to some specific aspects. The vast majority of European port authorities are trying to optimize the use of scarce land via the inclusion of throughput specifications in the contract. They are also increasingly using the terminal awarding process in view of a broader environmental compliance of port activities and a sustainable development of the port.

Port authorities continue to use terminal award procedures also in view of shaping the structure and market organization of the terminal handling business in the port area, thereby in principle ensuring further capacity growth for efficient incumbent firms and ensuring intra-port competition by allowing new entrants in case a poor competitiveness urges the port to do so.

All of the above points make that port authorities should be given the possibility to work out awarding procedures for new terminals taking into account local objectives and the need for a sustainable and highly competitive port context. However, fierce competition and the fear of traffic losses increase the risk of putting port authorities in a weak position, eventually making them less observant and strict with regard to the editing and the enforcement of the rules in the contract. With the emergence of international terminal operator groups and shipping lines, port authorities are confronted with powerful and footloose players.

If further policy action at a national or supranational/EU level were to be envisaged, it should be aimed at empowering port authorities better to fully take up their responsibilities and to further develop their role as (local) regulator in an environment that provides legal certainty to all parties involved. The survey results seem to suggest this can best be done through guidelines on general principles instead of detailed legislative proposals.

Terminal awarding policies as part of governance structures are not static but evolve constantly in line with the requirements imposed by the market. The dynamics in the port environment urge the port authority to continuously evaluate the effectiveness of its terminal award policies in light of market trends. This further supports the argument for giving full ‘ownership’ and responsibility on terminal awarding procedures to the port authorities. A code of good governance, as intended by ESPO, could be a useful complement to the Commission’s guidance and avoid a rigid legislative approach.

Notes

The views and opinions expressed by the authors do not necessarily state or reflect those of the European Sea Ports Organisation (ESPO) or any member of ESPO. The

survey results are based on an aggregation of information provided by port authorities across Europe.

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