

Ports & Terminals

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GETTING THE
DEAL THROUGH

Portugal

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General

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

There are five key ports in Portugal: Aveiro and Douro & Leixões in the north; and Lisbon, Setubal and Sines in the south. Apart from these, there are also ports in the Autonomous Regions of Madeira and Açores and some other small ports that are managed by the four main ones: Viana do Castelo, managed by Douro & Leixões; Figueira da Foz, managed by Aveiro; and Algarve, managed by Sines. Recently the government has put in place a joint board of directors to manage the ports of Lisbon and Setubal in what can be seen as a first step to joining these two ports, something that has been under discussion for a long time.

The key ports have capacity for all sorts of facilities, although they tend to specialise in some types of cargo ahead of others. Douro & Leixões and Lisbon have the capacity for all types of cargo, having specialised facilities for containers, oil and gas, bulk, general cargo and cruises. Sines is the main Portuguese port for oil and gas, but also has the largest container terminal. Setubal specialises in ro-ro and general cargo. Sines is also Portugal's main transshipment port, stretching its influence into the centre (Estremadura) and north (Galicia) of Spain.

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

The main ports in Portugal underwent a large change in their organisation model around 20 years ago.

The main port authorities were transformed from state integrated public entities to limited liability companies, although at the moment they are still wholly owned by the state.

The model mostly used is the landlord model, where the port authority is responsible for regulation and infrastructure and operations are carried out via public service concessions or licensed private operators.

Discussions are currently ongoing as to whether the model should evolve to a mix of private service port and landlord, transferring the overall responsibility for certain terminals from the port authority to private operators, including construction and maintenance of the infrastructure. It should be noted that for the moment the legal regime in Portugal prohibits the privatisation of ports, allowing only the concession regime.

In the last five years the ports have also undergone a management reform, with the main ports in charge of the smaller ports, as stated above. Thus Douro & Leixões, Aveiro and Sines manage some small ports (respectively, Viana do Castelo, Figueira da Foz and Algarve). Also, Lisbon and Setubal are managed by the same board of directors, giving them a unified policy and investment strategy. The government felt that they are complementary to each other and not far apart, having the same territorial influence. They remain autonomous ports for the moment, although with a joint board.

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

There is a special member of government responsible for ports (the Sea Minister) who supervises all the ports and oversees the main

investment policy. The general economic regulation of ports, namely the fixing of tariffs, is also done by an independent government body (Autoridade da Mobilidade e dos Transportes).

Notwithstanding, each port authority has full autonomy to define its own strategic goals within the general policy lines defined by the government.

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

Environmental policies are becoming more and more important for port authorities. For instance, with the Decree-Law No. 165/2003, which implemented the Community Directive 2000/59/EC in Portugal, the port authorities became liable for the management of the waste brought by ships and their loads. Some ports have been designated as 'green ports', taking into consideration the environmental measures in the way they do business. Also, the Water Law (Law 58/2005, which implemented the Water Directive) is mandatory to keep the port environments clean and to manage them in order to preserve the water conditions and the environment.

All public service concessions have obligations to the private operator to keep the terminal environmentally aware.

The Port of Setubal has been recognised as an EcoPort by the European Sea Ports Organisation (ESPO), recognising the excellent environmental quality of the port.

Legislative framework and regulation

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

The existing legal framework is under revision, but still prioritises the traditional public service contracts. Notwithstanding this, the newest concession in place (Lisbon) tends to include most of a PPP model contract. The older concession contracts in all ports are undergoing revision in order to include some PPP structures.

This change shows the need to modify the present law, which dates from the 1990s (Decree-Law No. 298/93 and Decree-Law No. 324/94).

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

Nowadays, the Autoridade da Mobilidade e dos Transportes is the regulatory entity for all ports.

Also, the Ministry of the Sea, in coordination with the Ministry of Planning and Infrastructures and the Ministry of Finance, supervises the port authorities.

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

The main powers are of supervision and economic regulation, having influence on tariffs and investments.

8 How is a harbourmaster for a port in your jurisdiction appointed?

The harbourmaster is a naval officer appointed by the National Maritime Authority.

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

The ports are subject to general competition rules, national and European.

The Portuguese Competition Authority is presently making a general review of the way in which ports comply with competition rules and the services that are offered. A preliminary report from the Competition Authority was published in 2015, but was severely criticised, mainly about the lack of knowledge of port operation on the part of the Authority, and is being revised. However, this shows that the competition rules already apply in the ports. In the past the Competition Authority has fined towage services for anticompetitive practices.

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

There is a general law on port tariffs (Decree-Law No. 273/2000), but all port authorities have their own regulations on tariffs for operations alongside the general rules set by the law. The tariffs are fixed by the port authorities after having been approved by the AMT (the Regulator).

In specific terminals under concession contracts, the concessionaire fixes the tariffs after consultation with the port authority, normally taking into consideration the rules fixed in the contract.

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

The ports afford free access to all because they are in the public domain and are managed by the state through port authorities under limitations on safety and security.

Notwithstanding this, the services supplied in the ports are limited to those operators and suppliers that apply and fulfil the legal requirements, including public service obligations. The port authority passes on these public service obligations to private operators through concession contracts (port terminals) and licences (other port services).

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

There are no examples to date of such a joint venture. In the past, the state managed all the terminals through the port authorities, and today the terminals are managed by private operators through public service concessions. Nevertheless, the law allows for the possibility of joint ventures in ports as they are permitted by law and occur in other sectors.

Portuguese law does not impose a specific percentage threshold.

13 Are there restrictions on foreign participation in port projects?

There are no restrictions on foreign participation in port projects.

As Portugal is a full member of the European Union it cannot impose any restrictions on the participation of another member of the EU. For countries outside the EU it can restrict their participation, but it has never done so.

Currently the largest container terminal in Portugal is managed and operated by a Singapore company (PSA), in Sines. Several terminals in the Lisbon port are managed and operated by Turkish companies (Yildirim in containers and GPH in cruises).

Public procurement and PPP

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

The legislation governing procurement and PPP is general.

Procurement is regulated by the Public Procurement Code (PPC) approved by Decree-Law 18/2008, of 29 January 2008, which incorporates in the Portuguese legal system Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council of 31 March. The decree regulates both the procedural rules applicable to public tenders and the substantive regime governing the execution of public contracts, including specific liability rules. The PPC is under revision in order to adapt the 2014 Directives on public procurement. It should be noted that ports are included in the specific utilities rules included in the PPC.

In turn, PPP are regulated by Decree Law No. 111/2012, which states the general standards applicable to the intervention of the state in the definition, design, preparation, launch, award, modification, supervision and monitoring of PPPs.

There have been some discussions about the application of the general PPP law to ports as they have a specific regime, but the principles of the PPP law are applicable.

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

There is no room for unsolicited proposals or for privatisation, as stated above. The procedure used for port concessions is a public tender regulated by the PPC.

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

The criterion is always the best proposal for the public interest. Within this are included the criteria of the best technical solution and the best capacity to attract cargo and revenue to the port authority. The value of the investment to be made and the duration of the concession, along with other criteria specific to the tender, may also be considered.

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

In the tender to be launched the Authority proposes a model contract. The public body can only deviate from its terms as specified in the tender and when it is allowed a negotiating procedure. It is common to allow some deviations negotiated within the tender procedure.

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

There is no need for a specific law in our jurisdiction, but some approvals (eg, permits) and licences (eg, environmental) are needed.

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

As a rule, until now the port concessions have not been greenfield projects, as they have been designed and built by the government or port authority, and what is transferred to the private operator is just the operation and management of the port terminal. In specific cases where it is included in the concession for the improvement of the terminal, the model used is build-own-operate-transfer (BOOT).

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

The applicable law establishes a general term of 30 years. This period may vary according to the value of the investment, because the term should allow recovery of the amount invested. Discussions are ongoing as to whether this term should be increased to at least 50 years, as other European countries have already done, taking into consideration the huge investment that a port operation represents especially if the government wants to transfer more responsibility to the private operator, such as the enlargement of the terminal and the necessary dredging.

21 On what basis can the term be extended?

As a rule, the initial term of the contract can only be extended in cases expressly stated in the contract. The EU rules and the PPC limit the possibility to extend the term of the concessions.

Nevertheless, even the PPC in some cases allows the extension of a concession as a mechanism to rebalance the finances of the concession in the event of a change of circumstances. The extension is made considering the investments made and the time necessary to conclude the return on the investment, for example.

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

As a rule, the fees are a mix of fixed land rents and revenue shares. The fees usually are subject to indexation. The new model of recent concessions (Lisbon) establishes a formula that benefits an operator that

attracts more cargo to the port and allows more risk partnership with the port authority.

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

No guarantees are given by the government or the port authority, so the operator assumes all the demand and financial risks.

As the model contract in use is a public service concession contract it is granted with exclusivity for the terminal.

Port development and construction

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

The construction licence is given by the port authority with the concession contract. An environmental licence may also be needed on a case-by-case basis. The time needed to obtain the said permits depends on the specifics of the case, but as the construction part of a concession is normally limited the environmental approval assumes low relevance and is easily obtained. That is not the case when the private operator assumes the construction or expansion of a new terminal, because the environmental impact assessment is then important and can take some time to obtain, with no assurance that it will be (as happened in one recent case in Lisbon).

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

Normally the public authority (government or relevant port authority) undertakes all of the construction, access and dredging of the port.

Sometimes the contract transfers that construction responsibility, or part of it (dredging and maintenance) to the private operator.

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

The operator does not have to adhere to any specific construction standards, although it normally assumes the responsibility to use best practice and best engineering methods. The past experience of the operator in similar projects is a criterion for awarding this type of contract.

The operator may engage any contractor it wishes, unless otherwise specified in the contract.

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

In the case of delays or defects, the party responsible for construction of the port can be held liable for the said delays or defects and the contract can ultimately be terminated. A penalty may also be applied for each day of delay.

Port operations

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

No specific approvals are required, as the right to operate a terminal is given by the concession contract. The concession contract allows the port operator to commence operations immediately following construction.

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

The port authority may provide to port operators the use of equipment, workers and facilities, and electricity and water supplies. It may also supply pilots, towage and moorage. According to law the port authority has the obligation to supply waste services. These services are charged according to the regulations approved by each port authority. Some of these services may be supplied by private operators licensed by the

Update and trends

As stated, Portugal is undergoing a revision of its concession laws as applicable to ports. The concession contracts are under renegotiation in order to introduce new and more friendly modern clauses to attract more investment and cargo. The main aspects to be considered are the duration and remuneration clauses. The general rules on port authority tariffs also need to be revised to accommodate the same scope.

With regard to the organisation of ports, the current trend is to have fewer ports, but with much greater size and investment capacity, allowing them to attract major cargos, namely transhipment and European and Mediterranean short sea.

port authority, and in this case the tariffs are established by the private operators.

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

The government or relevant port authority does not give any commitments in relation to access to the hinterland (rail, road etc). Those are obligations of the government. All the ports in Portugal have good access by road and rail, and a new rail track is under construction to link the ports of Lisbon, Setubal and Sines more directly to the Spanish hinterland of Estremadura. Logistics terminals (dry ports) are also ready to serve all the ports, managed by either private operators or a government-owned company.

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

The port authorities oversee terminal operations through their inspection powers given by law and by the concession contracts. The port authority is responsible for the whole port management, even if it is operated by private operators.

In a major emergency, a port authority can suspend the activities of a private operator. However, our jurisdiction allows only that the public entity suspend or even terminate the contract or the licence if the cessation of activity is imminent or if a serious disturbance in the management of the terminal occurs that adversely affects the regularity of the operation. A legal procedure must take place that allows the private operator to be heard and to present its case. In the event of suspension the port authority can only maintain the suspension for a year, after which it has to resume the contract or licence or terminate it.

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

The port authorities may access the port for inspection and the operator cannot deny or hamper this access under any circumstances. The port authority should liaise with the private operator in order to avoid any disturbance in the management of the terminal that could involve the responsibility of the authority.

The takeover of port operations can happen in two possible cases: default of the private operator or reasons of public interest. In the event of default, the authority can seize the concession (*sequestro*): the authority may take control over operations if a serious disturbance occurs, and in this case the operator must pay the authority operating expenses if the value is higher than the operation revenues. In the public interest situation, there are two possible scenarios: concession redemption (*denuncia*), in which the authority has to communicate its intention one year in advance and only takes place if half of the contract period is completed; and termination (*resolução*), in which the authority may terminate the concession for specific reasons. In the last two cases the operator has the right to fair compensation.

Finally, in the event of a major emergency the authority may take control of port operations. If this happens the contract is suspended.

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

It is normal to establish a penalty system in the contract depending on the seriousness of various criteria.

Another available remedy is concession seizure, referred to in question 32.

The port authorities can also terminate the contract in the event of non-fulfilment of the main obligations. In this case, the terminal will revert to the authority without any compensation and the authority can take over the terminal without needing the consent of the operator.

Finally, the operator is in any case subject to the general rules of civil liability and is responsible for all damages incurred.

In case of a licensee the authority can revoke the licence and apply a fine prohibiting the operator from working in the port for some years.

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

After the concession terminates the operator must transfer all the assets necessary to operate and maintain the terminal to the port authority, including those that it received at the beginning of the contract. These assets shall revert free of charge and in good working condition, without any right to claim compensation or retention by the operator.

Investments in replacement equipment or technological updates made by the operator during the last ten years of the contract which the authority has expressly approved and agreed to reimburse are excluded from the above rule, normally being reverted with the right for just compensation. The price to be paid is established taking into consideration the value of the non-redeemed asset.

The concession contract can foresee the terms under which the reversion and transfer of assets will take place, as the law is only subsidiary and the parties to the contract can overturn the general rule.

Miscellaneous

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

The port operator must establish an SPV with the sole object to operate and manage the terminal. The SPV will be the concessionaire and it must be incorporated in Portugal.

36 Are ownership interests in the port operator freely transferable?

The ownership in a port operator is freely transferable, but subject to prior authorisation by the public entity. This will not be denied it unless there are sufficient relevant grounds.

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

The PFI model has not been used widely in port concessions to date, but it is a model quite frequently in use in Portugal in roads, hospitals and other big infrastructure projects. The Portuguese PPP law is generally applicable to ports and if this model of financing the construction and operation of terminals is to be chosen in the future it is easily applicable. There are some cases where the PFI model has already been applied to ports, and in those cases direct agreements were put in place (Setubal and Lisbon).

The only problem is that not all the assets transferred to private operators can serve as security, as some are public domain. Normally the contract allows the private operator to use some assets as securities or it specifies that to serve as securities the port authority must authorise it previously. Another problem is that by specific EU rules the assets owned by the government or port authority and transferred to the concessionaire cannot be used as security, as this would transfer the risk from the private operator and thus would place a burden on the government deficit. Therefore, it limits the securities to those that are built or acquired and owned by the private operator.

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

The agreements to construct or operate a port facility have, as a rule, specific clauses related to the modification of the contract and the terms under which the said modification is admissible. The modification of a contract is limited by law (including the PPC and EU law) and can only happen in the event of a substantial variation from the initial conditions of the contract and will be very limited in scope. If these rules are not followed the contract is deemed to be terminated and a new contract must be put in place after launching a new procurement.

Termination of the contract can occur in the event of a severe breach or for reasons of public interest.

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

The remedies available to a government or port authority for contractual breach by a port operator result, as a rule, from the contract: penalties for each day of breach and responsibility for damages. Also, if the breach is considered serious, the contract or the relation between the parties can be terminated.

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

As a rule, it is governed by the laws of Portugal. However, the parties may consider some parts of the contract to be ruled by laws of other jurisdictions, as normally happens with the financing clauses and



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agreements (English law). That has an impact in dispute resolution clauses – namely place, language and law ruling arbitration.

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

Usually disputes between the government or the port authority and the port operator are solved by arbitration, as set forth in the contract. Subsidiary law ruling arbitration, including international arbitration, is in place in Portugal (Law No. 63/2011, 14-12) that incorporates the best international practice.

Parties can resolve disputes in the general courts or in other alternative ways, such as conciliation, mediation or dispute boards.