

# Authority publishes findings on competition in port sector

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### Introduction

The Competition Authority recently published its preliminary findings on a study entitled "Competition in the port sector" for public consultation. The authority also announced that it had conducted surprise inspections on the premises of companies located in four Portuguese ports (Viana do Castelo, Lisbon, Setúbal and Sines) as part of an investigation into suspected cartel activity – allegedly in the form of market partitioning – in the port services sector.

The two initiatives – albeit of a different legal nature – illustrate that the port sector is under close scrutiny from the Competition Authority. The public consultation is expected to result in a set of recommendations aimed at promoting competition in the sector.

### Analysis

The authority's analysis begins by highlighting symptoms indicative of the port sector's inefficient operation – in particular:

- the country's poor rating in international indexes that measure logistics performance and competitiveness in terms of the quality of the port network;
- the average negative results of an inquiry undertaken by the authority with the primary users of national ports – most strikingly in terms of price and value for money;
- the absence of productivity indicators for ports and port terminals; and
- the significant levels of profitability of some national ports when compared to Spanish ports.

The authority has also identified a set of competitive conditions in the port sector that could be the cause of the symptoms identified and highlight a reduced level of competition in the market. These competitive constraints include:

- the high level of supply-side concentration;
- the high installed capacity utilisation rate of port infrastructures and the consequent risk of bottlenecks;
- the existing differentiation between port infrastructures, which reduces the possibility of competition between them;
- high barriers to entry;
- the vertical integration of certain port operators with, for instance, vessel owners and shipping agents; and
- the absence of countervailing buyer power among users of port infrastructures.

### Recommendations

Based on the authority's analysis, five preliminary recommendations are outlined.

### ***Governance model***

The first concerns the port sector's governance model. The Competition Authority recommends a clear separation between:

- regulation, which should be handed over to the Authority for Mobility and Transport; and
- the activities of port administration, the provision of services and the operation port terminals.

As a shareholder of port administrations, the state should establish guiding principles to guarantee:

- the efficient use of infrastructure;
- the level of performance of port services; and
- value generated for port users.

This implies promoting effective competition between port terminals and port service providers and reducing rents charged – which should be limited to what is strictly necessary to guarantee the economic and financial sustainability of port administrations and the ability to finance their investments.

Further, the authority recommends that port administrations disclose indicators of the efficiency and productivity of ports and port terminals, which would allow for a comparison of performance between national and international ports.

### ***Concession model***

The second recommendation addresses the concession model, as concession award proceedings and concession contracts are the main instruments for promoting market competition. Concession proceedings and contracts should be defined in a manner that guarantees effective competition between candidates and a more frequent return of the concession to the market (eg, by setting the contract duration strictly in terms of the timing required to recoup the investment or by establishing the possibility of early termination of the contract). For existing concessions, any applicable renovation and extension clauses should not be exercised, so that contracts can be put out to tender more quickly. Further, increased relevance should be given to criteria relating to the regulatory or competition risks of a given award when assessing all relevant proposals.

The most relevant recommendations issued in this respect are generally in line with the principles and solutions of EU Directive 2014/23/EC on the award of concession contracts – its adequate implementation at a national level should suffice to comply with most of the recommendations.

### ***Rents and the rent models***

The third recommendation – regarding rents and the rent model – suggests a reduction in the level of rents charged by port administrations to concession holders (port operators) and a modification of the rent model, according to which the relative weight of variable rent should be significantly reduced.

The reduction of variable rent is expected to reduce marginal or variable costs for port operators and thus increase their ability to charge lower prices for services, whereas a lower proportion of variable to total rent has the advantage of decreasing the level of risk undertaken by port administrations regarding demand fluctuations and increasing the incentives of port operators to attract additional cargo.

The authority further suggests that these principles should apply in the renegotiation process for existing concession contracts, and that any reduction of rents charged should include a reduction of the concession's duration as a countermeasure.

### ***Liberalisation of access***

The fourth recommendation concerns the liberalisation of access to port services. The authority recommends that the general rule should be – in line with the principles established in the Proposal for European Parliament and Council Regulation 2013/0157 regarding the legal framework for

access to services and the financial transparency of ports – freedom of access to port services. Further, any limitations should be the exception and justified only in case of:

- restrictions in available space in the port (in which case at least two service providers for each type of service – selected pursuant to competitive tenders and for short-term contracts – should always be permitted); or
- the need to fulfil public service obligations.

### ***Pass-through of costs***

The fifth recommendation concerns the pass-through of costs along the value chain. Any cost reduction achieved upstream should translate into a cost reduction downstream, so that ultimately users benefit from the reduction. This could be achieved, for instance, by linking incentives to performance. Performance indicators and specific objectives in terms of cargo movements and the level of utilisation of infrastructure should be included in the contract (along with the respective penalties and premiums), and should be subject to effective monitoring by port administrations.

### **Comment**

The recommendations proposed correspond to an attempt by the authority to promote a profound intervention in a sector that is of high strategic value to the national economy.

The deadline for public consultation – initially September 15, which covered a large part of the summer holiday period – was extended until the end of September 2015. No timeframe for next steps has been made public.

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