

Executive summary

This competition assessment review was carried out by the OECD, in co-operation with the Brazilian Competition Authority (CADE), to identify rules and regulations that may hinder the competitive and efficient functioning of markets in Brazil in the civil-aviation and ports sectors.

This review analyses regulatory barriers to competition in these two sectors, which are essential for the transport of goods and people, both in the domestic and international markets. The civil-aviation sector plays a fundamental role in the economic development and in the national integration of a large country as Brazil. Similar to the ports sector, it plays a fundamental role in Brazil's foreign trade, as water transportation is responsible for the flow of most Brazilian exports and imports.

This report submits 368 recommendations that can mitigate harm to competition. The OECD has also evaluated the impact that the implementation of specific recommendations would have on the economy and a conservative estimate finds that the savings would be between BRL 700 million to BRL 1 billion a year for the Brazilian economy.

Civil aviation

Brazil has the largest air transport market in Latin America and the Caribbean. Before the COVID-19 pandemic, civil aviation represented 1.4% of GDP and 1.5 million jobs. In the 1990s, Brazil began a process of deregulating the civil-aviation sector, aiming to promote competition by fostering entry and investment; this process accelerated in the early 2000s. Continuous regulatory changes in recent years, such as allowing airlines to explore any desired route and to set ticket prices freely, has contributed to intense sectoral growth.

The key recommendations submitted by the OECD to Brazilian authorities include:

1. Clarify the legislation and ensure proper enforcement towards a genuine open-access regime for jet-fuel supply infrastructures, especially at large international airports that handle more flights with larger, more fuel-consuming aircrafts, where access to hydrant systems can give those firms using them a competitive advantage compared to others using refuelling trucks. Open access should be based on transparent, objective and non-discriminatory criteria, while regulation still ensures other public policy objectives, such as safety, security, environmental protection and recoupment of the investments. Any dispute arising from the enforcement of open-right access should be decided by an independent third party.
2. More effectively monitor prices and the quality of commercial services at airports. For that purpose, ANAC could build upon the current consumer surveys provided for in airport-concession contracts and consider including indicators related to the price-performance ratio of commercial services as a quality factor in future airport concession contracts. Any suspicious behaviour of anti-competitive practices should be duly notified to CADE.
3. Adopt non-exclusivity clauses for commercial contracts in airports, except in justified situations subject to prior ANAC approval.

4. Require airport operators, when defining the lease terms of commercial-concession contracts, to take into consideration the minimum level of investment that will be incurred by the contracting party. If no investment is required, the contract should have short terms.
5. Consider harmonising all airport-concession models, so as to ensure that all players are subject to the same regulatory environment, especially the tariff-regulation regime. Ideally, improvements implemented in the most recent concession rounds should be retrospectively applied to previous concession contracts whenever possible.
6. Implement a structured approach to determining the technical-experience requirements for airport-concession auctions. These requirements should be at the lowest possible levels and based on objective, proportionate and technical criteria, such as the size and characteristics of the airport.
7. Ensure that an entity (or related entities) is not allowed to control competing airports, either in already-awarded or future concessions. Minority holdings should only be accepted in exceptional cases and barred from participation in corporate governance.
8. Consider relaxing the nationality requirement for aircrews, especially for international flights. This should include ANAC issuing guidelines on the transparent, objective, and non-discriminatory assessment of requests for temporary admission of foreign crew members when national labour is short. ANAC should also consider the possibility of extending the flexibility period for longer than six months if no sufficient qualified Brazilian workers can be found in that time frame.
9. Consider reviewing flight-time and duty-period limitations applying to crew members, taking into account the regulations established in other jurisdictions, but also relevant scientific principles and knowledge, past experience, cultural issues and operational nature, in line with ICAO recommendations.

Ports

Ports in Brazil have recourse to two models of management, each with a specific legal framework: the landlord model for public ports and a model for fully privatised ports (private-use terminals – TUPs). In 2021, Brazil had 125 terminals in public ports and 170 TUPs, responsible for handling 34% and 66% of the cargo in Brazilian ports, respectively.

The key recommendations submitted by the OECD to Brazilian authorities include:

10. Abolish the Pool of Port Workers (OGMO) monopoly for the registration and supply of port workers. Brazilian authorities should discuss the necessary considerations for the design of new legislation with unions. In particular, Brazilian authorities should take into account both the unpredictability of the demand for casual port workers and the flexible requirements of today's shipping industry. The outcome should be that Brazilian authorities enable port operators to assign workers and allow them to choose workers who best meet their needs. In addition, Brazilian authorities should introduce flexibility in the set number of workers required to perform each task.
11. Remove OGMO's exclusive management of port workers' training and allow port operators to choose the training most appropriate for their workers.
12. Abolish the single rotation shift for pilotage, in line with the possibilities offered in the Pilotage Law to give pilots a choice of how to provide their own services. In this case, Brazilian authorities should define another way of identifying which pilot will provide the service to ensure service competition between the pilots and their entities while guaranteeing safety. This new scheme should take into account pilot fatigue, exercises for the renewal of pilot qualification, and ensure uninterrupted availability of pilots. Alternatively, if Brazilian authorities maintain the current rotation shift established by the Directorate of Ports and Coasts (DPC), some form of control over prices of

pilotage services would seem appropriate. If this option is chosen, any price-setting body should be independent and use objective criteria in its decisions.

13. Address the lack of legal certainty related to the port fees for the handling of ship containers . Brazil should consider clarifying the current legal framework with transparent, non-discriminatory, and objective provisions to charge port fees including those related to the SSE/THC2 fee.
14. Introduce more flexibility in the rules which lay down the conditions and procedure for delegation of the leasing process to port authorities (currently, Ordinance No. 574/2018) to give more autonomy to port authorities when choosing lessees, whether through tenders or simplified processes for non-complex contracts, while remaining subject to federal legislation on public procurement and port-leasing contracts.
15. Review the regulations and put in place more efficient and speedy processes for contractual changes regarding the use and improvement of space in public ports. Brazilian authorities should also consider the creation of more instruments such as the agreement of investment risk, which make it easier for the operator to change the contract at its own risk with the possibility of a later rebalancing of the contract in cases of public and private interest.
16. Consider reducing the number of bodies involved in the authorisation process to build and operate port facilities. In addition, consider implementing provisional instruments that authorise a request after a fewer number of steps in the authorisation process to allow the requesting entity to move forward without having to wait until the completion of the entire process.



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