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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

on the application of the Airport Charges Directive

1. Introduction

Airport charges are paid by airport users (airlines) for the use of airport facilities. They are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight and fund in part or entirely the provision of runways and associated areas and passenger and cargo terminal areas. Although airport charges are levied on airlines, the cost is ultimately borne by the passenger or freight customer since these charges form part of the final price which they pay.

The share of airport charges in airlines' total costs varies based on the type of carrier and the airports served.¹ They make up around half of the average airport's revenues² and given the current difficult cost climate for airlines, they are under closer scrutiny than ever. Airport charges are also linked to the level of service offered to passengers. For low cost and short haul operations in particular, the level of airport charges might be one of the determinants in airlines' decisions on which routes to fly. The availability of competitively-priced and quality airport infrastructure for all types of airline is clearly of key importance to a successful aviation sector in the EU.

The Airport Charges Directive³, which the Member States were required to transpose to national law by 15 March 2011, is a specific EU legal framework for airport charges at all airports in the European Economic Area and Switzerland with more than 5 million passenger movements per year and at least the largest airport in each Member State. Around 70 EU airports fall within the scope of the Directive; representing just under 80% of EU passenger traffic. This group represents a wide variety of airports, ranging from medium-sized airports making a key economic and social contribution to their respective regions, to the largest hub airports in the EU linking destinations worldwide. The Directive sets common principles for the levying of airport charges and in this connection it aims to: provide for greater transparency on how airport charges are calculated; ensure that airports do not discriminate among airlines in the application of airport charges (unless justified by well-defined public policy considerations); establish regular consultation between airports and airlines; and establish in each Member State an independent supervisory authority (ISA) tasked with settling disputes between airports and airlines on the level of airport charges and overseeing the correct application of the measures taken by Member States to comply with the Directive.

In this report, the Commission provides an overview of the application of the Directive in the Member States and indicates specific findings with regard to possible problems in its

¹ According to ACI Europe (2007) airport charges account for around 4 to 8% of major EU carriers' operational costs. In its March 2013 Economic Briefing IATA claimed that all infrastructure user charges combined accounted for 14.4% of the cost of air transport (2011 figures). According to IATA airports' aeronautical charges make up some two thirds of these infrastructure user charges.

² Steer Davies Gleave, Evaluation of Directive 2009/12/EC on airport charges; September 2013

³ Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges; OJ L 70, 14.3.2009, p. 11.

implementation with a possible follow up for future analysis. The report draws upon a recent study carried out for the Commission for this purpose⁴. This study has analysed whether there has been any impact on airport charging practices which could be attributed to the Directive and also includes a comprehensive consultation of stakeholders to canvas views on the implementation of the Directive, the results achieved and areas requiring further attention. Such stakeholders include the independent supervisory authorities established by the Directive, other competent authorities in the Member States, individual airport managing bodies and airlines as well as their representative associations.

2. Market developments

Over the last decades EU airports have gone through an important transformation which also has an impact on the setting of airport charges. While public authorities used to view major hubs and smaller airports primarily as infrastructure to respond to connectivity needs, these airports are developing into businesses that are expected to make profits and attract private investors.

This process has involved the "corporatisation" of publicly-owned airports and, in some cases, privatisation. This can be attributed to different changes. Firstly, the role of the state in the provision of transport infrastructure is changing from one of provider to one of enabler. Second, airports, which are in many cases profitable, are today regarded as pursuing a commercial activity. Lastly, public authorities have been eager to attract private investors both to expand infrastructure and provide income for the state. While still predominantly publicly owned,⁵ airports across the Union are currently witnessing a growing involvement of private investors.

However, given the strategic character of airport infrastructure, Member States have typically retained a degree of direct interest or control, either through direct ownership/concession of airport operations and/or via a system of (national) economic regulation. The latter is the case in particular in Member States where large airport hubs are located due to these airports' 'price-making' capacity.⁶

At the same time, a shift in bargaining power between airports and airlines to the benefit of the airlines can be observed at certain – generally smaller – airports with the growth of low-cost carriers (LCCs). Such carriers, due to their flexibility, can not only switch the routes they serve but also switch the airports at which they base aircraft. Airlines review the performance of their existing routes continuously with a view to seeking out new destinations and improving the attractiveness and profitability of their operations. This has the effect of

⁴ Steer Davies Gleave, Evaluation of Directive 2009/12/EC on airport charges; September 2013

⁵ According to Airport Council International Europe, 77 % of airports were fully publicly owned in 2010, while 9% were fully privately owned, see Airport Council International Europe: The Ownership of Europe's Airports 2010.

⁶ The largest EU airport hubs are located in the UK, France, Germany and the Netherlands.

introducing competition among airports in different geographical locations and increasing the pressure upon airport managers to offer more favourable conditions, including lower airport charges. Added to this, an excess of airport capacity has also brought about competition among airports, further increasing the bargaining power of the airlines in certain instances. Airports claim that they are faced with increasing competition⁷ and not only as a result of the impact of LCCs at regional airports. However, the degree of competition among airports appears to vary and is dependent upon largely local factors. Airlines argue that passengers tend to switch airlines rather than airports, on the basis of competing air travel products.

3. Achievements of the Directive

By early 2013, all Member States had notified their full transposition of the Directive. However, formal transposition is only the first step. The correct, practical application of the Directive and its impact on airport operators, airlines and the broader aviation sector are of also of great importance. At this early stage, the Commission finds that a number of the main objectives of the Directive have already been achieved. However, there are specific problems regarding transposition and application in a number of Member States and these are to be resolved by drawing Member States' attention to identified problems and via the infringement procedure where necessary. The most important features of the Directive that will be analysed in this chapter are:

- Regular **consultation** of airport users by airport managers on the operation of the system of charges, on the level of charges and the quality of service and consultation of the airport users on plans for new infrastructure (Article 6 of the Directive).
- **Transparency** by the airport manager concerning the basis for setting charges including requirements for information flow to and from the airport users (Article 7 of the Directive).
- **Non-discrimination** between airport users (Article 3 of the Directive).
- The establishment of an **independent supervisory authority (ISA)** in every Member State to ensure the correct application of the Directive's measures and to intervene in case of disputes on airport charges (Articles 6 and 11 of the Directive).
- **Flexibility** to allow airport managers to offer differentiated services to airlines (Article 10 of the Directive).

The Directive builds upon policies on airport charges developed since 1974 by the International Civil Aviation Organization.⁸ It should be understood against the background of

⁷ Airports Council International (Europe), 'Airport Competition in Europe', June 2012.

⁸ See recitals (9) and (10) of the Directive, Cf. ICAO's Policies on Charges for Airports and Air Navigation Services (ninth edition, 2012)

the relevant bilateral air service agreements, drafted in accordance with the ICAO standard clauses, pursuant to which the EU and its Member States are generally required to allow airlines of the third country a fair and equal right to compete in providing international air transport. In this connection, the comprehensive air transport agreements concluded with the US and Canada, for example, also contain specific provisions with regard to user charges, including airport charges, namely to ensure that such charges are reasonable and reflect the cost of providing the services provided.

3.1. Consultation

Views among stakeholders vary regarding the provisions on consultation. Although a fair number of airports already had a consultation mechanism in place, the Directive has brought more clarity as to the timelines and format of the consultation. At airports in some Member States, for example Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Luxembourg, Slovenia, Spain and Sweden, mandatory consultation was only introduced as a result of the Directive being transposed. In addition, the Directive imposed mandatory consultation procedures for the first time at those airports in the UK falling within the scope for the Directive which had not hitherto been subject to the economic regulation applied at the largest UK airports.

Airlines question the application of the consultation arrangements, arguing airports should do more to engage with airlines rather than merely provide information. Airlines would like their opinions not only to be heard but also be followed. A further issue raised relates to the timeline and the tight deadlines given in some Member States for airport users to respond in the consultation process.

Among airlines, satisfaction with the consultation varies depending upon the Member State of the airport. While airlines at larger airports in the UK and the Netherlands are generally satisfied with the consultation procedure, airlines were critical as regards the process in Spain, Italy, Greece and Hungary, in particular about the time given to respond and the fact that the consultation often rather takes the form of an information session.

Among airports, those with a wider base of airport users (Amsterdam Schiphol, Heathrow, *Aéroports de Paris* and Frankfurt) are generally satisfied with the consultation process and find it useful to have codified guidelines at EU level. On the other hand, concerns about the formality of the process and the administrative burden associated with organising a formal consultation procedure are cited by some of the smaller airports subject to the Directive. Several airports criticised the uncertainty caused by the limited degree of participation by airlines and the procedures for appeals on airport charges, without any time limit for airlines. The Directive also provides for a duty for airports to consult airport users before plans for new infrastructure projects are finalised, although the procedure to be followed and the minimum requirements are not specified.

The Commission regards airport users' confidence in the consultation process as essential. It is therefore important that they have a reasonable expectation that their views will be heard and responded to, in accordance with the relevant provisions of the Directive. To ensure the practical effects of those provisions, this can mean, as the case may be, that the consultation should be organised in a way which provides for a suitable degree of interaction (including, for example, pre-notification of meetings or deadlines for input). The Commission also attaches importance to a constructive engagement of airlines in the consultation process.

Complaints received by the Commission with regard to the financing of major infrastructure expansion at Dublin and Rome demonstrate the importance of a functioning consultation system given the impact on future airport charges. Related to consultation on new infrastructure is the question of infrastructure prefinancing, the system whereby today's airport users are levied higher charges in order to fund tomorrow's infrastructure (as opposed to raising funding through issuing new equity or through borrowing, for example). Research carried out for the Commission indicates that prefinancing is possible in the majority of Member States, although the conditions applicable are usually unclear in the Member States. The Commission has identified two Member States (Portugal and the Netherlands) where the law is clear that airports may not finance infrastructure in this way. Of the remaining Member States, which presumably do allow prefinancing, the Commission has identified nine Member States operating specific rules. It is not clear to which extent the guidelines adopted by ICAO, which detail a number of safeguards which should apply where prefinancing is used, are consistently applied in practice. The introduction of additional and more specific means of ensuring adequate consultation and achieving greater transparency under the Directive with regard to prefinancing may require further consideration.

3.2. Transparency

In order for a consultation on airport charges to work properly, it is necessary that the airport users being consulted have access to sufficient information in order to be able to provide input. Airport users, airports and Member States value the clarity on transparency provided by Article 7 of the Directive, but airlines tend to find the requirements of the Directive too general. Airlines criticise, in particular, the broad level of detail in the cost information to be provided and the fact that the Directive does not require the provision of information on airports' commercial activities. Airlines also consider that the information provided may not be sufficiently detailed to allow them to determine whether or not charges are cost-related.

Satisfaction of airlines with the transparency of information differs among airports and among Member States. Airport users were generally satisfied with the situation at UK airports and at Amsterdam Schiphol where they consider that information is provided in a transparent manner and on a regular basis.

Among those airports where airlines are not satisfied, airlines cite the application of transparency requirements for airports in Italy, Hungary, Belgium, Germany, Greece, Cyprus,

Latvia, Spain, Sweden and Finland. Airport users indicated a lack of detailed cost data as the most common concern in these cases.

The Directive allows in principle Member States to choose single or dual till charging systems for their airports. In a single till, all airport revenues, including from non-aeronautical activities such as retail and car parking, are taken into account when setting airport charges. The dual till system separates the aeronautical and non-aeronautical revenues and only takes into account the aeronautical revenues when setting airport charges and is generally favoured among airports on the grounds that non-aeronautical activities are not monopolistic. Hybrid systems are also in operation. Airlines typically argue in favour of the single till on the grounds that it lowers the airport charges for airlines, which are responsible for bringing passengers to the airport and which therefore drive the non-aeronautical revenues.

Whilst not expressing a position at this stage for or against one particular system, the Commission considers that a greater degree of supervision may in some cases be required from the ISAs to ensure that fundamental principles of the Directive are upheld in the case of airports at which the dual till applies, taking into account the economic context in which the airports operate and the possibility to establish their tariffs in a competitive environment. For example, it may be appropriate to ensure that the cost of airline incentives designed to boost traffic at an airport are applied in a way which does not have an impact on the charges paid by airlines not benefitting from the scheme. Moreover the Commission considers that, as a general rule, any change from single till to dual till, or vice versa, is a fundamental change to the system of charges in so far as it may have a significant impact on the level of charges applied. Such a change should be accompanied by a consultation together with possible appeal to the independent supervisory authority in accordance with the relevant provisions of the Directive, which provide for consultation when there is a change proposed to the level *or system* of charges.

3.3 Non-discrimination of airport charges and incentive systems

Non-discrimination in the application of airport charges among airport users is of key importance. It does not, however, prevent the modulation of charges, as long as this occurs in accordance with the requirements set out in Article 3 of the Directive, i.e. the modulation should be for issues of public and general interest, including environmental issues, and the criteria used in this respect should be relevant, objective and transparent. Although airports claim there is no discrimination in the application of such modulations, airlines complain about the large variety of modulation in charges that in their view results in discrimination among airport users.

Modulated charges for environmental reasons, such as relating to emission and noise charges, are a widespread phenomenon which appears to be uncontroversial. The same goes for modulation relating to peak/off peak times, which a limited number of airports apply. The

modulation of airport charges on environmental grounds may become increasingly important given the pressure to improve aviation's performance in this area.

Modulation of charges according to domestic or EU destinations of flights is subject to the case-law of the European Court of Justice.⁹ In its rulings, the Court has held that discriminatory taxes or charges are contrary to the freedom to provide services as set out in Regulation 1008/2008¹⁰. In so far as differentiated charges are not justified on the basis of the Article 3 (issues of public and general interest, including environmental issues) they could be regarded as making the provision of services between Member States more difficult than the provision of services purely within one Member State. The Commission has recognised that passengers subject to border controls may generate higher costs than other passengers, thereby justifying a higher passenger charge¹¹. Subject to compliance with the requirements of Article 3 and the need to ensure proportionality, modulation could therefore apply between Schengen and non-Schengen destinations.

Modulation of airport charges designed to increase traffic, based on new routes, increased frequency and/or passenger numbers ("incentives schemes") are, on the other hand, controversial among stakeholders. Network and regional air carriers consider that volume discounts and growth discounts for new and existing routes favour low-cost carriers and newcomers. On the other hand, discounts for transfer passengers at hub airports are unpopular with low cost carriers which generally do not offer connections. Such discounts may be significant, for example amounting to more than 50% at Amsterdam Schiphol. The extent to which such transfer discounts are granted on a purely economically-justified basis is not always clear.

The Commission will encourage the sharing of experience among Member States, with a view to promoting best practices taking into account the possibility for airports to set their tariffs on the basis of economic criteria, and in compliance with the provisions of the Directive. A balance has to be reached between providing airports with an appropriate degree of commercial freedom, for the benefit of airports but also airlines and passengers, and safeguarding the position of carriers which may not have the power to moderate airports' pricing behaviour. Improving the transparency of incentive schemes could be an important first step.

3.4. Remedy procedure and independent supervisory authorities

The Directive has brought clarity by obliging the setting up of an independent supervisory authority (ISA) in each Member State, although establishing them has sometimes been a slow process. However, with the establishment at the end of 2013 of the *Autorità di Regolazione*

⁹ Ruling of 26.06.2001 Commission/Portugal (C-70/99) rec. p. I-4845, point 20; ruling of 6 February 2003, Stylianakis, C-92/01, Rec. p. I-1291, point 23 onwards.

¹⁰ OJ L 293, 31.10.2008, p. 3.

¹¹ State aid case E4/2007

dei Trasporti in Italy, the last Member State to designate its ISA, all Member States have now completed this step. The most common model chosen by the large majority of Member States is to grant the ISA functions to existing aviation administrations. Some Member States have granted ISA functions to existing regulators (such as Ireland, UK, Sweden, Finland) and two Member States have granted ISA functions to competition authorities (Netherlands, Spain). Airlines in particular are satisfied that the Directive provides for a clear remedy procedure in case of disagreement on the setting of the airport charges but it remains to be seen how the role of independent supervisory authorities develops. On the side of the airports, concerns were raised on the increase in appeals procedures by airlines to the ISA and the suspensive effect of appeals. The most important issues surrounding appeals seems to be that the Directive does not expressly provide for a statutory deadline for airlines to submit an appeal and the suspensory effect of appeals, which might have the effect of holding up investment in infrastructure.

One of the core issues raised, especially among airlines, is the perceived lack of independence of the ISA. In particular, the perceived imprecise definition of the degree of independence required of the ISA was considered a concern in the case of Member States with a public shareholding in airports where a ministerial department is the ISA or where the department exerts a degree of political or administrative control over the ISA. Effective independence of the ISA in accordance with the requirements of Article 11 of the Directive is crucial, *inter alia*, for the consultation and remedy process to function properly and lack of independence undermines the achievement of the objectives of the Directive.

Where Member States have transposed Article 6 (5) (a), according to which airport charges are set or approved by the ISA itself rather than the airport managing body, the rules on appeals set out in paragraphs 3 and 4 of that Article do not apply. This generally means that the only remedy available in case of disagreement is bringing a legal action before the competent national courts in accordance with the relevant rules of national law. Airlines consider this problematic since the cost of such actions may be prohibitive. A significant number of Member States, such as Austria, Belgium, Cyprus Denmark, France, Germany, Hungary, Ireland, Netherlands and the UK have chosen to make use of the option offered by Article 6 (5) (a) of the Directive for some or all of the airports located in their territory and covered by the Directive.

Airlines have also raised concerns on the passive role of some ISAs based on a possible lack of expertise or human resources. On average, only one full time equivalent is employed in each authority to deal with matters related to the Directive, mainly consultation, oversight and dispute resolution procedures. This in turn means that the additional administrative cost for the Member States imposed by the Directive is considered minimal in all Member States, although the level of activity of each ISA diverges. There is evidence that a limited degree of visibility for the newly-established ISAs has translated into fewer complaints being received by such bodies compared to authorities which were already handling airport charges matters prior to the entry into force of the Directive.

The Commission will continue to monitor the implementation of the Directive with regard to the independence of the ISAs established in the Member States. On a related issue, the Commission notes the evolution in ownership and management models found at airports subject to the Directive. There is a risk in some cases that long-term concession agreements, under which airport charges are determined for a long period in a binding manner by agreement of the concessionaire and the responsible public authority but with no consultation of airport users, may render the Directive's provisions on consultation and the intervention of the ISA inoperative. Vigilance is required to ensure that in so far as airport charges are concerned, concessions, or public private partnerships, are not concluded in such a way so as to deprive airlines of their full rights under the Directive or that the Directive is otherwise infringed.

3.5. Differentiation of services

Services available at an airport may be tailored by the airport managing body to the needs of different airport users and may vary in terms of quality and, therefore, cost. The Directive provides that any airport user wishing to use the tailored services or dedicated (part of a) terminal should have access to this terminal or part of it. Where there are capacity constraints upon the differentiated service, access is to be determined on the basis of relevant, objective, transparent and non-discriminatory criteria. This has provided a framework for airports to match their offer to airlines' sometimes diverse needs in terms of services at the airport. It is not uncommon for airports to differentiate their charges accordingly based, for example, on the level of service provided in terms of stands and air bridges. On the other hand, only a small (but growing) number of airports have specific terminals dedicated to domestic and international routes, or to low-cost and full-service operations. The low-cost terminals are sometimes significantly cheaper in terms of the charges payable by airlines (up to 30% in some cases).

Airports have sometimes encountered difficulties in tailoring their services and establishing the criteria to justify the difference in charges, as required by Article 10 of the Directive. The Commission will continue to monitor the application of this Article by the Member States in order to identify, if necessary, possible remedial measures.

4. Conclusions

Although it is too early to draw definitive conclusions on the impact of the Directive due to its recent entry into force, preliminary conclusions can be drawn. The main positive effects mentioned by the market players are increased transparency in defining airport charges at the largest European airports, better consultation, and the setting-up of independent supervisory authorities in each Member States and remedy procedures.

Whilst the Directive appears to have made an important contribution to improving the process for setting airport charges at the larger European airports at which it applies, its application

needs to be further monitored. Several infringement procedures have been initiated and the Commission will act, as appropriate, in other cases on the basis of complaints received or *ex-officio*.

More specifically, the establishment of the independent supervisory authorities with the necessary degree of independence as required by the Directive is crucial to the attainment of the Directive's objectives. The role of the authorities in all Member States will be addressed as a priority issue.

The Commission also intends to create a forum of ISAs, meeting regularly to discuss issues related to the enforcement of provisions of the Directive in the Member States. The objective is to help these ISAs to develop their working methods and knowledge by sharing experience and best practice. The first meeting will take place on 13 June 2014.

Lastly, it will also be necessary to reflect on to what extent the objectives behind the Directive might need to be revisited in the future as a result, for example, of changes in the competitive landscape in which airports operate. Similarly, the Commission will need to determine whether the attainment of the Directive's objectives could be better served by revising the Directive. Some of the specific issues which could merit further examination, such as the use of incentive schemes, differentiated services, are discussed in sections 3.1 – 3.4 of this report and the Commission will use the group of ISAs to review the findings of this report.

For the aviation sector in the EU to respond to the challenges it faces, to give good value for money services to passengers and to continue to provide intra-EU and global connectivity, it is essential that competitive airport services be available to airlines and passengers. As EU airlines integrate ever more closely with airlines from other regions, through the development of open skies agreements, carrier alliances and other forms of airline cooperation, the issue of discrimination between users of the airports becomes even more important. It is important to ensure that airport charges are applied in a fair manner so that airlines of all nationalities can fairly compete at European airports, in the interest inter alia of connectivity. It is also necessary to allow airports to grow their businesses in a dynamic way, which will contribute to the further development of a competitive European aviation sector.