

Ports & Terminals

Contributing editor
Alex Kyriakoulis



2016

GETTING THE
DEAL THROUGH

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DEAL THROUGH 

Ports & Terminals 2016

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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2015
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First published 2015
ISSN 2397-0316

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Turkey

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TURUNÇ

General

1 Which are the key ports in your jurisdiction and what sort of facilities do they comprise? What is the primary purpose of the ports?

Turkey's key port facilities, listed along with their primary purposes, are the following:

- Izmir: cargo handling, cruise, storehouse, general cargo, casting and container;
- Haydarpaşa: cargo handling, general cargo, container and ferry;
- Derince: cargo handling, general cargo, container, and oil and gas;
- Mersin: cargo handling, general cargo, container, cruise, oil and gas;
- Samsun: cargo handling, general cargo, container and cruise;
- Bandırma: cargo handling, general cargo and container;
- Iskenderun: cargo handling, general cargo, container and storehouse;
- Ambarlı: cargo handling, general cargo, container and storehouse;
- Antalya: cargo handling, general cargo, container and cruise; and
- Marport: cargo handling, general cargo and container.

Except for the Izmir and Antalya ports, Turkey's key ports are generally focused on general cargo, cargo handling and container services. The Izmir and Antalya ports supply an important service to Turkey's tourism industry by providing cruise port services. For additional information regarding certain key port facilities, please refer to the table on page 73 of the 2013 Marine Industry Report published by the Turkish Chamber of Shipping (www.denizticaretodasi.org.tr/Shared%20Documents/sektorraporu/IMEAK_DENIZCILIK_SEKTOR_RAPORU_ENG.pdf). The Antalya, Ambarlı and Marport ports are not included in the table.

2 Describe any port reform that has been undertaken over the last few decades and the principal port model or models in your jurisdiction.

As discussed in more detail below, there has been a major trend in port privatisations. This can be seen in that, as of 2015, of the 178 coastal facilities suitable for international shipping in Turkey, only two ports (Haydarpaşa and Izmir) are owned and operated by the Turkish government. In 2004, the High Board of Privatisation issued Decision No. 2004/128, which allowed the privatisation of seven of Turkey's largest and most significant ports (Bandırma, Izmir, Samsun, Derince, Mersin and Iskenderun) via a build-operate-transfer (BOT) model. Following the 2004 decision, the trend has continued, leading to the current status of nearly all of Turkey's ports having been privatised through BOT structures or concession agreements. Turkey does not give private entities the right of ownership of ports, but instead gives them a right of operation for a maximum of 49 years.

3 Is there an overall state policy for the development of ports in your jurisdiction?

The overall state policy for the development of ports in Turkey is reflected in the trend towards the privatisation of ports, as well as Turkey's '2023 goals', which include improving and expanding overall port capacity in the country.

Turkey initially adopted privatisation laws and policies in the 1990s, as a result of which nearly all ports in Turkey have been privatised. These privatisations have been and continue to be governed by Law No. 4046 of 27 November 1994. Given that these privatisations transfer the right to operate an existing port for a certain duration of time to a private entity, they are

sometimes referred to as 'brownfield' projects. The development of green-field ports, in other words the creation of new ports, has been governed by Law No. 3996 of 13 June 1994 and Council of Ministers Decree No. 2011/1807 implementing that law, which together constitute the general BOT legislation in place. Turkey has set certain development goals that it aims to reach by 2023, which will be the 100th anniversary of the Turkish Republic. Among Turkey's 2023 goals, which cover a wide variety of sectors, are the construction of new ports, the rehabilitation of existing ports and the creation of unified port complexes rather than individual piers.

4 What 'green port' principles are proposed or required for ports and terminals in your jurisdiction?

There are no green port requirements for Turkish ports. However, a voluntary green port certification system was established in 2012 by the Ministry of Transport, Maritime Affairs and Communications. The first 'Green Port' certificate was given to the Port of Marport owned by Arkas Holding in July 2015.

Legislative framework and regulation

5 Is there a legislative framework for port development or operations in your jurisdiction?

As explained above, the privatisation of ports has been encouraged by the government through the passing of new laws and regulations. There is no single unified piece of legislation, and no single ministry or department that deals with such projects or ports in general. Turkey's current port development and privatisation policies are supported by various pieces of legislation including the following:

- Law No. 618 (Law on Ports 1925);
- Law No. 815 (Law on Cabotage 1926);
- Law No. 3621 (Law on Coasts 1990);
- Law No. 3996 (Law on Build-Operate-Transfer Projects 1994);
- Law No. 4046 (Law on Privatisation 1994); and
- Regulation on Ports of 31 October 2012.

6 Is there a regulatory authority for each port or for all ports in your jurisdiction?

There is no specific regulatory authority for ports, and there is no unified port authority that oversees all port related affairs, but there are a number of port related-bodies including but not limited to the following:

- the General Directorate for Construction of Railways, Seaports and Airports;
- the Ministry of Agriculture;
- the Ministry of Environment;
- the Ministry of Health;
- the Ministry of Industry (MOI);
- the Ministry of Interior;
- the Ministry of Public Finance;
- the Ministry of Public Works and Settlement;
- the Ministry of Transport (MOT);
- the State Planning Organisation (SPO) of the Prime Ministry;
- the Turkish Maritime Organisation;
- the Turkish State Railways (TSR); and
- the Undersecretariat for Maritime Affairs.

Each of these listed bodies deals with various types of matters that could arise in port projects such as financial, regulatory, privatisation and PPP issues in accordance with their respective jurisdiction and mandate. For example, the SPO determines when there will be new investment in specific port projects based on feasibility and the national investment budget, the MOT coordinates the development of ports and sets the port tariffs for TSR ports, while the MOI controls industrial ports operated by state owned companies. Depending on the type of port and the nature of the project or issue at hand, there are several possible responsible bodies and bodies of regulations that could have jurisdiction or be applicable in each instance.

7 What are the key competences and powers of the port regulatory authority in your jurisdiction?

See question 6.

8 How is a harbour master for a port in your jurisdiction appointed?

A harbour master is appointed by the Republic of Turkey Ministry of Transportation, Maritime Affairs and Communications.

9 Are ports in your jurisdiction subject to specific national competition rules?

Ports are not subject to specific national competition rules. However, in practice it has been observed that the Turkish Competition Board has followed EU competition rules and the approach of the EU commission regarding maritime disputes in its decisions.

It should be noted that mergers and acquisitions including privatisations which exceed certain thresholds are subject to the Turkish Competition Board's approval. The applicable pieces of legislation are:

- The Communiqué Concerning Mergers And Acquisitions Requiring the Authorisation Of The Competition Board (Communiqué No. 2010/4); and
- The Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be Filed with the Competition Authority in order for Acquisitions via Privatisation to Become Legally Valid (Communiqué No. 2013/2).

10 Are there regulations in relation to the tariffs that are imposed on ports and terminals users in your jurisdiction and how are tariffs collected?

Tariffs are collected by the Ministry of Customs and Trade pursuant to Decree Law No. 640 (dated 3 June 2011) concerning the organisations and functions of the Ministry of Customs and Trade. The Port Service Fee to be collected from the both foreign and Turkish flagged ships are determined in accordance with article 26 of Law No. 5174 through the Turkish Chamber of Shipping (see www.denizticaretodasi.org.tr/en-en/pages/tarif.asp).

11 Does the state have any public service obligations in relation to port access or services? Can it satisfy these obligations through a contract with a private party?

No.

12 Can a state entity enter into a joint venture with a port operator for the development or operation of a port in your jurisdiction? Is the state's stake in the venture subject to any percentage threshold?

Pursuant to applicable privatisation legislation, which allows the transfer of the ownership of companies within the privatisation portfolio partially or fully, a state entity can enter into a joint venture with a port operator for the development or operation of a port in Turkey. There is no statutory percentage threshold applicable to the state's stake in such joint ventures.

13 Are there restrictions on foreign participation in port projects?

Law No. 815 of 1926 provides that certain maritime activities can only be performed by Turkish persons (such as the provision of certain auxiliary services at Turkish ports). Therefore, if the operator of a Turkish port does not qualify as a Turkish person, it would need to outsource such reserved activities to Turkish persons. In practice, foreign entities can normally acquire the operational rights of a port through a Turkish subsidiary.

Public procurement and PPP

14 Is the legislation governing procurement and PPP general or specific?

The legislation governing procurement and PPP is specific. Although there are some general codes such as the Public Procurement Code (4734) and the Public Procurement Agreements Code (4735) that are also applicable, one must comply primarily with the specific procurement or PPP regulations applicable to the relevant activity. For example, some PPPs are made according to Code 4734; others fall under the health ministry or other relevant ministries regulations. As stated above, BOT projects are governed by Law No. 3996.

15 May the government or relevant port authority consider proposals for port privatisation/PPP other than as part of a formal tender?

As a general rule, a formal tender process is required.

The Privatisation Higher Council is the authorised entity for decisions on privatisations according to the Law on Privatisation Practices (4046). Once the Council decides that a public entity will be privatised, the bidding process starts through a formal tender process.

However, there is no general code for PPPs in Turkey because there are various methods for the operation of public services. The authorised entity for approving BOT projects is the Higher Planning Council and a formal tender is required for this process as well.

16 What criteria are considered when awarding port concessions and port joint venture agreements?

According to Law No. 3996, the principles and procedures of BOT projects are brought into force by the Council of Ministers. Pursuant to the relevant Council of Ministers' Decision (2011/1807), it is compulsory that a bidding company have a solid financial structure, be certified by independent auditors, and have experience performing activities related to the investment in question.

17 Is there a model PPP agreement that is used for port projects? To what extent can the public body deviate from its terms?

There is no model PPP agreement. The Higher Planning Council is the authorised entity that allows a government entity to enter into an agreement with a private entity. After the approval, the relevant government entity determines the conditions of the agreement (subject always to constitutional, statutory and public policy limitations). In practice, concession agreements are used in the privatisation of existing ports and the BOT model for new ports.

18 What government approvals are required for the implementation of a port PPP agreement in your jurisdiction? Must any specific law be passed in your jurisdiction for this?

The relevant public entity must apply to The Higher Planning Council for permission to enter into a PPP agreement with a private entity. The Higher Planning Council then consults the relevant ministries, which could be one or more of the following: the Ministry of Environment and Urbanisation, the Ministry of Finance, the Ministry of Transport, Maritime Affairs and Communications, or the Ministry of Culture and Tourism. The Higher Planning Council may reject the request of the relevant public entity if such a decision is supported by the relevant ministry's reports. If the application is approved, the relevant public entity determines the PPP agreement conditions and the bidding process ensues.

19 On what basis are port projects in your jurisdiction typically implemented?

In other sectors, build-operate (BO), transfer of operating rights (TOR) and build-lease-transfer (BLT) models are used, but there is no specific legal framework in place for build-own-operate-transfer (BOOT) projects in Turkey.

20 Is there a minimum or maximum term for port PPPs in your jurisdiction? What is the average term?

There is no minimum term; however the maximum term is 49 years. In practice, 30-year or 36-year terms are most common.

There are no existing examples of greenfield port projects in Turkey in a pure PPP form (such as those recently seen in the Turkish healthcare

sector). Private entity operated ports are all under the BOT model (for new ports) or concession agreements (for existing ports).

21 On what basis can the term be extended?

Law No. 3996 specifically states that the 49-year term for BOT projects cannot be extended. It should be noted that there is legislation in place providing for other types of PPP projects such as BO, TOR and BLT, which may have different term durations, but the pertinent regulations governing these other types of PPP projects do not explicitly include ports and thus are not relevant here.

22 What fee structures are used in your jurisdiction? Are they subject to indexation?

Various fees are collected for different activities, and for different kinds of ships and capacities (eg, registration fees, annual contribution fees, port service fees).

The fee structure is determined annually by the Chamber of Shipping (www.denizticaretodasi.org.tr/Shared%20Documents/Gelirler/DTO_2015_TarifeENG.pdf).

23 Does the government provide guarantees in relation to port PPPs or grant the port operator exclusivity?

The government does not, in practice, provide guarantees in relation to port PPPs.

Once it has won the tender, the port operator is granted exclusivity under the relevant structure for a fixed period of time, as discussed above.

Port development and construction

24 What government approvals are required for a port operator to commence construction at the relevant port? How long does it typically take to obtain approvals?

Permission is required from relevant ministries determined by the Higher Planning Council. Generally it is necessary to get feasibility reports from the Ministry of Transport, Maritime Affairs and Communications, Ministry of Environment and Urbanisation, and Ministry of Finance. It is also generally required to get permission from Ministry of Culture and Tourism to ensure that any cultural or historical heritage sites near the port will not be compromised by the project.

25 Does the government or relevant port authority typically undertake any part of the port construction?

No. In Turkey, there are no examples of the government undertaking part of a port construction. Consistent with Turkey's preferred BOT PPP model, the aim of privatisation is transferring the port operation and construction to private entities, and this is reflected in current practice.

26 Does the port operator have to adhere to any specific construction standards, and may it engage any contractor it wishes?

As per Council of Ministers' Decision No. 2011/1807, the relevant administration designates specifications of any PPP type agreements, which can include terms governing construction. Additionally, there are some technical standards for the construction of ports that must be complied with. In 2007, a technical guideline (Coastal Structures and Ports, Planning and Designing Technical Guideline) was issued by the Ministry of Transport Directorate General of Railways, Ports and Airports Construction. In 2015, the Ministry of Transport, Maritime Affairs and Communications Directorate General of Infrastructure Investments prepared a draft amended version of the technical guideline that, as of October 2015, is awaiting approval.

27 What remedies are available for delays and defects in the construction of the port?

As per Council of Ministers' Decision No. 2011/1807, provisions regarding delays and cost changes in a construction project must be covered in the relevant agreement. If these types of problems occur, they are considered contractual breaches and the administration may terminate the agreement. It is required that provisions regarding contract termination be included in the agreement. If the agreement is not terminated, the dispute can be resolved via arbitration or Turkish courts depending on the terms of the agreement.

Port operations

28 What government approvals are required in your jurisdiction for a port operator to commence operations following construction? How long does it typically take to obtain approvals?

A private entity port operator that has already successfully entered into a PPP agreement with the government must submit a facility information form and a business permit application document and certain supporting documents in order to commence operations. The private entity port operator must apply to the Examination, Determination and Audit Commission with the required documents to get port operation permission.

29 What services does a port operator and what services does the port authority typically provide in your jurisdiction? Do the port authorities typically charge the port operator for any services?

Private port operators perform all port services for their ports. The government is not involved in providing port services when a private entity is the port operator.

30 Does the government or relevant port authority typically give any commitments in relation to access to the hinterland? To what extent does it require the operator to finance development of access routes or interconnections?

The general practice is for operators to finance and develop access routes and interconnections. According to the Ministry of Development's five-year development plan for 2014–2020, one of the goals of the Turkish government is to realise hinterland connections from existing ports by road and rail. As such, we expect to see a continued increase in hinterland connection projects.

31 How do port authorities in your jurisdiction oversee terminal operations and in what circumstances may a port authority require the operator to suspend them?

The Examination, Determination and Audit Commission has the right to supervise ports. If any nonconformity is detected by the Commission, a maximum of six months is given by the commission to correct the nonconformity. If the private entity does not correct the nonconformity, the commission can suspend operations until the private company corrects the problem. The permission to operate the port may also be cancelled by the Commission if the documents provided by the operator are deficient. Further, if the name, coast facility name or the type of operation written in the permission to operate changes, the permission becomes invalid.

32 In what circumstances may the port authorities in your jurisdiction access the port area or take over port operations?

Accessing the port area is generally possible if there is a court decision granting such a right. If there is reasonable doubt or a court decision, law enforcement agencies may also access the port. Further, auditors from the Examination, Determination and Audit Commission may access the port. The Turkish Tax Inspection Board may also supervise port operations.

33 What remedies are available to the port authority or government against a port operator that fails to operate and maintain the port as agreed?

Pursuant to Law No. 3996, the agreement between the administration and the private entity is a private law agreement if the relationship is part of a BOT PPP project. The administration may terminate the agreement if the conditions for termination set out in the agreement occur, and the auditors from the Examination, Determination and Audit Commission may suspend or cancel the permission to operate. The administration can also apply to Turkish courts (or arbitration if it is provided for in the agreement) for remedies generally available under private law contracts.

34 What assets must port operators transfer to the relevant port authority on termination of a concession? Must port authorities pay any compensation for transferred assets?

Such requirements would be included in the terms of the PPP agreement, which is negotiated on a case-by-case basis.

Update and trends

In Turkey, there is a general trend towards increased PPP projects, particularly greenfield projects. Significant investment is being made in port development projects by private entities and international organisations such as the European Bank for Reconstruction and Development (EBRD). The EBRD has estimated that Turkish ports will require US\$3.5 billion in foreign direct investment over the next 10 years. Turkey's plan to continue the record economic growth it has experienced over recent years includes a serious commitment to fully develop and cultivate its strategic maritime and shipping positions on the Aegean, Mediterranean and Black Sea. The Turkish Ministry of Development has set goals for further hinterland connection development, intermodal transport connections of logistics centres development, and the formation of a port authority model specific to Turkey. We expect progress in these areas over the next several years. The establishment of the green port certification programme in 2012 has also created a new trend to watch; applications for this voluntary certification have begun to be submitted.

Miscellaneous

35 Is a port operator that is to construct or operate a port in your jurisdiction permitted (or required) to do so via a special purpose vehicle (SPV)? Must it be incorporated in your jurisdiction?

As per Council of Ministers' Decision No. 2011/1807 article 17, it is required that a private entity that has won a bid to operate or construct a port establish a Turkish joint stock company SPV after it has been selected for the job. The equity capital ratio of the SPV may not be less than 20 per cent of the amount that will be used for the investment. As an exception to this SPV formation requirement, if a Turkish public entity owns more than 51 per cent of the shares of the company, it is not required to establish an SPV.

36 Are ownership interests in the port operator freely transferable?

As per Council of Ministers' Decision No. 2011/1807 article 27, a private company may transfer its rights and obligations to another company subject to the same agreement conditions. The new company must abide by the procedures and satisfy the requirements of Council of Minister's Decision No. 2011/1807. The approval of the relevant administration and signature of the related minister are required for the transfer to take place.

37 Can the port operator grant security over its rights under the PPP agreement to its project financing banks? Does a port authority in your jurisdiction typically agree to enter into direct agreements with the project financing banks and, if so, what are the key terms?

With the approval of the relevant authority, the port operator can grant such security. In practice, some agreements include share pledges granting step-in rights to the financing banks.

There are no examples of regulatory authorities entering into a direct agreement with project financing banks.

38 In what circumstances may agreements to construct or operate a port facility be varied or terminated?

As per Council of Ministers' Decision No. 2011/1807, an agreement may be terminated by the relevant administration upon the private entity failing to fulfil its obligations, breaching the agreement, going into bankruptcy, entering into a composition with creditors or becoming insolvent. Further, as per Council of Ministers' Decision No. 2011/1807, if the private entity changes the amount of its capital during the establishment period without the permission of the administration, the agreement may be terminated by the administration.

39 What remedies are available to a government or port authority for contractual breach by a port operator?

The administration may terminate the agreement within the scope of Council of Ministers' Decision No. 2011/1807 if conditions triggering termination as set forth in the agreement occur. In the event of a breach, it is possible to apply to Turkish courts, and if it is provided for in the agreement, it is possible to start an arbitration process.

40 Must all port PPP agreements be governed by the laws of your jurisdiction?

As per Council of Ministers' Decision No. 2011/1807, disputes may only be resolved by Turkish courts or, if specifically provided for in the agreement, through arbitration. If arbitration is provided for in the agreement, it is compulsory that the substantive law applicable to the arbitration proceedings be Turkish law.

41 How are disputes between the government or port authority and the port operator customarily settled?

Such disputes are technically considered to be private law matters, but as discussed in question 40, they can be resolved only by Turkish courts or arbitration.

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ISSN 2397-0316



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