

Competition in the Portuguese Ports Sector

Market Study

Executive Summary



December 2018

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The port sector plays a fundamental role in the Portuguese economy. It contributes directly and indirectly to job creation, domestic investment and economic development. Promoting competition, both for the market and in the market, is crucial to increase the efficiency of cargo handling activities in Portuguese ports.

The Portuguese Competition Authority - Autoridade da Concorrência (AdC) carried out a number of analyses into competition conditions in the national port sector, covering structural, legal and regulatory aspects. In July 2015, the AdC submitted to public consultation a study on competition in the Portuguese port sector (the preliminary version of the present report).

Between April 2016 and July 2018, the AdC, in collaboration with the Organization for Economic Co-operation and Development (OECD), developed a detailed competition impact assessment of the port sector's legal and regulatory framework in Portugal. This collaboration culminated with the OECD recommendations package and the AdC Action Plan, with proposals for legislative change.¹ The present study combines an updated and more detailed take on the competition issues tackled by the market study's preliminary version with the findings from the AdC/OECD collaboration.

The present moment represents a window of opportunity to promote efficiency and competition in the Portuguese port sector. Several concession contracts will come to an end over the next 5 to 10 years. Furthermore, the implementation of an investment plan for ports (amounting to around 1.8 thousand million Euro) represents an opportunity to mitigate capacity constraints and improve intermodality conditions.

The study's conclusions and recommendations aim to inform the concession contract award and renegotiation process from a competition policy perspective, as well as to optimize the governance and port service provision framework. Notwithstanding its relevance for market competition, the identification of constraints in the articulation between ports and the remaining transport systems falls outside the scope of the study.

The above mentioned opportunity is more likely to materialize if new award procedures are favored, to the detriment of a concession contract renegotiation.

Key characteristics of the ports sector in Portugal

The Portuguese port system is composed of nine commercial ports on the mainland and seven ports in the autonomous regions (Azores and Madeira). Five mainland ports form the so-called main port system – Leixões, Aveiro, Lisbon, Setúbal and Sines. Out of these, three ports – Leixões, Lisbon and Sines – belong to the core Trans-European Transport Network (TEN-T), which account for more than 4/5 of total handled cargo and 94% of all container cargo.

All Portuguese ports have terminals able to handle break-bulk cargo. Moreover, with the exception of the ports of Figueira da Foz and Faro, the remaining ports may also handle ro-ro cargo. Lastly, all ports in the main port system, including the port of Figueira da Foz, handle shipping containers.

In 2017, Portuguese mainland ports handled approximately 89.9 million tons of cargo. The main types of cargo were liquid bulk (38%) and containers (32%). Between 2012 and 2017, handled container cargo (in tonnes) has grown significantly, with an average annual growth of 12%; followed by liquid bulk, with an annual average growth of 5%. The evolution of these two types of cargo accounts for a good part of the average annual growth of total cargo movement – 7%.

¹ OECD (2018), "OECD Competition Assessment Reviews – Portugal" and the AdC Action Plan available in Portuguese ("Relatório da AdC – Plano de Ação da AdC para a Reforma Legislativa e Regulatória de 13 Profissões Autorreguladas e para os Setores de Transporte Rodoviário, Ferroviário, Marítimo e Portuário").

Renegotiations carry risks like foreclosing the market to competitors and unjustified benefits for the concessionaire. Renegotiations might also have adverse effects on bidding strategies in new public tenders.

Not all existing concession contracts were awarded through a public tender. This limited competition for the market. In the contracts that were awarded through a public tender procedure, the AdC identified aspects where the efficiency of terminal usage can be improved.

A substantial share of port terminal concession contracts were awarded for a 30-year period. Even though contract duration should be related to the timeframe in which the concessionaire's investment can be recouped, the OECD found no significant relationship between contract duration and cumulative investments in the existing contracts.

The relevance that revenue maximization plays in port authorities' conduct and the weight attributed to the variable rents they receive from concessionaires create incentives for port authorities to increase the tariffs and rates that they charge for their services. High variable rents limit a port's ability to attract further traffic and cargo.

The current governance model assigns regulatory, management and service provision duties to port authorities, which gives rise to conflicts of interest that might impact on competition.

Competition in the port sector would be enhanced by the separation of the three port authority duties and the liberalization of port services. The AdC identified room to increase the participation of service providers by extending the use of licensing, namely in towing and piloting services. A licensing regime allows for the simultaneous activity of several service providers and a varying number of available service providers at different points in time.

In view of the identified constraints in the port sector, the AdC puts forth a set of recommendations aimed at promoting more competitive offers for port users and, ultimately, consumers. The recommendations are directed, in particular, to the Government and Port Authorities.

Redefining the port governance model

1. Clear separation of the i) regulatory, ii) port management and iii) service provision and terminal operation activities.
2. Port authorities' intervention should be aimed at the promotion of efficient infrastructure use, good port service provision and value creation for port users, with the enhancement of competition in mind.
3. Port authorities should ensure that their revenues are limited to the amount that allows them to guarantee their economic and financial sustainability and their ability to make the necessary investments in the port. To achieve this, port authorities should establish a dividend distribution policy that takes into account the port's investment plan.
4. Port authorities should be bound to publish a wide range of port efficiency and productivity indicators.

Promoting competition for the market in port terminal concessions

5. Award criteria should be objective, non-discriminatory, proportionate and in line with the concession's goals, avoiding distortions to competition.
6. In line with Directive 2014/23/EU, concession durations in excess of 5 years should be limited to the period in which the concessionaire can reasonably expect to recoup the operational investment and achieve a return on investment under normal operating conditions, while taking into account specific contractual objectives.
7. The AdC recommends that the time extension clauses of existing contracts should not be exercised in order to promote new competitive tender.
8. Concession contracts should incorporate specific clauses under which substantial modifications to an ongoing concession, as foreseen by Directive 2014/23/EU, may require an early termination of the concession and a new concession award procedure.
9. Concession contracts should result in an effective transfer of risk to the concessionaire.
10. In concession contracts that include operational and economic performance indicators, an incentive system comprising concrete bonuses and penalties related to the degree of contract compliance should be in place, so as to ensure efficient contract monitoring.
11. The opening of new tenders should be given priority over the renegotiation of existing concession contracts, given the risks of not achieving a mutually beneficial outcome.
12. Notwithstanding the above recommendation, in case of a renegotiation, the AdC recommends that lower variable are reduced (bringing a reduction of prices to the users of the services) and, as a compensation, the length of the concession contract (or the potential extension length) are reduced.

Liberalisation of access to towing and piloting port service markets

13. The general principle of open access, namely through licencing, should be applied to towing and piloting port service markets, as well as the rules on financial transparency set out in Regulation (EU) 2017/352.
14. Access to the port towing and piloting service market may only be limited under the conditions laid down in Regulation (EU) 2017/352.
15. If limiting the number of providers of a particular port service is necessary, the service provider(s) should be selected through a competitive, non-discriminatory, transparent and open procedure. On this, the recommendations issued for awarding port terminal concessions apply, with the necessary amendments.

The AdC reiterates the OECD's recommendations and proposals aimed at amending the national legislative and regulatory framework, as per the AdC Action Plan for the port sector. The main recommendations concerning other port services are highlighted below.

OCDE recommendations included in AdC Action Plan

A. In the scope of legal and regulatory barriers relating to towing services

- Applicants for a licence to provide towing services should be able to choose between financial guarantees and civil liability insurance for covering the compulsory civil liability needed to practice.
- Applicants for a licence to provide towing services should not be required to have a technical service responsible with adequate experience.

B. In the scope of legal and regulatory barriers relating to piloting services

- Pilot exemption certificate (PECs) should be issued by an entity other than port authorities.
- Port authorities should be able to define the value of PECs' emission and renewal fees based on the respective costs.
- The period of validity of PECs should be extended.
- English should be recognised as an alternative to Portuguese for obtaining PECs by foreign citizens and for accessing the piloting profession.
- Pilots should not be required to be merchant navy officers and, in particular, to have, at least, the first-pilot category of the merchant navy or equivalent.
- Trainers of candidates to the piloting profession should be extended, namely to former pilots and to shipmasters whom do not perform the piloting profession.
- A candidate to the piloting profession should be evaluated by an independent body or, at least, by individuals whom have not trained him.

C. In the scope of legal and regulatory barriers relating to the provision of port labour

- The market for the provision of port labour should be opened to temporary work agencies, by adopting legal provisions establishing that such activity can be performed by any company as long as it fulfils the necessary rules.
- The specific legal regime of port labour companies should be revoked and the general regime of temporary work agencies should be applied instead.

D. In the scope of legal and regulatory barriers relating to shipping agents

- Shipping agents should be able to choose between financial guarantees and civil liability insurance for covering the compulsory civil liability needed to practice.
- The legal provisions which establish the shipping agents' duties concerning human and material means should be revoked.