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7 July 2010
Hei/St/III-5/350

**Response of ZDS
to
Public Consultation
of EU Commission
on a possible initiative on concessions**

In response to the EU Commission's public consultation on a possible initiative on concessions, ZDS comments as follows from the viewpoint of the companies involved in cargo handling at German seaports:

1. A concession is essentially characterised by the transfer of public tasks to private operators. The public authorities thereby ensure the procurement of a service which was previously provided by the state.

The award of a concession thus creates a procurement relationship between the public authorities and private operators. The concession holder is subject to strictly defined conditions for provision of this service. Specific contractual duties are therefore a constitutive factor in the existence of a concession.

2. Thus concessions may be arranged in so many different ways that they cannot be covered by a uniform set of rules.

For example, concessions in the safety and security relevant areas cannot be awarded purely on the basis of economic criteria. Investments may in certain areas play only a minor part or no part at all, while in other cases they may be indispensable for reliable provision of the services.

Uniform criteria for the award of concessions for different services always involve a risk that relevant criteria may not be considered, and that will subsequently mean poor service quality and higher prices.

Thus at most it is possible to set up general criteria for the procedure, such as transparency and non-discrimination. These are criteria which are in any case already applicable.

We therefore believe that there is no need for a possible initiative on concessions.

3. Cargo handling services are not public tasks, and are therefore not the subject of concessions.

Cargo handling is not a sovereign activity that would require a concession. On the contrary, it is a primary entrepreneurial activity, which is included in the core area of basic freedoms that are also protected by the EC Treaty. Exercise of such entrepreneurial activities must not be made dependent on concessions.

4. Cargo handling terminals would prefer to exercise their activities on land which they own themselves. However, for legal reasons for which the member states of the EU have final regulating competence, it is often not possible for them to own the land they use for their terminals.

Under German law, tenancy or lease contracts are therefore concluded between the public authorities and the seaport operators when port sites are transferred to them. These contracts are normal tenancy contracts for the purpose of operating commercial business.

A tenancy contract between the public authorities and the terminal operator is required only because it is normally not possible for the operator to acquire title to the land used for the terminal. But such contracts do not constitute a “concession” for the provision of port services.

5. The development of port services requires ongoing substantial private capital investment in building and modernisation of terminal capacities, including for hinterland transportation.

Flexible extension and expansion possibilities for existing contracts must therefore not be excluded. Exclusion would put a stop to investment and delay investment in the port economy, with serious consequences for productivity, competitiveness, growth and employment.

6. That is why Article 57 (b) of the EU Directive on the coordination of procedures for the award of public works contracts, 2004/18/EC, stipulates that the provision of ports is excluded from the strict regime for award of public building and services concessions, but is subject to the general requirement for transparency.

This regulation has proven itself, and has contributed to the creation of modern, efficient seaports in Europe. A change in this system would eliminate the existing investment incentives in long-term, sustainable business development. That must be avoided.

7. It must continue to be permissible for a Port Authority, in accordance with the provisions of the EU Directive on coordination of procedures for the award of public works contracts, to transfer port sites to seaport operators by means of tenancy and lease contracts, including transfer on the basis of negotiation, in such a way that it can optimally manage the infrastructure, for can optimally implement the port development plan which it designed and for which it bears sole responsibility. There is such a wide range of possible criteria that they cannot be meaningfully regulated by a general set of regulations.

The Port Authority must also have the possibility, during the term of contracts, to extend and expand contracts which have already been signed with port service providers, where significant maritime or shore investments are to be made, for expansion of capacity, increase in

productivity, increase in efficiency, adaptation to technical progress and for improvement of environmental protection.

That strengthens competition within and between the ports, safeguards inexpensive, high-quality services, ensures the ongoing necessary investments in modern, environment-friendly facilities, gives security of investment, and ensures the steady improvement in quality of port services which is necessary for growth of the European economy. It also ensures long-term maintenance of the social standards achieved, and of a skilled labour force.

Departing from the existing regulations would endanger all of that, and would lead to lower investment, lower social standards, less employment and less efficiency of the port companies. That would have major disadvantages for the European economy, and would lead to increase in the prices of port services.

8. We therefore believe it is essential to maintain the existing regulations. There is no need for a possible initiative on concessions.