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Executive summary

Inland ports are of special importance for landlocked countries in the Danube region as they facilitate access to a navigable waterway as the most economic and environmentally friendly transport mode, thus providing the countries all benefits of economies of scale and size. There are two important reasons why all countries should strive for creation of own funding mechanisms for port development. The first one is that many Danube countries consider their ports as strategic assets and port activities as activities of strategic national importance, and the second one is related to the geopolitical importance of port infrastructure development. In order to develop ports, many countries are forced to involve, apart from their own financial means, third parties like international financing institutions (IFI), such as the World Bank or European Investment Bank or similar.

It can be safely stated that the majority of Danube ports are publicly owned and independently operated by a private or an independent public operator. This is the most convenient solution since the port land represents a finite and strategic asset of any country and, on the one hand, needs to be governed by the public sector, while, on the other hand operated by independent public or private operators on a commercial basis.

In their constant quest for development, port authorities in the Danube region have engaged considerable financial means to develop, rehabilitate and/or modernize their ports. Some countries have been doing it with more success, some with less. As mentioned, substantial funds have already been dedicated to port development, while even more funds are planned to be engaged in the forthcoming period, as the needs for further development are tremendous. The investment needs for the projects that are planned to be completed before 2030, a year which matches the deadline for the full establishment of the core network on the Rhine-Danube Core Network Corridor, reach a total amount of 5.5 billion Euro, only in the 19 selected ports in seven Danube region countries.

In order to keep the port efficiency on the designed or desired level, to facilitate their ability for quick responses to dynamic market demands and to maintain the desired sustainability levels, port investments need to be active and continuous. There is a large number of factors that can influence port investments, such as increase of cargo throughput in ports, market volatility, type of the traffic, increase of passenger traffic, greening of ports, EU legislation on alternative fuels in ports, hinterland connections, pressure caused by urban development in case of city ports, initiatives to improve the modal shift, digitalisation of port processes and introduction of various port community systems, etc. All port projects generate both economic and societal values for a wide range of users and other stakeholders. Publicly funded projects are most frequently those projects which have a positive value case (societal value), but a negative business case, or an insufficient economic value for users. These types of projects are usually funded or co-funded by local, regional or national governments and, in determined cases, by supranational organisations such as the European Union. Public funding of projects which demonstrate positive societal *and* economic value can also be justified. The combination of considerable development costs, lengthy and uncertain approval processes and high risks (societal risks associated with stakeholder acceptance of port development, political risks associated with certainty of political support and infrastructure policies and

commercial risks because of long pay-back period and associated uncertainty) may lead to a very low private investor interest in port projects, even in those with a positive financial business case. Whenever public funding of port project is involved, EU Member States must exert caution in order to avoid the project being classified as "State aid", when direct public funding of such projects would not be allowed if it "distorts or threatens to distort free competition by making it more favourable to certain undertakings, the production or marketing of certain goods or the provision of certain services, so far as it affects trade between Member States of the European Union."

Port development can be financed by EU funds out of various financing instruments including those for financial support for implementation of European policies and strategies. Out of five European Structural and Investment Funds (ESIF), two funds are aimed, mostly, at reducing the wealth gap among the regions of the Union through the provision of grants: the European Regional Development Fund (ERDF) and the Cohesion Fund (CF). These multisector funds are accompanied by some sector-specific funds, such as the Connecting Europe Facility (CEF) supporting Trans-European Networks.

Public-private partnership (PPP) in ports, as a very attractive option for port investments, is a contractual framework, or structure, where the public and private sector agree to deliver a port project and/or port service that is traditionally provided by the public sector, by means of risk transfer and risk share. Large variety of PPP forms can exist. A common denominator for all forms are the better benefits which can be realized through leverage of private sector efficiencies and know-how and the allocation of risks to those parties that would manage them in the best possible way. Various PPP schemes can be applied in any publicly owned and governed port, regardless of the organizational form of a port authority. In a nutshell, the most important benefits of PPPs in ports are: increasing private sector participation, integrated approach to development and operations, innovation, defined performance metrics and accountability and enhancement of relationships between public sponsor and private provider.

From the point of view of riparian countries, various guidelines and recommendations are given. Various public-private partnership models are seen as a preferred method of port investments. For example, Austria recommends the transformation of port authorities into commercialized or corporatized entities so that they could work under the commercial law (company law) and thus perform faster and easier business relations with port tenants and lessees. Slovakia, however, recommends clear and specific PPP legislation which would clarify the issues on priority investments, land lease and payment methods. Hungary, on the other hand, applies long-term concessions which were directly agreed, with no public tenders, and the only issues recommended to be solved are the conditions for concession termination. In Croatia, main recommendations are focused on resolving the issues of land ownership, where for efficient PPPs, including concessions, the land should be state-owned. In addition, it is recommended that the concession granting and re-negotiating rules should be more flexible. Serbia recommends such legal background which provides a level playing field for all parties, caution with land issues and determination of the port land as "good of common interest" before any concession plans. In addition, transparency, flexibility and clarity in concession conditions and payment methodologies (calculation of fees) are also highly recommended.

Romania recommends, above all, the clarity and precision of PPP legislative framework, clear guidelines for PPP procedures implementation, better training on PPP procedures and even a regional agency tracking and assisting PPPs. Bulgaria recommends more autonomy of port authorities in terms of decision-making on concessions, as well as keeping the incomes from the concession "in the house", that is, within the port authorities so that such revenues could be used for further port development and infrastructure investments in ports where concessions are not convenient, not applicable, not possible, not attractive or not planned.

Finally, apart from flexibility requirement, it is highly recommended that the risk allocation process is carefully performed and agreed. Significant part of the negotiation "package" between the port and the private sector during the tendering process belongs to the process of risk allocation. When PPP agreements involve capital investments, negotiations for risk allocation frequently include potential lenders.

1 Introduction

Port development is seen as a catalyst to stimulate economic activity and create employment. Both seaports and inland ports have enormous economic and strategic significance for countries and their societies. Inland ports are of special importance for landlocked countries in the Danube region as they facilitate access to a navigable waterway as the most economic and environmentally friendly transport mode, thus providing the countries all benefits of economies of scale and size. Many landlocked countries use the Danube for their strategic exports or imports, of, for example, ores, oil, wheat, coal, etc. In this view, it is very logical that many countries consider their ports as strategic assets, that is, strategic objects of the national transport infrastructure.

Taking this fact into account, it is understandable that most countries exert different levels of control on ports, their development, financing and operation. While different forms of public-private partnerships are already well known as a reliable source of funds for infrastructure investments, many countries still have to, or wish to, fund port development on their own, from their own resources. In order to apply this policy, many countries are forced to involve, apart from their own financial means, third parties like international financing institutions (IFI), such as the World Bank or European Investment Bank or similar. Grants or loans for port development give the lending country a leverage on international trade flows, which, in turn generates political influence. Therefore, apart from the strategic importance of ports for different countries, investments in port development also has a strong geopolitical importance.

There are two pillars on which the strong case for creation of funding mechanisms for port development in each country lays.

- First pillar: many Danube countries consider their ports as strategic assets and port activities as activities of strategic national importance; still, many countries turn towards foreign investors or greenfield concessions to provide for funds needed for the creation of strategic assets, which is good, but should not be a sole source of funds for port development.
- Second pillar: the geopolitical importance of port infrastructure development strongly calls for own public funding schemes (own budget, loans, grants, etc.), instead of relying only on foreign and/or private party investments and concessions.

1.1 Structure of the report

Figure 1 illustrates the structure of the report, which consists of nine chapters.

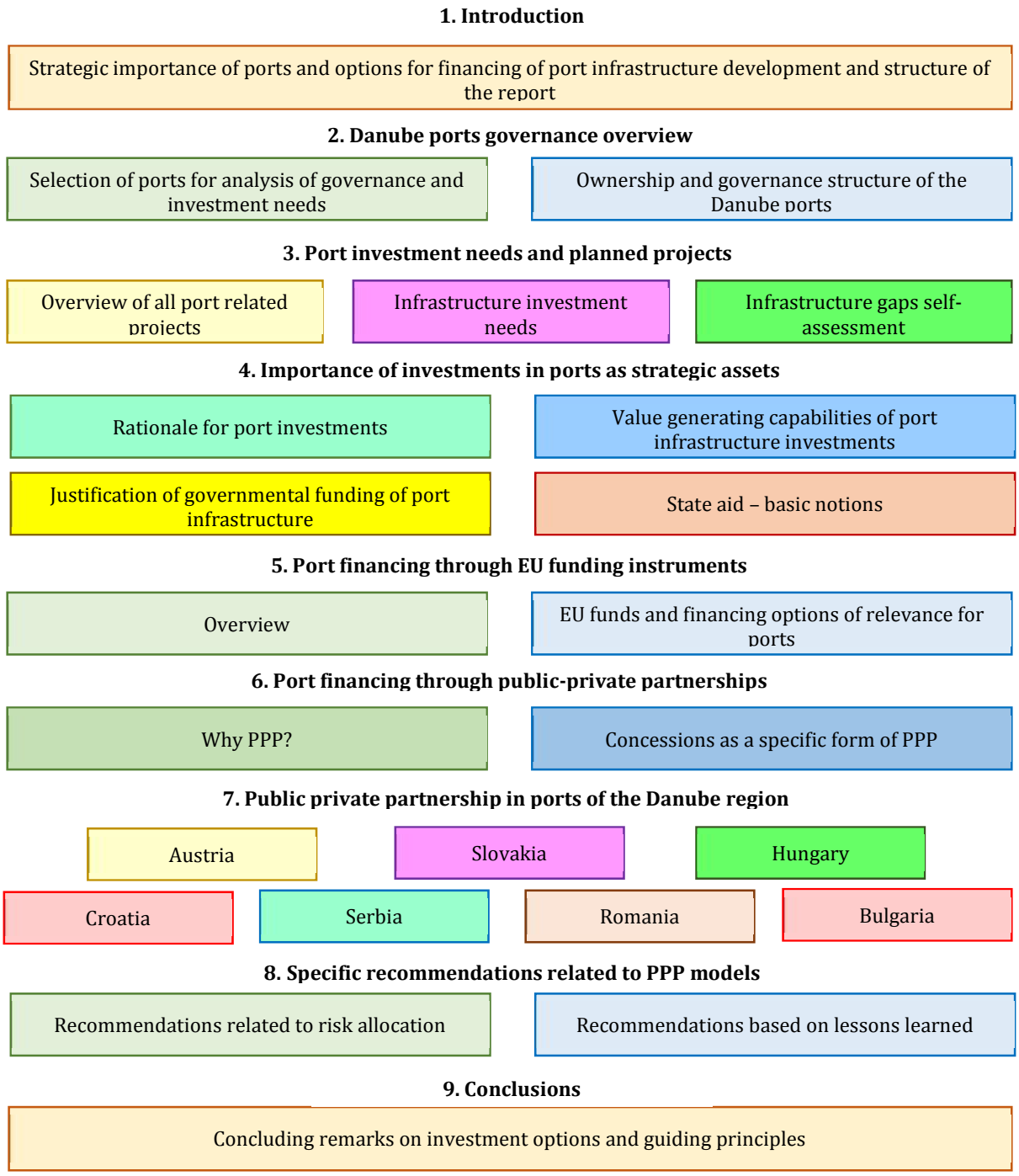

Figure 1: Structure of the report

The first chapter explains the strategic importance of ports and introduces two pillars on which the strong case for creation of funding mechanisms for port development in each country lays. The second chapter briefly reflects on the governance structure and ownership issues of the Danube region ports. In continuation, the third chapter discusses the development needs in the form of planned project, where such needs are quantified in the number of planned projects and their cost in each port and in each country. The fourth chapter discusses on the importance of port investments, explains a distinction between the economic and societal value of port investment projects, provides a justification of governmental funding of port development projects and explains the basic notion of state aid in port infrastructure. Chapter five explains the basics of project funding through different EU funding instruments. The sixth chapter elaborates on financing port development projects through various models of public-private partnership (PPP). In connection to this, the seventh chapter explores the legal background and practical experiences of PPPs in the Danube countries and provides main findings, messages, identified problems and recommendations for their mitigation. The eighth chapter discusses the specific recommendations in terms of risk allocation in PPPs and recommendations based on the experience of PPP implementation in the Danube ports. Finally, the ninth chapter brings the concluding remarks on investment options and guiding principles.

2 Danube port governance overview

2.1 Selection of ports for analysis of governance and investment needs

Due to the huge number of the ports in the Danube region (70+), this report will encompass a sample of 19 different ports (inland and sea ports) from 7 countries along the Danube, for which the study team could provide data. The analysis includes 18 inland (river) waterway ports, as well as the most important "sea gate" for the Danube ports – the seaport of Constanta.

Following ports are selected for detailed analysis in this report:

- Austria: Enns and Vienna
- Slovakia: Bratislava and Komarno
- Hungary: Budapest and Komarom
- Croatia: Vukovar and Slavonski Brod
- Serbia: Belgrade and Novi Sad
- Bulgaria: Lom, Ruse and Vidin
- Romania: Drobeta Turnu Severin, Giurgiu, Galati, Braila, Tulcea and Constanta.

2.2 Ownership and governance structure of the Danube ports

All nineteen Danube ports selected for this analysis demonstrated variations in terms of governance and ownership of port land and port infrastructure. It is considered that a selection of 19 Danube ports represents a statistically significant sample enabling a reliable basis for the overall assessment of all operationally significant ports on the Danube.

In this view, it can be safely stated that the majority of Danube ports are publicly owned. This is, in the opinion of the responsible authors of this report, the best possible solution since the port land represents a finite and strategic asset of any country and therefore needs to be governed by the public sector of different tiers (state, region or city/municipality). Among 19 selected ports, the state owns the port land in 15 ports, while the city (municipality) owns the land in one port. Private ownership of the port land was recorded in one port, while mixed ownership (public and private) was recorded in two ports. Following figure demonstrates the share of different ownership models in the selected Danube ports.

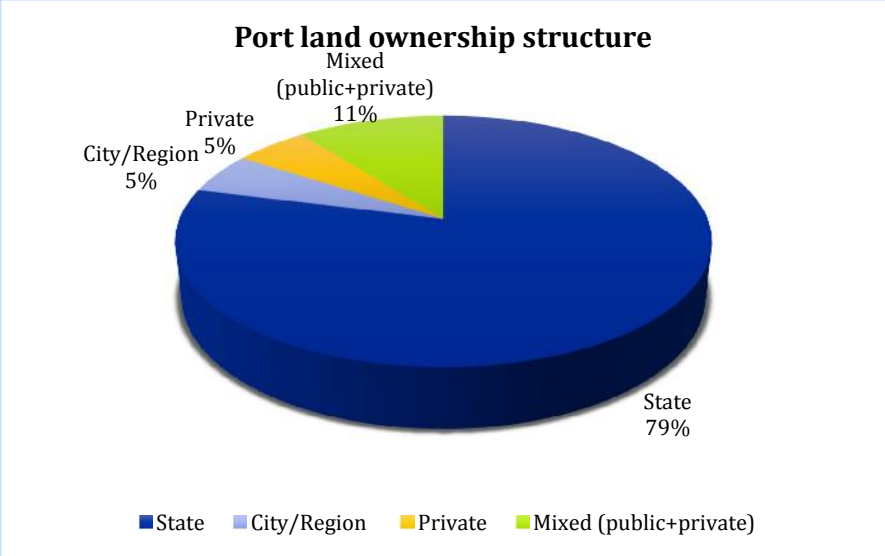

Figure 2: Port land ownership structure

(Source: iC consulenten)

As regards to the ownership of port infrastructure (basins, bank protection, breakwaters, quays, piers, docks, etc.) the state owns infrastructure assets in 11 ports, city (municipality) owns infrastructure assets in 2 ports, while private ownership of infrastructure was reported in 4 ports and mixed ownership in 2 ports. Figure 3 represents results of the port infrastructure ownership analysis.

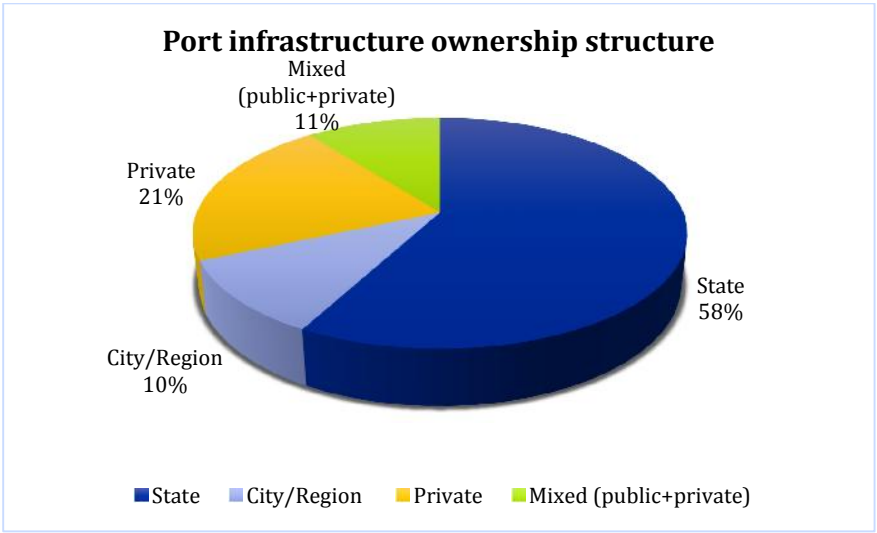

Figure 3: Port infrastructure ownership structure in Danube ports

(Source: iC consulenten)

When bodies and/or entities responsible for port governance (port authorities and similar entities) are concerned, it was reported that 15 port authorities were state owned bodies or

enterprises, 2 were city/region owned, 2 were privately owned, while no mixed ownership was reported. Figure 4 shows the structure of ownership in port authorities.

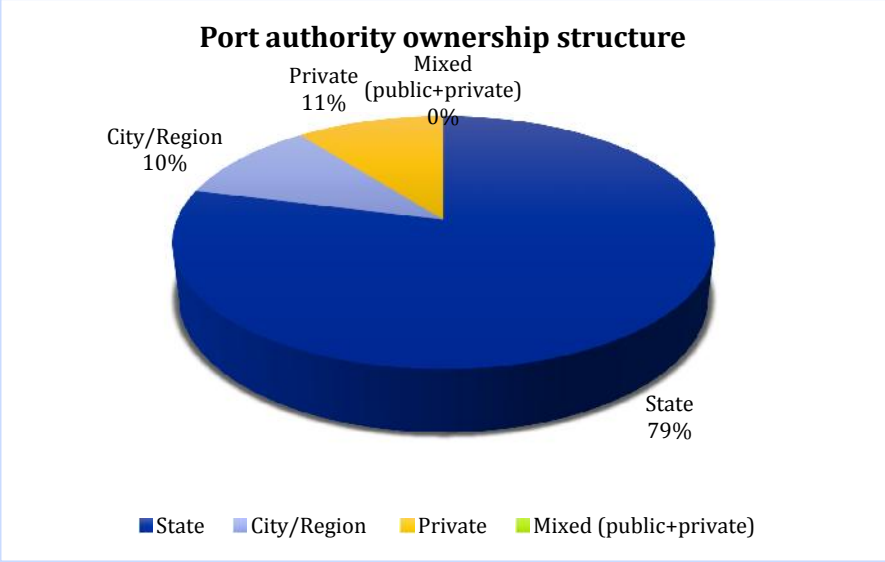

Figure 4: Port authority ownership structure in Danube ports

(Source: iC consulenten)

Commercial exploitation of ports is entrusted, in most of the cases, to private port operators. In this view, 13 port operating companies were privately owned, while 3 ports housed a mixture of public and private port operators. The city/region owned 2 port operators and only one port had a state owned port operator using the port. Figure 5 shows a distribution on public and private operators in the selected 19 ports on the Danube.

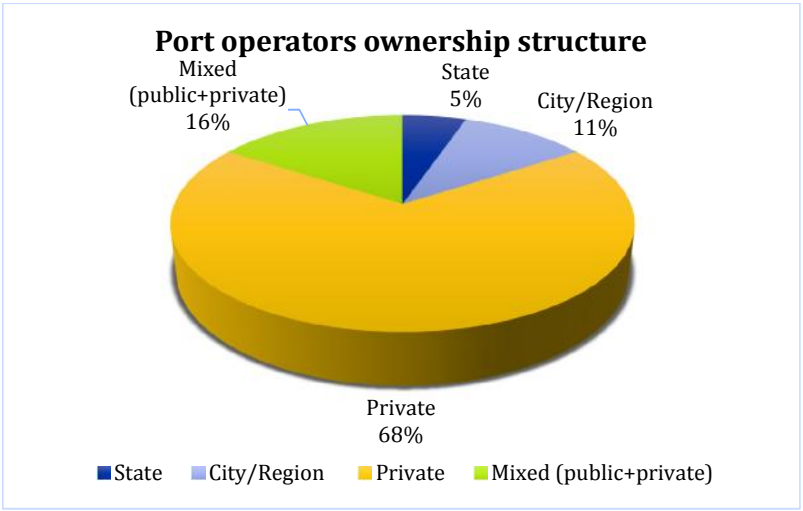

Figure 5: Ownership of port operators in Danube ports

(Source: iC consulenten)

Port governing and port operating functions are separated in the vast majority of ports, more precisely in 17 our 19 analysed ports. This separation of public (governance, administration) and private (operations, exploitation) functions is often seen as a perfect balance of public and private roles in the use of strategic assets such as ports.[1] Figure 6 demonstrates the distribution of separated port governance and port operating functions in the selected Danube ports.

Nevertheless, the fact that ports are usually operated by private operators does not necessarily mean that such port operators are always owned by private shareholders. Publicly owned companies working under private company laws can also successfully operate ports, as long as they are successfully corporatized or commercialized.

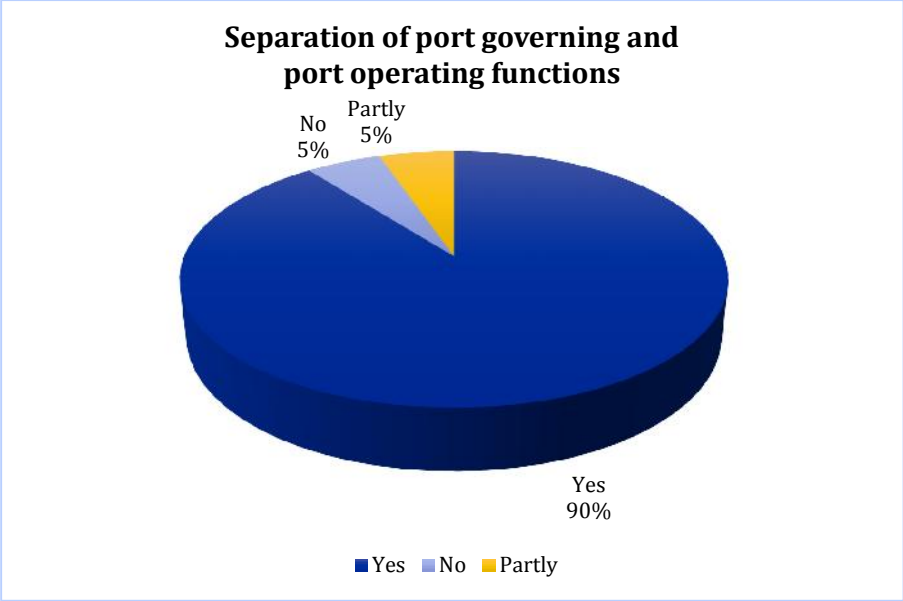

Figure 6: Separation of port governing and port operating functions in Danube ports

(Source: iC consulenten)

Danube ports demonstrate a large variety when it comes to the number of port operators. Most operators operate ports under a licensing agreement, contract or concession agreement. Figure 7 shows a number of port operators in the selected 19 Danube ports.

[1] World Bank, "Port Reform Toolkit", 2007.

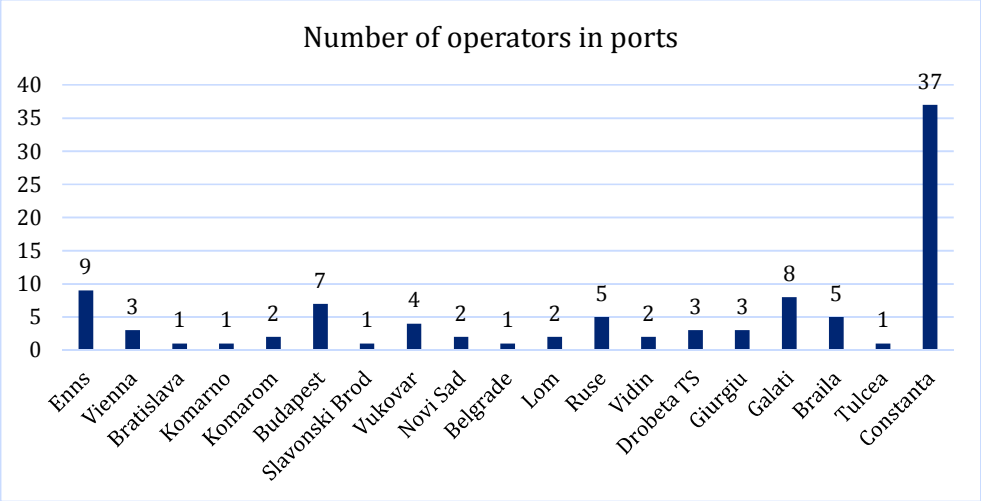

Figure 7: Number of port operators in the Danube ports

(Source: iC consulenten)

3 Port investment needs and planned projects

3.1 Overview of all port related projects

During the survey[2] of the port development projects of the selected 19 ports in the Danube area, a total of 136 projects (recently completed, on-going and planned) was reported to the activity leader by participating project partners. Project list was compiled by the study team, based on the important inputs from port infrastructure managers (port authorities). Figure 8 shows the total number of port projects in each country, for their ports included in the analysis.

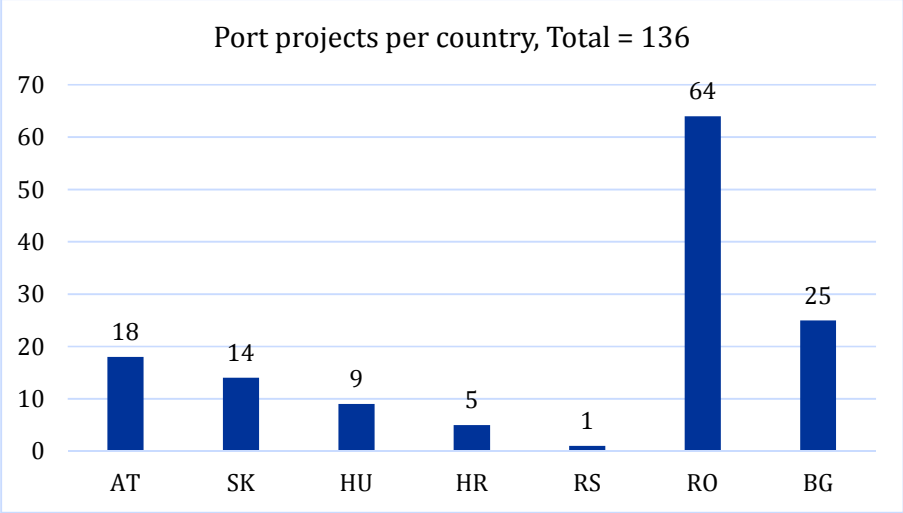

Figure 8: Total number of port development projects in Danube area ports

(Source: iC consulenten)

The largest number of port projects was recorded in Romania. The reason for this is dual: first, Romanian partners suggested 6 Romanian ports to be included in the analysis, which was accepted by the consortium; second, the seaport of Constanta was included in the analysis and has by far the largest number of projects, due to its sheer size, a total of 48 projects.

Out of the total 136 port development projects, the consortium decided to include the projects which were recently completed in all analysed ports, namely in the period from 2012 to 2016, so as to obtain an overview of the development directions in the recent past and to connect them with the projects that are currently on-going and those that are planned in the forthcoming period. In this view, 26 completed projects were recorded, along with the 39 on-going projects and 73 planned projects. Figure 9 demonstrates the distribution of completed, on-going and planned projects in each country.

[2] Group of authors (2017), "Status of port infrastructure development along the Danube", Deliverable D.5.1.1, Work Package 5, Daphne project.

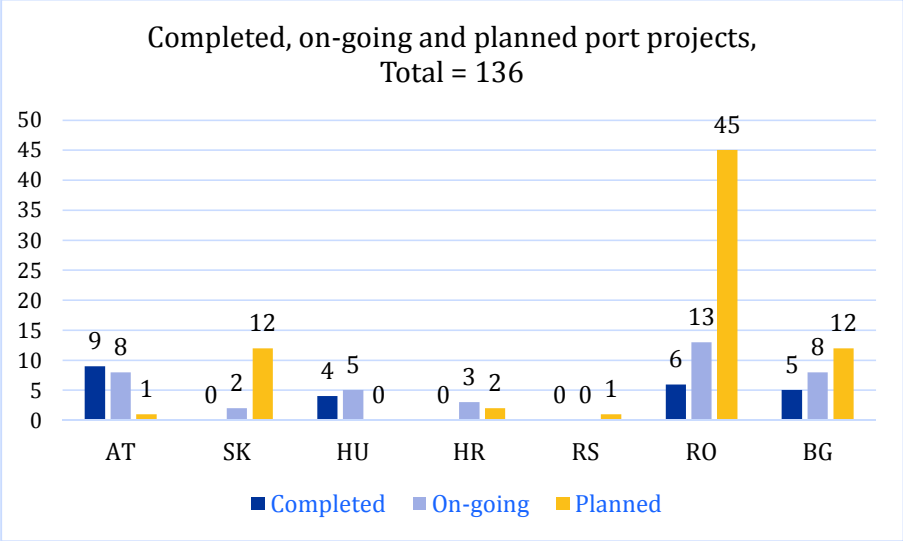

Figure 9: Distribution of completed, on-going and planned port projects per country

(Source: iC consulenten)

As already mentioned, from the breakdown of projects per ports, it can be noted that the seaport of Constanta has the largest number of projects, due to its size and complexity of large seaports which also have their sections dedicated for inland waterway vessels as well. In this view, Figure 10 shows the breakdown of projects in each port.

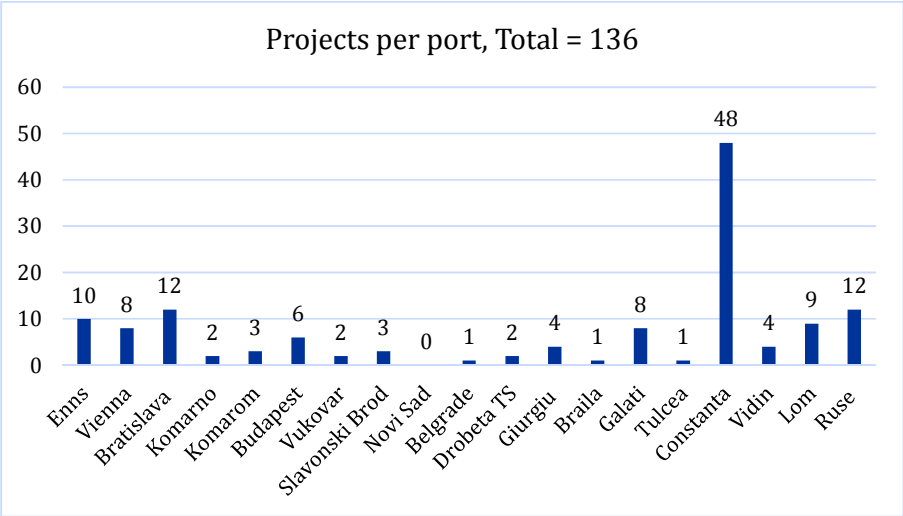

Figure 10: Port projects in each of the analyzed ports in the Danube area

(Source: iC consulenten)

Note for Figure 10: there are two projects which include Vidin, Lom and Ruse together. For the purposes of calculation, these projects are assigned to Vidin only.

Furthermore, each port was analysed for the further breakdown of ports into completed, on-going and planned projects. Project breakdown is shown in Figure 11.

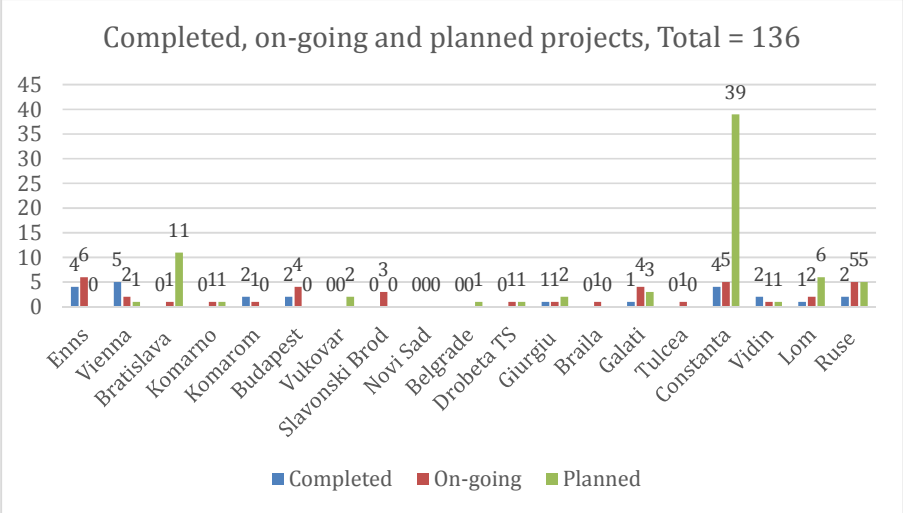

Figure 11: Breakdown into completed, on-going and planned projects in each port

(Source: iC consulenten)

In terms of project costs, seaport of Constanta again shows considerable difference from the costs of other projects in inland ports, due to complexity, scope and size of projects for seaports. Figure 12 shows the distribution of costs of port projects in the Danube riparian countries taking part in the Daphne project.

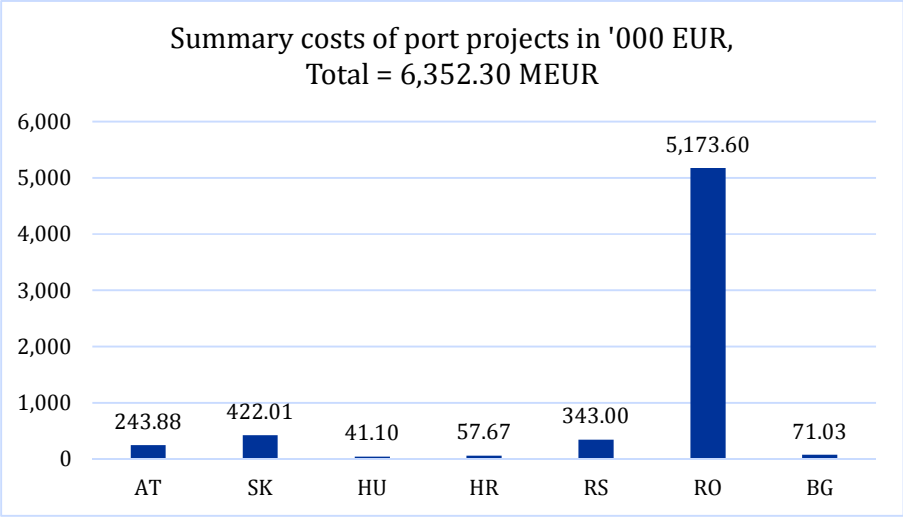

Figure 12: Summary costs of all port projects in selected Danube ports

(Source: iC consulenten)

When the above project costs are distributed over completed, on-going and planned projects, the following situation is seen.

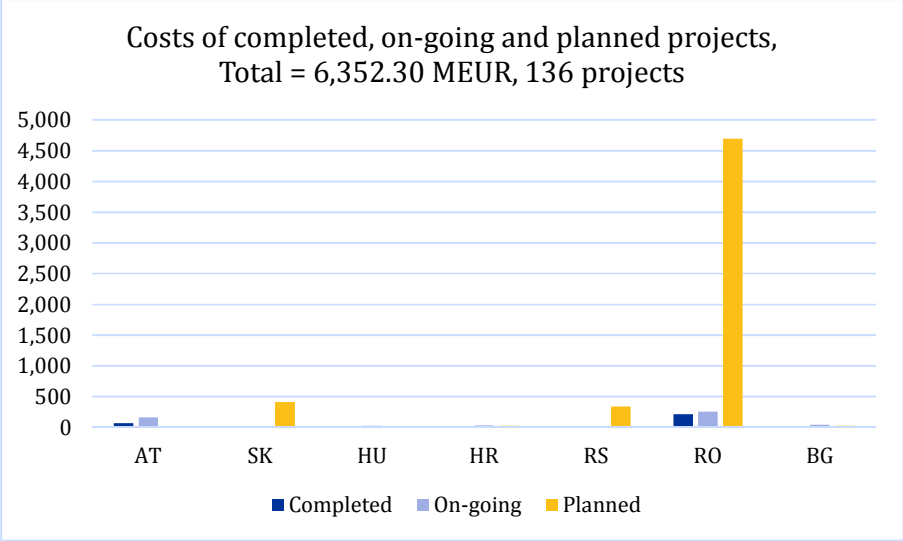

Figure 13: Costs of completed, on-going and planned port projects per country

(Source: iC consulenten)

Table 1: Costs of completed, on-going and planned port projects in each country

	Port project costs in MEUR			
Country	**Completed**	**On-going**	**Planned**	**Total**
AT	72.65	162.21	9.02	243.88
SK	0.00	7.67	414.34	422.01
HU	13.47	27.63	0.00	41.10
HR	0.00	31.90	25.77	57.67
RS	0.00	0.00	343.00	343.00
RO	213.75	259.88	4,699.98	5,173.60
BG	2.70	42.73	25.60	71.03
Total	**302.57**	**532.02**	**5,517.70**	**6,352.30**

(Source: iC consulenten)

It needs to be noted that a certain number of planned port projects did not have determined costs at the moment of writing of this report and that costs of determined on-going or completed project were not available for public use.

When project costs are broken down to individual ports, it can be noted that the majority of port projects are well below 100 million Euro, with the exception of the projects in the ports of Constanta, which has the highest total project costs of 4.8 billion Euro, and other six ports which have project costs higher than 100 million Euro. Breakdown of project costs for each individual port under analysis is given in Figure 14 and Table 2.

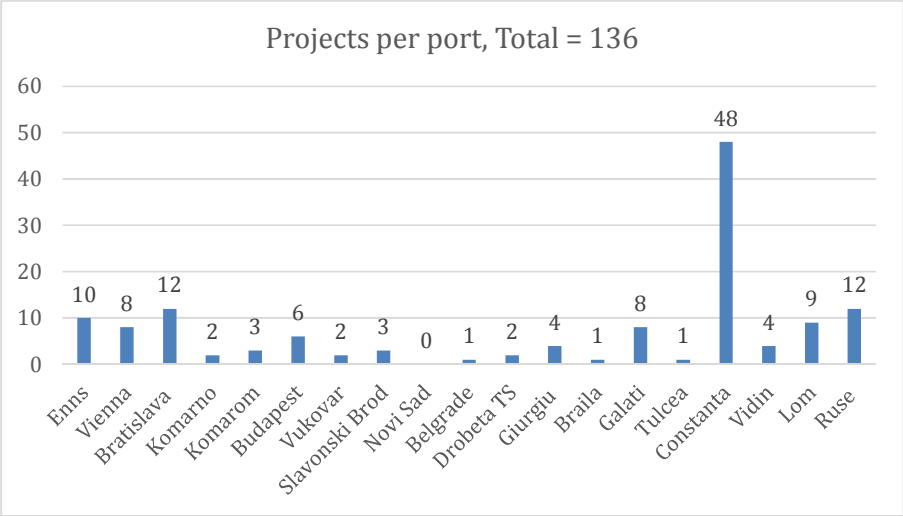

Figure 14: Breakdown of number of port projects costs in individual ports

(Source: iC consulenten)

Table 2: Breakdown of port projects in individual ports

	Project costs (MEUR)			
Port	**Completed**	**On-going**	**Planned**	**Total**
Enns	44.51	100.10	0.00	144.61
Vienna	28.14	62.11	9.02	99.27
Bratislava	0.00	7.00	292.22	299.22
Komarno	0.00	0.67	122.12	122.79
Komarom	2.58	1.05	0.00	3.63
Budapest	10.89	26.58	0.00	37.47
Vukovar	0.00	0.00	25.77	25.77
Slavonski Brod	0.00	31.90	0.00	31.90
Novi Sad	0.00	0.00	0.00	0.00
Belgrade	0.00	0.00	343.00	343.00
Drobeta TS	0.00	71.00	20.00	91.00
Giurgiu	0.80	15.59	108.53	124.93
Braila	0.00	0.72	0.00	0.72
Galati	0.29	44.00	56.48	100.77
Tulcea	0.00	41.00	0.00	41.00
Constanta	212.66	87.56	4,514.97	4,815.19
Vidin	0.00	8.00	0.00	8.00
Lom	0.10	12.40	25.60	38.10
Ruse	2.60	22.33	0.00	24.93
Total	**302.57**	**532.02**	**5,517.70**	**6,352.30**

(Source: iC consulenten)

If data from the Table 2 are analysed, it can be concluded that the investments in ports are generally on the rise, taking into account the comparison between the completed projects and on-going projects, for which the finances have already been secured. If the planned projects are taken into consideration, in spite of the fact that there are no guarantees that all of the planned projects will be financed, it can be noted that the port investments will be almost ten times higher than the on-going ones. Regardless of the financial destiny of the planned projects, it is safe to conclude that the port investments are constantly on the rise since 2012 which was taken as the base year for the completion year of port investment projects.

In terms of the scope of work of port projects (Figure 15), the largest share of projects belongs to rehabilitation and upgrade works (40 projects) and construction of new infrastructure assets (58 projects). Only 22 projects are reported to cover only studies, while 11 projects contain both studies and works, where studies are referred to as feasibility studies, master plans and designs studies, all leading towards the concrete physical works on port infrastructure. Minor number of projects were related to dredging equipment, specialized vessels for port waste collection and safety, administrative operations and telematics.

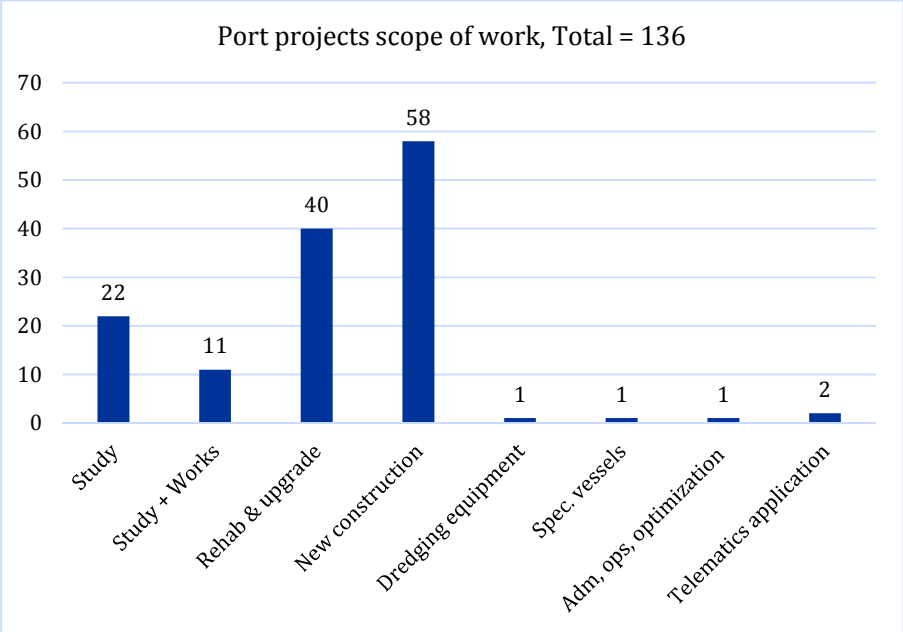

Figure 15: Scope of work of port projects

(Source: iC consulenten)

As far as the type of works in port development projects are concerned, most of the projects deal with extension of the waterside capacity, which is a positive sign from the point of view of increase of inland waterways transportation. Total of 24 projects deal with improvement of road connection or internal roads in ports (11 projects) and improvement of rail connection or internal rail capacities within ports (13 projects). What is especially encouraging is the fact that ports are keeping the pace with other transport nodes and modes in terms of combating

greenhouse gasses (GHG) emissions. In this view, 7 port development projects are dealing with construction of alternative clean fuels facilities, while 8 projects involve greening of port operations through incorporation of electric-driven equipment, solar power, LNG powered machinery, waste management, etc. Type of works in port development projects are shown in Figure 16.

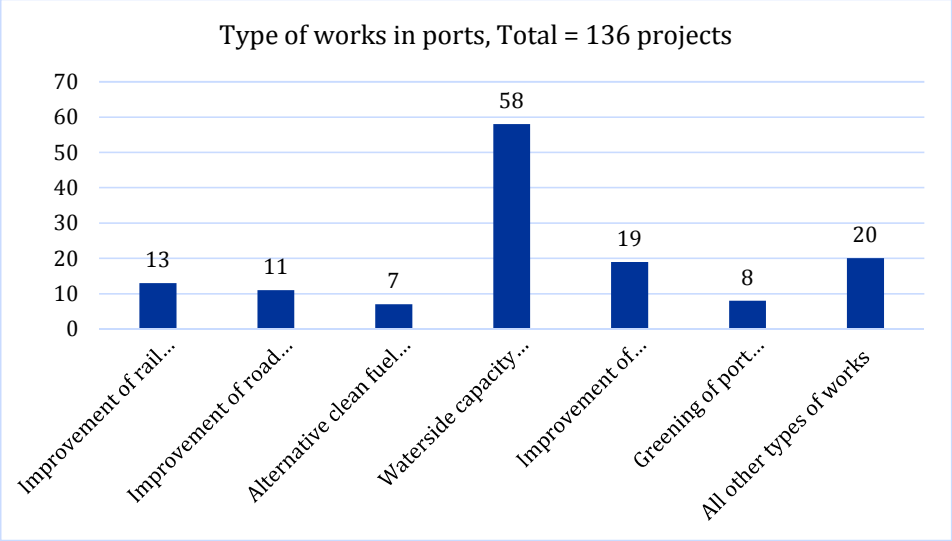

Figure 16: Type of works within port development projects

(Source: iC consulenten)

Finally, the time frame for all identified port development projects is given in Figure 17.

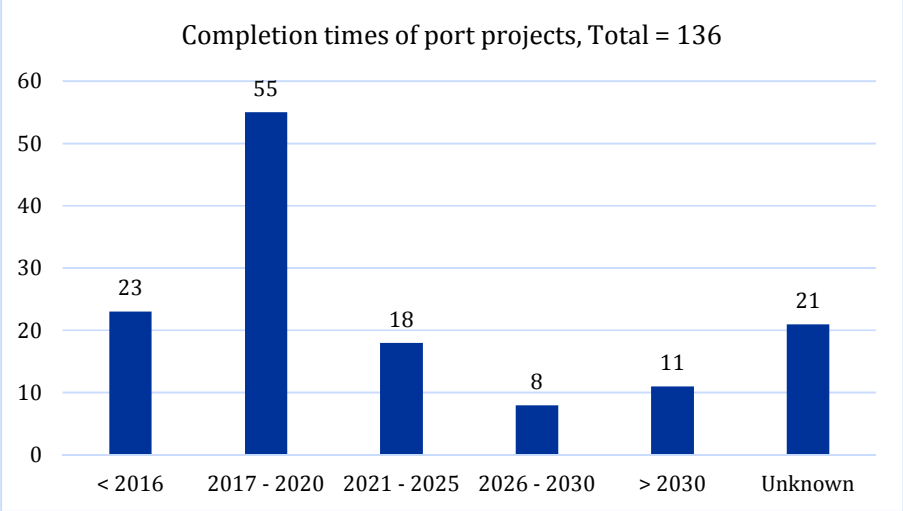

Figure 17: Time frame for execution of the identified port development projects

(Source: iC consulenten)

It needs to be noted that the largest number of projects are either on-going projects or are planned within the current decade. Unfortunately, a relatively large number of projects have the start and end date unknown, meaning that the financing of those projects have not been secured until the moment of writing this report, or that the projects are not mature enough to have the financing figures ready at this moment.

3.2 Infrastructure investment needs

The investment needs for the forthcoming period are contained in the number and value of the projects that are planned (base year 2018) to be completed before 2030, a year which matches the deadline for the full establishment of the core network on the Rhine-Danube Core Network Corridor. Planned projects (excluding those that are on-going) per port are shown in Table 3, Figure 18 and Figure 19.

Table 3: Number and costs of planned port projects in each port

Port	Number of planned projects	Cost of planned projects (MEUR)
Enns	0	0.00
Vienna	1	9.02
Bratislava	11	292.22
Komarno	1	122.12
Komarom	0	0.00
Budapest	0	0.00
Vukovar	2	25.77
Slavonski Brod	0	0.00
Novi Sad	0	0.00
Belgrade	1	343.00
Drobeta TS	1	20.00
Giurgiu	2	108.53
Braila	0	0.00
Galati	3	56.48
Tulcea	0	0.00
Constanta	39	4,514.97
Vidin[3]	1	0.00
Lom	6	25.60
Ruse[4]	5	0.00
Total	**73**	**5,517.70**

(Source: iC consulenten, based on inputs from project partners)

[3] Costs of the planned projects were unknown at the time of the survey
[4] Same as above

Grouped by countries, the largest number of port projects is located in Romania, due to the number of ports selected for the survey and due to the fact that the seaport of Constanta has a very large number of planned projects due to its sheer size. Planned projects grouped by country are represented in Table 4 and Figures 20 and 21.

Table 4: Planned port projects by country

Country	Number of planned projects	Cost of planned projects (MEUR)
AT	1	9.02
SK	12	414.34
HU	0	0.00
HR	2	25.77
RS	1	343.00
RO	45	4,699.98
BG	12	25.60
Total	**73**	**5,517.70**

(Source: iC consulenten, based on inputs from project partners)

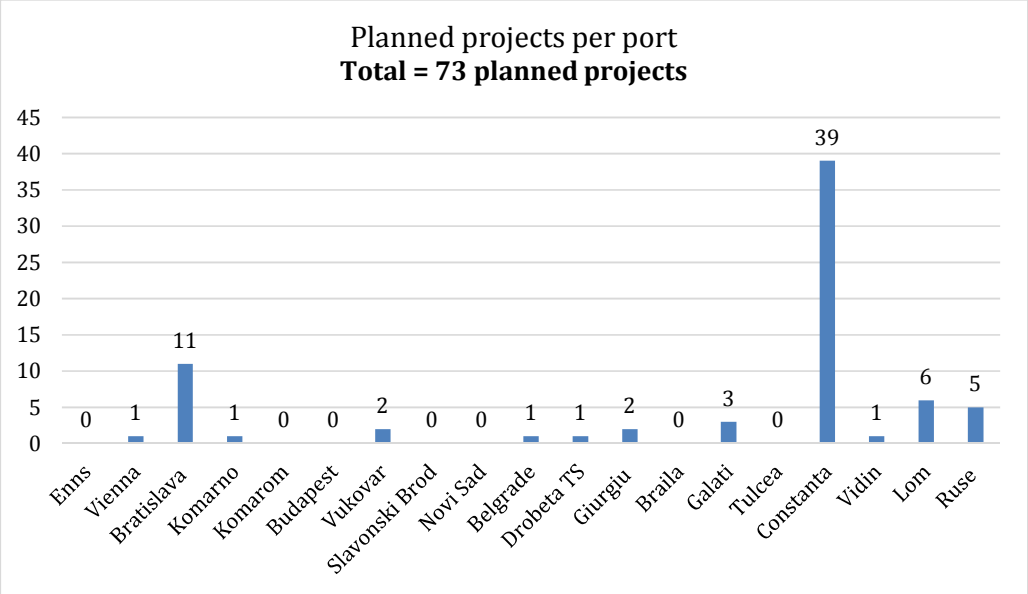

Figure 18: Number of planned project per port

(Source: iC consulenten, based on inputs from project partners)

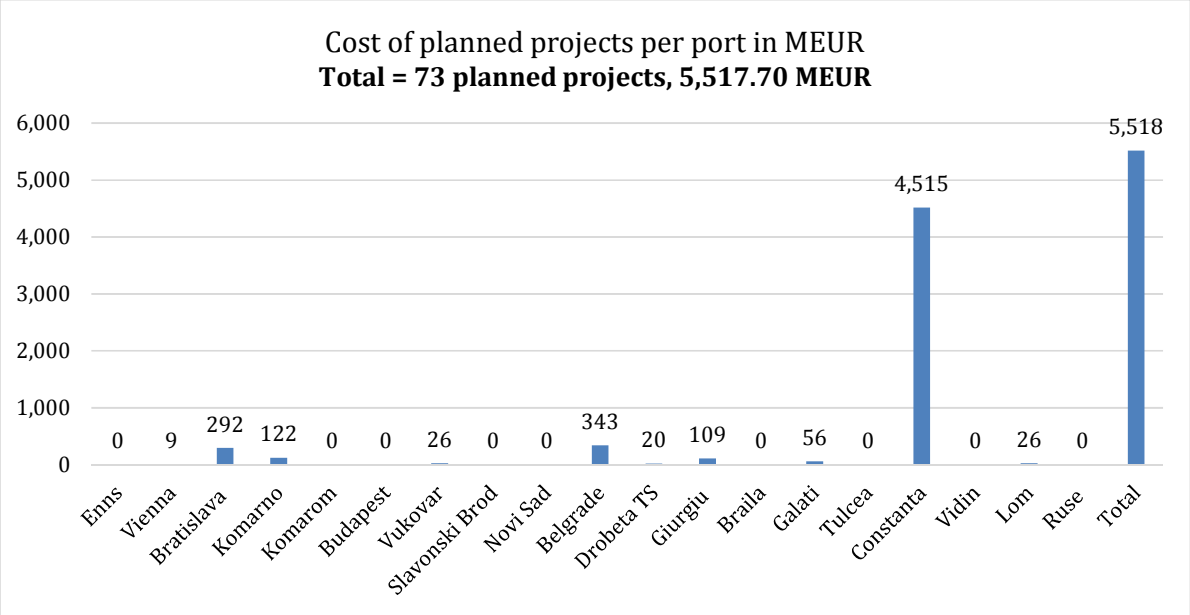

Figure 19: Cost of planned projects per port in MEUR

(Source: iC consulenten, based on inputs from project partners)

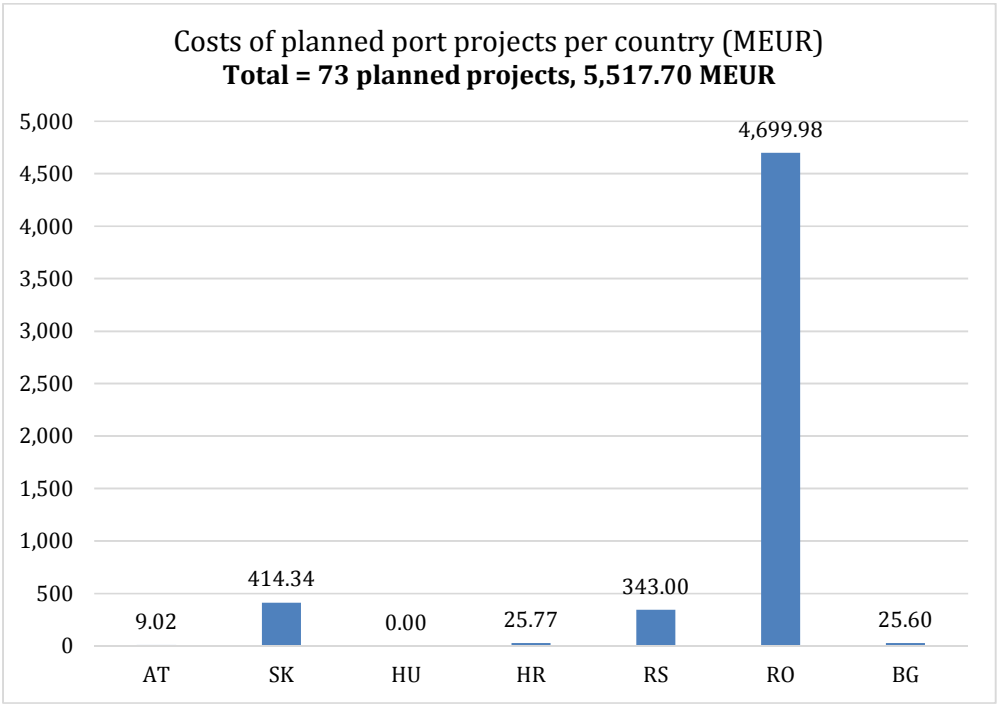

Figure 20: Costs of planned port projects per country

(Source: iC consulenten, based on inputs from project partners)

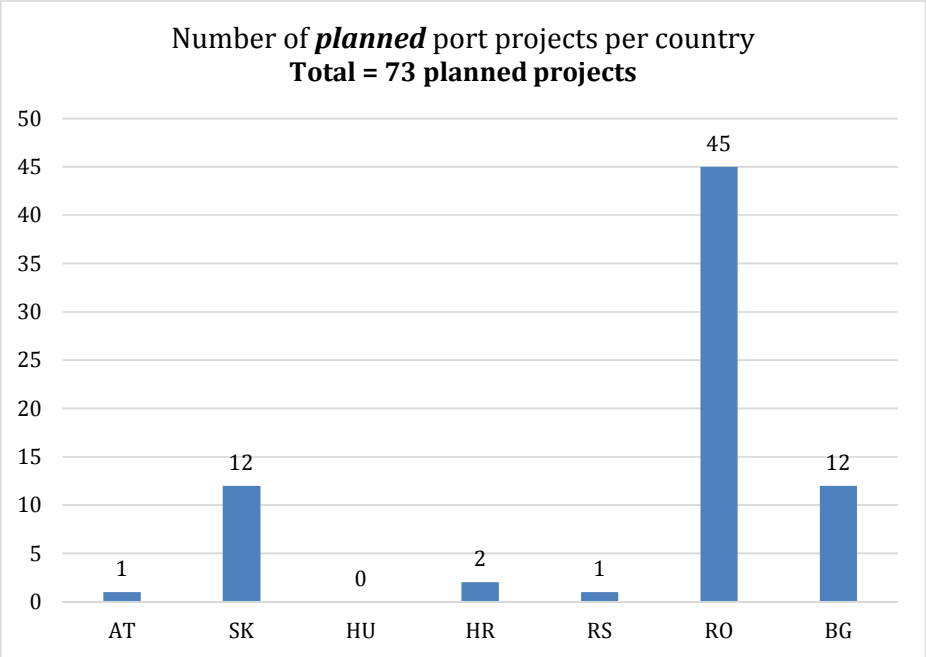

Figure 21: Number of planned port projects per country

(Source: iC consulenten, based on inputs from project partners)

Complete list of projects identified in the 19 selected ports in the Danube area is given in Annex III of the Deliverable D.5.1.1 Status of port infrastructure development along the Danube.

3.3 Infrastructure gaps self-assessment

All ports participating in this project have identified their most important infrastructure gaps, regardless of whether such gaps have been tackled within on-going and planned projects or not.

In relation to the identified gaps, a matrix of the most important gaps, needed to be tackled in order to facilitate unhindered development of ports as important nodes of the overall transport network, is elaborated within this study. The self-assessment infrastructure gap matrix was intended to enable the ports themselves to identify their infrastructure gaps, with the assistance of the study team. The results of the self-assessment are summarized in the matrix given in Table 5.

From this matrix, it can be safely concluded that many ports in the Danube area are focusing their development towards the construction and provision of intermodal facilities. However, this may be seen as a double-edged sword. Taking into account that intermodal transportation (e.g. container transportation) on the Danube is virtually inexistent, except for the containers in the seaport of Constanta which are being exported and imported via maritime transport,

and sporadic transport of empty containers on the upper Danube, it needs to be noted that inland ports are increasingly using their port areas for bi-modal intermodal transport, involving only or mostly rail and road transport. Of nearly a million of containers transhipped in, for example, ports of Enns and Vienna combined, only a negligible (less than a value of statistical error) amount of containers are being loaded/unloaded to/from inland vessels. Starting from the axiom that the core business of ports is ship-to-shore operations, it can be concluded that many ports are using their space for the bi-modal (rail to road and vice-versa) land-to-land transportation, and that some of them are even reclaiming the land from the basin waterfront areas (thus reducing the number of ship berths) in order to provide space for land-to-land bi-modal transportation. It is true that ports are intermodal nodes by definition, as they are meant to provide onward distribution or pre-haulage for the cargoes being loaded onto, or unloaded from vessels, by both rail and road transportation. Nevertheless, it is also true that, in the lack of ship-borne cargoes, ports are forced to turn to land-to-land intermodal transports as ports need to function economically and at least cover their operating costs. This can be seen through the number of “hits” (15) of the column of “Intermodal facilities” in the matrix given in Table 5.

However, it is encouraging that, apart from the analysis of the port development projects in the previous section, ports are still seeing the lack of waterside capacities as their infrastructure gaps that need to be tackled.

Table 5: Port infrastructure gaps matrix

	Intermodal facilities	Structures for precipitation pre-treatment	Quay extension	Waiting areas for vessels (waiting berths or anchorage)	Internal rail tracks extension or improvement	Rail shunting capacities	Electrification of port rail tracks	Extension of operational/handling areas	Capital (not maintenance) dredging	Internal roads extension or improvement	Rail connection to hinterland (new or improved)	Road connection to hinterland (new or improved)	Reconstruction of sloped quays to vertical quays	Ro-Ro ramps	Parking for trucks and cars waiting for loading/unloading	Additional storage area	Additional space for further development	Alternative fuels (LNG) bunkering facilities	Alternative fueled (LNG, electric, etc.) handling equipment	Waste collection facilities	Capital and/or specialized transshipment & handling equipment
Enns	X	X			X					X	X				X			X	X		
Vienna	X		X					X	X	X			X	X	X		X		X		X
Bratislava	X		X	X	X	X		X		X	X	X		X	X	X	X	X		X	X
Komarno			X	X	X	X		X		X	X	X			X	X	X				
Komarom											X		X			X	X				X
Budapest					X					X	X	X			X			X		X	
Slavonski Brod	X		X		X			X					X							X	
Vukovar	X		X		X			X		X	X	X	X	X						X	X
Novi Sad			X		X					X			X								X
Belgrade	X		X		X	X		X		X	X	X		X	X	X	X		X	X	X
Lom	X	X	X					X						X						X	X
Ruse	X		X		X		X	X			X		X							X	X

	Intermodal facilities	Structures for precipitation pre-treatment	Quay extension	Waiting areas for vessels (waiting berths or anchorage)	Internal rail tracks extension or improvement	Rail shunting capacities	Electrification of port rail tracks	Extension of operational/handling areas	Capital (not maintenance) dredging	Internal roads extension or improvement	Rail connection to hinterland (new or improved)	Road connection to hinterland (new or improved)	Reconstruction of sloped quays to vertical quays	Ro-Ro ramps	Parking for trucks and cars waiting for loading/unloading	Additional storage area	Additional space for further development	Alternative fuels (LNG) bunkering facilities	Alternative fueled (LNG, electric, etc.) handling equipment	Waste collection facilities	Capital and/or specialized transshipment & handling equipment
Vidin	X		X		X			X	X	X			X							X	
Drobeta TS	X		X		X		X			X	X	X									X
Giurgiu	X		X	X				X	X		X					X					
Galati	X	X	X		X					X	X			X				X			
Braila	X	X	X		X					X	X	X		X				X			
Tulcea	X	X	X		X					X	X	X	X	X				X			
Constanta	X		X		X	X	X			X	X	X			X			X	X		

(Source: iC consulenten, based on data provided by EHOO, POV, VPAS, HFIP, BPICO, APDM, PAV and MPAC)

It is very important to note that, according to the number of hits of different gaps categories, the number one gap for ports is still the lack of sufficient quay space, or the quay length. A total of 16 (out of 19) ports have identified the need to extend the quay length, that is, their waterside capacities. The importance of this lays in the fact that ports need, on the one hand, to respond to the growing demand for vessel handling facilities and, on the other hand, to offer additional quay capacities in order to prevent vessel operators to divert to other ports in case of continuous port congestion problems, or to keep the cargo receivers or shippers to use their port instead of choosing another port or even another transport mode if even the seasonal effects cause repetitive congestion and delays.

Another important infrastructure gap requiring attention, which received the same number of "hits" (15) as the need for intermodal facilities, is the need to improve or extend internal railway capacities. This is very logical as many ports strive to provide direct ship-to-wagon transshipment whenever possible, due to easier organisation of on-haulage or pre-haulage of cargoes and faster cargo collection or distribution, freeing space for next incoming cargoes.

Next two gap categories which received the same attention (number of "hits" = 14) are the need to improve internal road extension or improvement and rail connection to hinterland. Improvement of internal roads is needed for the daily operations in ports in situations when huge number of trucks are carrying port inbound and outbound cargoes and when internal port vehicles and handling equipment handle the cargo between the quay area and base or transit storage areas and the port gate. Rail connections (construction or improvement) to hinterland is of crucial importance since the ports need efficient and reliable connection to their hinterland and the rest of the transport network feeding the ports with their cargoes.

Due to the increase of cargo throughput and expansion of value added services for cargoes handled in ports, many ports (number of "hits" = 10) have expressed the need for an extension of cargo handling areas, usually located just behind the quay wall or between the quay wall and transit or base storages.

Almost half (9) of the analysed ports identified the need for capital and/or specialized transshipment, Ro-Ro ramps, improvement of road connection to hinterland, and handling equipment including heavy lift capacities. The reason for this is of dual nature. First, a number of ports have either outdated capital equipment (all sorts of loading/unloading cranes and similar equipment) or such equipment is nearing the end of its life cycle, making such ports lag behind more developed ports and thus jeopardizing the efficiency and reliability of entire supply chains along the given routes. Logically, the need for replacement of such equipment, which is very expensive, is on the rise. Second, ports are looking towards the new markets, such as the markets of heavy and out-of-gauge cargoes, which represent very convenient cargoes for inland waterway transportation since no special licenses or permissions or special vehicles are needed for the transport of such cargoes on inland waterways. Since not many ports possess equipment for handling of such cargoes, the orientation towards the market of

high and out-of-gauge cargoes caused the need for such equipment, reflecting the pro-active attitude of ports towards new markets.

Last but not least, it is important to emphasize the fact that an increasing number of ports are showing their awareness of the need to "green" the ports and port operations. In this view, 5 ports have expressed their need for structures needed for collection and treatment of precipitation water (rain, snow, etc.) from the operational areas before their releasing back to the river, while 6 ports have expressed the need for alternative clean fuels (LNG) bunkering facilities, even though no LNG fuelled vessels currently operate on the Danube and its tributaries. Finally, 4 ports identified the need for alternative fuelled (LNG, electric, etc.) handling equipment (cranes, reach-stackers, forklifts, straddle carriers, etc.).

Summary of port infrastructure gaps ranking is given in Figure 22.

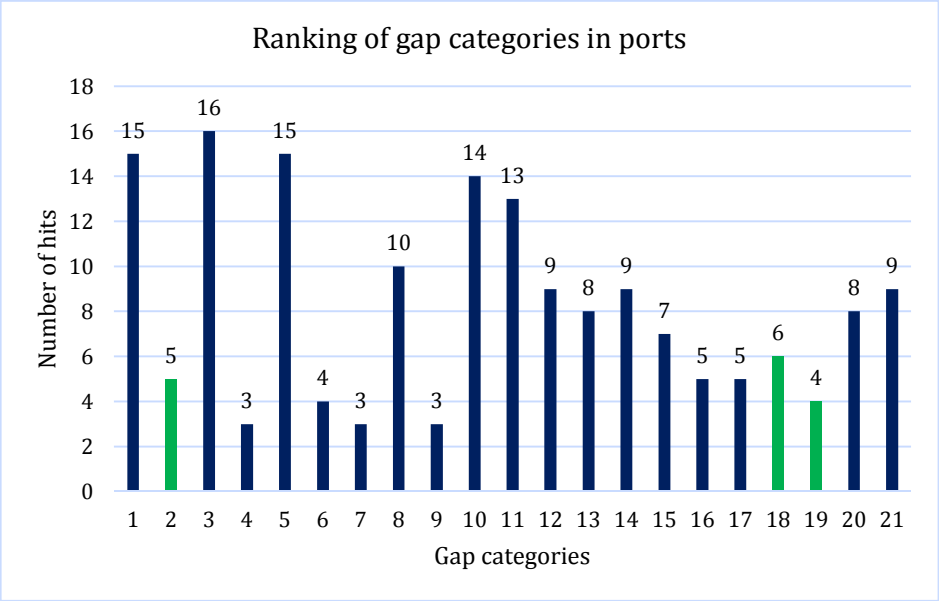

Figure 22: Ranking of port infrastructure gaps categories

(Source: iC consulenten)
Note: gap categories (1 – 21) correspond to the categories listed in Table 5, from left to right, respectively.

Finally, this additional self-assessment matrix of infrastructure gaps is yet another indicator of the needs for infrastructure development. Although non-quantitative at the current stage, these indicators imply the magnitude of funds needed to meet the infrastructure development needs of ports in the Danube region.

4 Importance of investments in ports as strategic assets

4.1 Rationale for port investments

In order to keep the port efficiency on the designed or desired level, to facilitate their ability for quick responses to dynamic market demands and to maintain the desired sustainability levels, port investments need to be active and continuous.

There is a large number of factors that can influence port investments, their size, scope and timing. Some of these factors are listed in continuation:

- Increase of cargo throughput in ports, especially in ports reaching high level of capacity utilization.
- Market volatility and significant periods of low or peak cargo flows for certain goods, as well as significant periods of low or high water levels where ship-to-shore operations are not possible.
- Nature of the traffic, which is especially important for seaports – if they are hub or spoke ports, as well as cargo specialization, if any.
- Increase of passenger traffic, both in sea and river ports, whereas the river ports are seeing a tremendous increase of cruise traffic, which calls for new investments for this particular type of traffic.
- Greening of ports, as an integral part of the overall process of decarbonisation of economy. This refers to the overall decrease of greenhouse gasses (GHG) emissions, increased use of power units with alternative and/or renewable fuels or energy sources, such as wind power, LNG fueled or electricity powered mobile equipment in ports, solar powered facilities in ports, etc. Last, but not least, port investments will be influenced by this factor in terms of adaptation to climate change and the need to invest in port facilities resilience.
- European legislation on alternative fuels in ports - The TEN-T guidelines also require that inland and sea ports of the core network established by Regulation (EU) No 1315/2013[5] of the European Parliament and of the Council ("TEN-T Core Network") provide for the availability of alternative fuels. In addition, the Directive on the deployment of alternative fuels infrastructure[6] states that shore-side power supply should be installed as a priority in ports of the TEN-T core network, and in other ports by 2025, unless there is no demand and the costs are disproportionate to the benefits.
- Hinterland connections – road and rail connections from the main road or rail network towards the port and, in case of seaports, connections with inland waterways.

[5] Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (OJ L 348, 20.12.2013, p. 1).
[6] Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure

- Pressure caused by urban development in case of city ports which are, frequently, located in the heart of the downtown areas (e.g. Port of Belgrade). In this case, significant investments are needed in order to connect the port with the rest of the transport network in the safest possible way or even to dislocate the entire port.
- Initiatives to improve the modal shift towards more environmentally friendly transport modes in general.
- Initiatives for improvement of internal port modal split and intentions to move more cargo by rail instead of road, requiring investments in intra-port rail infrastructure.
- Digitalisation of port processes and introduction of various port community systems requiring increase automation levels on the basis of real-time data processing and information related to virtually all port processes and operations.

The above factors are just some of the most typical drivers for investments in ports, but the above list is definitely not a finite one. Since ports are important elements of any transportation network involving maritime routes or inland waterways, continuous investments in ports are needed in order to maintain or improve the port efficiency levels and their sustainability.

4.2 Value generating capabilities of port infrastructure investments

Port investments are undertaken either when a need occurs, or when the port investments are planned to be a generator of economic activities and thus attract additional traffic. In both cases, these investments must create value for port users and/or for the entire society of the host city or the region, otherwise the investments are destined to fail.

When value for users is created, it must be taken into account that such investments are triggered by pure demand generated by users which, in turn, are ready to pay the port fees to those entities making the investments – in most of the cases, port authorities or concessionaires. There are three types of users:

- Shipping companies (ship operators) paying the ship related fees;
- Port/terminal operators paying the lease or concession fees, and
- Exporters/importers (cargo owners), paying the cargo related fees.

In addition to the creation of direct values, port infrastructure investments also create societal values on the basis of reduction of negative externalities, job creation, multiplier effects, road congestion reduction, competitiveness of the local and/or regional economy, improved connectivity, traffic management, reduction of CO2 emissions, flood protection, higher levels of security and safety, etc. These societal values are often difficult to quantify and they are usually a subject of investigation in cost-benefit analyses (CBA) of port investment projects.

Table 6 contains an overview of potential value generation features of port infrastructure investments, including the features of both economic and societal value generation.

Table 6: Value generation features of port infrastructure investments

Investment object	Generation of economic value	Generation of societal value (benefit)
Maritime access (for seaports)	Economies of scale and thus reduced unit shipping cost in case of improved accessibility for larger vessels.	Added traffic generation, increased safety, flood protection in case of locks and breakwaters, etc.
Inland waterway access (for inland ports)	Reduced units shipping costs if off-loading is avoided and if the depth in port matches the depth of the fairway, increase of efficiency.	Increased vessel safety, flood protection, lower GHG emissions.
Basic port infrastructure (e.g. quay walls, etc.)	Reduced costs for shippers, cargo owners, higher efficiency, faster ship turnaround.	If investment allows for cargo to get closer to the final destination, then reduction of the transport journey on land to the last mile = less GHG emissions.
Facilities (equipment and suprastructure)	Value for port users through more capacity and/or higher productivity	Same as above.
Internal transport infrastructure (internal roads, rail, handling yards, etc.)	Value for port users through lower generalised transport costs and efficiency	Reduced GHG emissions due to increased efficiency and faster turnaround time of vehicles.
Renewable energy related infrastructure (e.g. solar panels for electricity production)	Value for port users due to lower production costs	Increased sustainability and energy efficiency, improved energy independence.
Rail connectivity	Value for port users through lower generalised transport costs[7]	Increased trade due to broader hinterland and lower environmental footprint in case of electrified railways.
Road connectivity	Value for port users through lower generalised transport costs	Increased trade and lower pollution due to lower congestion levels in case of higher road capacity.
Inland waterways connectivity	Value for port users through lower generalised transport costs	Increased trade, and lower environmental footprint if IWT share is increased.
Port community systems and other IT and digitalization facilities	Value for port users through lower generalised transport costs	Lower pollution and congestion as a consequence of optimized use of assets and less empty voyages.
Intermodal terminals	Value for port users through lower generalised transport costs	Increased trade due to broader hinterland, optimized modal split and lower GHG emissions.
Alternative fuels infrastructure (LNG fuelling stations, shore-side power supply, etc.)	Value for port users through lower generalised transport costs	Reduced environmental footprint of shipping and land vehicles.

[7] In transport economics, the generalised cost is the sum of the monetary and non-monetary costs of transport from port of origin to the port of destination. Monetary (or "out-of-pocket") costs can include a freight rate or the costs of fuel, wear and tear and any port fees, infrastructure charges or congestion charge on a trip from port A to port B. Non-monetary costs refer to the time spent undertaking the transport leg under question. Time is converted to a money value using a value of time figure. Value of time, on the other hand, is the opportunity cost of the time that a ship (or a cargo) spends on its journey. In essence, this makes it the amount that a ship operator (or cargo owner, charterer) would be willing to pay in order to save time, or the amount they would accept as compensation for lost time.

Investment object	Generation of economic value	Generation of societal value (benefit)
Hybrid logistic zones	Value for port occupants benefiting from a location in a port-focused hybrid logistic zones	Increased competitiveness of the region through investments in manufacturing and logistics, including job creation and multiplier effects.

(Source: iC consulenten, modified from "The Infrastructure Investment Needs and Financing Challenge of European Ports"[8])

4.3 Justification of governmental funding of port infrastructure

Port facilities that are used and charged on a commercial basis are usually self-sustained, or viable. However, not all viable investments can generate the necessary financial return on investments to make them attractive for a private sector to undertake the investment. The main reason lays in the fact that the generation of the societal value cannot be fully encompassed by port's incomes. Moreover, port infrastructure investments are usually capital investments and have a very long pay-back period, often very discouraging for the private sector.

De Langen, et.al.[9] claim that a distinction can be made between the "business case" of an investment in port infrastructure for the port managing body and the "value case" of the investment for society at large. The business case only includes the value that is generated for users and captured by the port managing body through charges and lease fees, while the "value case" also includes the value generation and the costs for society, which include its positive and negative externalities.

Figure 23 shows a framework to classify investment projects according to business potential and societal value.

[8] Langen, P de, Turró, M., Fontanet, M. and Caballé, J. (2018) "*The Infrastructure Investment Needs and Financing Challenge of European Ports*", ESPO Report.
[9] Ibid.

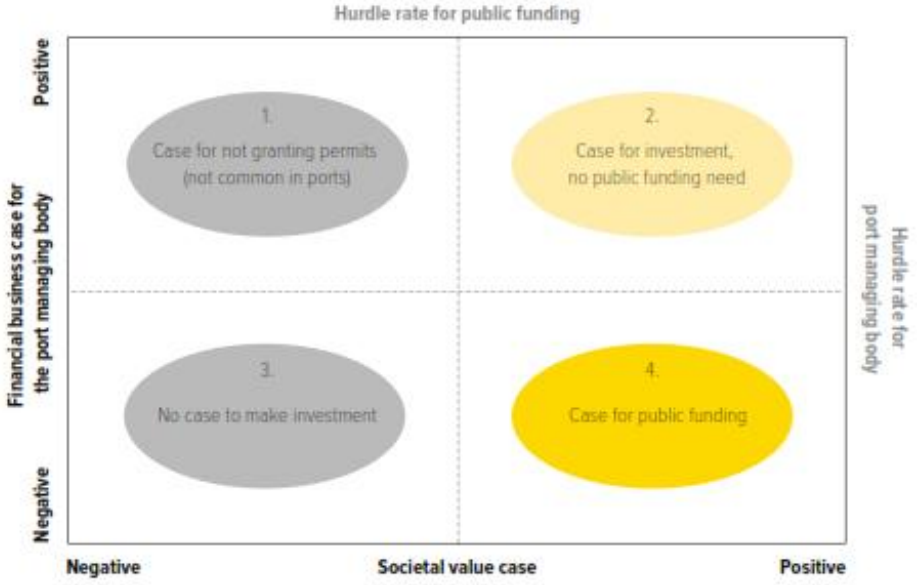

Figure 23: Investment projects framework

Publicly funded projects are most frequently those projects which have a positive value case (societal value), but a negative business case, or an insufficient economic value for users. In Figure 23, these projects are classified as "Type 4" projects. These types of projects are usually funded or co-funded by local, regional or national governments and, in determined cases, by supranational organisations such as the European Union.

Public funding of projects which demonstrate positive both societal and economic value ("Type 2" projects in Figure 23) can also be justified. The combination of considerable development costs, lengthy and uncertain approval processes and high risks (societal risks associated with stakeholder acceptance of port development, political risks associated with certainty of political support and infrastructure policies and commercial risks because of long pay-back period and associated uncertainty) may lead to a very low private investor interest in port projects, even in those with a positive financial business case. The higher the value creation for users, the stronger the impact of investments on the competitive position of a port. Thus, public funding for investments which predominantly create value for users distorts the level playing field.

Nevertheless, when port infrastructure investments generate only or mostly the societal value, the aim for a level playing field is not in contradiction with public funding mechanisms. All port authorities can set their own "hurdle rate", which is the minimum financial return required for investment projects. In compliance with their societal goals, public port authorities are likely to have lower hurdle rates than private port operators or even concessionaires. However, since port authorities become more and more commercialized or corporatized, they are also given substantial financial independence, hence they are not always financially capable of financing the "Type 4" investments on their own.

Therefore, for self-financing public port authorities and private port managing bodies alike, "Type 4" investment projects are not commercially viable and bankable. This type of investments requires public funding through various financial injections from the government. In addition, public funding from government budgets can be paired with long-term loans by public entities, such as the European Investment Bank or national development banks and therefore assist to make the project financially sustainable. Whatever the case may be, whenever the port infrastructure investment generates significant societal value (a.k.a. socio-economic benefits) the public co-funding of such projects is justified.

In most of the world's countries, port infrastructure projects are financed by the public sector fully, or to close the "financial gap" for projects with a positive "value case". Public funding of port infrastructure is the rule, rather than the exception, including the European Union.

Public grants represent the most common practice of public funding. This practice is tackled in the EU's State aid policy with respect to ports. The General Block Exemption Regulation for ports[10] allows direct public financing of port infrastructure, access infrastructure and dredging below a certain threshold as it is considered to be compatible with the internal market and of common interest. These public grants, including the block exemptions, imply that the port infrastructure projects are projects with high socio-economic benefits, making the grants an important mechanism for realization of port infrastructure projects.

However, identifying the "Type 4" projects (Figure 23) and assessing the societal value case of port projects is not an easy task, especially ex-ante. Taking into account the large scope of uncertainties of quantification of societal values (socio-economic benefits), mechanisms to reduce the risks of misallocating public funding are relevant.

The main risk in relation to public funding is the improper allocation of funds, i.e. putting public money in infrastructure projects that do not generate sufficient value for users and society at large to justify the use of public money. This risk is relevant and omnipresent as the generation of value cannot always be precisely estimated. For example, the use of port infrastructure is subject to uncertain factors such as the general development of the economy and trade flows, the competitiveness of the port vis-à-vis competing ports and trends in waterborne logistics. Moreover, cost benefit analysis generally tends to overestimate benefits and underestimate costs[11]. Consequently, this bears a risk of inefficient use of public money, which can be reduced through the following mechanisms (which may not be applicable in all cases):

- Perform risk and sensitivity analyses for all cost benefit analyses.
- Using the so called "blending" mechanisms as a combination of funding sources where loans are an important component, since loans lead to financial scrutiny of the

[10] Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs.
[11] Flyvbjerg, B. (2007). Policy and planning for large-infrastructure projects: problems, causes, cures. Environment and Planning B: Planning and Design, 34(4), 578-597.

project and place the risks with the managing body, reducing the risk of excessively optimistic assumptions in the business case.

- Using a harmonized approach for cost-benefit analysis.
- Phasing an infrastructure investment project into several stages, preferably with loan commitments that are conditional to achievement of demand related performance criteria.
- Applying a "one step at a time" approach to project realization, where planning processes and funding are secured but the final investment decision is conditioned to reliable information about the demand, for instance through contracts with current or future users.

4.4 State aid – basic notions

Since the concept of "State aid" was mentioned in previous sections, hence the need to briefly tackle the basic notions and definitions related to the State aid.

> *"State aid" means any aid granted by the State or the municipality, or at the expense of government or municipal resources, directly or through other persons in any form, which distorts or threatens to distort free competition by making it more favourable to certain undertakings, the production or marketing of certain goods or the provision of certain services, so far as it affects trade between Member States of the European Union[12].*

Commission regulation (EU) No 651/2014 (GBER regulation) uses the following additional terms:

- Individual aid: (1) ad hoc aid and (2) awards of aid to individual beneficiaries on the basis of an aid scheme.
- Aid scheme: "Aid scheme" means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be granted to one or several undertakings for an indefinite period of time and/or for an indefinite amount.

[12] Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs.

- Aid intensity: "Aid intensity" means the aid amount expressed as a percentage of the eligible costs.
- Aid category: “State aid” and “non-state aid” categories according to Article 107 (1) TFEU, (e.g. de minimis or aid for local infrastructures.

On the basis of Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU), any aid granted by a Member State or through state resources in any form is generally prohibited. The reason of the prohibition is that state aid distorts or threatens to distort competition in the internal market. Favouring certain undertakings or the production of certain goods through state funds that can be either direct, i.e. grants provided or indirect, e.g. exemptions from any payment obligations to the state budget, is deemed to have an adverse effect on the trade between Member States.

A measure shall be considered as state aid if involving all the following attributes:

- transfer of state resources;
- economic advantage: the aid reduces the costs normally borne in the budgets of the
- beneficiary undertakings;
- selectivity, i.e. when the aid favours certain undertakings or the production of certain goods;
- distortion of competition, and
- effect on trade between the Member States.

Transfer of state resources means the use of funds belonging to or being controlled by and imputed to public authorities. The form in which this transfer takes place is irrelevant from a state aid perspective.

The private investor test is to assess whether there is an economic advantage involved for the beneficiary. This means that the economic advantage shall be established of the state did not act in the same way as a private investor would have acted.

Where aid benefits only products which are not subject to inter-state trade or where trade is affected only at a purely national level, the measure will not fall within the scope of prohibited state aid. This does not mean that only measures relating to exports or imports from a Member State to another are affected by Article 107 (1) TFEU. It may be that several circumstances in which aid is granted will lead to affecting the trade between Member States.

When, for instance, aid strengthens the position of an undertaking compared with others competing in intra-Union trade, the latter shall be affected by the aid even if the beneficiary itself is not involved directly in exporting or importing goods.

Despite the general prohibition of State aid, in some circumstances government interventions are necessary for a well-functioning and equitable economy. Certainly, there are exemptions from the principle of state aid prohibition. First, there are exemptions where the aid shall be considered to be compatible with the internal market and thus involving no competition distortions. Then there are aid measures that, under certain conditions, might be compatible with the approach of the internal market.

The measures qualified as compatible by the TFEU are of a social and reparative nature, i.e. (1) social aid, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (2) aid to restore damages caused by natural disasters or exceptional occurrences; (3) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

The following may be considered to be compatible with the internal market:

- aid to promote the economic development of the seriously underdeveloped areas;
- aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition.

Apart from the above, other categories of aid may be specified and deemed compatible by decision of the Council.

5 Port financing through EU funding instruments

5.1 Overview

In order to implement the agreed policies and strategies, the European Union has developed various instruments, including those for financial support for implementation of such policies and strategies.

Over half of EU funding is channelled through the five European Structural and Investment Funds (ESIF). They are jointly managed by the European Commission and the EU countries.

The purpose of all these funds is to invest in job creation and a sustainable and healthy European economy and environment.

The ESIF mainly focus on 5 areas:

- research and innovation
- digital technologies
- supporting the low-carbon economy
- sustainable management of natural resources
- small businesses

Out of five ESIF funds, two funds are aimed, mostly, at reducing the wealth gap among the regions of the Union through the provision of grants: the European Regional Development Fund (ERDF) and the Cohesion Fund (CF). These multisector funds are accompanied by some sector-specific funds, such as the Connecting Europe Facility (CEF) supporting Trans-European Networks. The potential of these EU instruments for port investment financing are briefly explained in the next section.

5.2 EU funds and financing options of relevance for ports

The European Regional Development Fund (ERDF) finances infrastructure projects that are essentially defined by Member States and regions through their Operational Programmes. These are prepared by the beneficiaries, who also propose the projects to be financed by these programmes. However, programmes require an initial approval from the Commission services and projects are only financed once these services give a final acceptance. The grant may cover up to 50% of the project cost, requiring thus a strong contribution from national and/or regional budgets.

Financial instruments co-funded by the ERDF can potentially be used for all investment priorities outlined in the ERDF operational programmes of the Member States and regions, provided that they address an identified market gap, i.e. areas where banks are unwilling to lend and/or where the private sector is unwilling to invest (for instance where the market is not supplying enough capital to SMEs/ start-ups, where there is not enough funding available for high-growth firms or where commercial bank lending is limited or comes with conditions that firms cannot meet).

Financial instruments can thus contribute to the achievement of a broad set of ERDF investment priorities, for instance:

- promoting business investment in R&I;
- extending broadband deployment and the roll-out of high-speed networks and developing ICT products, services and e-commerce;
- supporting the capacity of SMEs to grow and to engage in innovation processes, including developing new business models;
- promoting the production and distribution of renewable energy, of energy efficiency and renewable energy in enterprises, in public infrastructure and housing;
- investments for adaptation to climate change;
- investing in the waste and water sectors;
- improving the urban environment, including regeneration of brownfield sites;
- supporting industrial transition towards a low-carbon economy; and
- supporting multimodal and environmentally-friendly transport and regional mobility.

In addition, because ERDF support has to focus on several key priority areas, which is known as "thematic concentration", the use of financial instruments can be expected to be relatively high in the areas of R&I, SME support and energy efficiency and renewable energy sources.

Financial instruments co-funded by the ERDF can therefore be used to support a wide range of projects, from public infrastructure or productive investment projects, to support for households to improve the energy efficiency performance of their homes.

A broad range of ERDF financial instruments can be potentially implemented:

- **Loans**, which may be available where none are offered commercially (e.g. from banks), or may be on better terms than the commercial ones (e.g. with lower interest rates, longer repayment periods, or with less collateral required). For instance, interest-free start-up loans may be offered within a specific region to entrepreneurs who aim to build up their SMEs.
- **Microcredit**, which are smaller loans made to people sometimes excluded from financial services, often provided over a short term and with no or low collateral required. An example could be a microloan fund which offers loan support targeting disadvantaged individuals, sole traders, partnerships, limited companies and third sector enterprises within a region.
- **Guarantee**s, where assurance is given to a lender that their capital will be repaid if a borrower defaults on a loan. For instance, counter-guarantees could be set up against a national SME agencies' guarantee portfolio, thus ultimately reducing SME business financing costs and facilitating SME access to finance in that country.

- **Equity**, where capital is invested in return for total or partial ownership of a firm; the equity investor may assume some management control of the firm and may share the firm's profits. This can include venture or risk capital and early-stage capital (seed and start-up funding). The return depends on the growth and profitability of the business and is earned when the investor sells its share of the business ("exits") to another investor or through an initial public offering (IPO). Co-funded regional venture capital funds have, for example, successfully invested in sectors such as life sciences, IT/ communications, industry/transport, trade and energy/environmental technologies.

Financial instruments may also be offered in combination with grants and other forms of assistance. It is often necessary to improve the investment readiness as a pre-requisite for attracting investment funds. Advisory and other support can be grant-aided through the ERDF.

Financial instruments co-funded by the ERDF can make significant long-term contributions to market development through supply-side development and support, by stimulating and supporting commercially-viable projects and opening up new market opportunities. They can also create opportunities for investors and financial intermediaries as projects can become more attractive investments due to public sector participation in financial instruments and related risk-sharing.

However, the amounts dedicated to port investments from this fund are rather modest[13].

The Connecting Europe Facility (CEF), the successor of the TEN (transport and energy) budget line, supports the development of high-performing, sustainable and efficiently interconnected trans-European networks in the fields of transport, energy and digital services. In the case of transport, its focus is on missing links of the Core Network, in particular those that are cross-border and on horizontal priorities such as traffic management systems. CEF Transport also supports innovation to improve the use of infrastructure, reduce the environmental impact of transport, enhance energy efficiency and increase safety. In addition to grants, the CEF offers financial support to projects through innovative financial instruments such as guarantees and project bonds, usually in combination with EIB loans (see EFSI), mostly oriented to raise private sector investment in infrastructure and to incentivise the participation of other public-sector actors. These projects involving private partners are eligible to specific "Blending Calls", through which the CEF offers both grants and other support for these mixed ventures.

Whilst the responsibility for defining policies and priorities falls on DG MOVE, most of the CEF (27,4 €billion out of 30,4 €billion), is technically implemented Through the Innovation and Networks Executive Agency (INEA). For transport, INEA manages 22,4 €billion out of the 24,05 €billion allocated to the sector; the remaining 1,65 €billion are directly managed by DG MOVE. About 80% of the available money, corresponding to projects approved by Member States, was allocated in the two first years (i.e. the 2014 and 2015 calls), leaving relatively

[13] Langen, P de, Turró, M., Fontanet, M. and Caballé, J. (2018) "*The Infrastructure Investment Needs and Financing Challenge of European Ports*", ESPO Report.

small amounts for the next calls. Given the large oversubscription in 2014 – 2016, as well as for the Blending Call of 2017, it is clear that the programme is insufficient to fulfil the co-financing requirements of Member States[14].

The Cohesion Fund (CF) is a more recent fund, established in 1994 to assist those Member States with a Gross National Income per capita below the 90% of the EU average to join the Monetary Union. After the successive enlargements of the Union, it is now a fund that aims at reducing economic and social disparities through the financing of projects supporting the development of Trans-European networks and the improvement of the environment. The maximum amount to be granted by the CF is 85% of the public net contribution to the project. The requests to the CF originate at national level and are analysed and eventually approved by the Commission.

The countries benefitting from the CF for the 2014 – 2020 period are Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia and Slovenia. Most of them will probably still be recipients of the Fund for the next 2021 – 2027 period.

The amount of 63,4 €billion allocated in the current period will be affected by the ongoing negotiations on the EU budget and the Brexit negotiations. The CF can only be used to finance investments in transport and in projects that benefit the environment (including energy and transport). The transport component is devoted to finance projects being part of the trans-European networks and may be used as grants for port investments, particularly when they are included in priority projects, notably the nine TEN-T Corridors and the "Motorways of the Seas" (MoS) horizontal priority. The assignment of an important part of the CF to the Connecting Europe Facility (CEF), which has reached 11,3 €million, in current prices, for the period 2014 – 2020 (80 to 85% to priority projects), means that port projects in Cohesion Countries, may obtain grants directly through the CF or through the CEF. In the first case DG REGIO (through shared management with the Member State) would be responsible, whilst INEA manages the CEF. This arrangement will most probably continue for the period 2021 – 2027, as it is a convenient way to ensure the quality of the projects to be financed in the so called "Cohesion countries".

The component of the CF assigned to environmental projects may also include certain port projects. The requirement is that they are clearly devoted to the improvement of the environment. Energy efficiency, renewable energy or the development of rail connections are types of projects that are also eligible to this component of the CF. The co-funding rates for grants are listed in Table 7.

[14] Ibid.

Table 7: Co-funding rates for CEF grants

Types of projects		All Member States	Cohesion countries
Studies (all modes)		50%	50%
Works on			
Rail	Cross border	40%	85%
	Bottleneck	30%	85%
	Other projects of common interest	20%	85%
Inland waterways	Cross border	40%	85%
	Bottleneck	40%	85%
	Other projects of common interest	20%	85%
Inland transport connections to ports and airports (rail and road)		20%	85%
Development of ports		20%	85%
Development of multi-modal platforms		20%	85%
Reduce rail freight noise by retrofitting of existing rolling stock		20%	20%
Freight transport services		20%	20%
Secure parkings on road core network		20%	20%
Motorways of the sea		30%	85%
Traffic management systems	SESAR, RIS, VTMIS (ground/onboard)	50% / 20%	85%
	ERTMS	50%	85%
	ITS for road	20%	85%
Cross border road sections		10%	85%
New technologies and innovation for all modes of transport			85%

(Source: Langen, et.al.[15])

The EU offers financing support to projects of European interest through instruments that do not offer grants. For port projects, two sources of funding are particularly relevant. First one is the European Fund for Strategic Investment (EFSI). For port projects that are not eligible to CEF grants or have not been funded, there is an additional possibility of obtaining financing, but not grants, through EFSI. This facility, managed by the European Investment Bank (EIB), focuses on reviving and strengthening the European economy through investment in strategic projects that would have a leverage effect and attract private capital.

[15] Langen, P de, Turró, M., Fontanet, M. and Caballé, J. (2018) "The Infrastructure Investment Needs and Financing Challenge of European Ports", ESPO Report.

EFSI has been designed to assume some of the risks (construction, demand, financial, etc.) in eligible projects, either by providing equity to a Special Purpose Vehicle (SPV) or through other funding mechanisms making the project bankable. With this "additionality", EFSI is expected to attract private capital and generate a strong leverage effect. In some cases, the risk reduction will also entice some public administrations to devote more budget resources to EFSI-supported projects. Only 9% of EFSI funding has been assigned to the transport sector. In the maritime sector (excluding logistic zones), only shipping lines have been financed until now. The reasons for this low figure are not clear, but might stem from the fact that transport infrastructure is mostly carried out by public entities for whom loans may be relatively unattractive as loans alone cannot solve the funding gap of the planned port infrastructure investment.

In addition, these public entities may need time to adapt to be able to make use of the Facility. Eventually more transport (and port) public-private partnerships (PPPs) may enter the EFSI pipeline. A particular mechanism of EFSI, the use of Investment Platforms to finance projects that, due to their small size cannot be individually handled by CEF or by the EIB, may have potential to increase port financing within EFSI. Given the fact that EFSI has been functioning well, an extension (EFSI 2.0) has recently been approved to expand the total investment target from 315 €billion to 500 €billion. Continuity in the future EU Agenda for 2021 – 2027 can be expected. The focus of the Fund may move towards projects with a longer perspective, such as PPPs for infrastructure. Some port projects, such as rail links to the international hinterland or with a clear focus on the development of the Single Market, as well as protection works, required to increase resilience to climate change will be considered a priority for the new EFSI for the period 2021 – 2027).

The second option for non-grant (i.e. loan) financial support is the European Investment Bank (EIB). EIB is the International Financing Institution (IFI) with the highest lending amount (74,7 €billion in 2016) among all IFIs, 87% of it in the EU. It occupies a key role in funding those projects in the region requiring long-term and/or adapted financing that commercial banks are not ready to provide, at least without the complementary funds lent by the EIB. The EIB is covering a capital market gap through a limited contribution to the project (up to 50% of its cost) and by doing so it pulls investors and commercial banks to participate in ventures of EU interest. It is under this label that port projects, notably those that are part of the development of the TEN-T network, are financed, although other eligibility criteria, for instance regional development or environment improvement, can also be used. The traditional approach to project financing of the EIB is slowly changing towards playing a more proactive role in EU policies, in particular regarding the promotion of economic activity, the creation of employment and the movement towards a knowledge economy. This translates in a greater predisposition to adopt higher risks in their traditional lending activity and in providing more support to private project promoters adopting innovation or challenging the established markets. The EIB often assumes risks in tandem with the European Commission, notably through the specific financial instruments for SMEs and for research and development and the financing of PPPs (see EFSI). Practically all investments in ports are eligible to EIB financing because they comply with EU policies. Those included in the TEN-T networks or located in convergence regions (as defined by DG REGIO) are, by definition, eligible. Even projects in small non-TEN-T ports located in more developed regions may be acceptable if

they can show strong innovative content or aim to solve environmental concerns. The main potential advantages of the EIB financing of a project can be summarised as[16]:

- the provision of an important amount of the funding needs, that may reach 50% of the total cost of the project (which includes components, such as contingencies and interest during construction that are not easily included in the calculation of EU grants);
- lending at the lowest interests in the market, as it is a non-profit AAA institution obtaining the best conditions in the money market;
- the possibility to adapt the loan to the specific requirements of the project;
- the flexibility that arises from the joint analysis with the promoter to make sure that the financial structure is sustainable and that the project will be completed, as the objective of the EIB is not to make profits, but to support projects of EU interest.

The EU financing instruments described above are summarised in Table 8.

Table 8: Overview of EU financing instruments

EU financing instruments for ports	Loan/grant	Coverage	Remarks
ERDF	Grant	Convergence regions	Not very relevant for non-convergence regions
CF	Grant	Cohesion countries	85% of financial gap
CEF	Grant/mostly	Priority projects	Ports, esp. in priority corridors
EFSI	Equity, loans and guarantees	High-leverage projects in priority areas, with risks and/or insufficient private profitability preventing bankability	Potential for public and private investors, notably in cross-border and resilience to climate change projects
EIB	Loans (mostly)	Most port projects eligible(also non TEN-T)	Quality requirements

(Source: Langen, et.al.[17])

[16] Ibid.
[17] Langen, P de, Turró, M., Fontanet, M. and Caballé, J. (2018) "The Infrastructure Investment Needs and Financing Challenge of European Ports", ESPO Report.

6 Port financing through public-private partnerships

Taking into account significant legal differences between various countries in the Danube region, in spite of the fact that most legislations are, theoretically, harmonized with EU legislation, recommendations for the horizontal (region-wide) improvement of PPP schemes are extremely difficult task. In this view, the recommendations given in this Chapter should be understood as a general guidelines or a collection of "recipes" from which each port or each national lawmakers could take "ingredients" as they see fit, in accordance to their own reform directions and scope. In addition to this, any changes of PPP schemes frequently require legal changes, in most of the countries.

All recommendations made in this Chapter are a compilation of proposed measures from participating countries, with an addition of general recommendations given on the basis of the overall situation in the port industry and on the basis of the opinions given in the questionnaires listed in Annexes I – VII of D.5.2.2 Report on PPPs in the Danube Regioin.

Very broadly speaking, a very generic definition of a public-private partnerships (PPP) in ports can be derived as follows:

> ***Public-private partnership (PPP) in ports is a contractual framework, or structure, where the public and private sector agree to deliver a port project and/or port service that is traditionally provided by the public sector, by means of risk transfer and risk share.***

Large variety of PPP forms can exist. A common denominator for all forms are the better benefits which can be realized through leverage of private sector efficiencies and know-how and the allocation of risks to those parties that would manage them in the best possible way.

PPP models include the following:

- Service Agreements / Outsourcing
- Joint Ventures
- Concessions / Project Delivery
    - Design – Build – Transfer (DBT)
    - Design – Build – Operate – Transfer (DBOT) Structures
    - Design – Build – Finance – Transfer (DBFT) Structures
    - Build – Operate – Transfer (BOT) Structures, etc.
- Hybrid Structures (mixture of concession for rehabilitation, maintenance, design, build, finance and operation)
- Full privatization / Sales (rare and not recommended)

Before the elaboration of the proposed improvement measures, we will first have a brief overview of roles of public and private sector in ports, including both seaports and inland

ports. Figure 24 represents a generic division of roles in port governance and operation between the government, public port authority and private sector which usually takes the role of commercial exploitation of port services (port operation). This division represents a theoretical distribution of roles and explains which services and activities are best managed by each sector.

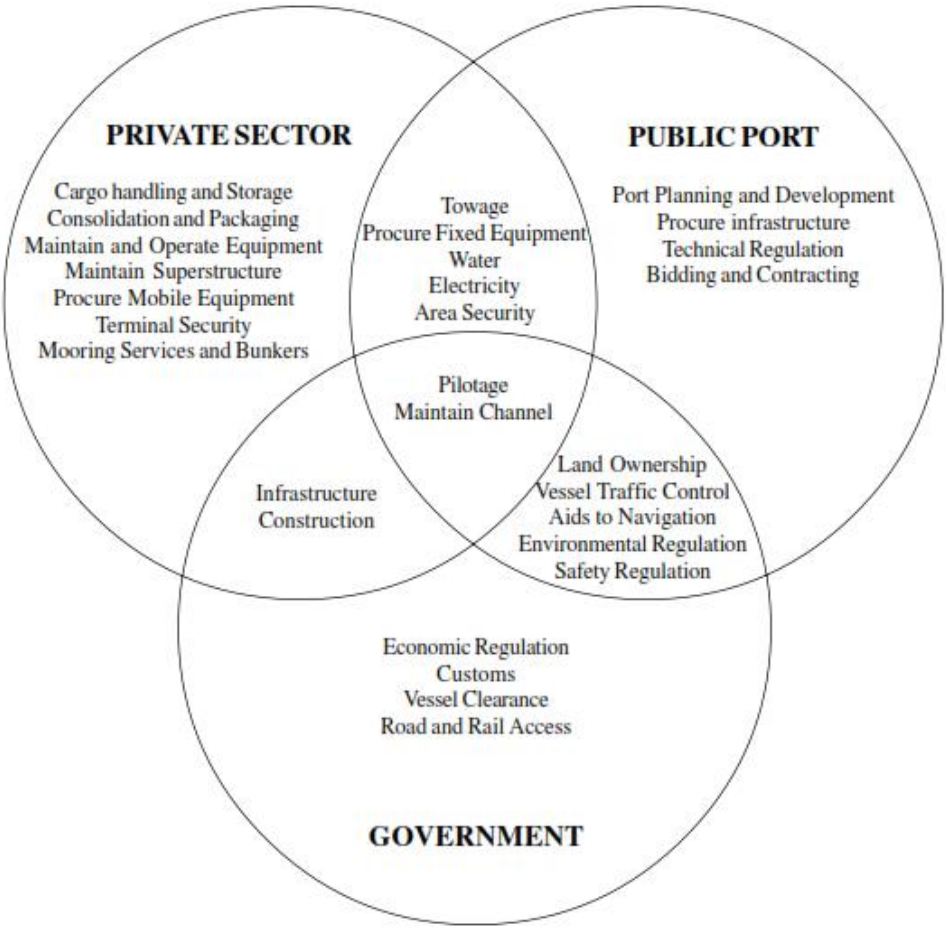

Figure 24: Best case scenario for division of roles in port governance and operation

6.1 Why PPP?

Public private partnerships have arisen for dual reason:

- Need to increase the efficiency of public port operations, and
- Access to private capital needed for construction and maintenance of infrastructure, including the provision of services.

Since ports are usually regarded as strategic objects of national transport infrastructure, whose proper functioning is of high importance for the economy of entire nations, both

aforementioned reasons are equally important. Various PPP schemes can be applied in any publicly owned and governed port, regardless of the organizational form of a port authority. Naturally, an entity such as port authority (in any form) should exist in order to keep/maintain or take over the governance/administrative function of a port, while operating functions of a port should be transferred to private sector.

In many countries in the Danube region, port authorities are commercialized and/or corporatized, but in rare cases they perform port operating functions. Port governance/administration and port operation functions are clearly and properly separated and performed by different entities. Although port operating functions are usually transferred to private sector, it is not necessarily a rule. For example, port operator in the Port of Vienna is not privately owned company, but a publicly owned one. Nevertheless, it operates under a corporate (company) law and is therefore equal in all aspects to any other private operator.

In terms of the need to increase the efficiency of port operations, the private sector is rightly observed as more efficient in the following activities:

- provision of services which are efficient and cost-effective from the port users' perspective;
- response to changes in cargo-handling technologies;
- response to the very dynamic requirements of the port users;
- provision of choices of services and competition fostering;
- enforcement of labour discipline.

In addition, in terms of access to private capital, the private sector is seen as much more efficient in:

- making of timely capital investments to improve efficiency and expand capacity;
- provision of the funds needed to finance investments.

When properly combined, public and private sectors can form PPP's which should, ideally, achieve the following objectives:

- maintain and/or improve service levels with the same or higher safety and security levels;
- increase operational efficiency;
- accelerate growth of traffic;
- promote competition among ports and terminals;
- use private sector skills in project delivery through right skills, technologies and innovation;
- access to capital and cost effectiveness;
- balanced risk allocation and proper risk transfer;

- procurement based on life-cycle costs (LCC)[18];
- promote equity ownership;
- efficient asset management;
- "value for money" principle;
- improve the quality and capacity of infrastructure;
- reduce operating subsidies;
- reduce the national deficit;
- downsize government bureaucracy;
- removal of political influence on port operations.

Objectives are achieved through:

- equity (value of an asset less the value of all liabilities on that asset);
- operations risk;
- competition;
- private sector commitment for profit making and discipline.

In a nutshell, the most important benefits of PPPs in ports are:

- increasing private sector participation through:
  - works and services contracts;
  - management and maintenance contracts;
  - operation and maintenance concessions;
  - build-operate-transfer concessions.
- integrated approach to development and operations;
- innovation:
  - financing options;
  - technology and operations re-engineering;

[18] Life cycle costing (LCC) is defined in the International Organization for Standardization standard, Buildings and Constructed Assets, Service-life Planning, Part 5: Life-cycle Costing (ISO 15686-5) as an "economic assessment considering all agreed projected significant and relevant cost flows over a period of analysis expressed in monetary value. The projected costs are those needed to achieve defined levels of performance, including reliability, safety and availability."
In the context of sustainable public procurement (SPP), the use of LCC is essential to demonstrate that procurement processes and decisions have to move beyond considering the purchase price of a good or service, for the purchase price does not reflect the financial and non-financial gains that are offered by environmentally and socially preferable assets as they accrue during the operations and use phases of the asset life cycle.
Typical LCC analyses are therefore are based on:

- purchasing costs and all associated costs such as delivery, installation, commissioning and insurance;
- operating costs, including utility costs such as energy and water use and maintenance costs;
- end-of-life costs such as removal, recycling or refurbishment and decommissioning;
- longevity and warranty time frames of the asset.

(From: Perera, O., Morton, B. and Perfrement, T. *"Life Cycle Costing in Sustainable Public Procurement: A Question of Value"*, A white paper from International Institute for Sustainable Development (IISD), 2009)

- defined performance metrics → accountability;
- enhancement of relationships between public sponsor and private provider.

In order to prepare a successful PPP scheme, both sides (public and private sectors) need to "show their cards" and be open in their expectations. In a very general case, requirements and expectations from public and private sector are given in Figure 25.

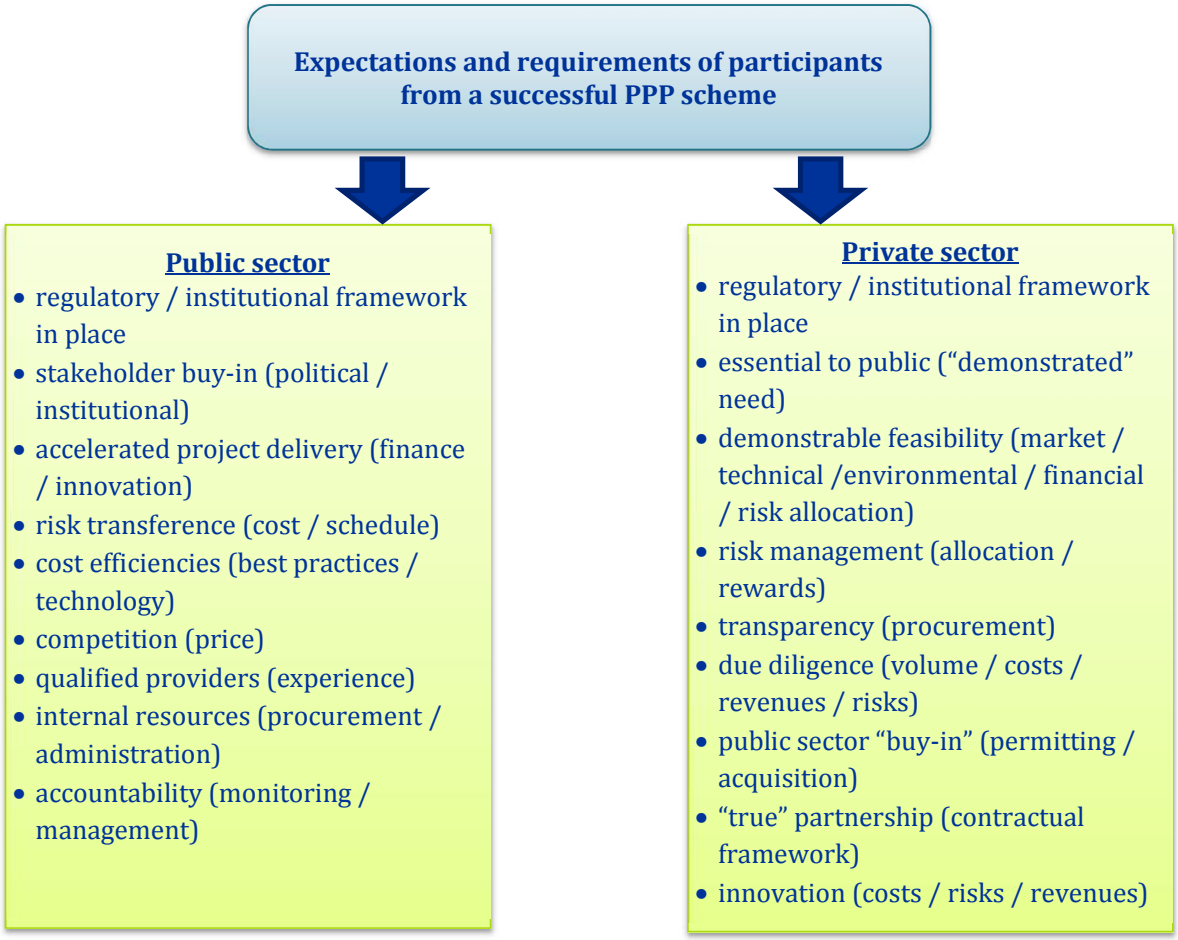

Figure 25: Requirements from public and private sector in port PPP schemes

6.2 Concessions as a specific form of PPP

6.2.1 Basic notions

Very briefly, a concession is kind of partnership between the public sector and a (usually) private company that has shown its added value in a specific area, for example developing infrastructure.

Concessions are used in sectors that affect EU citizens' quality of life, such as road and rail transport, port and airport services, motorway maintenance and management, waste management, energy and heating services, etc. Concessions permit to mobilise private capital and know-how to complement public resources and enable new investment in public infrastructure and services without increasing public debt.

Concession contracts are used by public authorities to deliver services or construct infrastructure. Concessions involve a contractual arrangement between a public authority and an economic operator (the concession holder). The latter provides services or carries out works and is remunerated by being permitted to exploit the work or service.

Concessions are a particularly attractive way of carrying out projects in the public interest when state or local authorities need to mobilise private capital and know-how to supplement scarce public resources. They underpin a significant share of EU economic activity and are especially common in network industries and for the delivery of services of general economic interest. Concession holders may, for example, build and manage motorways, provide airport services, or operate water distribution networks.

The 2004 Public Procurement Directives only partially covered concessions and the absence of clear EU rules led to legal uncertainty and obstacles to the free provision of services. It also caused distortions to the functioning of the internal market, such as the direct award of contracts without transparency or competition. This process risked national favouritism, fraud and corruption. This absence of proper regulation generated economic inefficiency and had a negative impact on getting the best value for public money. In response, Directive 2014/23/EU on the award of concession contracts was adopted in 2012. EU countries had to transpose this directive into their national legislation by 18 April 2016.

The new directive creates a stable legal framework for public authorities and economic operators to ensure non-discrimination and fair access to markets and EU-wide competition for high-value concessions. It gives the most efficient providers a fair chance of winning contracts by proposing the best offers.

The Directive has the following main features:

- facilitates new investments
- promotes a quicker return to sustainable economic growth
- contributes to innovation and the long-term development of infrastructure and services

A *difference* should be made between a *public contract* and a *concession*.

In a *public contract*, a company is paid a fixed amount for completing the required work or providing a service.

Example: a private company builds and manages a port for a fixed price.

In a *concession*, a company is remunerated mostly through being permitted to run and exploit the work or service and is exposed to a potential loss on its investment.

Example: a private company builds and manages a port and is remunerated through port fees, running the risk that the revenue generated will not cover its investment and other costs incurred.

What is not a concession?

- Licences and authorisations — unilateral acts made by a public authority to establish the conditions under which companies may carry out a specific economic activity;
- Grants or subventions — financing that does not involve transferring ownership or the benefits of the work or service to the public authorities that granted it;
- Public-domain and land-lease contracts — when a public authority establishes only general conditions for using certain public resources such as land or other public property (e.g. maritime property, inland ports or airports) without procuring specific work or services;
- Rights of way — use of public immovable property to provide or operate fixed lines or networks that provide a service to the public (e.g. installation of electricity cables), without the public authorities imposing supply or acquisition obligations;
- Free-choice systems — all companies that fulfil certain conditions are entitled to perform a given activity (e.g. customer choice and service-voucher systems).

6.2.2 Rules on the award of concessions

Concessions allow for the mobilisation of private capital and know-how to complement public resources and enable new investment in public infrastructure and services without increasing public debt. They are typically granted for road and rail transport, port and airport services, motorway maintenance and management, waste management, energy and heating services, leisure facilities and car parks.

Concessions are **partnerships between the public sector and mostly private companies**, where the latter is entrusted with the execution of works or the provision and management of services.

In a concession, a **company is mostly remunerated by being permitted to run and exploit a work or service**. It is also exposed to a potential loss on its investment. An example of a concession is a private company building and managing a motorway and then being

remunerated through tolls. This company also runs a risk in that the revenue generated may not cover its investment.

Concessions covered by Concessions Directive 2014/23/EU
Only works and services concession contracts whose **value is equal to or greater than € 5 225 000**fall under Concessions Directive 2014/23/EU. When estimating a concession's value, the buyer must take into account the concessionaire's total turnover generated over the duration of the contract.

Duration of concessions
A concession contract must be **limited in time**. For **concessions lasting more than 5 years**, the duration must not exceed the time in which a concessionaire could reasonably be expected to recuperate their investment.

The **maximum duration** must be referred to in the concession documents, either as a point subject to negotiation (may be part of the award criteria and fixed through competition) or as a part of the fixed conditions which take into account things like total investment (including copyrights, patents, logistics), the asset's capacity to generate revenue or user tariffs, and the asset's operation and maintenance costs.

General principles and procedural guarantees for the awarding of a concessions contract
The public buyer is free to structure the procedure according to national standards or their own preferences, **provided that it follows certain basic rules such as**:

1. **Publishing a concession notice** in the Tenders Electronic Daily (TED) data base, including a description of the concession and the conditions of participating in the concession award procedure (the minimum turnover, availability of a specific kind and quantity of machinery, experience with specific kinds of work or services, etc.)
2. Informing potential and actual participants to the **procedure of the minimum requirements** (number of lanes on a motorway, dimensions and shape of tunnels, frequency of the bus transport service, etc.) and **the award criteria** (fees to be paid by users, the environmental performance of vehicles to be used to provide the service, etc.)
3. **Respecting established requirements** and eliminating candidates who do not fulfil them
4. Excluding **candidates who have been convicted of certain crimes**, such as fraud and money laundering
5. Providing all participants with a description of how the **procedure will be organised** and an indicative timetable.
6. Using **award criteria** that ensures the **equal treatment of all participants**. In other words, criteria should be non-discriminatory, meaning that they cannot aim at or result in favouring local or national products or companies; be linked to the subject matter of the concession; be objective; and be advertised in advance and listed in descending order of importance.

7. The public buyer may negotiate with candidates and tenderers. However, **certain elements** of the initial call for tender, the concession's subject matter, the award criteria and the minimum requirements, cannot be changed during the course of the procedure. The public buyer has to ensure that **all stages of the procedure are recorded**.

6.2.3 Basic types of concessions

"Greenfield" concessions

Build Operate and Transfer (BOT)
This is the simple and conventional PPP model where the private partner is responsible to design, build, operate (during the contracted period) and transfer back the facility to the public sector. Role of the private sector partner is to bring the finance for the project and take the responsibility to construct and maintain it. In return, the public sector will allow it to collect revenue from the users.

Build-Own-Operate (BOO)
This is a variant of the BOT and the difference is that the ownership of the newly built facility will rest with the private party.

Build-Own-Operate-Transfer (BOOT)
This is also on the lines of BOT. After the negotiated period of time, the infrastructure asset is transferred to the government or to the private operator.

Build-Operate-Lease-Transfer (BOLT)
In this approach, the government gives a concession to a private entity to build a facility (and possibly design it as well), own the facility, lease the facility to the public sector and then at the end of the lease period transfer the ownership of the facility to the government.

"Brownfield" concessions

Lease-Develop-Operate (LDO)
Government or the public sector entity retains ownership of the newly created infrastructure facility and receives payments in terms of a lease agreement with the private party.

Rehabilitate-Operate-Transfer (ROT)
Under this approach, the Governments/ public sector entity allows private partners to rehabilitate and operate a facility during a concession period. After the concession period, the project is transferred back to Governments/ public sector entity.

Design, Build, Finance and Operate (DBFO)
In this model, the private party assumes the entire responsibility for the design, construction, finance, and operate the project for the period of concession.

6.2.4 Flexible concessions

Regardless of the type of the concession, the contracts regulating concessions should be flexible enough to maintain a win-win solution for both public and private party.

With the changing environment, the need has arisen for concession agreements to adapt to new societal, environmental and technical conditions that cannot be foreseen at the time of contract signature – moreover, concessions have to adapt to innovations and new trends in asset management.

In many instances, the contracts are not flexible enough to allow their adaptation to reality. In many jurisdictions there are legal challenges to the Concession because the legal framework in effect does not deter challenges and allow for their prompt resolution with unpredictable consequences.

The two main areas requiring flexibility in concessions are as follows:

- **Technical**: Adaptable performance-based indicators that incorporate mechanisms promoting innovation and well define the level of service in different phases of the asset, construction, operation and also at the end of the concession
- **Regulatory**: Regulation of Concessions varies greatly throughout their duration and depending on jurisdiction. A simple solution is to embed clauses of progress that guarantee both value for money and the economic and financial balance of the concession.

Furthermore:

- **Political**: Concessions signed by previous governments creates uncertainties for the private operators – responsibility for executing concession agreements should be embedded with independent PPP units with know-how of infrastructure and is well-resourced – should be politically impartial.

7 Public private partnership in ports of the Danube region

7.1 Austria

7.1.1 Regulations and practice of the PPP schemes in ports

7.1.1.1 Laws, directives, by-laws and other acts regulating PPPs

In Austria the ports are organized in the legal form of a "GmbH" and this makes it very easy and simple. There are no specific laws for PPP-items in a legal form of an entity according to private law (e.g. Austrian "GmbH"), even it is a "public equivalent body". The most important law in this context of PPP is the Austrian "GmbH-law" in connection with some smaller inputs from the federal procurement law ("Bundesvergabegesetz") and the non-discriminatory-papers of EU as mentioned below.

For example: regarding the legal status of Ennshafen OÖ GmbH

- Ennshafen OÖ GmbH (EHOÖ) itself is a "private law body" according to the definitions of Austrian laws; EHOÖ has got the legal form "GmbH" (Ltd.) and is registered in the Austrian company register under the number FN 118997x

- however, the owners of Ennshafen OÖ GmbH are two companies (1) OÖ Landesholding GmbH and (2) OÖ Verkehrsholding GmbH which are both 100 % owned by the State of Upper Austria / "Land Oberösterreich" (OÖ Verkehrsholding GmbH itself is totally owned by OÖ Landesholding GmbH); the supervisory board of OÖ Landesholding GmbH is the government of the State of Upper Austria

- according to general EU-wide classifications it is necessary to classify the company Ennshafen OÖ GmbH under "public sector undertaking or body established in the EU".

Concluding, the Ennshafen OÖ GmbH shall be understood as a "public sector undertaking or body established in the EU" governed by the private law. However, understanding the complex situation as regards the legal status of Ennshafen OÖ GmbH as being fully part of the public sector however governed by private law (usual situation in Austria where companies are 100 % owned by the public entities).

Since decades all public ports in Austria are formed in the legal status of "GmbH". The great advantage of this status regarding to PPP-processes is, that the company is absolutely free to make all kinds of contracts according to the complete Austrian law system and all directives, by-laws, business rules, etc which are in force in Austria, when the manager of the port (= general Manager of the GmbH fulfils all internal guidelines of his company and the governance / owners above him and – as for all other items in the company – respects the laws of Austria relevant for GmbHs. This gives a very good framework for acting as a business partner.

Only some special chapters of special laws have to be fulfilled in Austria for those bodies. Relevant for PPP-processes are the federal procurement law ("Bundesvergabegesetz") and

the EU-wide regulations for transparency and non-discriminatory ("commission paper on publication / pari passu / expert appraisals") These papers mean that some special activities the ports have to fulfil regarding publicity of planned investments in order to call for suppliers and make a transparent decision process of selecting the relevant partner. The best example of the last years for such a process is the tender of Ennshafen regarding the long term contract of terminal renting.

Even the Austrian competition law ("Bundeswettbewerbsbehörde") must be respected – but this is no special law for PPP, it is in force for everybody and the same is in force regarding the anti-trust law ("Kartellrecht"). As a summary: non-discriminatory is the core element of this laws regarding PPP and the port has to handle all his partners in equal manners.

Some laws regulate the ship business in ports – which have a little influence to the PPP-processes - are capitalized in the reports of WP3 of the DAPhNE-project, but these sections do not deeply influence PPP-processes but fix the elements of non-discriminatory activities in the ports. As a matter of fact, the Austrian ports actually have enough infrastructure capacities so there do not come up really problems regarding PPP from this side.

In Austria the main legal regulation governing ports is the Federal Navigation Law (*Schifffahrtsgesetz*). It consists of several individual parts and governs all regulatory aspects of Austrian navigation and port law. The application of the Navigation Law depends on the type of body of water concerned. The Navigation Law applies i. a. to the Danube which is defined as waterway pursuant to Article 1 (1) in connection with Article 15 (1) Navigation Law and Article 2 (1) Water Rights Act (*Wasserrechtsgesetz).* On the level of secondary legislation, the most important regulations are the Shipping Facilities Ordinance (*Schifffahrtsanlagenverordnung)* and the Waterway Traffic Ordinance (*Wasserstraßen-Verkehrsordnung).* Both ordinances were passed by the Minister of Transport, Innovation and Technology ("BMVIT") and specify primary legislation. The Shipping Facilities Ordinance regulates, in particular, the operation and use of shipping facilities as well as port fees. The Waterway Traffic Ordinance, inter alia, lays down general rules for the navigation of the Danube and also stipulates rules for ports.

As far as EU port legislation is concerned the rules have generally been implemented in the Navigation Law. On the level of international law Austria is a contracting party to the Danube Convention (Belgrade Convention). The general principle of this convention is that navigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all states, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping. While the convention mainly sets out rules regarding shipping, it also contains general rules for port fees. The Danube Convention has the quality of a federal law in Austria. All the aforementioned legal regulations are general laws and thus apply to parties from the private and public sector. The highest port authority in Austria is the Minister of Transport, Innovation and Technology ("BMVIT"). The BMVIT also has the authority to pass secondary legislation in certain areas of port legislation. In addition, in the Austrian provinces the district administrative authorities (Bezirksverwaltungsbehörden) are competent in port matters. In particular, the district administrative authorities are responsible for granting

permits for the construction of shipping facilities (ports) pursuant to Article 71 Navigation Law.

Although there are no critical problems regarding PPP-processes within these regulations. One small impact derives from the fact that fees such as shore money "Ufergeld" must be accepted by the authorities before ports can apply it in business processes, but this don't have really great influence in PPP-business.

7.1.1.2 Available and permitted PPP schemes for ports

Everything is allowed which respects the Austrian laws if you perform as a legal entity "GmbH" und you respect the special laws mentioned in 3.1.1. So it is a simple business decision of the company (and his owners) for how long you go into contracts – like an ordinary business partner it is your strategic decision. The conditions must be non-discriminatory – this means that you have to treat all partners in the same way, but you have a broad range of possibilities to create tailor-made systems with your clients. The market sector is quite narrow in Austria so there are not really problems in practice.

7.1.1.3 Types of concessions and/or long-term leases in ports

Standard contracts are normally used in form of renting and transshipment („Pachtvertrag , Umschlagvertrag"), several kinds of operator contracts ("Betreiberverträge"), in combination with superaedificate or construction aw ("Baurechtsvertrag"), less are used contracts regarding usage of machines, etc or lease contracts, praecarium, concession agreements ("Gestattungsverträge"); these combinations are the preferred forms; only for special topics you find specialized others (e.g. temporary employment / "Arbeitskräfteüberlassung"); the only thing you have to be aware be choosing the forms of contracts: create a non-discriminatory system and give the same key figures even to other contract partners.

7.1.1.4 Fees types and methodology for determination of concession or lease fees

Mostly rent fee (paying fixed amount per m2 and month) and transhipment fee / shore money (operated per ton) are part of the business contracts; special fees are payed for vending of electricity (per kWh) or water – where applicable or other kinds of utilities or special services. Sometimes it is combined to monthly flat rates. It is a simply business decision which system is the best for which deal/contract. Monthly paying is generally used, even if the amounts are fixed in yearly figures – completely indifferent if it is a short term or a long term lease.

7.1.1.5 Types of revenues and charges of a concessionaire or private partner

Revenues for doing all kind of transhipment activities, storage or other business services - depends to the special company, what kind of business the offer (perhaps custom services, packaging, logistic services, …).

7.1.1.6 Property rights transferred from the Grantor to the concessionaire/lessee

Usually you use "superaedificate" or construction law ("Baurechtsvertrag") regarding the erection of assets (buildings) on foreign ground; all other items are clearly defined in Austrian

laws to whom assets belong or have to be fixed in the contracts (e.g. underground facilities, asphalt, …).

7.1.1.7 Requirements for minimum investment and performance

No regulations for investments if they are not fixed in a special contract for a special project; for quay usage: there is normally a minimum level of tonnage per meter and year, but it depends on the concrete business what kind of regulation will be fixed in a contract, because business is not a "demand-business" in Austria but a "supplier-business" and port authority has to look for companies which will use the infrastructure because there is surplus of capacity installed.

7.1.1.8 Agreements for the scope and type of port services operated

No specific legal act, scope and type must be fixed in the contract (usual procedure, no legal acts); red line is once more "non-discriminatory", this is written in special sentences in the contracts

7.1.1.9 Rights and obligations towards existing personnel in ports/terminals

Personnel is dedicated to the employer in Austria ("Arbeitgeber"), otherwise you have to look for the special concession for temporary employment ("Arbeitskräfteüberlasser"); no temporary employment exist, every company has its own staff; if a company works for the other, you do it for the business service and you have to pay money for the service and not for the staff itself; if a port will "give his people" to other contractor for hourly basis, you work according to service contracts when working for others and you will be paid for it (b2b/ 2 x "GmbH"); only in special projects the Austrian "AVRAG" - employment contract law adaptation act - is necessary (perhaps when selling part of a company to a contractor or go into long term contracts).

7.1.1.10 Maintenance requirements for infra and suprastructure during concession or lease

Must be fixed in detail in the contracts; normally it is done in the way that 1) infrastructure is in the hand of the port and 2) superstructure is in the hand of the concessionaire and so it is clear which one is responsible for what part; but there can be other constructions, it depends on the special case and contract.

7.1.1.11 Early termination conditions

No special legal procedures for PPP; tailor-made fixation is necessary in the contract, depends on the special business and erected superstructure – otherwise the general business laws will come into force.

7.1.1.12 Role of port authority during the concession / lease period

Port company provides these services in the form of the "GmbH" – but in the small Austrian ports there are quite few of these services; monitoring system e.g. is a camera system in the port.

7.1.1.13 Treatment of land, infrastructure and equipment during concession

Distinct regulation is done in the contract, all kind of rights are defined between the partners; depends on the ownership, what must be regulated (principle: owner has the rights or gives rights to the user); a general right cannot be written, it depends on the special project and must be negotiated and put in the contract.

7.1.1.14 Participation of a port authority or grantor in concessionaire's company

Mixtures are not practiced know; but theoretically it can happen, but it would be more complicated to some special laws of the public ownership ("private investors test" or "pari passu" – so the owners of the port companies try to avoid constructions like this because it is really complicated for both partners and prefer clear systems.

7.1.1.15 Risk allocation and unforeseen events

It is fixed in detail in the contact according to the needs of the business, no general rule; risks of the quay are allocated to the port, risks of the rented land (incl. his own equipment / suprastructure) and the transhipment amount has the contractor.

7.1.1.16 Requirements for the experience of concessionaire / lessee

No additional special requirements – partner has to be a company ("GmbH") and has to bring good business figures ("KSV-rating" in Austria) and all the necessary papers for running a business (e.g. permission for logistic services, …); regularly subleases are not allowed without information and written permission of the lessor – but conditions can be fixed within this process and the contract.

7.1.1.17 Direct negotiations and unsolicited proposal

In general, concessions ("great projects") are given after calls, …. (fulfilling al regulations of EU rights) – a very distinct process; direct negotiations only in "smaller cases" like ordinary settlement in the port areas – but: all these negotiations are proceeded in a general frame of contract items (rent price per m2, quay fee, …) and must be accepted be the supervisory boards of the ports (actually there is surplus of supply and not a surplus of demand !); due to the Austrian experience it is useful to negotiate within a frame of parameters and the two companies (port company and private company) can negotiate on a lot of details because every business is different from the other in order to bring the best result – bevor starting the result has to be accepted by the supervisory board – this procedure is quite practicable and useful.

7.1.1.18 Pre-qualification requirements

It depends on the detailed project – e.g. when a container terminal licence is offered, then other conditions will be written in the announcement as will be done when a licence for quay logistic (cranes, …) will be let; it depends additionally on the scheduled time of the contract and the scope and the type of the business (e.g. service of railway company needs other pre-qualifications, special business ratings, etc.).

7.1.1.19 Return of land, facilities and equipment after the concession/lease period

In the first contract it is written what will be done by the end of the first contract time – is there a "negotiation process" or anything else or must the lessor make an additional call or etc. – as it is very seldom there is no great experience for this case (and everybody is happy if business will go on if both partners are satisfied – once more: because port/water business is not a "narrow business", there is surplus of options and capacities.

7.1.1.20 Procedure in the case of disputes

Procedure according to general business law in Austria – judicial settlement process between two companies (sometimes court of arbitration is fixed in the contract before going to the judge) - no distinction for PPP-processes.

7.1.2 Main findings, messages and problems of PPPs in ports

Main findings and key messages:

- Finding / Key message 1: establish ports (port authorities) as companies according to private law, so every contract can be done like any other company in business processes
- Finding / Key message 2: give the ports (port authorities) great freedom to act as a really business partner for the private sector, but establish a control loop in the governance of the owners for supervising the general manager of the port company in order to make quick decisions on a documented base
- Finding / Key message 3: make it as simple as possible to create PPP-processes with the minimum requirements of EU laws (non-discriminatory, public announcement, public procurement)
- Finding / Key message 4: be flexible and work together – not against – the public partners, otherwise you will not be a good business partner and find a way to create "law security" for them, they need it in order to invest money

Main issues, problems and obstacles:

- No issues, problems or obstacles in Austria.

Solution proposals:

- No problems in Austria – no solutions required.

7.2 Slovakia

7.2.1 Regulations and practice of the PPP schemes in ports

7.2.1.1 Laws, directives, by-laws and other acts regulating PPPs

Following legislation determines and/or influences public-private partnership schemes in Slovakia.

1. **Directive 2004/17/EC of the European Parliament and of The Council**

Directive for public procurement in the fields of water management, energy, transport and postal services. This Directive constitutes a more lenient legal framework for the areas concerned compared to national law. For this reason, it would be likely that in the case of a dispute, the ECJ would have a direct effect on the provisions of the Directive. It may therefore be included among the sources of legislation.

2. **Act no. 343/2015 Coll. on public procurement**

The Act regulates the award of supply contracts, works contracts, service contracts, design contests, award of concessions for construction works, award of service concessions and administration in public procurement.

3. **Act no. 278/1993 Coll. about state property management**

This Act regulates the management of property owned by the Slovak Republic in the public and non-business sphere, which is performed by the asset manager of the state.

4. **Act no. 513/1991 Coll. Commercial Code**

This Act regulates the position of entrepreneurs, business engagement relationships, as well as some other business-related relationships.

5. **Law 523/2004 Coll. on the rules of public administration**

This law regulates

a) budget of the public sector
b) the budgetary procedure, the rules of budgetary management, the function and the preparation of the state final account and the summary annual report of the Slovak Republic

c) the position of the Ministry of Finance of the Slovak Republic, other ministries and other central bodies of state administration and other legal entities of public administration in the budget process,
d) the establishment of budgetary organizations and contributory organizations and the management of budgetary organizations and contributory organizations.

The Act regulates the area and the use of funds intended to finance the joint programs of the Slovak Republic and the European Union and the means intended to finance the purposes of international grant agreements concluded between the Slovak Republic and other countries and the procedures, legal relations, rights and obligations of persons in relationship to these means, unless otherwise provided in a separate regulation.

6. **Act no. 583/2004 Coll. on the financial rules of territorial self-government**

This law regulates
a) local government budgets, which are the municipal budget and the budget of the higher territorial unit
b) budgetary procedure, rules of budget management, preparation and approval of the final account of the municipality and the final account of the higher territorial unit,
c) financial relations between the state budget and the budgets of the municipalities and the state budget and the budgets of the higher territorial units, the financial relations between the budgets of the municipalities and the budgets of the higher territorial units as well as the financial relations of the budgets of the municipalities and the budgets of the higher territorial units to other legal entities and natural persons.

7. **Law 292/2014 Coll. on the contribution from the European Structural and Investment Funds.**

This Act regulates the legal relations in the provision of the contribution in the 2014-2020 programming period, the procedure and conditions for the provision of the contribution, the rights and obligations of the contributors, the competence of the state administration bodies and local authorities in granting the contribution and the responsibility for the breach of the conditions for granting the contribution.

8. **Resolution of the Government of the Slovak Republic no. 245/2005 Report on the creation of conditions for the implementation of projects with a private partnership**

A government document analyzing the main benefits and risks of this method of building and financing public infrastructure and public service provision.

9. **Resolution of the Government of the Slovak Republic no. 914/2005 on the draft policy for the implementation of public-private partnership projects (PPP)**

Government resolution approving the draft policy for the implementation of public-private partnership (PPP) projects.

10. **Resolution of the Government of the Slovak Republic no. 786/2007 on the proposal for the implementation of a public-private partnership (PPP)**

Government resolution approving the proposal to implement a public-private partnership (PPP) technical assistance scheme. It also defines the following terms:

a) the concept of PPP in general
b) PPP on concessions for construction works, which will receive technical and financial assistance from the Ministry of Finance,
c) concessions for construction work of central authorities of the SR.

11. **Decree of the Public Procurement Office 171/2013 Coll., Laying down the details of the notifications used in the public procurement and their content**

The Decree defines, among other, the content requirements of the following documents:

a) Service Concession Notice
b) Notice of the award of public contracts to contracts awarded by a concessionaire not a contracting authority.

12. **Resolution of the Government of the Slovak Republic no. 80/2008 on the Proposal for Basic Methodological and Implementation Documents Related to the Management of the Technical Assistance Scheme for Public Private Partnerships**

By Resolution, the Government of the Slovak Republic has adopted and approved the basic methodological and implementation documents related to the management of the Public-Private Partnership (PPP) Technical Assistance Scheme.

7.2.1.2 Available and permitted PPP schemes for ports

Since 2004, when preparations for the first PPP project in Slovakia have begun, PPP projects are used at national level in the sphere of road transport (construction of road infrastructure). A few projects in the area of territorial self-government can be identified. The basic legislation for public-private partnerships is Act No. 25/2006 Coll. on public procurement, the adoption of which Directives 204/18 / EC and 2004/17 / EC were implemented. The Public Procurement Act regulates public procurement as a lex generalis and also contains a legal regulation of concessions.

Therefore, Slovak legislation does not explicitly define any special regime for port-based PPP projects. All the terms of the concession contracts (PPP model based on risk distribution,

financing, liability, etc.) are the result of agreement between the parties. Agreement cannot be against the law.

7.2.1.3 Types of concessions and/or long-term leases in ports

The Public Procurement Act divide concessions to:

- Concessions for construction works
- Service concessions.

A concession for construction works is a contract in which the consideration for the construction work to be carried out is either the right to use the building for an agreed time or the right related to the cash performance.

A service concession is a contract in which the consideration for the services to be provided is either the right to use the services provided at an agreed time, or the right related to a cash payment.

In the case of a concession having as its object the execution of the works and the provision of the service, the concession shall be assessed by reference to the main subject of the concession.

Concessions, the parts of which are inseparably linked and objectively form an indivisible whole, are governed by the rules applicable to the main object of the concession; in the case of a contract involving a service concession element and an element of the supply contract, the principal subject shall be deemed to be the one whose estimated value is the highest.

PPP by form

There are many different forms of PPP projects. Most often they are divided into four groups. They distinguish between the ownership of PPP assets and the sharing of risks between the state and the private partner:

1. **PPPs with prevailing risks on the part of the public sector,**

This form is currently used in our country. This includes turnkey construction, outsourcing, leasing, etc. Property ownership remains the state and private partner is responsible only for precisely defined tasks with limited liability.

- **D & B - Design & Build** (design and construction). The private partner designs and builds the infrastructure according to the state's requirements for a fixed amount, with the risk of exceeding the costs borne by a private partner. As a private partner does not own or operate a building, it does not risk that the investment will be loss-making or will lose its operational capacity over time.
- **O & M - Operation & Maintenance**. The private partner only operates and maintains the infrastructure, but ownership remains state-owned. It is currently a commonly used outsourcing.

2. **PPPs with a higher share of risks on the private partner side, but with public finance guarantees**

These are long-term projects, often twenty years or more. They are financed with the prevailing state resources. The private partner has the responsibility that the building meets all the prescribed criteria but is not responsible for whether or not the infrastructure will be available to the public.

- **BOT - Build Operate Transfer** (construction, operation, transfer of ownership to the state). Infrastructure financing is fully guaranteed by public finances and, in the event of a project failure, for example because of the loss of investment, the consequences are borne by the state. As a rule, a private partner has a minority shareholding in the SPV.
- **DBOT** - as a BOT, but the design is provided by a private partner. In Slovakia there have been projects of this type in the field of heat supply called "Energy Performance Contracting". The private partner has ensured a complete reconstruction of the central heat supply system, and the public administration sector has for a long time been committed to paying the same (or slightly lower) heat supply charges than before the reconstruction. The investment was repaid from the savings achieved.

3. **PPPs with prevailing risks on the private partner side**

In this group, the risk transfer to a private partner is substantially higher. The owner of the infrastructure is a purpose-built company (SPV), financing is provided by project financing or leasing. In many countries, only this group of private partnership projects is considered to be a PPP because they are implemented without the provision of public finance guarantees.

- **BOOT - Build Own Operate Transfer** (construction, ownership of infrastructure by private partners, operation, transfer of ownership). The private entity finances, builds, owns and operates the infrastructure, transfers property to the state after the end of the contract period.
- **BOOT concession** - same as BOOT but with concession. The private entity, on the basis of the concession, finances, builds, owns and operates the infrastructure, transfers the ownership to the state after the concession ends. Granting a concession gives the project more comfort in terms of its financing, because it is a form of "guarantee".
- **DBFM - Design Build Finance Maintain** (project, construction, financing and maintenance, or maintenance concession). Ownership share of a private partner in the SPV may vary and may change over time according to the development of the project. After the end of the project, assets go to the public administration sector.
- **DBFO (T) - Design Build Finance Operate (Transfer**), (project, construction, financing, operation and transfer). Such a contract allows a private partner to design, finance, build (or reconstruct) the infrastructure he then runs, and transfers ownership of the state after the concession ends. Such a project has a transparent selection of a concession granted over a long period of time.

4. **PPPs on the border of privatization and private ownership**

- **BOO - Build Own Operate** (construction, ownership, operation). The private partner finances, builds, owns and operates the infrastructure permanently. State interests are

enforced through a regulatory body, or contractually agreed competencies for the state, such as checking agreed criteria, and so on. Since full privatization, this type of project differs, for example, by the fact that the public sector has the right to withdraw from pre-established contractual reasons and must ensure the economic and substantive regulation of that entity if it gives the private partner a monopoly position.

In the ports of Slovakia, all the above-mentioned forms of concessions can be applied, with the view that, for the future, from the point of view of the application of PPP projects in ports, it would be from the perspective of the company Ports, a.s. the best solution is to use PPP projects with prevailing risks on the part of a private partner when, after the end of the contractual period, the ownership will be transferred to the state, a company using public funds.

7.2.1.4 Fees types and methodology for determination of concession or lease fees

The best way to come up with a proposal for a payment mechanism is to start what the developer would consider an ideal scenario. Ideally, the payer would pay to the private partner payment after the end of the period and as a fixed amount only and exclusively for each unit of the service provided that met the qualitative criteria. This would be in line with the PPP principles that should make payments only when the service is available, of the agreed quality, and should not be designed merely as a mark-up for the real costs of a private partner (PPPs should not function as a freight contract). The ideal payment mechanism provides a strong incentive for a private partner to fulfill his obligations and should also carry significant risks to him.

On the other hand, it is necessary to avoid situations where these risks are excessive or disproportionate. Excessive risks would be that would cause a private partner to claim a premium that is not an adequate benefit from higher efficiency. At the same time, it would mean that a private partner would either generate excessive profits or, on the contrary, face significant losses. The design of the payment mechanism should thus ensure a balanced remuneration and risk relationship for a private partner. The following adjustments to the payment mechanism are considered:

a. indexing the payment (the payment components) so that the risk of inflation remains on the public partner,
b. costs and risks outside the control and reach of a private partner may be passed on to the public sector (in any case such mechanisms should be generally limited and very precisely defined);
c. declines for inferior performance should not only be symbolic and should have a relatively significant impact on the return on equity but, on the other hand, they should not be even disproportionately high so that the less significant problems cause default on credit commitments. It is true that the deductions should reflect, in particular, the degree of deficiencies and the loss resulting from a public partner or users from a lower quality of service or unavailability,

d. the emphasis must be on ensuring that the payment mechanism does not provide room for unwanted motivations.

For the purpose of long-term lease contracts, the calculation of the fee in the past was subject to the Decree of the Ministry of Finance of the Slovak Republic no. 465/1991 Coll. on prices of buildings, land, permanent crops, payments for the establishment of the right of personal use of land and compensation for the temporary use of land. At present, fees are determined by agreement between the parties on the basis of the relevant expert opinion in the light of current market conditions.

7.2.1.5 Types of revenues and charges of a concessionaire or private partner

Types of payment mechanisms

The highest possible involvement of a private partner in a PPP project is through a concession when the private partner is responsible for the complete implementation of the project (design, construction and operation) including financing, and recovers its costs from the collection of payments from end-users of the public service and thus runs the risk of demand. This type of PPP is particularly suited to projects that provide an opportunity for introducing user fees, for example, in the case of transshipment.

Payments in the form of fees, tolls or similar items are usually proposed by the concessionaire himself, in the case of a critical infrastructure or the real impossibility of using a different alternative to secure the user's needs may be subject to the amount of payments approved by the contracting authority. Transferring the risk of demand to the concessionaire means that the concessionaire will take over the risk of future long-term consumer behaviour of infrastructure users. It is generally appropriate in particular in cases where:

a. it is a type of infrastructure / service that is commonly used commercially but there is also a public interest in regulating the service or infrastructure to a certain extent,
b. the demand for infrastructure / service is predictable in the long term and is ideally dependent on the performance of the private partner and the quality of the service it provides,
c. the tenderer is able to wholly or to a large extent renounce the subsequent possibility of significantly affecting service pricing and pricing.

If the risk of demand between the grantor and the private partner is to be shared, then the payment mechanism will be structured in much the same way as the so- shadow toll, which means the payer's payment to a private partner, which is partly or wholly deducted from the rate of use of the infrastructure or service. If the contracting entity takes full risk of the demand (or a majority thereof), the payment mechanism will take the form of a payment for availability (i.e. the payment to the private partner for the availability of the infrastructure or service of the required quality).

7.2.1.6 Property rights transferred from the Grantor to the concessionaire/lessee

Under the Public Procurement Act, this Act does not apply to the acquisition or acquisition of existing buildings or the lease of existing buildings or other immovable property in any form of financing.

The developer will consider in advance, according to the type of PPP project, who will be the owner of the project asset (eg real estate built within the project) and how the right to use it will be solved. The processor will consider who will be the owner of the asset used to implement the project. Except where this is excluded by special legislation, the project may be set up by the owner of the project (ie a private partner builds the infrastructure directly in the ownership of the contracting entity) or through the duration of the contract, the property owned by a private partner who termination of the contract shall be transferred to the contracting authority.

One of the key considerations in assessing the issue of the ownership of a private partner (which may be optimally taxable in some respects) or the contracting entity is the consequences of the possible bankruptcy of a private partner and the risk that the property owned by a private partner that is part of the project will become part of the insolvency and the contracting authority will lose control over it. This risk can not be completely avoided under current legislation.

In relation to the regulation of property law relations, due attention will be paid in the context of legal due diligence in particular to regulations regulating the management of state and territorial assets. The processor will focus on conditions relating to transfers of property of the State or territorial self-government, or the provision of such property to third parties, on the assumption that such property may be used for the project. The processor always verifies that the proposed model of ownership arrangement (eg, mode, scope, and length of provision of infrastructure built into use by a private partner) is complied with in accordance with these regulations.

The arrangement of property law relationships may also predominate to a large extent in some sectoral rules, so if relevant, the processor will investigate whether and how the arrangement of property law relations will affect. If certain restrictions or obligations arise from internal regulations or documents regulating the activities of some of the contracting entities (e.g. the constituent charters of contributory organizations) (for example, the consent of the creator to certain dispositions of property), the processor will assess how these documents will affect its progress in the implementation of the project.

The PPP Agreement deals with the ownership of the assets that are the subject of the contract. Traditionally, it is mainly land, infrastructure built and its equipment. In assessing whether these assets are the property of the contracting entity, the contracting entity should consider several of the following aspects:

- legislation,
- tax consequences,
- bankruptcy law.

The text of the PPP contract must clearly indicate which of the contracting parties - the contracting entity or the private partner is resp. will be the owner of the land on which the construction of the infrastructure will take place. In relation to legislation, however, the contracting authority must carry out a legal analysis as to whether it is legally possible for the private infrastructure to be owned by the private partner.

If the legislation permits the construction of the infrastructure in the assets of a private partner, the contracting authority will consider possible tax impacts that greatly affect the financial flows of the project and, at the same time, assess the possible consequences of the bankruptcy law in force if the infrastructure was owned by a private partner.

Apart from ownership on the part of the contracting entity or private partner, it is possible in practice to apply a combined ownership model in which the contracting entities will own part of the infrastructure necessary for the provision of public services (including equipment) and, if necessary, retain only those parts of the infrastructure owned by a private partner, which are not intended for the direct provision of the public service, but as a complementary commercial infrastructure.

7.2.1.7 Requirements for minimum investment and performance

Public procurement legislation does not imply any conditions for a minimum investment, a concessionaire, or the achievement of a certain production capacity. Concession conditions are the result of prior mutual agreement between the parties, which may not be contrary to the law.

In the context of the "PPP Project Preparation and Implementation Process and Control Process", it is recommended that the contracting entity considers PPPs only for projects with estimated investment costs above EUR 10 million (or where the value of the interim service is of adequate value).

7.2.1.8 Agreements for the scope and type of port services operated

Services provided in port in the case of concessions are not regulated by any legal act, documents. It is up to the contracting parties to provide what services to agree.

In the case of PPP projects, it is necessary for the European Commission to approve an operational program to specify the project and the services to be provided to it.

7.2.1.9 Rights and obligations towards existing personnel in ports/terminals

In the case of a PPP project, the private partner will assume responsibility for securing the activities that have been provided so far by the specific personnel of the procuring entity, the feasibility study processor will assess the legal consequences of the assignment of the contracting entity's employees to the private partner.

This transfer can take place under the regulations of the Labor Code, which stipulates that if the role or activity of the employer or part of the employer is transferred to another employer,

the rights and obligations of the employment relationship are transferred to the transferred employer by the transferred employer.

The processor will define the range of staff involved in this transition because it will be one of the aspects that will undoubtedly be considered by the tenderers in the procurement process and will also affect the feasibility, the costs and the risks of the project as well as the socio-economic impact of the project.

7.2.1.10 Maintenance requirements for infra and suprastructure during concession or lease

The issue of rights to infra structure and superstructure is discussed in more detail in the *"4.1.6 Property rights transferred from the Grantor to the concessionaire / lessee"* within the definition of the right of ownership between the contracting authority and the concessionaire.

7.2.1.11 Early termination conditions

The PPP project contract is concluded for a relatively long period and during this period it may be reasonably premature to terminate it for various reasons. Even if early termination should be rather exceptional, it is necessary to pay special attention to negotiating these provisions (and the compensation paid). These provisions contain a significant part of the risk transfer and can significantly influence the incentive of the private partner and the quality of the services provided.

The reasons for the withdrawal of the contract as well as the manner and consequences of withdrawal are primarily defined within the concession dialogue / wording of the concession contract text.

Typical situations where early termination is relevant are:

- termination by private partners for the failure of the contracting entity;
- voluntary early termination by the contracting authority;
- termination by the contracting authority for the failure of a private partner;
- termination by the contractor for corruption;
- termination for the dishonesty of a private partner
- termination by either party due to a force majeure event.

Each of the above situations should treat the contract in detail, including setting the conditions for granting and calculating the compensation of a private partner.

Legislation by the Public Procurement Act:
The contracting authority / entity may withdraw from the concession contract if:

- at the time of its closure, there was a reason to exclude the supplier or concessionaire from non-fulfillment of the participation condition under that law
- The Slovak Republic has breached the obligation arising from a legally binding act of the European Union claiming the contracting authority or the contracting entity has breached the obligation arising from this legally binding act decided by the Court of

Justice of the European Union in accordance with the Treaty on the Functioning of the European Union.

- The contracting authority / entity may withdraw from the part of the contract or concession contract that substantially changed the original contract or concession contract and required new public procurement.
- The contracting authority and the contracting authority may withdraw from the concession agreement concluded with the tenderer who was not entered in the public-sector registrar at the time of concluding the concession contract or was deleted from the register of the public-sector partners.

This does not interfere with the right of the contracting authority or the contracting authority to withdraw from the concession contract or part thereof under a special regulation (eg Commercial Code, Civil Code.) However, the Commercial Code, like the *lex generalis*, contains a very general waiver of the contract. According to him, the contract may be withdrawn only in cases stipulated by the contract or the law.

Termination payment

Termination payment is an important part of the economic assessment and determination of project financing, as this payment sets out the limits of the risk of loss of return (principal and interest, shareholder profit). For this reason, an important part of the PPP contract is a provision on payments made to a private partner in case of early termination because it is a project that is bound by a concession period and whose value is estimated on the basis of project risk for a specific time frame.

From the perspective of the contracting authority, termination provisions are an important aspect of risk transfer. The termination payment can be divided into several basic types due to termination of the concession contract:

a. withdrawal from the contract due to violation by the concessionaire,
b. withdrawal from the contract on grounds of breach by the contracting authority,
c. the termination of the contract due to a force majeure event,
d. withdrawal from the contract by the contracting entity without giving any reason.

Withdrawal from a contract due to a violation by a private partner can be foreseen for reasons of serious violation of the contract by a partner (at the same time a reasonable deadline for notification and removal of grounds for serious breach of contract, preparation of a correction plan, the introduction of a tightened monitoring regime and the possibility of a private partner of the terms of the PPP contract). These reasons may include:

- any significant breach of contract with the effect on quality or timing of construction works and service provision,
- a breach of contract which prevents the contracting authority from performing its duties or providing the public service concerned,

- repeated violations by private partners of other non-critical provisions of the concession agreement,
- bankruptcy, restructuring, or liquidation of a private partner,
- non-compliance with important project dates,
- non-compliance with performance standards documented by reaching a certain number of penalty points,
- repeated or permanent unavailability in the agreed range,
- corrupt practices on the part of a private partner.

Compensation for a breach of contract by a private partner should take due account of the fact that the reason for the termination of the contract was the failure of the partner. Therefore, in the present case, the termination payment should not be paid for the partner's planned profit, on the contrary, the payment should take into account the costs of the contracting authority related to the alternative service provision, the loss of users resulting from unavailability, On the other hand, the opposite effect of the too restrictive set-up of the termination payment should be considered, for example through excessive fines or little consideration of the value given by the private partner as this will affect the risk assessment by the institutions financing and the subsequent over-execution of the project. Reasons for withdrawal due to breach of contract by the contracting entity should be materially equivalent to the reasons for withdrawal from the contract in case of breach of contract by a private partner.

It can be expected that the main serious breach of the contract by the contracting authority would be repeated retention of payments or non-payment. Payment in this case will most likely have the character of a final financial settlement on a contractually negotiated contract, in order to secure the project's economic outcome from the point of view of the private partner as presented in the tender. In the event of a contractual possibility to terminate the contract without giving any reason, the compensation should normally be the same as in the case of termination due to breach of the contract by the contracting authority.

7.2.1.12 Role of port authority during the concession / lease period

Public Ports, jsc was established on 21 January 2008 under the Act No. Act No. 500/2007 Coll., Amending Act No. 338/2000 Coll. on inland navigation. The founder of the company is the Slovak Republic, in which the Ministry of Transport and Construction of the Slovak Republic acts.

Public Ports, jsc is responsible for:

- ensuring the preparation and realization of the construction of public ports in the Slovak Republic, together with the elaboration of long-term and short-term concepts of their development,
- ensuring the operation, maintenance and repairs, as well as the registration of facilities and facilities in the territorial districts of public ports,
- renting land in the territorial districts of public ports and other activities directly related to the loading of property in the territorial districts of public ports,
- collecting payments for the use of public ports,

- creating the conditions for the development of combined transport, including the handling of combined transport cost units.

Within the limits of these activities, the company provides public procurement and supervising the fulfilment of existing contracts. Other activities such as towage, pilotage, VTS, gate/access controls and checks are carried out by the private company Slovenská plavba a prístavy a.s.

Public bodies

- **Public Procurement Office**

The Public Procurement Office is the central authority of the state administration for public procurement. It supervises compliance with the obligations of the contracting authority, the contracting authority or other controlled entity by law. In the performance of supervision, the Office also monitors the fulfilment of the obligations imposed by the Office's decisions. It is "a professional guarantor in the field of public procurement, supervising the principles of transparency, equal treatment and non-discrimination of tenderers and candidates, as well as the principles of economy and efficiency in the spending of funds". Its role is to "ensure the conditions for the correct implementation of Act No. 343/2016 Coll. on Public Procurement and on Amendments to Certain Acts ".

Public Procurement Office in the supervision process

a) issues notices of compliance or inconsistency of the documents submitted with the Public Procurement Act (Ex ante Assessment)
b) issues relevant decisions,
c) imposes fines for administrative delicts

- **Ministry of Transport and Construction of the Slovak Republic**

The public-private partnership project section fulfils mostly the following tasks:

a) fully manage the preparation and implementation of public-private partnership projects
b) comprehensively manage the processes related to the fulfillment of the procedures according to the methodological documents of the Ministry of Finance of the Slovak Republic for the area of public-private partnership projects

- **Ministry of Finance of the Slovak Republic**

The Department of Financial Instruments and International Institutions mainly performs the following tasks:

a) ensures the preparation and updating of methodological documents for PPP projects,
b) coordinates the preparation of opinions on individual forms of implementation of PPP projects,
c) represents the Ministry of Finance of the SR in the European Center for Expertise in the Field of PPP (EPEC)

d) draw up opinions and comments on proposals for measures to promote economic growth in public-private partnership (PPP) projects in cooperation with the value-for-money unit.

7.2.1.13 Treatment of land, infrastructure and equipment during concession

The issue of rights to infra structure and superstructure, as well as land and real estate rights, is dealt with in the "*4.1.6 Property rights transferred from the Grantor to the concessionaire / lessee*" within the definition of the right of ownership between the contracting authority and the concessionaire.

7.2.1.14 Participation of a port authority or grantor in concessionaire's company

The public procurer may, when awarding a concession, require the creation of a joint venture to be awarded the concession. The Joint venture is a legal entity that was established by the trustee together with the concessionaire for the purpose of concession. The Joint venture is also a legal person established by a concessionaire in which the capital of the State was incorporated under the concession agreement.

The activities of the Joint venture may be exclusively activities related to the implementation of the subject of the concession contract. The contracting authority and the contracting entity shall conclude a concession contract with a legal person that is a joint venture.

The only port authority in Slovakia is the Public Ports, jsc. However, its activities are exhaustively defined by the law on which the company was founded. Public ports, jsc, it is not entitled to set up a trading company or acquire a stake in an existing trading company. It would be necessary to change the law to create a joint venture.

7.2.1.15 Risk allocation and unforeseen events

The risk transfer must be clearly defined, and it is also necessary to take into account the conditions under which the risks are passed on to the parties involved. If a private partner would bear most of the risks, it could cause an unnecessary overrun of the project or the impossibility of financing it. Determining the risk carrier is not a problem in some cases. For example, the risk of non-compliance is borne by a private partner. This will be reflected by the fact that the public partner begins to pay for mandatory payments only after putting the construction into operation.

The private partner must also count on certain risks of changes such as rising construction costs or supply delays. Such risks are usually taken over by a private partner. In case of risk of changes in the tax area, this risk takes on the public partner. It is important to consider all types of risks that may occur in a particular project and to take them into account in the award of the contract, as they may affect the establishment of quality standards and performance requirements, the timing of delivery and the period during which the private sector may benefit from the performance and also on the total cost of the contract and the possibility of increasing it. In a public-private partnership, it is crucial that some of the risks associated with

securing a particular property be borne by a private partner, and this must be a significant risk.

Construction risk includes cases such as delay of building submission deadline, failure to comply with valid standards, technical deficiencies, breaches of environmental standards, cost overruns, and others. In order for the State not to take this risk, the conditions laid down in the contract should be that the state will not pay the agreed annual payments in case of non-compliance with the prescribed deadlines, timetable, budget, standards and agreed specifications.

Availability risk indicates that the infrastructure or service has predefined parameters and is publicly available. The fact that the state does not take the risk of being available is that its periodic payments to a private partner are automatically and significantly reduced if the infrastructure or service is not available to the public as agreed in the contract, does not work or does not meet technical, environmental or other standards.

Risk of demand poses a risk of interest in the given infrastructure or service. Lower-than-expected demand may cause a financial loss to the supplier. Interest in the given infrastructure or service can affect competitive projects, the ability of end-users to pay the specified prices, and so on. The analysis of these three risks serves to determine whether a PPP-funded project is included in the public finance budget or not.

Force majeure, based on past practice, does not constitute an entitlement to claim against the other Contracting Party claims for breach of contract obligations by the Contracting Party if an event of force majeure occurs and the respective Contracting Party can not fulfil its obligations under this Contract because of force majeure. The Contracting Party shall be bound by the power to interfere with force majeure without delay informing the other Party. Due to the complexity of the PPP projects, details of the procedure in case of force majeure are contained in the concession contract.

Higher power is regulated in the Civil and Commercial Code. The PPP projects are considered to be a subject to the commercial law. The Commercial Code regulates force majeure only for delays. In the Commercial Code mode, the borrower can only defer liability for delays if he is in delay due to the creditor's delay. For other reasons, the debtor cannot be held liable for delays. The disclaimer of liability for delay due to force majeure is therefore inadmissible.

7.2.1.16 Requirements for the experience of concessionaire / lessee

The legislation divides the conditions for participation in public procurement into three categories:

- *Personal status*
- *Financial and economic status*
- *Technical competence or professional competence*

Personal status and Financial and economic status are described in 4.1.18 Pre-qualification requirements.

Legislation sets out the conditions for participation in public procurement in general. For the purposes of a specific public procurement / concession, Public Ports, jsc to determine the individual technical, economic and other requirements of the tenderer in the tender specifications and in the tender specifications.

Technical competence

Technical competence or professional competence shall be demonstrated by the nature, quantity, importance or use of the supply of goods, works or services evidenced by one or more of the following documents:

a) a list of supplies of goods or services provided for the preceding three years (if necessary to ensure an appropriate level of competition, the contracting authority and the contracting authority may specify for a prolonged period) from the award of the contract, indicating the prices, delivery terms and purchasers; the document is a reference if the customer was the contracting authority or the contracting authority under this Act,
b) a list of the works carried out over the preceding five years from the award of the contract (if necessary to ensure an appropriate level of competition, the contracting authority and the contracting authority may specify for a longer period), indicating the prices, places and times for the execution of the works; the list must be accompanied by a certificate of satisfactory execution of the works and the assessment of the works carried out under the terms of the business and if the purchaser
    a. was the contracting authority under the Public procurement act, the document is the reference,
    b. was a person other than the contracting authority or the contracting authority under this Act, proof of performance shall be confirmed by the customer; if such a confirmation is not available to the tenderer, by a declaration of the tenderer or seeking to carry it out, accompanied by a document proving their performance or the contractual relationship on the basis of which they were made,
    c. information on technicians or technical bodies, especially those responsible for quality control, regardless of the contractual relationship they have with the candidate or tenderer; in the case of a works contract, those to which the tenderer or the tenderer may apply for the work to be carried out,
    d. a description of the technical equipment, the study and research facilities and the arrangements used by the applicant or the applicant for quality assurance,
    e. in the case of complex goods to be supplied or goods intended for specific purposes, by checking the production capacity of the tenderer or the tenderer carried out by the contracting authority or the contracting entity or on its behalf by the competent authorities in the country of the place of business, habitual residence of the tenderer or candidate and with the consent of that authority; if

necessary, by checking the available study and research facilities and the quality of the control measures in place,

f. in the case of complex services or services for specific purposes, the technical competence of the tenderer or the tenderer performing the service carried out by the contracting authority or the contracting authority or on its behalf by the competent authority in the country of establishment or place of business or habitual residence of the tenderer or candidate and with the agreement of that authority; if necessary, by checking the available study and research facilities and the quality of the control measures in place,
g. in the case of works or services, data on education and professional experience or professional qualifications of persons designated to perform the contract or concession contract or the managerial staff unless they are a criterion for the evaluation of tenders,
h. by indicating the environmental management measures that the tenderer or the candidate applies to performance of the contract or concession contract,
i. in the case of construction works or services, data on the average annual number of employees and the number of managerial staff over the previous three years,
j. information on the machinery, operation or technical equipment available to the tenderer or candidate for the execution of the works or the provision of the service,
k. supply chain management and tracking information that the candidate or candidate will be able to use when performing a contract or concession contract,
l. by indicating the proportion of the performance of the contract or concession contract that the tenderer or the tenderer intends to provide to the subcontractor,
m. in the case of goods to be supplied,
    i. samples, descriptions or photographs, the authenticity of which must be verified if the contracting authority / entity so requires or
    ii. certificates or endorsements with clearly identified references to technical specifications or technical standards applicable to goods issued by quality control authorities or designated conformity assessment bodies.

Tenderers or candidates may use the technical and professional capacity of another person to prove their technical competence or professional competence, irrespective of their legal relationship.

In such a case, the tenderer or tenderer must demonstrate to the contracting authority / entity that in the performance of the contract or concession contract, he or she will actually use the

capacity of the person whose capacity he / she uses to demonstrate his / her technical competence or professional competence. The fact of the second sentence shall be demonstrated by the tenderer or tenderer by a written contract concluded with the person whose technical and professional capacity is to prove his technical competence or professional competence. The written agreement must indicate the person's obligation to provide his / her capacity throughout the duration of the contractual relationship. A person whose capacity is to be used to demonstrate technical competence or professional competence must demonstrate compliance with the terms of participation regarding personal status and there must be no grounds for exclusion; the right to deliver goods, to perform construction works or to provide the service proves in relation to that part of the object of the contract or concession for which the capacities were provided to the candidate or tenderer. In the case of a requirement relating to education, professional qualifications or relevant professional experience, in particular pursuant to paragraph 1 g), the tenderer or candidate may only use the capacity of another person if he / she will actually carry out the construction works or services for which the capacity is required.

The contracting authority / entity may require that the tenderer or candidate and any other person whose capacity is to be used to demonstrate technical competence or professional competence are responsible for the performance of the contract or concession contract jointly.

In the case of a supply contract which also includes the activities related to the placement, assembly and installation of goods, the provision of services or the execution of works, the technical competence or professional competence of the tenderer or the person seeking to carry out those activities shall be assessed, in particular, with regard to his / her ability, efficiency and reliability.

7.2.1.17 Direct negotiations and unsolicited proposals

Direct negotiation procedure

The direct award procedure may be used by the contracting authority only if at least one of the following conditions is fulfilled:

a) no tenderer or tenderer has submitted a tender or documents demonstrating compliance with the conditions for participation in a previous call for competition or in a restricted procedure, or none of the tenderers or candidates fulfills the conditions for participation or none of the tenders, without substantial changes, satisfies the requirements and requirements specified by the contracting authority for the subject of the contract; and provided that the original terms of the contract are not substantially altered,

b) goods, works or services may be supplied only by a particular economic operator, if:
   - the subject of the contract is the creation or acquisition of a unique artwork or artistic performance,
   - for technical reasons, there is no competition and provided there is neither a reasonable alternative nor a substitute and the lack of competition is not the result of an artificial narrowing of the procurement parameters or

- Exclusive rights and provided that there is no adequate alternative or substitution and lack of competition is not the result of an artificial narrowing of the parameters of public procurement,

c) a contract for the supply of goods, for the execution of works or for the provision of a service is awarded on account of an exceptional occurrence uninformed by the contracting authority which it could not have foreseen, and in view of the timing of the tendering procedure, a restricted procedure or negotiated procedure with publication,
d) the goods required are produced exclusively for research, experimental, study or development purposes; it does not apply to large-scale production-related economic activities or to the cost of research and development,
e) it is the supply of additional goods from the original supplier for the partial replacement of the normal goods or equipment or the extension of the goods or equipment already supplied where a change of supplier forces the contracting authority to obtain material of different technical characteristics which would cause incompatibility or disproportionate technical difficulties in the operation or maintenance; the duration of such a contract as well as the recurring contracts may not exceed in aggregate three years,
f) the supply of goods whose prices are quoted, and which are directly purchased on a commodity exchange,
g) it is the procurement of goods offered under particularly advantageous conditions by the liquidator, the administrator or the executor,
h) is a service contract following a design competition made under this Act and awarded to a candidate whose proposal has been evaluated by the jury as a winner or one of the winners in the design contest; if more than one winner is involved, the contracting authority must invite all to the negotiations,
i) new works or services consisting in repeating identical or comparable works or services carried out by the original supplier, provided that:
    - are consistent with the core project, which lists the scope of possible additional construction works or services and the terms of their assignment,
    - the original contract was awarded by public tender, restricted procedure, negotiated procedure with publication, competitive dialogue or innovative partnership, and information on the award of the contract by direct negotiation was already part of the notice of award of the contract awarding the original contract,
    - Repeated award is made within three years of the original contract.

The Procurer may proceed with preliminary consultations with representatives of the private sector are an important phase of the project preparation. The public sector learns whether the project is interested in the private sector and also analyses the economic viability of the project. Project promoters can submit their offers as well as innovations. And just such

competition between investors can lead to a reduction in the set price of the project. However, it is important that such consultations take place before the public procurement starts.

The very fact of involving the private sector is not in itself a guarantee of efficiency. The delegation of public sector functions makes sense if the private partner is sufficiently motivated by the specified performance conditions that would otherwise be difficult to achieve. Throughout the process of implementing the project, it is therefore crucial that maximum competition between tenderers is induced to discover as much as possible the potential of potential private partners (eg pressure to reduce prices, design of innovative solutions, etc.). Since the competitive dialogue is the most elaborate public procurement procedure for complex PPP projects.

This process allows you to find the best project solution in the form of a dialogue with potential private partners. Within the framework of its own dialogue, the contracting authority, with qualified tenderers, shall submit proposals for the solution and the draft contract, which should be part of the dialogue documentation. Talks with individual bidders can take place in several rounds, separately with each candidate for confidentiality. It is true that the procuring entity cannot, without the consent of the tenderer, provide its draft solution or other confidential information obtained from it. For the purpose of each negotiation, the contracting entity shall prepare in advance a negotiation procedure covering the subject matter and scope of the negotiation which is the same for all tenderers and from which it is not possible to deviate. Very often, it is not possible to provide all relevant information and data (whether due to a large scale, format or because they were not yet available) only in the form of an informative document prepared for the competitive dialogue or its final version. In practice, therefore, the data room is often used, which contains various factual information, and which can be opened not only during the competitive dialogue but also during the tender submission period. For each negotiation held, the contractor should draw up a separate protocol or in the same structure for all, with all its substantive conclusions from the negotiations that are relevant in terms of concretizing the proposed solution. The tenderer can conduct negotiations in several successive stages to reduce the number of solutions, in particular by reducing the difficulty of conducting a dialogue on a number of different solutions. This exclusion shall be based on the quantifiable elimination criteria selected for the evaluation of the tenders referred to in the contract notice or in the information document. However, such a procedure must always be maintained and allowed for competition.

The developer continues the dialogue until he selects a solution (one or more) that meets his needs and requirements. The outcome of these negotiations should therefore be to select the most advantageous solution for the contracting authority, both technically and financially and legally. Upon completion of the competitive dialogue, the contracting entity shall prepare the final version of the tender document and invite all tenderers invited to participate in the competitive dialogue to submit final bids. Even though the Public Procurement Act allows in fact to choose more than one of the solutions specified in the dialogue, the tenderer should submit a final draft PPP contract to the tenderers before the call for tenders, since variant solutions are almost never equivalent in terms of economic benefits, make evaluation difficult, and reduce the transparency and simplicity of the process. The Public Procurement Act regulates the statutory deadlines for the individual stages of the process, but the length of the

competitive dialogue will vary depending on the complexity of the projects. In any case, with regard to the quality of the project preparation, the deadlines set by the contracting authority should in principle be longer than the minimum statutory deadlines, only in view of the fact that, bidders will take the form of multi-vendor consortia, will have to undertake comprehensive due diligence, will have to negotiate pre-financing agreements with banks, and prepare a draft technical solution, respectively. estimating the cost of complex output, which takes time.

Unsolicited proposals
Slovak regulation does not allow unsolicited PPP proposals.

7.2.1.18 Pre-qualification requirements

The legislation divides the conditions for participation in public procurement into three categories:

- Personal status
- Financial and economic status
- Technical competence or professional competence

Personal status
Only those meeting the following conditions for participation in a personal status may take part in a procurement procedure:

a) neither he nor his statutory organ, nor a member of the statutory body, nor a member of a supervisory body, nor a prosecutor legally convicted of a criminal offense of corruption, a criminal offense to the detriment of the financial interests of the European Communities, an offense of legalization of the proceeds of crime, the offense of founding, the offense of terrorism, terrorist offenses and certain forms of participation in terrorism, a crime of trafficking in human beings, a criminal offense related to the conduct of a business or a crime of public procurement and public auction .
    - the applicant or the applicant demonstrates the fulfillment of the conditions attested by the extract from the criminal record not older than three months

b) has no arrears of health insurance, social security and old-age pension contributions in the Slovak Republic or in the State of residence, place of business or habitual residence,
    - the applicant or the applicant proves that the conditions attested by a certificate issued by the Health Insurance Company and the Social Insurance Company are not more than three months old

c) has no tax arrears in the Slovak Republic or in the State of residence, place of business or habitual residence,
    - applicant or candidate demonstrates fulfillment of the conditions attested by a local tax authority not earlier than three months

d) has not been declared bankrupt, has not been restructured, is not in liquidation, nor has bankruptcy proceedings been instituted against it for lack of assets or bankruptcy proceedings for lack of assets,

- applicant or candidate demonstrates compliance with the conditions attested by a confirmation of the relevant court not older than three months

e) is entitled to supply goods, carry out construction works or provide services,
- the tenderer or candidate demonstrates that the condition is met by documentary evidence of the right to deliver goods, to perform construction work or to provide a service corresponding to the subject of the contract

f) does not have a prohibition on participation in a public procurement confirmed by a final decision in the Slovak Republic or in the State of residence, place of business or habitual residence,
- the candidate or candidate demonstrates the fulfillment of the condition, as evidenced by an affidavit

g) has not, within the three years preceding the declaration or the demonstrable opening of a public contract, committed a serious breach of obligations relating to the protection of the environment, social law or labor law under special rules for which he has been legally sanctioned by the contracting authority and the contracting authority,

h) has not, within three years from the date of the declaration or the demonstrable opening of the procurement, have committed a serious breach of professional obligations which the contracting authority and the contracting authority can prove.

Tenderer or candidate is considered to be eligible to participate in a personal status as per par. (b) and (c) where he has paid arrears or has been allowed to pay arrears in instalments.

If the applicant or tenderer is domiciled, habitually resident or habitually resident outside the territory of the Slovak Republic and the State of its registered office, place of business or habitual residence does not issue any of the documents necessary to prove compliance with the above conditions of participation and does not issue equivalent documents, it may be replaced by an affidavit the rules in force in the State of residence, place of business or habitual residence.

If the law of a candidate country or an applicant with a seat, place of business or habitual residence outside the territory of the Slovak Republic does not regulate the institute of affidavit, it may replace it by a declaration made before a court or administrative body, a notary or other professional institution or business institution, business or habitual residence of the tenderer or candidate.

Financial and economic status

Financial and economic status is generally demonstrated by the submission of:

a) statements by a bank or a branch of a foreign bank,

b) certificates of liability for damage caused by the pursuit of an occupation or of an insurance certificate for loss of business liability, where such insurance requires a special regulation,
c) the balance sheet or statement of assets and liabilities, or data from them; or
d) a general turnover report and, where appropriate, an overview of the turnover achieved in the area covered by the contract or concession, for the last three marketing years for which it is available, depending on the commencement or commencement of operations.

Tenderers or candidates may use the financial resources of another person to prove their financial and economic status, irrespective of their legal relationship. In such a case, the tenderer or tenderer must prove to the contracting authority / entity that in the course of performance of the contract or concession contract he will actually use the resources of the person whose position he uses to prove his financial and economic standing. The fact according to the second sentence is demonstrated by the candidate or tenderer by a written contract concluded with the person whose sources are meant to prove his financial and economic standing. The written agreement must indicate the person's commitment to provide performance throughout the duration of the contractual relationship. The person whose resources are to be used to demonstrate the financial and economic standing must demonstrate compliance with the terms of participation regarding personal status.

The contracting authority / entity may require that the tenderer or candidate and any other person whose resources are to be used to demonstrate the financial and economic standing are responsible for the performance of the contract or concession contract jointly.

If, for objective reasons, the candidate or tenderer cannot provide a document designated by the contracting authority or the contracting entity for the purposes of establishing the financial and economic standing, the financial and economic standing may be demonstrated by the submission of another document which the contracting authority / entity considers appropriate.

Requirements for **technical competence and professional competence** are described in 4.1.16 Requirements for the experience of the concessionaire / lessee.

The contracting authority may require

- Submitting a quality management system certificate
- Submission of a certificate issued by an independent institution certifying compliance with the requirements of the environmental management system standards.

7.2.1.19 Return of land, facilities and equipment after the concession/lease period

The regular termination of the contract and settlement of the parties takes place after the expiry of the period for which the contract is concluded. Upon completion, the Infrastructure Administration is returned to the Advertiser. This means that the private partner removes the assets that remain in his possession from the infrastructure, handing the "keys" to the client,

copies of the project documentation, the employment agenda and the information needed to run the infrastructure and provide the services. The private partner shall deliver the infrastructure to the developer in the proper condition that meets the requirements that should be defined in the contract. It is important for the developer to be prepared for the postponement process in the sense of securing the condition foreseen in the contract, but also in the sense of assuming responsibility for the operation of the infrastructure or related issues (transfer of employees, etc.). At the agreed time before the termination of the contract (in the order of several quarters), the contracting authority should carry out inspections and rigorous inspections of the state of the infrastructure so that the conditions of the return are respected, and it is appropriate to have the right to withhold a certain percentage of the monthly payment to the private partner. This reserve fund shall be used by the contracting authority as a policy-relevant insurance policy. Prior to the termination of the contract, the contracting authority may declare additional public procurement, in which the newly selected private partner will continue to provide the service.

7.2.1.20 Procedure in the case of disputes

Arbitration

The method of dispute resolution defined in the Concession Dialogue and therefore is the content of a concession agreement. Based on experience with PPP projects implemented in Slovakia, the primary means of resolving the dispute is its immediate referral to the representatives of the parties. The aim is to resolve the dispute without the need for a third party's meritorious decision. In the event of a mediation failure, the parties shall proceed according to the arbitration clause / arbitration clause contained in the concession agreement.

The General Court

By the above procedure, the jurisdiction of the General Court which is considered to be generally applicable, is under the Commercial Code excluded.

Administrative Procedure

Legislation defines, in relation to PPP, the administrative procedure, which is focused only on the pre-concession phase. It is therefore a matter of resolving a possible dispute before concluding a concession contract, not a dispute arising from it.

A tenderer, an applicant, a participant or a person whose rights or legitimate interests have been or may have been affected by the contracting authority or contracting entity may apply for remedy against

a) notification of the intention to conclude a concession contract, a concession notice, a notice of a call for competition and a call for proposals
b) the conditions specified in the tender documents, the concession file, the tender conditions or other documents provided by the contracting authority or the contracting authority within the time limit for the submission of tenders or proposals.

7.2.2 Main findings, messages and problems of PPPs in ports

Main findings and key messages:

- Little experience with PPP projects in Slovakia.
- The PPP projects that have been carried out so far only concerned the construction of motorways and road infrastructure, so practical experience of the port area is not available for the purposes of the study.
- Absence of a comprehensive code for PPP projects. Slovak legislation regulates them only marginally within the framework of the Public Procurement Act.
- Legislation of PPP projects is to a large extent general.
- The wide scope for parties involved in the PPP project provides the opportunity to adjust the mutual relations, rights and obligations by agreement so that the parties achieve the expected outcome.

Main issues, problems and obstacles:

- Lack of funding opportunities through PPP projects.
- Poor awareness of the possibilities of using PPPs.
- Land is a priority investment property of the state.
- Long-term lease of land.
- Method of determining payments.

Solution proposals:

- Increase of the time reserve for the preparation of operational programs, for PPP projects.
- Creating a comprehensive information system on PPP funding opportunities.
- Exemption of land from priority investment property.
- Termination of long-term lease agreements.
- Need to create a specific way of determining payments for individual PPPs.
- PPP landscape could benefit from introducing a positive PPP test covering all major public investment project. This measure would help identify projects where the PPP approach would yield significant benefits.

7.3 Hungary

7.3.1 Regulations and practice of the PPP schemes in ports

In case of Hungarian ports, there is no relevant PPP system, as most of them are owned and operated by private entities.

The Freeport of Budapest, the Port of Baja and the Port of Győr-Gönyü are already managed in a concession structure. As an example, the Freeport of Budapest Logistics has a 75-year concession contract with the asset manager state-owned company for the management and development of the Freeport.

Accordingly, there are three contracts, which can be used as a source of this topic. However, the mentioned contracts are classified as state secrets, so the access to the information is limited.

From the three above mentioned ports operating with concession contract, two were inclined to answer the questions listed below.

7.3.1.1 Laws, directives, by-laws and other acts regulating PPPs

Currently there are no existing laws, directives, by-laws, which regulate PPPs in Hungary. As mentioned above, three PPP contracts exist in Hungary. All three contracts were made for different and special situations, but in all of the three cases the law of the management of state assets must be considered.

Law of the management of state assets regulates among others that the high-value asset purchases must be organized by public procurement procedure.

7.3.1.2 Available and permitted PPP schemes for ports

Given that all three so-called PPP schemes in force in Hungary are unique and classified as state secrets, there are no available and permitted PPP schemes for ports yet.

7.3.1.3 Types of concessions and/or long-term leases in ports

In the ports of Hungary, according to the form of the ownership, mostly asset management contracts have been signed, but there are examples for concession contracts and form long-term lease contracts as well. The reason of this fact that these kinds of contracts have the potential to preserve, develop and manage properties.

Accordingly, the BOOT concession type is the closest version to the Hungarian practice. All contracts are binding on the concessionaire to carry out port activities, which is the same as the operating.

The concessionaire is committed by the contract to return all the land, property and tangible asset in accordance with their original condition after the expiry of the concession contract. This also means, that concessionaire must build and develop during the concession period.

7.3.1.4 Fees types and methodology for determination of concession or lease fees

All of the incomes and outcomes of the operating are charged to concessionaire. In returned for the operation, the concessionaire must pay for the rights of the operating, orderly. As an example, in Port of Baja, the concession fee is payed compared to the tons of stored goods.

7.3.1.5 Types of revenues and charges of a concessionaire or private partner

According to the terms of the above-mentioned contracts, both the concessionaire and private partner must organize port activities, so all the commonly charges of port services are possible types of revenues.

Examples:

- storage fee
- wharfage
- rent cost, etc.

The most important part of the three contracts is that all three ports must keep the status of a National Public Port, which means that all fees and charges must be unified for all port users.

7.3.1.6 Property rights transferred from the Grantor to the concessionaire/lessee

All rights of usufruct or usage of land, property and asset are transferred to the concessionaire, but the owner is still the grantor. In the case of Freeport of Budapest, the 75% of the area must be used for port activities, but the less 25% can be used without any regulation.

7.3.1.7 Requirements for minimum investment and performance

There was only one case, when a Grantor had requirement for investment. In the case of Freeport of Budapest, when the shares of the concessionaire company had been sold, the shareholders had to undertake a port development obligation. Since then, the company had to operate the port according to the potential of the market, keeping the National Public Port status, which is an obligation for all three ports, that have concession contract.

7.3.1.8 Agreements for the scope and type of port services operated

See point #5.1.6.

7.3.1.9 Rights and obligations towards existing personnel in ports/terminals

There were no rights and obligations towards the existing personnel in ports. For example, at Freeport of Budapest the predecessor of the concessionaire company was the original operating company, with the same existing personnel.

7.3.1.10 Maintenance requirements for infra and suprastructure during concession or lease

During the concession period, the lessee has the obligation to maintain the conditions of the infra and suprastructure, in accordance to the conditions before the period. While performing this, the concessionaire cannot claim any compensation and the related costs cannot be re-denominated to the grantor. During the management of the property, state property laws should be governed.

7.3.1.11 Early termination conditions

There are different provisions about this case. For example, the contract according to Port of Baja states that the contract can be terminated any time during the concession period by the will of the grantor.

By contrast, the contract of Freeport of Budapest says that the contract can be terminated, if the concessionaire does not fulfil the obligations listed in the contract. The denunciation is preceded by the suspension of the usufruct, in order to ensure the sustainability of the contract. The breach of contract is sanctioned by compensation. The concessionaire also has the right to quit from the agreement, if the owner of the port hinders the operating.

7.3.1.12 Role of port authority during the concession / lease period

The port authority has no role during the concession, aside from its usual rights and obligations.

7.3.1.13 Treatment of land, infrastructure and equipment during concession

The provisions about this topic of the concession contract are the same as an asset management contract. If the concessionaire builds a new building, the concessionaire will be the owner and the beneficial owner as well, but the land under the new building is still going to be the property of the port owner.

Even though the grantor has the right to purchase the mentioned real estate, the purchase is just a possibility, not an obligation. That is the reason why the grantor of the Freeport of Budapest has the right to reject the request of the concessionaire to build a new facility in the last 15 year of the concessions period.

7.3.1.14 Participation of a port authority or grantor in concessionaire's company

The port authority does not participate in the concessionaire's company, nor in the grantors.

7.3.1.15 Risk allocation and unforeseen events

All risks are allocated to the concessionaire, according to all unforeseen events are the part of the management and the operation tasks.

7.3.1.16 Requirements for the experience of concessionaire / lessee

None of the three existing concession contracts were a result of a public call, in each case the concessionaire was directly selected. This means, the grantor had no requirements for the experience of concessionaire.

7.3.1.17 Direct negotiations and unsolicited proposal

Based on the fact mentioned at point #5.1.16, there have been neither direct negotiations, nor unsolicited proposal regarding the concessions.

7.3.1.18 Pre-qualification requirements

Based on the fact mentioned at point #5.1.16, there have not been any pre-qualification requirements regarding the concessions.

7.3.1.19 Return of land, facilities and equipment after the concession/lease period

See sections #5.1.10, #5.1.11 and #5.1.13. If the concession contract is going to be extended, the conditions would not be changed.

7.3.1.20 Procedure in the case of disputes

According to the contracts in question, the intervention of the elected court would manage the controversial case.

7.3.2 Main findings, messages and problems of PPPs in ports

Main findings and key messages:

- In Hungary the existing PPP contracts (concessions) work very well in ports.
- Since the start, the ports have begun to develop rapidly.
- This is an easier way to develop

Main issues, problems and obstacles:

- There are some provisions of the concession contracts that had not been formed, such as termination conditions.

Solution proposals:

- As the project duration approaches to its end, the missing provisions of the concession contract must be prepared in a predetermined way.

7.4 Croatia

7.4.1 Regulations and practice of the PPP schemes in ports

7.4.1.1 Laws, directives, by-laws and other acts regulating PPPs

Following regulations deal with PPP in ports in the Republic of Croatia:

- **Law on Public Private Partnership** ("Official Gazette" no. 78/12, 152/14) – regulates procedure for proposing and approving of PPP projects, implementation monitoring of PPP projects, PPP contracts content, small value PPP projects issues and other;
- **Regulation on Public Private Partnership Implementation** ("Official Gazette" no. 88/12, 15/2015) – determines content of information for PPP project implementation, basic questions regarding preparation, documentation and implementation of small value PPP projects, criteria for PPP projects approval, fundamental changes of the contract, criteria for economic most favorable bid choosing etc;
- **Law on Concessions** ("Official Gazette" no. 69/17) – regulates concessions granting procedure, contract, concession termination rules, legal protection for concession granting procedures, concessions policy and other;
- **Law on Public Procurement** ("Official Gazette" no. 120/16) – regulates public procurement for public or sector purchaser with the purpose for entering into agreement for purchase of goods, works or services;
- **Law on Inland Navigation and Ports** ("Official Gazette" no. 109/07, 132/07, 51/13, 152/14) – regulates inland navigation in Republic of Croatia, navigation security, legal status and management of inland waterways, transport, port harbor master's offices work and organization, supervision and other issues regarding navigation and inland ports;
- **Ordinance on Concessions Fees Criteria in Inland Ports** ("Official Gazette" 72/15) – defines criteria for concession fee and other criteria for port services concessions granting for in public and private ports.

7.4.1.2 Available and permitted PPP schemes for ports

Concession for public works in public ports, where concession is granted for construction of port facilities, according to the public-private partnership model – duration can be up to 30 years, and with consent of the Government of the Republic of Croatia up to 50 years. (Art. 144, par. 1 AINIP).

Extension/change of the concession contract is possible only within the public bidding procedure except in following situations which are defined by the Concession Law (Art. 62 Par. 1):

- when Croatian Parliament determines that national security and country protection, environment or public health is jeopardized,
- if the interest of the Republic of Croatia stated by the Croatian Parliament demands that,
- in other situations, defined with the special law.

Law on Inland Navigation and Inland Ports had not defined other special situations that would give the opportunity to change/prolong concessions contracts.

PPP contract is a long-term contract between public and private partner. Subject of PPP is building/reconstruction of a public building with a purpose of public service providing. (Art. 2 Law on PPP). Public body should deliver a PPP project proposal to Agency for the PPP which approves it. Before approval Ministry of Finance gives its confirmation.

7.4.1.3 Types of concessions and/or long-term leases in ports

Concession in inland ports can be given for:

a) port services,
b) for the right to exploit common good and
c) for public works.

The period for which concession is granted in public ports and public wharfs shall be determined based on the type of concession and planning documents based on which the concession is granted, but no longer than:

1. Concessions for public services, for the performance of public services: for nautical services up to 5 years; for transport services up to 15 years.
2. Concession for the right to exploit a common good or other goods, for other economic activities performed in the port area – up to 25 years.
3. Concession for public works where concession is granted for construction of port facilities, according to the public-private partnership model – up to 30 years, and with consent of the Government of the Republic of Croatia up to 50 years. (Art. 144, par. 1 AINIP).

Port activities include port services and other economic activities carried out in a port area. Port services:

1. nautical services: mooring and unmooring of vessels, port towing service, reception and servicing of vessel at anchorage, supplying of a vessel, crew and passengers, receipting of regular waste generated on board vessel, which includes the activity of waste collection in accordance with a special regulation regulating sustainable waste management;

2. transport services: cargo loading, unloading, transhipment and stowage, storage, depositing and transport operations depending on cargo type, preparation and grouping the

cargo for transport, services for reception and conveying of passengers, forwarding services and port agency;

3. Other economic activities involving cargo distribution and logistics, processing and improving of goods, industrial activities, including production, which render possible better economic exploitation port capacities and activities of waste usage and disposal. (Article 141 AINIP).

Besides the afore mentioned, activities in ports open for public traffic other activities may be carried out as well which are usually carried out along with port activities (Art. 142 AINIP).

Port services in private ports and private wharfs are carried out based on concession for the right to exploit common good or other goods (Art. 143. Par. 2. AINIP). The Port Authority with the approval of Ministry grants concession (Art. 143. Par. 4. AINIP).

7.4.1.4 Fees types and methodology for determination of concession or lease fees

Concession fees are defined with Ordinance on Concessions Fees Criteria in Inland Ports. The concession fee consists of two parts:

a) Fixed fee – the level of the fixed fee is defined depending on the type and volume of the port activity done in the port area of the public port. Fixed part of the concession fee is payed as a one-off annual amount.

   Fixed fee is calculated by the formula given in the Ordinance:

   $$Fix = B \times \frac{n}{k1 \times k2 \times \ldots kn}$$

   B – basis which is defined by the port authority based on the unit of the brutto size of the port area which is used for the port activity. This should be based on the economic justification study which has to be elaborated before public tendering procedure;

   k – coefficient for each group of port activities (groups are defined by the Ordinance);

   n - number of groups for concession activities.

b) Variable fee – is based on the achieved business activity by the concessionaire in the accounting period and represents the percentage of the yearly income realized from the concession activities. Minimal amount of for the variable fee is defined by the Ordinance and it depends on the type of activities. It can be 0,1% for some activities and for other 0,5 %.

7.4.1.5 Types of revenues and charges of a concessionaire or private partner

Port operator/concessionaire provides port service at a fee the maximum amount of which shall be established within the framework of port rates for particular types of cargo and particular types of services. Port rates shall be approved and published by port authority. Port rates are an integral part of the concession contract. (Art. 154. Law on Inland Navigation and Inland Ports).

7.4.1.6 Property rights transferred from the Grantor to the concessionaire/lessee

Port authority has public authorities prescribed by the virtue of the Law on Inland Navigation and Inland Ports (Art. 131.) which, beside other, includes management of the real estate owned by the Republic of Croatia which are part of port area in public ports. Port authority is also in charge for granting the right of rental, lease, establishment of easement or right to construction on public water domain in a port area.

Law on concessions determines that, if the Republic of Croatia is an owner of the land where concession is being granted, one who earns the right to concession earns a right to use of the land during the concession period (Art. 11. Par. 1. Law on Concessions).

If the owner of the land where concession is being granted is not Republic of Croatia or the concession grantor, in tendering documentation it should be stated that future port operator must settle legal property issues by himself before concession contract is signed (Art. 11. Par. 7.).

7.4.1.7 Requirements for minimum investment and performance

In the tendering procedure, except offer for the variable fee, bidder should also prepare a business plan for the period of the concession. Business plan has content defined in Ordinance on Concessions Fees Criteria in Inland Ports. One of the obligatory contents is investment policy of the bidder. Bidder must estimate his capital investments for the concession period depending on his activities and must prepare financial business model for various development scenarios (Art. 9. Par. 7. Ordinance).

7.4.1.8 Agreements for the scope and type of port services operated

Port authority has a three-year and, based on it, a yearly plan for the concession granting. In accordance with that, port operators apply to public open tender procedure for concession. Port authority is in charge for public tendering procedure conducting and implementing. The procedure can last from 40-60 days. After concession award is prepared, Ministry of the Sea, Transport and Infrastructure gives its approval on it (Art. 143. Par. 4. AINIP). Based on the decision on granting a concession, the port authority enters into concession agreement with the concessionaire (Art. 144 Par. 3 AINIP).

7.4.1.9 Rights and obligations towards existing personnel in ports/terminals

The usual practice that concessionaire has his own personnel which comes and goes together with the operator company. One of the obligatory parts of the Business plan is also personnel policy.

7.4.1.10 Maintenance requirements for infra and suprastructure during concession or lease

Infrastructure maintenance in public ports is obligation of port authority. Port operator is responsible for superstructure building and maintaining. Details are defined by the concession agreement.

7.4.1.11 Early termination conditions

Concession agreement must contain a regulation about contract partly or completely termination by the decree of the concession grantor in cases when Croatian Parliament defines that it is necessary for the public interest (Art. 72. Law on Concessions). If the contract is terminated partly, concessionaire has the 30-day period to decide to terminate contract completely.

Law on Concessions defines situations when contract can be terminated by the unilateral decision (Art. 73. Law on Concessions).

7.4.1.12 Role of port authority during the concession / lease period

Port authority provides services as entering/leaving the port and it can provide services that are necessary to be existing in the public port but only if there is not economic interest from others. Towage is done by the port operator. Parking services (for trucks) is also done by the port operator. Port authority is responsible to ensure building, access and maintenance for so called "shared/common port objects" that is waterway objects, river surface, main roads, railways and switches, electronic facilities, port outdoor lightning, port water supply network, port wastewater system, telecommunication network, signal equipment.

7.4.1.13 Treatment of land, infrastructure and equipment during concession

For the land, if the owner is Republic of Croatia, it is considered that the port operator has the exclusive right to use the land covered by the concession contract (charged within the fixed concession fee). If the land owner is other company or private person port operator must solve property rights by himself or it can be done by the port authority if it is so defined in the tender.

Infrastructure in public ports should be the property of the State and port authority is in charge for its building and maintaining. During the concession period common infrastructure objects must be accessible and used by all port users.

Superstructure is, in principle, built by the port operator. For the existing plants, when the concession contract is over, in new tender procedure could be stated that new port operator

can buy the existing superstructure from the previous one, or it could be demanded that plant must be removed, it depends on the contract and tender for the future concession.

7.4.1.14 Participation of a port authority or grantor in concessionaire's company

In Croatia, port authorities cannot take shares in concessionaire's or operator's company exercising the right to operate a port.

7.4.1.15 Risk allocation and unforeseen events

Risk allocations are defined by the concession contract. In the case of force majeure events, extreme weather conditions, floods, uncommon low water level or other situations that could not be influenced it is considered that neither contracting party is violating the contract.

7.4.1.16 Requirements for the experience of concessionaire / lessee

Previous experience and expertise can be a criterion in the tendering.

Law on Concessions states that (Art. 68): during the concession period, it is allowed for the concessionaire to make sub-contract/sub-concession with third parties for:

a) For the certain work performance, for the supply of certain, smaller amount of existing concession services;
b) For the performance of the side activities.

Possibility for the sub-contract/sub-concession should be foreseen in the economic justification study, tender documentation and in the concession contract.

7.4.1.17 Direct negotiations and unsolicited proposal

In general, concession rules are very strict from the tendering procedure upon to contract changes.

Concessions must be granted in accordance with mid-term development plans, three-year and yearly concession granting plan. So, if not planned concession for some activity/work cannot be granted. Our opinion is that administrative procedures should be more flexible and adjustable to fast market changes.

7.4.1.18 Pre-qualification requirements

Pre-qualification requirements are defined in Ordinance on Concessions Fees Criteria in Inland Ports (Art. 9). It is said that within the offer for the concession bidder should prepare and deliver a Business plan with the following content: development strategy, operational plan, tariff models, human resources policy, investment policy, financial plan. Development strategy implies goals of the bidder, relation of the concessionaire and the other port users and the market concept. Operational plan continues general activity plan divided into phases considering different scenarios. Investment policy means the foreseen level of the capital investments for the concession period and with different financial business models for different development scenarios.

7.4.1.19 Return of land, facilities and equipment after the concession/lease period

Property/land using rights for the land of the Republic of Croatia terminate together with concession contract. For the private owned land, it can happen that some contracts for the land usage does not terminate parallel with concession contract. On the other side, new port operator must solve property rights before concession contract signing.

If the extension period happens, the situation regarding the land is the same as for the time when general contract was in force.

7.4.1.20 Procedure in the case of disputes

In case of disputes, options for settlement are in most cases judicial (Administrative Court) or could be arbitration (Art. 97 Law on Concessions).

7.4.2 Main findings, messages and problems of PPPs in ports

Main findings and key messages:

- Satisfying regulation for PPP
- For inland ports PPP rules should be more detailed/specified
- Granted time for concession duration – maximum 30 years (Law on Inland Navigation and Inland Ports); 40 years according the Law on PPP with possibility for longer terms if foreseen in special law

Main issues, problems and obstacles:

- Different land owners, frequent problems with private owned land
- Strict concession rules
- No concessions on demand in inland ports
- Old infrastructure
- Complicated procedure for concessions contracts changes
- Maximum PPP contract length sometimes too short for big investments (deppreciation time…)

Solution proposals:

- All land in public port should be State owned to enable concession granting processes to be more efficient
- Concession granting rules should be more flexible

- Inland Navigation and Inland Ports Law should give more opportunities for concessions on demand
- Quality infrastructure should be built;
- Contract changes should be more flexible;
- Foresee longer PPP contract duration in special law

7.5 Serbia

7.5.1 Regulations and practice of the PPP schemes in ports

7.5.1.1 Laws, directives, by-laws and other acts regulating PPPs

In Serbia, the following regulations deal with the issue of PPP schemes, including ports:

- The Law on Public Private Partnership and Concessions (Republic of Serbia Official Gazette No. 88/2011, 15/2016 and 104/2016)
  This Law sets general principles and establish specific procedures for the award of concession and of PPP project contracts by public authorities.
- Public Procurement Law (Republic of Serbia Official Gazette No. 124/2012, 14/2015 and 68/2015)
  This Law sets terms and conditions, planning and execution procedures for public procurements.
- The Law on Navigation and Ports on Inland Waters (Republic of Serbia Official Gazette No. 73/2010, 121/20212, 18/2015, 96/2015-other law, 92/2016, 104/2016-other law, 113/2017-other law and 41/2018)
  Articles 227-227i of this Law regulate some specific issues for the concession of ports.

7.5.1.2 Available and permitted PPP schemes for ports

Article 227 of the Law on Navigation and Ports on Inland Waters allows following possibilities for port concessions:

- Concession for the providing of port services
- Concession for public works, with the right for the commercial use of executed public works when the concessions are awarded for the construction of port infrastructure and superstructure.

Duration of port concessions are set, depending on the type of the awarded concession/service, as follows:

- for the providing of port services:
  - Nautical services – up to 5 years
  - Transport (transshipment) services – up to 15 years
- for public works, for the construction of port infrastructure and superstructure with the right for the commercial use – up to 30 years.

Port Governance Agency initiates procedure for the award of the Port Concession if the value of the concession is estimated to the amount of 5.186.000 EUR or higher.

Possibilities and conditions for extension of the port concession are not set within the Law on Navigation and Ports on Inland Waters.
At the same time, Law on Public Private Partnership and Concessions enables conclusion of the new agreement, if the same procedure for choosing the private partner, prescribed by the law, is applied.

7.5.1.3 Types of concessions and/or long-term leases in ports

Concessions for providing port services and concessions for works and services are described in chapter 7.1.2.

The exact model of the concession (BOT, BOOT, BOO, DBMF, ROT….) is not set within existing regulation. However, according to the Law on Navigation and Ports on Inland Waters, port land and infrastructure are the property of the Republic of Serbia and this can't be changed in the devolution or conversion processes of public goods (article 214). Also, the right to use the land for the purpose of the construction of port infrastructure/superstructure expires with the expiration of the port operation licence/port concession. Therefore, any model which include transfer of assets at the end of contract period is suitable.

Despite the existing legal framework, concession agreements were not concluded in IWT sector in Serbia yet. Actually, there is no experience in implementation of concessions in transport sector. The exception is concession agreement for the Belgrade airport Nikola Tesla, signed at the beginning of this year, but the concession is still not effective and no experience could be derived so far.

7.5.1.4 Fees types and methodology for determination of concession or lease fees

According to the Law on Navigation and Ports on Inland Waters, article 227ž, Concession fee for port concessions consists of fixed and variable part.

Fixed part of the concession fee is based on the yearly use of the port area, and the amount should be defined in line with the economic profitability of the port given in the feasibility study for the port concession with the EIA. Additionally, this amount is increased for the amount of the fee for the operational use of the port as a good in public use (long-term lease).

Variable part of the concession fee is based on the executed business activity of the concessioner, usually defined through the income percentage.

Fee for the operational use of the port as a good in public use (long-term lease, article 229g) is being calculated based on the market value of the land of port area, set by the Ministry of finance – Tax Administration, multiplied with the correction coefficient. This coefficient is determined taking into account the geographical position of the port, level of the connectivity of the port with other modes of transport, intended use of the port area, infrastructure investment plans of public and private partner, planned transhipment volumes etc.

7.5.1.5 Types of revenues and charges of a concessionaire or private partner

Concessionaire has a right and obligation to charge fees for provided port services and port dues, without discrimination to any port user.

Fees for providing of port services depend on the type of services defined in the concession agreement and purpose of the port-terminal. They can be nautical services provided to the ship (berth, anchorage, pilotage, pusher-tugboat services, bunkering, shipchandler services etc.) or transportation services provided to the goods (loading, unloading, transhipment, storage etc.)

Port dues are set by the Law on Navigation and Ports on Inland Waters and their amount is defined by the PGA decision and approved by the Government of the Republic of Serbia.

Both revenues can be quantified by the volume and/or time spent in service provision.

7.5.1.6 Property rights transferred from the Grantor to the concessionaire/lessee

Concerning the property rights, article 218 of the Law on Navigation and Ports on Inland Waters sets the rule that the elected Port Operator/Concessionaire can act as Investor on the port land (area). For the contracted period, he has a right to use the port land and do all necessary actions for the construction of the port infrastructure and superstructure, in line with the concession agreement. Until the expiration of the licence/concession agreement, Port Operator/Concessionaire can have full owner rights on the constructed objects of the port infrastructure and superstructure, including the mortgage possibility.

After the completion, cancelation/termination or breaking of the agreement, all property rights on the port infrastructure and superstructure are transferred to the Republic of Serbia, free of any liens or encumbrances, without the obligation of the Republic of Serbia to compensate the market price of these assets to the Concessionaire.

7.5.1.7 Requirements for minimum investment and performance

In theory, some of the main outputs of the concession feasibility study should be list of requirements for the minimum investments of the concessionaire and minimum annual throughput (volumes of cargo). These requirements will then become part of the tender documentation in the public procurement procedure. The exact investments, together with deadlines for the execution and minimum annual throughput (volumes of cargo), are then considered as important part of the concession agreement.

7.5.1.8 Agreements for the scope and type of port services operated

Similar to the issue of requirements for minimum investment and performance, concession feasibility study should provide the answer to question what kind of port services are necessary. Then, the provision of identified services would be required in tender

documentation. Consequently, Concession agreement should define the scope and type of port services to be operated by the concessionaire.

7.5.1.9 Rights and obligations towards existing personnel in ports/terminals

At this point, no such experience in the Republic of Serbia. The last state owned company – Port Operator is under privatisation process, thus it is not expected to have the scenario where concession agreement could be concluded in that manner that includes existing personnel.

7.5.1.10 Maintenance requirements for infra and suprastructure during concession or lease

Concessionaire is obligated to maintain existing and newly built infrastructure and superstructure in line with the professional standards of the construction industry, as well as with the legislation which regulates construction.

7.5.1.11 Early termination conditions

Public partner can initiate early termination of the contract in the following cases:

- If the private partner did not pay concession fee more than two times in the row, or continuously do not pay concession fee in due time.
- If the private partner does not execute public works or does not provide public services in line with the accepted standards, or in line with the terms of contract.
- If the private partner does not protect public goods, nature and cultural heritage.
- If the private partner has submitted untrue information on his qualification which was crucial in the election process of the successful tenderer.
- If the private partner does not start with the execution of the contract in due time.
- If the private partner does other activities not in line with the contract.
- If the private partner has transfer his rights to the other entity without the approval of public partner.
- In other cases, in line with the Concession agreement and other regulation.

Criteria for the above reasons must be specified in the agreement.
Public partner must send the letter of intention to terminate the contract to the private partner. At the same time, public partner must set the deadline for private partner to eliminate reasons for terminating the contract.
In case of the contract termination because of the fault of the private partner, public partner has the right for the damage compensation, caused by the private partner.

Private partner can initiate early termination of the contract if the public partner is acting in such way that makes contract unsustainable, or preventing private partner in execution of the contract.
Reasons for the termination, as well as the consequences must be specified in the agreement.

Early termination of the contract by the public partner is also possible in case of public security, or if the environment or the public health is endangered with actions which are part of the concession agreement.

7.5.1.12 Role of port authority during the concession / lease period

There is no limit in the legislation for the port authority (PGA) to provide some public services. On the other hand, considering available capacities, at the moment that is not a favourable option.

Beside its role as the public body to prepare tender documentation and Concession act which has to be adopted by the Government, Port Governance Agency has obligation to monitor performance of the concessionaire. At least once a year, concessionaire has to submit a report on activities and fulfilment of contract. More precise monitoring tools and procedures should be defined within the agreement.

7.5.1.13 Treatment of land, infrastructure and equipment during concession

As stated before, according to the Law on Navigation and Ports on Inland Waters, port land and infrastructure are the property of the Republic of Serbia and this can't be changed in the devolution or conversion processes of public goods (article 214). For the contracted period, concessionaire has a right to use the port land and existing infrastructure and superstructure for the purpose of providing port services, as well as to construct new infrastructure and superstructure on the port land. Depending on the terms of contract, concessionaire has owner rights on the newly built/procured assets until the expiration of the contract. Afterwards the ownership is transferred to the Republic of Serbia.

7.5.1.14 Participation of a port authority or grantor in concessionaire's company

In case a port authority is corporatized (can work and be organized as a company), is it allowed that such port authority takes any shares (ownership) in concessionaire's company? If so, how is the equal treatment towards other port operators (of other terminals/ports) being protected?

Serbian Port Authority (Port Governance Agency) is not corporatized and as such it cannot have any shares (ownership) in concessionaire's or operator's company. According to the Law on Navigation and Ports on Inland Waters, Port Governance Agency is established as Government regulatory body, not a company.

7.5.1.15 Risk allocation and unforeseen events

There is no general rule. Risks are shared between partners and they must be clearly defined in the concession agreement.

Basically, majority of risks for the project realization are transferred on the Concessionaire, who is considered more flexible partner and has a capacity for quick response to the changes of market conditions. On the other hand, higher risk usually brings higher profit.

Similarly, Concession agreement must include specific articles about Force majeure. If the fulfilment of contract obligations is endangered or affected by the occurrence of force majeure, affected partner must notify the other partner that conditions of the force majeure occurred and prevented him to execute contract obligations. In this case, the other party will not be entitled to claims in case of the contract disruption.

7.5.1.16 Requirements for the experience of concessionaire / lessee

No requirements of this kind are set by the Law. But the tender documentation should consider requirements in terms of experience and expertise, in order to avoid risks of concluding the agreement with unqualified Concessionaire and consequently risk failure of the whole project.

7.5.1.17 Direct negotiations and unsolicited proposal

According to the article 19. of the Law on Public Private Partnership and Concessions, Public body (in this case Port Governance Agency) has a right to consider and accept proposal submitted by the interested parties for the realisation of the PPP project.

Public body has 90 days to decide if there is public interest in the submitted project proposal. If public body decide to initiate procedure for the award of the concession agreement, it has obligation to state in the public call that the project was initiated by private partner.

Interested party who proposed the project has the right submit the application through the tendering procedure, if his role in preparation of project proposal does not discriminate other tenderers. Otherwise, public body has to provide other tenderers with the necessary information to neutralise such advantage of the project initiator.

7.5.1.18 Pre-qualification requirements

There is still no experience with the concession tendering procedure, thus there is no best practise in setting minimum pre-qualification requirements.

7.5.1.19 Return of land, facilities and equipment after the concession/lease period

There is no specific procedure defined by any regulation. Also, there is still no experience with this issue.

7.5.1.20 Procedure in the case of disputes

According to the article 60. of the Law on Public Private Partnership and Concessions, agreement can contain arbitration as an option for the settlement in case of dispute. National, or international arbitration can be agreed if private partner or his owner is foreign company or person.

If the arbitration is not contracted, all disputes are under the jurisdiction of courts of the Republic of Serbia.

7.5.2 Main findings, messages and problems of PPPs in ports

Main findings and key messages:

- Lack of experience with PPP projects in general.
- No port concessions implemented, yet.
- General legislation for PPP and concession projects exist, and port concession specifics are regulated within several articles in the Law on navigation and ports on inland waters.
- Clear subject of Concession (port services or public works for the construction of the port infrastructure/superstructure)
- Further elaboration of each project has to be elaborated through the Concession act.

Main issues, problems and obstacles:

- Poor awareness of the PPP projects possibilities in port sector.
- Spatial planning, port area determination and land property issues have to be solved before preparation of the Concession act.
- Maximum contract length (according to the Law on navigation and ports on inland waters) is limited to 5/30 years. Depending on the type of the services/size of investment, these periods could be too short for sustainable business development and return of the investment.
- Concession fee is increased for the amount of the fee for the operational use of the port. Depending on the implemented methodology, this could be recognized as the same (duplicated) fee.

Solution proposals:

- Promotion of Port Concession projects.
- Increase of the maximum contract length in line with PPP Law (50 years).
- Creating a clear methodology for the determination of the concession fee.

7.6 Romania

7.6.1 Regulations and practice of the PPP schemes in ports

7.6.1.1 Laws, directives, by-laws and other acts regulating PPPs

Romanian Government *Emergency Ordinance no. 39* from din 10 May 2018 regarding public-private partnership regulates the initiation, implementation and closing of PPP. According to the law, the PPP has the objective to accomplish or, if the case, to rehabilitate or extend an objective/s which will be part of the PPP and/or exploiting a public service.

Law no. 99 from 19 May 2016 regarding sectorial procurement which regulates the modalities in which contracting authorities will implement the sectorial procurement, the procedures for award for the sectorial contract and for organizing of the contest for solutions, the specific instruments and techniques that can be used for award of the sectorial contracts, as well as the specific elements in relation with implementing the sectorial contracts.

Law no. 101 of 19 May 2016 on remedies and appeals in respect of the award of public procurement contracts, sectoral contracts and concession contracts for works and concessions of services, as well as for the organization and functioning of the National Council for Solving Complaints.

Emergency Ordinance no. 54/2006 on the regime of concession contracts for public property.
Ordinance no. 22/1999 on the administration of the ports and waterways, the use of the public transport infrastructure of the public domain, as well as the carrying out of the activities of water transport in ports and inland waterways.
Law no. 98/2016 on public procurement.

Law no. 100/2016 on works concessions and concessions
Decision no. 357/2018 regarding the approval of the List of strategic investment projects to be prepared and awarded in a public-private partnership by the National Strategy and Forecasting Commission.

7.6.1.2 Available and permitted PPP schemes for ports

A very few project in the area of territorial self-government can be identified. The basic legislation for public-private partnerships is Law no. 100/2016 on works concessions and concessions.
New legal regulation Emergency Ordinance no. 39/2018 allows for:
a) the public-private partnership contract - the public-private partnership under a contract between the public partner, the private partner and a new company whose share capital is wholly owned by the private partner acting as a project company;
b) the institutional public-private partnership - the public-private partnership under a contract between the public partner and the private partner, through which a new company is set up by the public partner and the private partner to act as a project company and, after becoming a member of the company register, acquires the status as a party to the respective public-private partnership contract.

7.6.1.3 Types of concessions and/or long-term leases in ports

The Procurement Act divide concessions to:

- Concessions of works
- Service concessions

Works contract - contract for pecuniary interest, assimilated according to the law of the administrative act, concluded in writing, by which one or more contracting entities entrusts the execution of works to one or more economic operators, where the contraption for works is represented either exclusively by the right to exploit the outcome of the works which are the object of the contract, whether that right is accompanied by a payment.

Service concession contract - contract for pecuniary interest, assimilated according to the law of the administrative act, signed in writing, by which one or more contracting entities entrusts the provision and management of services to one or more economic operators, where the consideration for services is represented either by the exclusive right to exploit the services covered by the contract or by such a right, together with a payment.

7.6.1.4 Fees types and methodology for determination of concession or lease fees

At this time, we have not implemented a concession contract for works or services in Constantza ports. Methodology for determination of concession or lease fees must be established by agreement of the signatory parties to the contract.

7.6.1.5 Types of revenues and charges of a concessionaire or private partner

The concessionaire shall not be obliged to pay any amount of money if the contract determines that the operating risk is fully taken over by the concessionaire. If the concession contract contains clauses to this effect, the concessionaire is entitled to receive a fee that can be set at a fixed level or a certain percentage of the amount of revenue received by the concessionaire from the end-users as a result of the activities carried out.

7.6.1.6 Property rights transferred from the Grantor to the concessionaire/lessee

The land will not be the object of the transfer of ownership. Only the assets build by the concessionaire may be subject to the transfer of ownership.

7.6.1.7 Requirements for minimum investment and performance

Public procurement legislation does not imply any conditions for a minimum investment, a concessionaire, or the achievement of a certain production capacity. Concession conditions are the result of prior mutual agreement between the parties, which may not be contrary to the law.

7.6.1.8 Agreements for the scope and type of port services operated

The basic legislation for port services is the Ordinance no. 22/1999 on the administration of the ports and waterways, the use of the public transport infrastructure of the public domain,

as well as the carrying out of the activities of water transport in ports and inland waterways, with further completions and modifications. (Law no. 235/2017).
The purpose of Law no. 99/2016 on sector acquisitions is to provide the legal framework necessary to achieve the purchase of goods, services and works in terms of economic and social efficiency.

7.6.1.9 Rights and obligations towards existing personnel in ports/terminals

Port regulation nr. 31732/2012 lays down general provisions on labor and safety at sea in seaports.

According to the Ordinance 22/1999 the port workers operate in the port only if they are registered and have a working card. The methodology for issuing workbooks in port and registering port workers is approved by order of the Minister of Transports. The workbooks handed over are kept by the administrations.

7.6.1.10 Maintenance requirements for infra and suprastructure during concession or lease

According to the civil code, the user is required to make all the repairs needed to keep the asset in proper use for the duration of the contract. It is also his responsibility to make housing repairs, the necessity of which arises from the usual use of the good.
General repairs are the responsibility of the owner.

7.6.1.11 Early termination conditions

For exceptional reasons related to the public interest, the public partner may unilaterally modify or, as the case may be, unilaterally terminate the public-private partnership contract, subject to the following conditions:

a) This possibility, including the categories of exceptional reasons related to the public interest, has been included in the tender documentation in a clear, precise and unambiguous way, as well as in the public-private partnership contract;
b) the modification of the contract does not alter the generic nature of the original contract;
c) with the prior notification of the private partner, the project company and the financing of the public-private partnership project.

Exceptional reasons relating to the public interest may be such as public health, environmental protection, safety and quality standards, availability of tariffs by service users, need to ensure unobstructed access to a particular public service.

If the amendment or unilateral termination of the contract causes damage, the private partner has the right to a fair compensation, determined according to the provisions of the awarding documentation and the public-private partnership contract.
The PPP contract should include a mechanism for adjusting payments to the private partner and the project company if the unilateral modification of the contract by the public partner is favourable to the private partner by reducing the work to be performed or in any other way.

In case of disagreement on the amount of compensation / adjustment, it shall be determined by the competent court. Disagreement will in no case allow the non-execution or improper performance of the obligations by the private partner or, as the case may be, the project company.

When the public-private partnership contract is terminated for any reason, the rights created by the public partner in favour of the private partner or the project company shall cease and the assets acquired or acquired by the project company and representing the object of the partnership contract public-private and public service needs to be transferred to the public partner shall be free of charge, in good working order and exploitable according to the standards applicable to the public service and/or similar goods, under the terms of the partnership agreement public-private partnerships.

Upon termination of the public-private partnership contract as a result of the expiration of the term for which it was concluded, the goods realized or acquired by the project company and representing the object of the public-private partnership contract, as well as those necessary for the public service, shall be transferred to the partner public, free of charge.

Upon termination of the public-private partnership contract for any reason, except for the expiry of the term for which it was concluded, the goods made or acquired by the project company and representing the object of the public-private partnership contract, as well as those necessary for the public service, including the goods for which the reception was not completed at the end of the works, shall be transferred to the public partner under the conditions stipulated in the public-private partnership agreement with the payment of a compensation calculated according to a mechanism provided by the awarding documentation and the public-private partnership contract.

If the termination of the contract was due to the fault of the private partner, the amount of the compensation owed by the public partner, determined under the public-private partnership contract, are deducted for the transfer of the goods.

If the termination of the contract was due to the fault of the public partner, the amount of compensation due by the public partner, determined under the public-private partnership contract, are added for the transfer of the goods.

Upon termination of the public-private partnership contract for any reason other than the expiration of the term of the contract, the public partner will be able to take over the shares or shares of the private partner in the project company in return for a price set in accordance with the provisions of the tender documentation and the contract of public-private partnership, observing the provisions of art. 38 from Romanian Government Emergency Ordinance no. 39 from din 10 May 2018. If the termination of the contract was due to the fault of the private partner, any sums owed by the private partner as compensation under the public-private partnership contract shall be deducted from the value of that price.

7.6.1.12 Role of port authority during the concession / lease period

The Romanian ports are organized on a "landlord port" model. The port infrastructure is owned by the state and administrated by a port administration (has also the function of port authority) while port operations are carried out by private companies, which provide and maintain their own superstructure, including buildings and cargo-handling equipment at the terminals.

The Romanian state conceded the port administration of Constanta, Managalia and Midia ports to National Company "Maritime Ports Administration" Co. Constanta, which is a joint stock company (80% of shares belong to Romanian state, 20% to *Proprietatea* Fund) subordinated to the Ministry of Transport. The National Company Maritime Port Administration Co. Constanta (CN APM SA Constanta) was established by Government Decision no. 517/1998[19], with subsequent amendments and completions, by reorganizing the former Autonomous Agency of Constanta Port Administration. CN APM SA Constanta is a joint stock company, designated by the Ministry of Transport to carry out activities of national public interest, as a port administration. The company fulfils the position of port authority in the Romanian seaports of Constanta, Midia and Mangalia and in the "Tomis" marina.

The Maritime Danube Ports Administration Galati founded in 1991, reorganized in the national company by Romanian Government Decision no. 518/1998, with amendments and completions subsequently, it functions as a joint stock company (79.99% of shares belong to Romanian state, 20.01% to Proprietatea Fund) and carries out activities of public interest national, as a port administration.

The main regulating act in Romania, for maritime and inland ports, is the Government Ordinance no. 22/1999 *concerning the ports and inland waterways administration, the use of waterborne transport infrastructure belonging to the public domain and the carrying out of the naval transport activities in ports and on the inland waterways*, republished, with further completions and modifications.
The provisions of the Government Ordinance no. 22/1999 shall apply in ports and inland waterways to all ships and to all shipping and related activities carried out in those areas.
Port regulations are drawn up in accordance with the provisions of Government Ordinance no. 22/1999 and the Annex to MTI Order no. 636/2010[20] for the approval of the Port Regulatory Framework. For Romanian ports the following port regulations are in force:

- Port regulation of the Romanian maritime ports under the administration of the National Company Maritime Ports Administration Co. Constanta, no. 31732 of 26/10/2012
- Port regulation of ports located on the Danube - Black Sea Canal and Poarta Alba-Midia-Navodari Channel, National Company Maritime Port Administration Co. Constanta, 2015
- Port regulation of the Romanian maritime and river ports under the administration of the National Company "Maritime Danube Port Administration" Co. Galati

[19] Decision no. 517/1998 on the establishment of the National Company "Constanta Maritime Ports Administration" - Co., published in Official Gazette no. 331 of 02/09/1998
[20] Order no. 636/2010 for the approval of the Port Regulatory Framework, published in Official Gazette no. 590 of 19/08/2010

The governance model is the corporate governance, defined and regulated by Government Emergency Ordinance no. 109/2011[21] on Corporate Governance of Public Enterprises, with further modifications and competitions. The corporate governance of public companies consists of the set of rules governing the system of administration and control within a public undertaking, the relations between the governing body and the bodies of the public company, between the managerial board/supervisors, directors/management, shareholders and other interested persons.

The port administration is the institution designated by the Ministry of Transport to fulfil the function of port authority and has as its main object the application of the port policy developed by the Ministry, the coordination of activities taking place in ports and the implementation of port infrastructure development programs. Port and/or inland waterway administrations provide the management of inland ports and inland waterways, monitor or ensure the provision of safety services in ports and inland waterways such as: pilotage of seagoing and inland waterway vessels at the entrance into, and exits out of ports between berths of the same port and inland waterways and manoeuvre towage of seagoing and river vessels in ports, and provides for the carrying out of activities ancillary to the shipping activities, comprising: maintenance and repair of the shipping infrastructure, coastal and floating signalling for navigation, maintenance dredging for providing deep water in ports and inland waterways, assisting ships to operate dangerous goods, collecting waste and sewage from ships, picking up garbage and household waste from ships**Error! Bookmark not defined.**.

The public authority seeks to satisfy a general public interest and the continuity of a service by applying the principle of financial equilibrium.

Public services such as pilotage, towage, VTS, gate/access controls or checks do not make the subject of PPP but of separate regulations. For example, the activity of pilotage is based on specific Romanian laws such as:

- OG 22/1999 (last modified on December 2017)
- Order no. 635 from 13.08.2010 for the establishment of the ports, inland waterways, zones or ports of these areas, as well as the categories of ships for which the pilotage service is mandatory, published in Official Gazette no. 590 of 19/08/2010
- Order no. 1008/2012 for the establishment of the performance of the seagoing pilotage service, published in Official Gazette no. 407 of 19/06/2012
- Order no. 547/2014 regarding the authorization of the economic operators for carrying out the activity related to the naval transport activities - the safety service of the navigation of the ships at the entrance and the exit from the ports, between the

[21] Government Emergency Ordinance no. 109/2011 on corporate governance of public enterprises, published in Official Gazette no. 883 of 14/12/2011, with further modifications and completions

same port and the inland waterways, published in Official Gazette no. 353 of 14/05/2014.

7.6.1.13 Treatment of land, infrastructure and equipment during concession

The land is public property of the state.
Only the objects built as a result of the PPP can be subject of a transfer. The transfer mode is set contractually upon termination of the concession.

7.6.1.14 Participation of a port authority or grantor in concessionaire's company

The new legislation allows contractual PPP– this is the PPP based on a contract signed between the public partner, the private partner and a new company owned by the private company whom will act as a project company.

7.6.1.15 Risk allocation and unforeseen events

The public-private partnership mechanism is characterized by the risk-sharing between the public partner and the private partner, depending on the ability of each contracting party to assess, manage and control a particular risk.

The justification study for the PPP should highlight as the main element that economically justifies the implementation of the public-private partnership project the risk-sharing structure for each alternative project implementation option. The study includes an identification of the risk categories related to project implementation, their quantification and a presentation of risk allocation alternatives between the contracting parties, depending on each party's ability to manage the risk assumed.

In the analysis of the economic efficiency of the project, a comparison of the estimated costs over the entire duration of the contract adjusted with the value of the risks is assumed in the case of the realization of the project by the public partner from public funds related to the realization of the project in public-private partnership. This comparative analysis will take into account the updated net costs of the project.

The public-private partnership agreement regulates the allocation of risks in the public-private partnership project.

7.6.1.16 Requirements for the experience of concessionaire / lessee

The criteria for technical and professional capacity established by the contracting entity may in particular refer to the existence of an appropriate level of experience, by reference to contracts executed in the past.

7.6.1.17 Direct negotiations and unsolicited proposal

Under the current legal framework, it is not allowed to initiate or implement a public-private partnership under direct negotiations and unsolicited proposals.

7.6.1.18 Pre-qualification requirements

The contracting entity has the obligation to indicate the qualification criteria in the concession notice.

7.6.1.19 Return of land, facilities and equipment after the concession/lease period

The land is public property of the state.
The equipment will be the property of the concessionaire.
The transfer mode is set contractually upon termination of the concession.

7.6.1.20 Procedure in the case of disputes

The competence to resolve any disputes arising from the conclusion and / or execution of public-private partnership contracts is established by Law no. 101 of 19 May 2016 on remedies and appeals in respect of the award of public procurement contracts, sectoral contracts and concession contracts for works and concessions of services, as well as for the organization and functioning of the National Council for Solving Complaints.

For the settlement of a dispute/appeal, the person who considers himself / herself to be injured may address either by administrative-judicial procedure of the National Council for Solving Complaints or by judicial means to the court.

During the initiation of a PPP, by accepting the complaint, the court can provide, as appropriate:

a) to cancel all or part of the act of the contracting authority;
b) obliging the contracting authority to issue an act / take the necessary measures to restore the legality, with a clear and precise indication of the operations to be performed by the contracting authority;
c) (c) the fulfilment of an obligation by the contracting authority, including the removal of any discriminatory technical, economic or financial specifications in the contract notice, awarding documentation or other documents issued in connection with the award procedure;
d) annulment of the award procedure, in case the remedy cannot be remedied.

7.6.2 Main findings, messages and problems of PPPs in ports

Main findings and key messages:

- lack of experience with PPP projects in Romania

- excessive regulation and over-tuning on certain segments, leaving other unclarified essentials segments
- The Romanian law has changed recently and provides only the framework of PPP. The guide which provides specific clarifications (and which explains the way the law should be applied) wasn't published yet.

Main issues, problems and obstacles:

- Lack of funding opportunities through PPP (reduced funds)
- poor experience in elaborating the procedures (for example: financial modelling, risks matrix) for beginning a PPP/ poor experience in implementing a PPP
- long-term lease of land

Solution proposals:

- better promotion and transparency on public – private partnership
- clarifying the segments that are not sufficiently covered in the regulation/law
- creating a clear and very well structured guide for applying the law (step by step)
- trainings on PPP funding opportunities
- creating a regional new institution responsible for tracking and assisting PPP

7.7 Bulgaria

7.7.1 Regulations and practice of the PPP schemes in ports

7.7.1.1 Laws, directives, by-laws and other acts regulating PPPs

1. **Constitution of the Republic of Bulgaria** – where the exclusive state property is identified and a possibility for establishing public-private partnership is regulated.

2. In November 2017, the National Assembly of the Republic of Bulgaria adopted an entirely new **Concessions Act** (promulgated, SG No. 96 / 1.12.2017, effective 1.01.2018), which transposed into Bulgarian law Directive 2014/23 / EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. With the new Act, the Concessions Act (since 2006) and the Public-Private Partnership Act (since 2013) have been repealed.

The Concessions Act regulates a public-private partnership where an economic operator carries out construction or provides services for the award of a public authority through a public works concession or service concession.[22]

[22] Source: http://www.minfin.bg/bg/523

3. **State property act** – dealing with issues related to acquisition, management and disposal of real estate and movable property - state property, as well as the issue of state-owned property;

4. **Municipal property act** – about acquisition, management and disposal of real estate and municipal property;

5. Maritime spaces, inland waterways and ports in the Republic of Bulgaria Act – regulates the legal statute of maritime spaces, inland waterways and ports of the Republic of Bulgaria;

6. Ordinance On Monitoring, Management and Control of Concessions adopted by Council of Ministers Decree No. 177 of 20.08.2018, omb. 70 of 24.08.2018 and

7. **Ordinance on the requirements for determining the financial and economic elements of concession** adopted by Council of Ministers Decree No. 83 of 22.05.2018, prom. 44 of 29.05.2018, in force since 29.05.2018.

7.7.1.2 Available and permitted PPP schemes for ports

Art. 6. (1) of the Concessions Act states basic PPP options: The concession is awarded for a fixed period by one or more public authorities to one or more economic operators with a long-term contract, hereinafter referred to as the "concession contract".
(2) According to its object the concessions under this law are:

1. concession for construction;

2. service concession;
3. concession for use of public state or public municipal property, hereinafter referred to as "concession for use".

(3) According to the authority which assigns them, the concessions are state or municipal.
(4) When awarded by two or more public authorities, the concession is a joint concession. The joint concession may be state - when assigned by two or more ministers, municipal - when awarded by two or more mayors of municipalities, and a joint concession with state and municipal participation - in other cases.

Ports of public transport of national importance may be granted to third parties under the procedure of the Concessions Act with a **concession for a service or concession for construction**, according to the provision of Art. 117c of the MSIWPRBA. By granting a concession for a service for which the use of port territory and / or port facilities is required, the concessionaire shall be granted access to the market of port services under Art. 117a of the MSIWPRBA. In Art. 117c, para. 3 of the MSIWPRBA is stipulated that if the concession is awarded for construction, the concession is defined as such for construction. **For both types of concessions envisaged, the port territory and infrastructure remain state-owned.**
The only form of PPP in the case of investment design of ports is the concession for construction. Duration of concessions is up to 35 years. After this period, a new concession procedure is started.

7.7.1.3 Types of concessions and/or long-term leases in ports

As of December 31, 2017 the current concessions in the country are 726, of which 102 are state concessions and 624 municipal concessions. No public concessions and joint concessions are granted. Concessions for services are 623 in total and occupy the largest share in existing concessions in the country (86%). The total number of granted port terminals is 13. (*source: National strategy for concession development 2018 -2027*)

Concessions Act regulates various forms of concession granting: BOT (Build-Operate-Transfer), BOO (Build-Own-Operate), BOOT (Build-Own-Operate-Transfer) . The type of concession that is performed in the field of river ports is the state concession for service provision.

7.7.1.4 Fees types and methodology for determination of concession or lease fees

The concession fees paid by the concessionaires in Bulgaria come under the budget of the Ministry of Finance and are redirected for different purposes. The concession is implemented with the funds provided by the concessionaire and at his own risk.

The concessionaire pays the following fees:

- **One-time payment** upon concluding of the contract - defined for each port terminal according to its scale and the financial analysis;
- **Annual concession fees** including two parts: **fixed** – dependent on the offer of the concessionaire and **variable** – usually on the basis of the increase in total net revenue versus the base net income or a fixed amount per ton multiplied by the increase in annual turnover;

The amount of the obligation to pay a concession fee shall be determined by the Grantor in each particular case depending on:
1. the fair distribution of the economic and financial benefit of the concession between the concessionaire and the grantor;
2. Achieving a socially acceptable cost of the services provided with the site of concession.

The way of determination of concession fees is described in **Ordinance on the requirements for determining the financial and economic elements of concession.**

7.7.1.5 Types of revenues and charges of a concessionaire or private partner

Art. 32. (1) of the Concessions act states that the revenues of the concessionaire from the exploitation of the construction or of the services shall be formed by payments from users, users and the grantor or only the grantor.

Port concessionaires have the right given by the force of the contract to determine and collect incomes from the port services they provide. The scope of services is defined in art 116 of the MSIWPRBA and include:

- Port handling services for freight, mail and passenger services.

- Marine technical services (mooring, supply of electricity, telephone and water) for which the use of port territory and / or port facilities is required.

- Accompanying activities.

7.7.1.6 Property rights transferred from the Grantor to the concessionaire/lessee

Main right of the concessionaire of a port include:
1. the right for exploitation of the port terminal by performing the port services and collecting revenue from them;
2. to determine the prices for port services provided and collect the incomes in his favour;
3. to obtain and use for the term of the concession the technical, financial, project (executive) and other documentation for the concession object existing until the signing of the concession contract;
4. to carry out the envisaged construction and installation works and the modernization of the facilities of the concession object according to the proposal of the concessionaire and the concession contract;
During the period of concession, the port territory and infrastructure are public state property. The grantor is the owner of all additions and improvements built on the territory of the concession site or in the aquatory adjacent to the port terminal.

7.7.1.7 Requirements for minimum investment and performance

There are requirements for minimum investments. For each port terminal requirements are set separately on the basis of the services provided, existing infrastructure, financial analysis, etc. The concessionaire is obliged to include in his offer when applying for concession the envisaged investments, which become obligatory upon conclusion of the concession agreement.

Upon approval by the Grantor, projects and programs become an integral part of the concession agreement and the concessionaire is required to fulfil the obligations arising from them.

In addition to the above, the concessionaire is obliged to manage and maintain the port terminal in operational suitability and to partially extend, reconstruct, rehabilitate and repair the object of the concession in accordance with the requirements of the effective legislation and under the terms and conditions established by the concession contract.

There is no explicit obligation for minimum annual cargo turnover of profit.

7.7.1.8 Agreements for the scope and type of port services operated

The scope of the services is preliminary set by the object of activity of the port/ port terminal. In all cases services are enlisted and are within the frames of the Maritime spaces, inland waterways and ports in the Republic of Bulgaria Act. The main subject of port concessions is the management of a service of public interest and management and maintenance of the port terminal at risk of the concessionaire against the concessionaire's right to perform the port services under Art. 116 of the MSIWPRBA. Full description of services is consisted in the tender documentation elaborated by the grantor.

7.7.1.9 Rights and obligations towards existing personnel in ports/terminals

The concessionaire "inherits" the personnel and the collective agreement either from the former state operator or from the previous concessionaire (if different). Conditions of change in the number and structure of the personnel are enlisted in the concession contract.
The concessionaire has to ensure compliance with the healthy and safe working requirements and staff capacity.

7.7.1.10 Maintenance requirements for infra and suprastructure during concession or lease

As stated above in 9.1.7, the concessionaire is obliged to manage and maintain the port terminal in operational suitability and to partially extend, reconstruct, rehabilitate and repair the object of the concession in accordance with the requirements of the effective legislation and under the terms and conditions established by the concession contract.

In other words, the concessionaire has to maintain at his own expense the entire infrastructure which he operates in appropriate condition and in compliance with all legal requirements. Constant provision of port services has to be assured for the duration of the concession.

BPICo. also has responsibility to elaborate and fulfil its investment program, which is focused on the construction, reconstruction, rehabilitation and maintenance of the port infrastructure.

7.7.1.11 Early termination conditions

Termination of concession contracts is detailed described in Section VI. of the Concessions Act - Consequences of termination of the concession contract. The section settles regulations in case of early termination with regard to compensation matters. The concession contract contains specific conditions negotiated with each concessionaire.

Usually the creation of obstacles and inactivity on the side of the concessionaire is considered to be a breach of the contract which may result in termination prior to its entry into force.

The Concessions act states in Article 151. (1) that when a concession contract is declared invalid, each of the parties must return to the other side everything received therefrom.

No compensation is owed when the contract is early terminated due to circumstances neither party is responsible for.

Art.153. (1) is in force both for early termination and in case of termination after the period has expired. After the termination of the concession contract, the concessionaire shall be obliged to deliver to the grantor the object of the concession which constitutes State property or, respectively, municipal property, as well as the accretions and improvements. The concessionaire shall not have the right to retain the object. The concessionaire fulfils this obligation within 30 days from the termination of the contract.

7.7.1.12 Role of port authority during the concession / lease period

The State Concession Policy is determined by the Council of Ministers, which approves the National Concession Development Strategy. The state concession policy is also determined by

the Council of Ministers, which approves the Action Plan for State Concessions adopted by the Coordination Council. The Concessions Act stipulates that the powers of a grantor for state concessions are implemented by the Ministers, but to ensure administrative control and to ensure the protection of the public interest, the Council of Ministers is entitled to approve the basic acts related to the award and execution of state concessions - the opening and termination procedure, as well as the modification and termination of the concession contracts.
The Council of Ministers determines by decision state fees that are collected and / or received in favor of a concessionaire of state concession, as well as the terms and procedure for their collection.

With regard to port concessions, the Minister of transport, information technologies and communication monitors and controls the concession contracts he concluded and prepares annual report on the implementation of the projects included in the Action Plan which fall within his competence and on the concession contracts they have concluded. The preparation for the granting of a concession is preceded by proposal by the Executive Agency Maritime Administration (EAMA) and the BPICo. EAMA and BPICo. assist the Minister of Transport in carrying out the control over the implementation of the concession contracts, as well as the contracts concluded for provision of port services with the state-owned commercial companies with assets – public state property. Monitoring of the activity of the concessionaire is ensured by the Bulgarian legislation in force for every port – private or concessioned. The concession itself is monitored by a commission which is different for each port terminal. The commission is determined by an order of the Minister of transport and includes members from the Ministry of transport, EAMA, BPICo. BPICo. performs many of the functions and duties that are part of the port authority in most European countries and covers the definition under Regulation (EU) 2017/352 for the "managing body of the port". Although the Company assists the Minister of Transport in exercising the control over concession contracts, BPICo, is in fact not in a position to exercise control (e.g. to take certain actions in case of failure of the obligations of the concessionaire).

Services provided by EAMA and BPICo. are not transferable to port operators (concessionaires) and have no relation to the concession contract.

7.7.1.13 Treatment of land, infrastructure and equipment during concession

Land and infrastructure of ports granted on concession are public state property. Nevertheless, the concessionaire has to insure the property in favour of the grantor. Newly built assets are transferred to the grantor and become public state property consequently.

The equipment such as – cranes, rich stackers, movable facilities, etc. are and remain property of the concessionaire.

There is a requirement for the concessionaire to own or rent technical equipment to ensure the quality performance of port services that will be performed with the concession object.

The concessionaire is the only one who has the right to perform port services within the territory of the granted port and has no right to transfer his rights to other party or to rent the port territory and infrastructure to other parties.

7.7.1.14 Participation of a port authority or grantor in concessionaire's company

No relevant practical examples for this type of concessions in Bulgaria.

7.7.1.15 Risk allocation and unforeseen events

Concession contracts usually include specific articles about force majeure. Having in mind that port terminals granted on concession are public state property, the State has the right, through the MTITC, EAMA and BPICo. to take appropriate measures to avoid the risks or to reduce the negative effect in case of unforeseen events. In these cases, the State does not owe compensations to the concessionaire. Due to the confidential character of the concession contracts, there is not enough data on this issue.

7.7.1.16 Requirements for the experience of concessionaire / lessee

Requirements include experience in the last at least 3 calendar years before the date of application and bid in activities of:

(a) the provision of port services and / or

(b) activities which are identical or similar to activities leading to the establishment and / or transport of goods and passengers through ports.

The concessionaire has to make registration in the register of port operators or another identical register under the law of the country in which the Participant is established during the last 3 calendar years at least prior to the date of submission of the offer.

Evidence of experience is required, at least in the last 3 calendar years, in carrying out the business activities - a list of the executed contracts containing the main elements of the contracts (type and volume of the goods and their destination, activities and / or services) and / or licenses, permits, confirmation letters or other.

7.7.1.17 Direct negotiations and unsolicited proposal

There are no relevant practical examples for such a procedure of direct negotiations between the port authority/ Ministry of transport and a private company. As mentioned, in Bulgaria a concession is granted by the Ministry of transport, not by BPICo. The Concessions Act regulates the competitive procedure with negotiation. Still the applicant shall submit an application and after receiving an invitation - an indicative tender proposal and a tender proposal under the award criteria. There is a commission which exclude from participation in the concessionaire designation procedure any candidate where a ground for exclusion applies or where candidate does not comply with the conditions for participation. After the invitation and exemption of the indicative tender proposals, the commission conducts the negotiations with each candidate.

7.7.1.18 Pre-qualification requirements

Requirements exist for certain amount of revenues for the last 3 financial years and carrying amount of the assets. The participant must present information about the registered capital of the company, type and number of the technical equipment owned or rented for the performance of the port services, and list of the technical experts responsible for execution of the concession contract.

7.7.1.19 Return of land, facilities and equipment after the concession/lease period

As explained in Chapter 9.1.11.

7.7.1.20 Procedure in the case of disputes

Art.154. (1) of the Concessions Act states that the provisions of the Commerce Act and of the Obligations and Contracts and Obligations Act shall apply to the unsettled issues related to the conclusion, implementation, modification and termination of the concession contract.
(2) The disputes concerning the conclusion, execution, modification and termination of a concession contract shall be settled by the order of the Civil Procedure Code.

7.7.2 Main findings, messages and problems of PPPs in ports

Main findings and key messages:

- Clear frame for PPP with regard to the ports – concessions for service;
- Change in the legislation yet has to be evaluated on practice;
- Concessions of ports are organized on high governmental level;
- Concession fees go directly to the state budget;
- EAMA and BPICo. are observation bodies and participate in commissions for monitoring and control of execution of concessionaire's obligations. The port managing body is not directly involved in the concession award process.
- Currently, concession revenue is considered to be revenue from public state property, which is why the concession fees are determined by the Minister of transport in accordance with a methodology defined by the Council of Ministers, although this public property was created as a result of an investment made by the BPICo.

Main issues, problems and obstacles:

- Issue / Problem 1: The investment in infrastructure projects does not return as revenue of BPICo. and the company does not actually have the power to exercise control over the concession contracts;
- Issue / Problem 2: Existing contracts for concession do not fully comply with the new legislation in force;

- Issue / Problem 3 BPICo. is not in position to take measures when there is failure in fulfilment of concessionaire's obligations;
- Issue / Problem 4 Outdated equipment, facilities and buildings not directly engaged in port operations remain poorly maintained or a subject of investment only in an emergency situation;
- Issue / Problem 5: There is a lack of transparency regarding the financial structure related to the management and operation of the ports, incl. as regards the concession contracts;
- Issue 6: The commercial and financial risk is bigger for the concessionaire;
- …Issue 7: Too long period after which a force majeure condition may be claimed
- It is very difficult to correct any non-compliance in the initial conditions specified in the tender dossier.

Solution proposals:

- Solution 1: It is necessary to regulate the autonomy of BPICo. in determining the amount of the concession fees (in accordance with the adopted methodology) and the port dues. BPICo. should collect concession fees and use them for further port development.
- Solution 2: It is necessary to amend the existing concession contracts in order to transpose new legislation and to terminate contracts with state-owned port operators. All ports should be operated by private companies.
- Solution 3: BPICo. should be directly involved in the entire concession procedure.
- Solution 4: It is necessary to stimulate concessionaires to renew and maintain all the assets that are granted for operation.
- Solution 5: To observe and research the feedback from concessionaires on the concession procedures and contracts. Improvements may be introduced in that could make the concession procedure and contracting more effective.

8 Specific recommendations related to PPP models

Private sector can be involved in port management and operations in various ways. These ways can be grouped into four major categories:

- outsourcing,
- restructuring,
- partial divestiture (concessions, leases, etc.),
- full divestiture (total sale of business, unrestricted private ports, very rare).

The choice of an appropriate PPP model depends not only on the port's (government's, port authority's) objectives and the legal changes required to effect these models but also on:

- the services most in need of private sector management;
- the scale of these services and the potential for creating financially viable activities;
- the current level of private sector involvement in other port-related activities;
- the capacity of the private sector to provide skilled labour and manage large commercial operations;
- the level of commitment of the government to the reforms which must accompany these models;
- the government's capacity for technical and economic regulation;
- the extent of corruption within the port and the government;
- the competitiveness of the private sector.

Typical PPP agreements used to implement any of the 4 PPP categories are shown in Table 1.

Table 9: Typical PPP agreement types for various PPP categories

Category	Agreements with limited port oversight	Agreements with active port involvement
Outsourcing	Franchises	Subcontracting labour and services Management contract Equipment leasing
Major restructuring	Capital leases Open competition	Wholly-owned subsidiaries
Partial divestiture	Concessions Long-term leases Sale of major assets (movable)	Minority equity partners Joint ventures Special purpose companies
Full divestiture	Sale of business Unrestricted private ports Capitalized long-term leases	Publicly traded stock company. Warning! 

(Source: iC, based on Asian Development Bank[23])

Outsourcing involves the transfer of specific port activities from the public sector to the private sector while permitting the port to function as an operating port. The port reduces

[23] "Developing Best Practices for Promoting Private Sector Investment in Infrastructure – Ports", Asian Development Bank, 2000.

operating costs and increases efficiency by utilizing private companies to supply labour and equipment and to perform specific services such as cargo related activities, vessel related activities, security, engineering designs, construction, dredging, maintenance, marketing, accounting, billing, data processing staffing, etc.

Four types of agreements can be used to implement this model. The first two are subcontracting and franchising. With the former, the port contracts the private sector to perform the services that the port offers to its users. With franchising, the private sector provides these services directly to the port users but under terms and conditions specified by the port.

The other two types of agreements are management contracts and equipment leases. The former allows the port to contract with the private sector to manage specific services utilizing the port's equipment and labour. The latter transfers responsibility for the maintenance, and sometimes operation, of cargo-handling equipment to the private sector. The port (port authority, or public port company) utilizes this equipment to provide services to its users.

Restructuring includes the transfer of the port's main business(es) to the private sector without transferring ownership of the port's major capital assets. The most typical arrangement is the leasing of the port's cargo-handling facilities together with the licensing of the right to provide services to private parties. The port transfers the responsibility for maintenance of the facility and for collection of cargo-handling charges. In return, the private operator pays agreed fees to the port. Under this agreement, the port no longer interacts directly with the port users but retains some regulatory authority over the quality and pricing of services. This model facilitates the strict division of port governing and operating functions. In this way of port planning and governance are performed by the public side (port authority), while the commercial (operating) functions are performed by private operators.

Alternatively, the port can form wholly-owned subsidiaries that operate as commercial enterprises. If this principle is applied, then the new port operating company must be allowed (organized) to function under the commercial (company) laws.

A third approach to restructuring is to allow open competition by private companies in the provision of the services associated with the main businesses. The public port provides the basic infrastructure, while the private companies provide suprastructure, mobile equipment and some complementary facilities.

Partial divestiture involves the transfer of assets for an extended period or joint ownership between the public sector and private investors. While few public ports have been willing, or able, to sell their land, many have entered into concession contracts of 20-40 years. Although these concessions require that the assets revert to the port, most of the investments have exceeded their technological life by the end of the agreements.

Various contractual agreements for this transfer have been established, some occurring at the beginning of the concession (build-transfer-operate agreements) and some at the end (build-

operate-transfer and build-own-operate-transfer). The port retains ownership of the land and basic infrastructure throughout the period of the agreement.

Since there is little likelihood that the port will resume operations at the end of these agreements, the port management effectively limits its involvement to administering the tendering process and the contracts. Because the period between tenders often exceeds the tenure of the management staff, there is little distinction between concessions and sale of all assets, including land.

If the port wishes to be actively involved following the divestiture, it can participate in a joint venture with the private sector. Most of these arrangements require the creation of special-purpose companies that allow the port and their private sector partners to make capital investments using project finance.

Full divestiture allows the permanent transfer of port assets along with operational responsibilities. Full privatization of a public port involves the sale of the port land. This model is very rare for a number of reasons. This model provides the public side a one-time cash injection, but the government (public partner, port authority) loses most of the influence on port business and port planning. This model usually involves a "bumpy road", can lead to a dead end and it may be very difficult to reverse the process, when/if needed.

Some countries allow the private sector to establish private ports on their own land, but primarily to handle their own cargo. This usually refers to own dedicated terminals.

Some port privatization initiatives have involved conversion of public ports to publicly traded corporations. The government retains ownership of the land but provides a concession to the corporation to maintain, operate, and expand the port. This permits private financing of port investment.

Another arrangement, which approximates full divestiture, is a long-term capital lease (50-99 years) with the lease payments made up-front. This allows the government to fulfil its obligation with regard to ultimate ownership of the land while obtaining payment for the value of the land. Even when only part of the payment is made up-front, these leases often resemble full divestiture.

8.1 Recommendations related to risk allocation

Whatever the form of a PPP, its accompanying contractual framework (and the contract itself), where the transfer of assets and/or responsibilities from the public port to the private sector (operators) must clearly define the objectives of transaction, the duration of agreement, the payment terms, and the right and obligations of both parties to the agreement. Such contract allocates liabilities and defines the procedures for extension and termination of the contract.

Table 2 contains the most common risks associated with the transfer of public infrastructure and/or services to the private operator. In general, these risks should be allocated to the party

that has the most control over the risk generating factors and/or the party that has access to methods for mitigating these risks. In real world applications, the allocation process is far more complex since both parties have determined level of involvement in the risk factors and access to different mitigation techniques. Significant part of the negotiation "package" between the port and the private sector during the tendering process belongs to the process of risk allocation. When PPP agreements involve capital investments, negotiations for risk allocation frequently include potential lenders.

Table 10: Types of risks in PPP schemes

Commercial	Financial	Force Majeure	Technical
• Traffic • Pricing • Competition	• Inflation • Cost of Capital • Exchange rate • Convertibility, Repatriation • Continuing Availability • Change in Ownership	• Expropriation • Riots, law and order • Conflicts and wars • Natural disasters	• Design Failure • Performance and Reliability • Obsolescence • Loss of Access
Regulatory	**Completion**	**Labour regulations**	------
• Rules of the Game • Responsiveness of Regulator • New Laws and Regulations • Investment Cost Recovery • Control/Ownership of Assets	• Permits and Approvals • Contracting, Procurement • Construction Delays • Cost Overruns	• Productivity Gains • Wage Growth • Restrictive Practices • Labour Confrontation • Pension Liabilities	------

(Source: iC, based on Asian Development Bank[24])

Commercial (Market) risk encompasses risks associated with the financial feasibility of the project. These include the risks that the demand will not be sufficient or will not support a sufficient level of charges and that the capital and operating expenditures will be significantly higher than anticipated. For seaports, this risk is somewhat higher than for inland ports due to the changing patterns of international trade and maritime commerce. However, the growing competition between intermodal routes and the control of the shipping lines over the routing of vessels and cargos has added to the commercial risk for both sea and inland ports. The greater this risk, the higher the projected return that the private sector will require. Despite the growing competitiveness of the industry, the ports remain a relatively safe form of investment compared to shipping or land transport, especially in the case of mass bulk cargoes. Experience has shown that all but the smallest ports can be operated profitably. Also, ports have much less revenue volatility than the transportation companies they serve. This

[24] "Developing Best Practices for Promoting Private Sector Investment in Infrastructure – Ports", Asian Development Bank, 2000.

low level of risk has made investments in port facilities and services attractive not only for port operators but also for individual investors purchasing port debt or equity.

The port authority (or public partner in general) rarely accepts part of the commercial risk. The exception occurs where the port requires a specific set of investments according to a fixed timetable. It is important to encourage timely renewal of existing facilities, expansion of existing capacity, and the introduction of new facilities. However, fixed requirements for private investment in facilities merely increase the amount, which must be paid by port users for the services required.

Private sector has ability to use capital efficiently, to obtain the maximum output with the minimum investment, and to mobilize capital quickly when there is demand for investment. Where the timing of these investments is set regardless to the level of traffic, then the port will assume some of the risk, usually in the form of a lower financial offer by the private sector.

Financial risk involves changes in basic financial conditions, which can affect the feasibility of the investment into the object of port PPP. These risks include fiscal issues, such as the inflation rate, the currency exchange rate and the convertibility of the local currency (in the case of the Danube area – currencies other than Euro), as well as the terms of financing, such as the interest rates, period, loan covenants, and availability of additional funds. The level of risk decreases where there is greater diversity in the sources of funds. It is highest where financing is limited to commercial bank loans and lowest where there is an established domestic long term capital market. The private sector will assume the risks associated with the terms of financing but will look to the port to assume some of the risk associated with the fiscal policy.

Regulatory risk encompasses risks attached to the port and the government's role in regulating the activity of the private operators. Three of these risks are:

- A change in the laws affecting port operations and investments, especially those related to health, safety and environment.
- A change in the rules and procedures for regulation of pricing and performance of port services.
- Other changes in laws or policies that affect the rights of the private party or the obligations of the government.

The first has become a serious concern in nations with evolving environmental laws affecting dredging, handling of hazardous materials, and disposal of ship wastes. The second and third involve changes in policy or political initiatives and are of greatest concern in countries which lack a well-established body of corporate law. A less important risk is that the port will, knowingly or unknowingly, assume contractual obligations where it does not have the legal right to do so. While the private sector will assume the regulatory risk and rely on a continuing dialogue with government to minimize this risk. They, and particularly their lenders, will expect the government to provide some form of mitigation. In some cases, this may be a formal government guarantee to protect against changes in the regulatory rules or a guarantee from

an MDB (any Multilateral Development Bank), for example, the Multilateral Investment Guarantee Agency, backed by an agreement between the MDB and the government.

Technical and completion risks refer primarily to the capital investments. They include the risks that the equipment and civil works will not meet the technical and performance standards and that the permitting/procurement/installation process will delay the start-up of a project. These risks are assumed by the private party, except for those activities that require government participation. The latter include securing land, providing basic infrastructure and obtaining environmental approvals. The private party will expect these to be completed prior to starting the project or for the port to assume all risks associated with the delay of these activities.

Labour risks can be considerable. The private sector requires an efficient labour force and good labour relations in order to provide good quality services and control the costs for providing these services. The private sector will assume the risks associated with labour relations, pension liabilities, and other obligations related to the provision of future port services. Usually the government assumes the risk for prior commitments to labour. At the time of transfer, the port and its labour should have reached an agreement with regard to the possibility for future employment with the port and the private sector, and the government's obligations related to outstanding pensions and retrenchment payments. The private sector should have reached agreement related to the terms and conditions for future employment. The port and the private sector should each assume responsibility for future problems arising from these agreements.

Force majeure risks are related to natural disasters, riots, conflicts, wars, etc. They should be covered under standard force majeure clauses. These would limit the obligations of the private sector under these circumstances and provide for adequate compensation in the event that these cannot be overcome. The assignment of risk and the setting of levels of compensation are developed during contract negotiation but should reflect common practice. The port, for its part, will require the private sector to provide insurance to cover part of the risk and will maintain insurance to cover other parts of the risk.

Typical risks and mitigation measures are given in Table 3.

Table 11: Typical risks and mitigation measures

Risk category	Risk source	Allocation	Mitigation measure
Technical	Effectiveness of Facilities and Equipment meeting the objectives	Port	Provide basic site data and operational information for preliminary design.
		Private partner	Undertake detailed engineering design, design review.
Commercial	Profitability and commercial sustainability which depends on the traffic growth and competition levels	Port	Introduce commercial prices prior to transfer, construct and finance basic infrastructure and facilities, provide limited protection from competition, use performance-based contracts.
		Private partner	Thorough marketing studies, subcontracting activities, obtain user commitments.
Completion	Time to develop and construct facilities	Government	Provide complementary infrastructure prior to start of project.
		Port	Obtain basic environmental and regulatory approvals prior to start of construction.
		Private partner	Careful planning and scheduling, turnkey construction with fixed deadlines.
Financial	Changes in cost of debt service or ability to meet debt service and effect on cash flow	Government	Provide guarantees for repatriation of earnings.
		Port	Recover costs through royalties rather than rents, allow foreign-exchange denominated tariffs.
		Private partner	Use of equity rather than debt to finance investments, use of long-term capital markets, and foreign exchange hedges.
		Lender	Fixed interest rates on commercial loans, adequate "step-in" provisions, compensation for early termination, repayment guarantees.
Regulatory	Consistency of government to applying regulatory framework and in keeping the "rules of the game"	Government	Sovereign guarantees, minimum regulatory framework.
		Port	Non-punitive exit provisions in the agreement.
		Private partner	Careful legal review of all areas including environment, labour, health and safety laws.
		Lender	Multilateral Investment Guarantee Agency (MIGA) and other multinational guarantees.
Labour	Overstaffing and inefficient work practices, contentious labour relations	Government	Establishing "Open Shop", break up union monopolies, introduce effective retrenchment schemes.
		Port	Absorb excess labour, reassign labour.
		Private partner	Negotiate with labour prior to the agreement.
Force Majeure	Natural disasters or civil unrest	Port	Coverage of Force Majeure clauses in agreement.
		Private partner	Adequate insurance coverage.
		Lender	Requirement for specific forms of insurance.

(Source: iC, based on Asian Development Bank[25])

[25] "Developing Best Practices for Promoting Private Sector Investment in Infrastructure – Ports", Asian Development Bank, 2000.

Another example of risk sharing, per risk categories is given in Table 4.

Table 12: Example of typical risk sharing in port PPP schemes

RISK	PUBLIC	PRIVATE
Legislative (existing and future)	Major responsibility	Sharing within defined parameters
Acquisition and Environmental	Major responsibility	Sharing within defined parameters, with public sector assistance
Permitting and Planning	Major responsibility	Sharing within defined parameters
Design and Construction		Major responsibility
Operation and Maintenance	Sharing within defined parameters	Major responsibility
Financing		Major responsibility
Termination		Major responsibility, unless demonstrably caused by public
Insurance	Sharing based on availability of commercial rates	Major responsibility
Force Majeure	Sharing based on event and availability of insurance	Sharing based on event and availability of insurance

(Source: iC)

8.2 Recommendations based on lessons learned

"One size fits all" recommendations are not possible, due to significant market and legal differences in riparian countries, especially from the point of view of the following:

- regulatory / institutional frameworks;
- available funding options through capital markets;
- local market & commercial opportunities for private partners;
- local requirements / considerations;
- public perceptions.

Having this limitation in mind, this section contains the recommendations for improved introduction of PPP in the Danube region ports, based on practical experience gained in PPP implementation in the Danube riparian countries.

Table 13: Recommendations based on lessons learned

Recommendation/Guideline	Relation to specific issue or problem	Recommended by:	Additional remarks
Port authorities should be corporatized so as to be allowed to work under company law, thus simplifying the B2B contracting procedures.		AT	
Port authorities should be allowed more autonomy in decision making on PPP processes.		AT	
PPP processes should be as simple as possible and flexible, and to include non-discriminatory features, public announcement, public procurement.		AT	
PPP should be regulated by a clear and comprehensive laws.	Very generic legislation on PPP schemes.	SK	
For PPP projects, the time reserved for preparation of operational programmes should be sufficiently long.		SK	
PPP projects should be accompanied by comprehensive information system on PPP funding opportunities.		SK	
Individual PPPs should have a specific way of determining payments		SK	
Exemption of land from priority investment property.		SK	Land owned by Public ports, jsc. has been defined as priority investment property. This means it cannot be the subject of any kind of pledge. This fact significantly limits eventual investment activities of the company.

Recommendation/Guideline	Relation to specific issue or problem	Recommended by:	Additional remarks
PPP "success stories" and its knowledge sharing should be boosted from the top level.		SK	
PPP schemes, including legislation and/or contracts must specify or set clear instructions on how the fees are paid, who pays what and who charges what from users		SK	
Property rights (from Grantor to concessionaire, and back) should be flexible and transfer of (temporary) ownership should be made possible	Currently, no property rights on objects of concession can be transferred to the concessionaire	SK	
Termination conditions, including early termination, of PPP contracts should be set well in advance.		HU	
Concessions on demand should be clearly regulated and facilitate in the legislation.		HR	
Concession agreements should be made more flexible, allowing the easier respond to market dynamics.		HR	
PPP agreements should last long enough so as to enable return of investment and reasonable profit.		HR, RS	
Land ownership issues should be solved before entering any PPP ventures.		HR, RS	Expropriation funds must be secured well before entering any PPP agreement.
Concession fees and the type of fees should be clearly specified in the legislation.		HR, RS	Not the amount, but to explain or direct what types of fees will be paid and how they are determined.
Spatial planning issues, port area delimitation and property issues must be solved before the preparation of Concession act for each port.		RS	

Recommendation/Guideline	Relation to specific issue or problem	Recommended by:	Additional remarks
PPP relate regulation should be clear and precise, but not excessive.	Certain elements of PPP schemes are "over-tuned" while other crucial elements are left unregulated or poorly regulated.	RO	
PPP schemes should be accompanied with guidelines on financial modelling, risk matrices.	Lack of experience in PPP implementation.	RO	A guideline/textbook should exist.
Training should be provided for PPP.	Lack of experience in PPP implementation	RO	Full training should be provided, including the basics, financial modelling, risk allocation and sharing, economics behind the fees, fees determination, legal issues, etc.
Creation of an regional institution for tracking and assisting PPP	Lack of experience in PPP implementation, low awareness of opportunities and benefits.	RO	
Transparency on PPP agreements and procedures should be maximized and compulsory.		RO	
Port governing bodies (port authorities and similar) should be entitled to determine the concession fees and port charges and to collect revenues from concession fees and other fees payable to the port authority. In addition, port authorities should be directly involved (if not leading it) in the concession process from the very beginning.	The investment in infrastructure projects does not return as revenue of port authority. and the company does not actually have the power to exercise control over the concession contracts.	BG	Currently, concession revenue is considered to be revenue from public state property, which is why the concession fees are determined by the Minister of transport in accordance with a methodology defined by the Council of Ministers, although this public property was created as a result of an investment made by the BPICo. (port authority).
Concession contracts must be fully in line with the existing regulation and control mechanisms should be made for that purpose		BG	
Concessionaires should be stimulated to renew and maintain all assets granted for operation.		BG	

Recommendation/Guideline	Relation to specific issue or problem	Recommended by:	Additional remarks
Concessions or any other PPP schemes should have control and monitoring mechanisms, such as performance metrics, so as to allow proper and timely reaction in case of problems.		iC	
When new ports or terminals are constructed under BOT concessions, the Grantor can consider giving the operator the exclusivity right for up to 5 years.		iC	This enables the concessionaire (operator) to build up its business without being directly confronted by a competing nearby facility. Caution should be exerted here so as to not disturb the market in an unwanted way (freedom of competition).
PPP agreements should always involve lenders, so as to increase the quality of the agreement		iC	

(Source: iC, based on inputs from project partners)

9 Conclusions

In the relatively recent past, many ports in the Danube region have been owned, managed and operated by public sector. No typical port authorities (with governing / management / administering functions) existed. Ports were managed and operated by a single company, usually state owned. These traditional methods of managing and operating ports have been abandoned in the last decade(s) and ports are largely operated as commercial entities, where governing and operating functions are strictly separated, keeping the governing and owning function (in most of the cases) for the public sector and transferring the operating function of ports to the private sector. Port operations are peculiar business and as such should be managed to achieve optimum utilization of capital. Ports are areas where significant value added is created, especially in terms of ports being nodes of the transport and supply chains. In this view, it is of extreme importance for national, regional and even global economy that the ports are operated efficiently, with their infrastructure being well developed and services adapted to the dynamic market demand.

Nowadays, in many ports the public sector has a role of planner, facilitator and regulator, while the private sector acts as operator, service provider and, in many cases, as a developer/investor. Nevertheless, this does not mean that all activities in port industry are suitable for privatisation, nor that the private sector is a suitable partner for provision of all services, particularly those related to the public interest. In many countries, public goods are inherently non-divisible and non-consumable, such as land and infrastructure. Private sector's prime goal is making profit. For that reason, port services, being divisible and consumable goods creating value added and therefore revenues, are very attractive for private sector.

On the other hand, where port projects create more societal than economic value, public investment in ports is fully justified. The combination of considerable development costs, lengthy and uncertain approval processes and high risks (societal risks associated with stakeholder acceptance of port development, political risks associated with certainty of political support and infrastructure policies and commercial risks because of long pay-back period and associated uncertainty) may lead to a very low private investor interest in port projects, even in those with a positive financial business case. The higher the value creation for users, the stronger the impact of investments on the competitive position of a port. Thus, public funding for investments which predominantly create value for users distorts the level playing field. Nevertheless, when port infrastructure investments generate only or mostly the societal value, the aim for a level playing field is not in contradiction with public funding mechanisms. All port authorities can set their own "hurdle rate", which is the minimum financial return required for investment projects. In compliance with their societal goals, public port authorities are likely to have lower hurdle rates than private port operators or even concessionaires. However, since port authorities become more and more commercialized or corporatized, they are also given substantial financial independence, hence they are not always financially capable of financing the port investments with high societal value on their own.

Therefore, for self-financing public port authorities and private port managing bodies alike, investment projects with high societal value and low economic value are not commercially viable and bankable. This type of investments requires public funding through various financial injections from the government. In addition, public funding from government budgets can be paired with long-term loans by public entities, such as the European Investment Bank or national development banks and therefore assist to make the project financially sustainable. Whatever the case may be, whenever the port infrastructure investment generates significant societal value (a.k.a. socio-economic benefits) the public co-funding of such projects is justified.

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Annexes