STUDY CASE: GIVING AWAY COMPANY TO INTERNATIONAL PARTNER

"Kontejnerski terminal i generalni tereti" from Bar

I: INTRODUCTION: The Montenegrin government has sold a major maritime company “Kontejnerski terminal i generalni tereti“, which is based in Bar and is engaged in transshipment of cargo containers and general cargoes, to the Turkish investor significantly below its real value.

The case study shows all disturbing aspects of the privatization arrangement between the government and foreign buyer, and a series of violations of laws of Montenegro to which the government resorted in order to grant concessions to the investor. Concurrently, the study shows that selling a company with bright business prospects was not economically justified, which led to giving up valuable resources to the detriment of the public interest.

II: BIRTH OF COMPANY IN 2009: In March 2008, the government of Montenegro decided to restructure “Luka Bar“,[1] the most important seaport in the country, which provided jobs for about 1,400 workers, in order to facilitate its privatization. The government's original intention was that the original company "Luka Bar" keeps the container terminal, as well as general cargo terminals and bulk-cargo terminals, while at the same time five smaller subsidiaries, which would provide port maintenance services at terminals would be established.[2] In the next phase, the subsidiaries would be fully privatized, and the state would then sell its majority stake in "Luka Bar".

However, a year later the government gave up the plan, on the grounds that the global economic crisis affected transshipment business in “Luka Bar“ and that mutual calculation of VAT between the newly established companies and the existing company would weakened their financial position. Thus, it decided to set up a separate company named “Kontejnerski terminal i generalni tereti“, which would transship cargo containers and general cargo.[3]

Prior to the separation of the company, the total share capital "Luka Bar" amounted €133,958,144, while the nominal value of a share was €2.3. The majority owner was the State holding 54 percent of the capital, followed by 23.2 percent owned by citizens, 9.2 percent was held by" Luka Bar" workers, 8.8

[1] Luka Bar Restructuring Program, March 2008.
[2] Proposal for Conditions and Disassociation with Establishing New Entity from Luka Bar, June 2009.
[3] Conclusion of Government of Montenegro No. 03-3086, on10 April 2008.

percent by privatization funds and 4.2 percent was owned by legal entities.[4] The new company "Kontejnerski terminal i generalni tereti“ was officially registered in September 2009, with joint stock capital of €65,196,596 (nominal value of a share was fixed at €1.1) and 1,109 employees.[5]

CONSEQUENCES OF SEPARATION	ORIGINAL “LUKA BAR“	NEW “LUKA BAR“	„KONTEJNERSKI TERMINAL I GENERALNI TERETI“
Share capital	€133,958,144	€68,761,548	€65,196,596
Value of share	€2.3	€1.2	€1.1
Number of employees	1,331	222	1,109

Table 1: Consequences of separation of formerly undivided “Luka Bar“ Expressed in Numbers

Regarding economic projections of the newly established company, the analyses have shown that it would earn an annual profit of €3.6 million.

III: FIRST PUBLIC BID FOR SELLING BAR-BASED COMPANY: A month after "Kontejnerski terminal i generalni tereti“ was officially registered as a separate company, at the end of October 2009, the Privatization Council invited a tender for selling 54 percent state package of shares and granting the concession for 30 years, with the obligation of investing.[6]

The participants in the bid were required to have had annually transshipped at least two million tons of general cargo or at least 100,000 containers in one of the last five years, they were required to have had generated revenues of €250 million in the last business year, and have had profitable business in the last three years. Bidders, who were able to participate in the consortium, had to meet cumulatively at least two conditions (first and third or second and third).

The deadline for submission of offers was February 2010. As there were no submitted offers for buying the Bar-based company, the bid was extended till March. However, even then it did not attract any offers, so the bid eventually failed.

IV: GRANTING STATE AID AND RECAPITALIZATION: After the failed bid, the government abruptly decided to grant the state aid to the company and increase its share through the recapitalization of €10,618,500.[7] According to the government's intention, €8.5 million for recapitalization was supposed to be secured from the European Bank for Reconstruction and Development, and the remaining €2,118,500 from the budget. All the funds were to be used for welfare programs designed to cut the number of employees in the company and purchase new equipment, all with the aim of successful privatization of the company.

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[4] Decision adopted by Board of Directors “Luka Bar a.d.” No. 0D/LXIV-5 on 27 June 2009, Decision adopted by Board of Directors No. 0D/LXIV-2 on 27. June 2009.

[5] Decision on Restructuring through Dissociation and Incorporation of a New Joint Stock Company No. 02/3e-30/2-09 on 04 September 2009.

[6] Privatization Council’s Public Invitation for Selling State Package of Shares in AD „Kontejnerski terminal i generalni tereti“; Amendments to Council’s Public Invitation for Selling State Package of Shares in AD „Kontejnerski terminal i generalni tereti.“

[7] Loan Agreement between Montenegro and European Bank for Reconstruction and Development on 20 December 2010.

The government's plan to increase the share capital was realized thanks to state aid that had been approved for "Kontejnerski terminal i generalni tereti."[8] Namely, at the end of 2010, the government requested state assistance for the Bar-based company in the amount of €2,118,500, stating that it would provide additional loan arrangement of €8,500,000. The government set out the requirement that in order to provide a total sum (€10,618,500), the company "Kontejnerski terminal i generalni tereti" had to have their own funds for investment, which was not the case. However, the government bridged "problem" in a way that imposed an obligation on "Luka Bar" to approve a short-term loan to "Kontejnerski terminal i generalni tereti" worth €2,118,500, and then the government took over claims by means of debt cession.[9] In this way, the requirement for submitting a request for granting state aid to the Bar-based company the Commission for State Aid Control was met.

YEAR	STATE AID	PURPOSE OF STATE AID	STATE RECAPITALIZATION
2010	€10,618,500	Welfare program and equipment	€6,051,803

Table 2: Government requests state aid for the company in 2010

Yet, the sate aid was granted completely illegally, since “an incentive to regional development“ was used as a legal basis, which actually means aid for creating new jobs, whereas the Bar-based company actually cut the number of employees through severance pay.[10] In addition, although it was announced in a much larger scale, the recapitalization amounted to €6,051,803 (nominal value of issued shares was €0.50 per share, the current value of the average share price on the stock market) so the company's capital increased to €71,248,399, i.e. state package of shares increased to 62 percent.[11]

V: NEW BID FOR SELLING: At the end of July 2012, the Privatization Council invited a new bid for selling the majority of the state package of shares in the port company, with a concession for 30 years. The privatization procedure included two stages: the pre-qualification phase and the submission of bids, whereas the potential bidders had to submit the required documents by 1 August 2012. At the same time, it is clear from the pre-qualification phase that three years after the first bid was invited, the state significantly lowered the criteria for selection of the buyer. Thus, the bidder had to own or oversee at least one container terminal with the annual container throughput of 100,000 containers, to have the annual transshipment of 200,000 tons of general cargo, to be able to provide (through debt or existing capital) a minimum of €50 million for the project funding, as well as to be financially sustainable.

QUALIFICATION CRITERIA	YEAR 2009	YEAR 2012
General cargo transshipment	2,000,000 t	200,000 t
TEU transport	100,000	100,000
Operating revenues	€250,000,000	/
Profit	Last three years	/
Financing	/	€50,000,000

Table 3: Government significantly lowered qualification criteria in the second bid

[8] Form of Ministry of Transport, Maritime Affairs and Telecommunication No. 04-2214/4 on 17 December 2010.
[9] Cession Agreement on 28 December 2010.
[10] Form of Ministry of Transport, Maritime Affairs and Telecommunication No. 04-2214/4 on 17 December 2010.
[11] “Kontejnerski terminal i generalni tereti“ Financial Report for 2010.

VI: SALE TO TURKISH COMPANY: In August 2012, after completing the prequalification stage, the government did not publicly announced which companies had shown interest in purchasing “Kontejnerski terminal i generalni tereti“. On 1 July 2013, having completed the qualification phase, the government acknowledged that the Turkish company "Global Ports Holding" from Istanbul submitted the only bid.[12] The Privatization Council then announced that the company offered €7.1 million for the state package of shares, as well as the investment program of €13.5 million, which would be implemented within three years. In late July, the Council announced it accepted the proposal from the sales and purchase agreement with the Turkish partner and that the offer was improved.[13] It was explained that the buyer was supposed to pay eight million euros for the state package of shares, the investment program remained at €13.5 million, whereas the additional investment program worth €7.6 million was envisaged, which would be implemented within five years, after the end of the first investment cycle.

The government sold its majority stake in the company, worth €71 million, for only €8 million.[14] Furthermore, it sold its package of shares at even a lower price than the value of the loan it took two years ago to pay employees' welfare program and purchase the company's new equipment, on the grounds to sell better the company. Also, when compared to the nominal value of the company's shares, which was €1.1 per share, it appears that the Turkish buyer paid less than 19 cents per share. It also took over the company with half the employees it used to have - in May 2012 there were 593 workers.

GOVERNMNET INVESTMENT 2011.	“GLOBAL PORTS“ SELLING 2013.	NOMINAL VALUE OF SHARE	SHARE PRICE FOR „GLOBAL PORTS“
€10,681,500	8,000,000 E	€1.1	€0.18

Table 4: Table shows who profits and who is at loss in the privatization of the Port Company

In October 2013, the sales and purchase agreement was signed and it contained a number of harmful provisions. Namely, the Agreement did not impose an obligation on the buyer to provide a performance bond for investments and welfare program, although pursuant to the sales and purchase agreement, as part of the tender documentation, the obligation of the buyer was to provide a guarantee of 100 percent of the value of the proposed investment and welfare programs.

Furthermore, when it comes to the investment program, it is not the capital investment of €21 million to be invested in the Bar-based company, but two million. The basic investment program of €13.5 million projects investing two million in the infrastructure and the rest is allocated for the purchase of the new equipment. The government has agreed that the new equipment worth €11 million is exclusively owned by the Turkish partner, which may, after the expiry of the concession period , sell it or take it away from

[12] Announcement form the session of Tender Commission of the Privatization Council on 1 July 2013.
[13] Announcement form the session of Tender Commission of the Privatization Council on 27 July 2013.
[14] Sales and Purchase Agreement of the company “Kontejnerski terminal i generalni tereti“ on 15 November 2013, with annexes.

Bar. Thus, the "Global Ports Holding" is investing in itself and there are no real capital investments in the Bar-based company. Moreover, the Turkish company has the right to put mortgage, take a loan or otherwise burden its equipment in order to secure funds, and at the same time it is entitled to acquire the ownership of the infrastructure which construction it has funded .

The conditions on the additional investment program worth €7.5 million have been met, and it will be implemented only if the Turkish partner reaches the planned container and general cargo throughput.

CONCESSIONS TO TURKISH COMPANY
1. Investment program worth €2 million
2. Retain ownership of purchased equipment
3. Free from paying annual fee in the first three years
4. Revenues from port fees go to buyer in the first three years
5. Agreement has „primacy over the law“

Table 5: Series of agreed decisions are in the interest of the buyer, not the state

VII: CONCESSION AGREEMENT' HARMFUL EFFECTS: The privatization process of the port company was parallel to granting the new owner a concession for a period of 30 years, which was the basis for adopting the concession act and signing of the concession agreement.[15] According to the Montenegrin Law on Ports, a concession act must contain a number of essential elements, such as the object of the concession, estimating investment value, duration of the concession, etc. MANS has found out that the concession act for the use of port services in "Luka Bar" is illegal, because it fails to incorporate several important aspects: an assessment of financial and technical feasibility of port services or economic activities, analysis of environmental impact assessment, parameters for determining the concession fee and in particular it does not contain a guarantee for the proposed investment program worth €21 million.

UNLAWFULNESS OF CONCESSION ACT
1. Does not include assessment of financial and technical feasibility of port services or economic activities
2.Does not include analysis of environmental impact assessment
3. Does not include parameters for determining concession fees
4. Does not include a guarantee for the proposed investment program

Table 6: Unlawful elements of Concession Act

Simultaneously, the concession act contains a series of provisions against the public interest and to the advantage of the Turkish investor. First of all, the government has committed to, after signing the concession act, determine environmental conditions of the area and fund its rehabilitation in case the permitted level of pollutants is exceeded.

[15] Concession Agreement on Port Activities, Repairs, Financing and Maintenance of Container Terminals and General Cargo between Government of Montenegro and "Kontejnerski terminal i generalni tereti" on 27 December 2013.

A fixed concession fee is determined at half a million euros per year whereas a variable fee is five euros per container, i.e. 20 cents per a ton of general cargo. However, the government has freed the buyer from paying annual concession fees, on the grounds of supporting the investor aimed at operational infrastructure, thus giving up a sum of €1.5 million.[16] The government referred to Article 58 of the concessions act which stipulates that the concessionaire may receive support aimed at achieving objectives in the public interest, but the decision in this particular case has no grounds, because it is a strategic buyer, to which the company was sold to invest in it and not to enjoy privileges at the very start. Moreover, in the first three years the Turkish company has the right to generate revenues from port fees in order to invest in the construction, reconstruction and maintenance of port infrastructure, which are, according to the Law on Ports, the state budget revenues.

Furthermore, particularly legally questionable is a provision of the concession agreement laying down that the Turkish company shall pay all taxes and duties in accordance with the applicable law, unless otherwise provided by the Agreement, which gives the agreement primacy over law. Vienna International Arbitral Centre is in charge of resolving disputes.

VIII: TURKISH COMPANY PLANS FOR PORT OF BAR: Bar-based company "Kontejnerski terminal i generalni tereti" covers an area of 518,790 square meters. According to the official data, the estimated annual transshipped general cargo was 2,139,800 tons and 50,000 containers at container terminals. Data available to MANS show that in 2008, 1.030.000 tons of general cargo and 44,704 containers was transshipped in "Luka Bar", only to decrease to 30,798 containers and 293,000 tons of general cargo in 2012.[17]

The Turkish company projects initial transshipment of minimum 42,768 containers and 479,000 tons of general cargo per year. By 2018 it plans to increase container traffic to 82,389 containers, whereas by 2020 general cargo traffic is envisaged to reach 529,000 tons. From the technical proposal of the Turkish company it is obvious that it envisages to increase container traffic five times in the next ten years reaching 254,234 tons, but not general cargo traffic, which will stay at 534,000 tons in that year, which is a quarter of the total capacity Bar's "Luka".

The data imply that "Global Ports Holding" will not develop the main asset of the port - general cargo terminal, but given the fact that cruise tourism is its predominant business, "Luka" could be turned into the cruising destination.

PORT OF BAR	CONTAINER TERMINAL CAPACITY	CONTAINER TERMINAL UTILIZATION	GENERAL CARGO TERMINAL CAPACITY	GENERAL CARGO TERMINAL UTILIZATION
Year 2008	50,000	44,704 TEU	2,139,800 t	1,030,000 t
Year 2012	50,000	30,798 TEU	2,139,800 t	293,000 t
Year 2025	?	254,234 TEU	?	534,000 t

Table 7: Turkish company will not develop general cargo traffic, even though it is its most valuable asset

[16] Conclusion on approving draft decision on granting a concession for economic use of port terminals for transshipment of containers and general cargo in the area of KO Novi Bar, published in the Official Gazette on 9 January 2014 (Official Gazette 1/14)

[17] Data for 2008 is taken from the document" Conditions for Separation of New Entity from Luka Bar", whereas data for 2012 are taken from technical offer "Global Ports Holding", which had indicators on traffic as tender participant.

IX: TURKISH INVESTOR INCREASES COMPANY'S LOSS: In 2013, when the State of Montenegro was still a majority shareholder in “Kontejnerski terminal i generalni tereti“, the uncovered loss of the company was roughly €14.4 million,[18] while in 2014, i.e. the year when the Turkish investor took over management of the company it stood at €20.2 million[19] (at the same time, the new investor renamed the company to "Port of Adria“[20]).
The company generated a balanced operating revenue as in the previous year when the State of Montenegro was the majority owner in the company (about seven million euros), but regarding a welfare program it showed extraordinary expenditure of nearly four million euros. The new owner borrowed the funds for the welfare program from the mother company "Global Ports Holding".

Loan from Global Ports Holding	Amount
Loan for welfare program	3,855,947
Loan for investing in IT system	135,691
Loan-other	44,662
Insurance obligation	115,015
Total:	4,151,315

Table 9: Loans from related legal entity in 2014

In 2014, the Ministry of Finance allowed deferred payment of tax debt in nine equal monthly installments, amounting to €1,113,602.[21]

X: THE TURKISH COMPANY: The company "Global Ports Holding" operates within the investment holding companies "Global Investment Holdings", based in Turkey.[22] The head of the "Global Investment Holding" is a businessman Mehmet Kutman, who is the biggest individual shareholder with 25 percent of the capital.
The first business activities of the holding group, which was registered in 2004, were linked to the stock exchange operations and capital markets, following which it started to invest in ports, energy, real estate market and the financial sector. According to the report of the holding group for 2012, issued capital was about €75 million, while the authorized capital was somewhat over €300 million.

When it comes to the company "Global Ports Holding", it manages three ports in Turkey: cruise ports in the cities of Kusadasi and Bodrum and cruise and container port in Antalya. The container port covers the area of 166,778 square meters. At the same time, the port has a capacity of container transshipment of half a million containers, five million tons of general and bulk cargo. The official data from financial reports indicate that Turkish company in Antalya does not use half of the available capacity.

XI: PROTEST OF EMPLOYEES IN BAR: After the Turkish company privatized "Kontejnerski terminal i generalni teret", about 250 employees pressed charges against the company for illegal payroll accounts for the period from January 2011 to February 2014, claiming that they were damaged for €2.2 million.

[18] Accurate amount of loss is €14,439.287.
[19] Accurate amount of loss is €20,237,596.
[20] Data from the website “Berza” “Kontejnerski terminali becomes Port Adria”, on 24 June 2015, http://www.bankar.me/2015/06/24/kontenjerski-terminali-postali-port-of-adria/
[21] List of legal entities and individuals who are allowed deferred payment, or paying tax debt by installments for period from 1 January to 31 December 2014.
[22] Website of Turkish company, visited at the end of 2014; http://www.globalports.com.tr/

According to them, a decision on reducing the calculated coefficient value in the gross amount from €90 to €74 was made in secrecy.[23] Moreover, they also accused the new owner of not respecting the collective agreement.[24]

After the workers filed the complaint, the court found that there were grounds for complaints and decided in favor of the injured party. However, despite the final judgments about 500 workers did not receive unpaid earnings, so in 2015 they organized protests.[25] In January 2016, one of the protests became radical when a number of the company's workers went on hunger strike in front of the Ministry of Labor and Social Welfare in Podgorica.[26]

Podgorica, April 2016
Author: MANS Investigation Center

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[23] Data for the website “Berza”, “KTGT’s Workers Filed Charges against Company”, on 6 February 2014; http://www.bankar.me/2014/02/06/radnici-ktgt-tuzili-firmu/

[24] Article “Turks Breach Agreement” from the Daily “*Vecernje Novosti*”, on 17 March 2014; http://www.novosti.rs/vesti/planeta.300.html:483131-BAR-Turci-krse-ugovor

[25] Article “Short €2.2 million due to Illicit Pay Cuts”, on 29 October 2015; http://www.dan.co.me/?nivo=3&rubrika=Ekonomija&datum=20151029&clanak=516609&naslov=Zbog%20nezakonitog%20smanjenja%20plate%20zakinuti%202,2%20miliona

[26] Article “KTGT’s Workers Strike: Staying until Requirements are Met” in Daily “Vijesti”, on 18 January 2016; http://www.vijesti.me/vijesti/strajk-radnika-ktgt-a-ostaju-do-ispunjenja-zahtjeva-870607