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**Brussels, Belgium**

**TO:**
**Members of the Thessaloniki Forum of Airport Charges Regulators**
**Aviation Policy Unit**
**Directorate-General for Mobility and Transport**
**European Commission**
**Brussels, Belgium**

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# Airport comments for the working group drafting the paper on "Concession agreement and ISAs supervisory powers and duties"

## Contents

## 1. The working group's paper impacts airports by generating uncertainty about the terms already agreed and approved for concessions

The working group has set out in its terms of reference that it will focus on "*the consistency of concession agreements [and similar frameworks with analogous effects] with ISAs supervisory powers and duties.*"

The working group has defined "*similar frameworks with analogous effects*" as "*For example, where similar provisions are contained in law rather than in a contract.*"

The terms of reference states that "*The paper will analyse the challenges raised by a potential overlap between concession agreements and ISAs powers.*"

ACI EUROPE suggests that the approach of the working group, which seems to pre-suppose an incoherence between the use of concession agreements and economic regulation, could be improved. Concession agreements for the operation of infrastructure are wide-spread and have a long-established track record. The inherent scepticism expressed in the Terms of Reference about concession contracts and especially so-called "*frameworks with analogous effects*" seems to seek to expand the role of Independent Supervisory Authorities (ISA) and to directly challenge governmental decisions which have already been reviewed for legal compliance and social value creation.

This does not say there is no role of ISAs to examine concession contracts. However, it should also be understood that concessions in advanced European economies have been granted under a mandate that is defined by the existing legal and regulatory framework, including the EU Airport Charges Directive.

### 1.1. A balanced approach or a finger on the scales?

In an objective policy environment, ACI EUROPE would be less alarmed by this paper. However, the discussion of the ownership and economic regulation of airports is heavily shaped by other parties.

The association representing network airlines in Europe, IATA, has long complained about concessions for airport operations, alleging that governments seek to maximise the revenue received from granting of concessions or privatisations, or that concessions do not provide airlines with an adequate voice in consultations on investment, or that concession payments to governments for long-duration concessions are onerous.

IATA's views were expressed in two reports in 2018. IATA and Deloitte in June 2018 published airlines' views on the guidelines for governments considering public-private partnerships (PPP) and other forms of privatization programs for airport infrastructure – the booklet called "**Airport Ownership and Regulation**", covered the options for models of privatization; best practices for the process of privatization; and the importance of regulation of privatized airports. In December 2018, IATA and Deloitte published guidance material for governments considering a concession-based privatization for airport infrastructure – the booklet called "**Balanced Concessions for the Airport Industry**", advocating for so-called "win-win" outcomes for concession contracts. Both documents include many sensible suggestions, but the IATA/Deloitte papers have a number of shortcomings.

Most significantly, the IATA/Deloitte claim of seeking a balanced concession outcome is contradicted by the elevation of airlines' interests above that of other stakeholders and especially that of taxpayers and governments. It should not be too surprising that the view of airlines, who pay airport operators for the use of airport services, have self-interested views when it comes to shaping governments approach to the management of air transport infrastructure. Notably, the views of IATA and its member and consultants receives little support from other parties.

Contrary to the IATA/Deloitte view, public organisations and international financial institutions support public-private partnerships and concessions as ways to obtain positive outcomes for governments and citizens, as discussed below section 3 below.

It is therefore odd that the Thessaloniki Forum has seen fit to address this topic which is of interest to one self-interested party.

## 2. Airport concessions are based on the economic regulation rules in place

Points 2 and 3 of the Forum's TOR asks if the way that governments set up concessions violates the principles of the Airport Charges Directive:

- *"Consistency between concession agreements and the requirement to consult airport users;*
- *"Consistency between concession agreements and ISAs powers (setting of airports charges, investments, quality of service…);"*

Privatising airport operations through concessions is a global practice and there is *a priori* no reason to question the compatibility of concessions with principles of airport economic regulation.

Concessions often include a number of obligations by the concessionaire which aim to guarantee the protection of consumers against any use of significant market power. For example, a concession contract may require that airport charges are frozen unless they are lower compared to a basket of peer airports. A concession may fix certain parameters, such as the maximum recoverable revenue per passenger or set a price or revenue cap. Such requirements and conditions are standard in concession agreements to protect users and ultimately passengers from potential use of any significant market power that at airport may possess.

A concession is based on the valuation of the enterprise and the true cost of provision. Therefore while it may be theoretically fair to say that a concession contract which fixes certain parameters may constrain an ISA, the fact is that in the absence of that concession, the cost of providing the airport services would still exist, and would have to be paid for by the users. This is in line with European principles expressed in the European Commission's long standing principles re-affirmed in the 2020 ***Smart and Sustainable Mobility Strategy***.[1]

Concession contracts are granted by sovereign states, often with involvement of international organisations, and for airports inside the territory of the European Union approved in many cases by the European Commission.

For nearly 20 years, the **European Commission** has had guidelines on the definition of successful PPPs, including concessions[2], which state clearly that verification of the legal framework is necessary and that a PPP is granted after legal due diligence, covering the EU acquis and national legislation.

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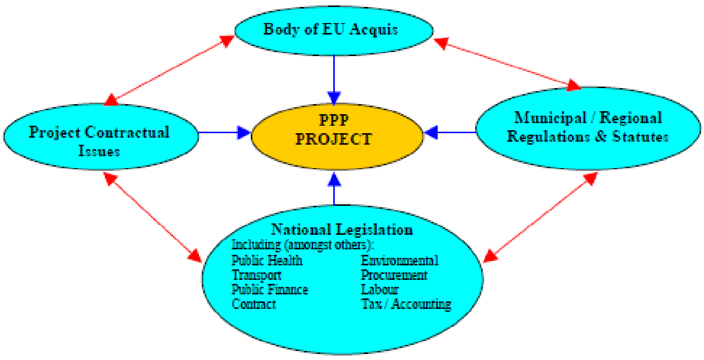
Sustainable and Smart Mobility Strategy – putting European transport on track for the future, [1] European Commission, COM(2020) 789, annex (action plan), supporting document SWD(2020) 331 final.

[2] It should be noted that the concession contracts related to public infrastructure (such as airports, highways, railways, bridges and tunnels) are regulated by the EU Directive 2014/23, however there are exclusions for concessions with regulated tariffs.

**Legal Hierarchy for Public-Private Partnerships (EC DG REGIO Guidelines)[3]**




The legal due diligence covering national legislation, including the national economic regulation of airports and transposition of the EU airport charges directive, would have ensured coherence between the concession and the Airport Charges Directive. It is a possibility that confusion arises because of misconceptions about what the Airport Charges Directive requires, as explained in the box below.

***BEING CLEAR ABOUT CONSULTATION***

There has been a slow "mission creep" of the concept of consultation to become far greater than the original intent as it is actually defined in the ICAO principles and EU law.

Consultation is not for airlines to tell the airport how and where to adjust charges, nor what the structure or level of those charges should be. Consultation does not mean that airlines determine the level of airport charges.

Consultation means that "*Users or their representative organizations should also be consulted concerning capacity development and investment plans. The purpose of such consultation is to ensure that the developments proposed meet current and future capacity requirements, and that users are aware of the potential financial implications*" [ICAO, doc 9082].

The consultation as envisioned in the ICAO documents is to allow airlines to plan their operations in response to the level of charges.

The European Union reinforces this concept, in articles 6 & 7 of the Airport Charges Directive, stating that consultation is compulsory and linking it to a needed amount of time for advance information for the airlines. The Directive requires that airlines are informed about "*changes to the system or the level of airport charges*" and "*the reasons for the proposed changes, no later than four months before they enter into force*," so that the airline is able to respond operationally to the changes in charges.

[3] Guidelines For Successful Public – Private Partnerships, European Commission, Directorate-General Regional Policy (March 2003), p. 37.

The consistency of concessions and sectoral legislation, such as the EU's Airport Charges Directive, is recognised also in the assessment of independent international financial institutions. **World Bank** lead air transport expert Charles Schlumberger has written "*the government has an important responsibility in ensuring sufficient oversight. […] In the area of economic regulation concerning airport charges, ICAO recommends that States regulate airport charges in accordance with its policies and guidelines.*"[4] The World Bank understands that effective economic regulation and oversight co-exists with airport concessions. The **International Finance Corporation**, which supports development in emerging markets, has actively promoted airport operation concessions in Europe and in EU member states, demonstrating in practice the regulatory viability.

Finally, the **European Investment Bank (EIB)** is also a promoter of concessions and manages the **European PPP Expertise Centre (EPEC)** which provides fulsome information on PPP legal and regulatory frameworks; ensuring that concessions are coherent with sectoral legislation.

From the above, it is clear that concession contracts and frameworks with analogous effects are coherent with national legislation.

## 3. Concessions are designed to allocate risk to the party best able to mitigate the risks

A desirable feature of a public-private partnerships (PPP) is the management of fiscal risk. The primary concern typically regarding PPPs is that a government takes on unnecessary fiscal risks (**IMF 2021**).[5] Undermining the provisions and terms contractually agreed in concessions for airport operations will increase the fiscal risk to governments. Normally the attention of bodies overseeing PPPs is to ensure that the contract does not put undue fiscal risks with the government, and by extension, taxpayers.

Conversely, the attention and interests of some regulatory authorities seems to be on a concern that airport charges – the regulated tariffs – are too high and should be lowered. Lower airport charges would result in an under-recovery of costs and a failure to provide an adequate return, and would paradoxically increase fiscal risk to the government. Were an ISA to seek to overturn the concession terms, it will challenge the fiscal risk oversight function of the grantor, usually the Ministry of Finance.

The IATA/Deloitte report alleges that governments have tried to maximise payments from a concessionaire, that governments have put investment requirements into the concession contract, that airports run under concessions have increased charges and profit. It should be noted that of these outcomes are desirable. They are exactly what is demanded and expected of a government during a privatisation process, to ensure the best outcomes for the taxpayer and overall national welfare, and are fully compliant with effective oversight of tariffs.

It is also clear that stable upfront rules are necessary to attract bidders for a concession. This includes promoting a proportionate regulatory framework. If potential investors know the legal framework governing airports under concession, including whether and how airport charges will be governed, they can take that into account in developing bids. If the legal framework is not clearly defined, it is possible major changes to the framework will be made mid-way through the concession, creating a serious risk the investor's financial model will not remain valid until the contract ends. Having certainty in this area is in the interest of both the public and the private sectors. Because the legal and regulatory

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[4] Public-Private Partnerships in Airports: Imperatives for Governments, Charles E. Schlumberger and Shruti Vijayakumar, Annals of Air and Space Law (VOL XL; 2015), p. 503.

[5] Mastering the Risky Business of Public-Private Partnerships in Infrastructure, International Monetary Fund (Washington, DC), Fiscal Affairs Department, No. 21/10.

frameworks are clear on determination of aeronautical charges, the sustainability of CAPEX financing is much improved. Depending on the airport's risk level and market profile, it may be useful to predetermine the level of charges and provide adjustment mechanisms based on inflation, service quality, regulatory constraints, capital expenditure triggers and/or other exogenous factors. Airlines can then enter into agreements with the airport in full knowledge of the market's economics and dynamics.

A lack of clarity concerning the regulatory framework will increase risk, put into doubt the operator's ability to earn a return on investment and will limit or even preclude needed investment.

## 4. Airport concessions have a long track record of success

For the past decade, nearly 3 out of 4 passengers travelled through airports in Europe that have at least some private shareholders.

Privatisation of airport operation, often through long-term concessions, brings beneficial outcomes for the users of air transport and for national welfare. The concession agreements signed between private investors and European Governments and/or Local Authorities are complex and long term. They are the result of public tenders and define the concessionaire's obligations under very strict conditions. This includes a transfer of risks related to traffic development, maintenance, investments, safety and security. Risk related to regulation and policy is best managed by the granting party.

Concessions are almost always linked to heavy requirements for investment; investment which the government is often unable to afford, or which would come at the opportunity cost of investment into other public functions, such as sanitation and education. This is the reason that the International Finance Corporation (IFC) and regional development banks have supported the privatisation of airports through concession contracts. The European Commission itself has approved concessions of airports as consistent with national and European law, while the Directorate-General for Economic and Financial Affairs has assessed and found effectiveness of private investment in airports.[6]

The concession is a public private partnership which has been chosen by an increasing number of countries all around the world. The related state grantors found many advantages to delegate the management and transfer the commercial risks to an experienced international operator. With the combined input of local management teams and experts of the headquarters, concession operators develop strongly the tourism industry, the mobility of citizens, the business exchanges and sustainable employment.

This is confirmed by the approach of the World Bank and International Finance Corporation in promoting concessions and PPPs for airports. The World Bank's Schlumberger wrote, "*Concession contracts, unlike management contracts, tend to be output-focused, i.e. delivering the actual service (the concessionaire determines how best to achieve this with agreed performance standards). Given that the private concessionaire has much more influence and power to optimise revenue generated in the concession, and concessions typically have longer fixed durations, a more significant contribution is expected from the private concessionaire. Often, an important upfront investment for the*

[6] Study on State asset management in the EU; Final study report for Pillar 3 – EU28 Summary Report; Directorate-General for Economic and Financial Affairs (DG ECFIN), European Commission (Brussels, Belgium), Written by KPMG and Bocconi University (February 2018).

*construction is required. Also, a direct initial payment or high on-going concession fees to a government granting a concession are possible modalities that define an airport concession scheme*."[7]

In the case of the small regional airports, the concession operator runs at their risk airports with low traffic levels, which used to consume a significant amount of public money when they were operated by state/local Authorities. Operators bring in a commercial focus and a combination of improved operational organization and diversification of revenues (i.e. real estate, business aviation, freight) to cover all operating expenses and most of the investments.

In sum, airports operated by concessionaires reduce public risk, increase timely capital expenditure and investment into capacity and quality, and reduce financing costs being passed to taxpayers.

### 4.1. Conclusion: Concessions are effective airport management models to ensure that users, and not taxpayers, pay for efficient airport infrastructure

Airport concessions have been tendered and delivered by governments to ensure the adequate and quality provision of airport infrastructure, to ensure the protection of consumers, and to enhance national welfare. Today, 3 out of every 4 passengers in Europe travel though an airport that has some private shareholders.

The principle for European transport infrastructure that users should pay the full internal costs of the infrastructure that they use was re-affirmed in the European Commission's December 2021 ***Smart and Sustainable Mobility Strategy.***[8] The general fault with the papers produced by Deloitte for IATA is that they seek to lower the cost of use of airports by pushing that cost onto taxpayers, as demonstrated above. Airlines view of concessions is from a position as large buyers, seeking to reduce procurement costs. Indeed, for half of all airports in Europe, one airline accounts for 66% of all departing seats.[9] Additionally, airlines carry influence with their governments, and seek to leverage governments and regulators to apply downward pressure on airport charges. This is fully understandable from the airlines perspective; they are focused on cost control. But it is far from being proper public policy.

The concession model includes strong control by the public authorities, as explained in section 2. Concession contracts generally refer to the law (national and supranational) ad also relate to ICAO principles. Public supervision of concessions is important, as is the economic regulation of entities that have the ability to use significant market power to the detriment of consumers.

There is no evidence that airport concessions are incoherent with the aims of economic regulation as established by the EU Airport Charges Directive. To the contrary, positive government support for the development of concessions, overseen by regulatory agencies and with advisory services from globally experienced development banks, demonstrates the value of concessions to citizens. Undermining this would do nothing but harm one option for the provision of adequate airport infrastructure and services that supports economic growth and connectivity.

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[7] Schlumberger, op cit., p. 498.

[8] European Commission, Sustainable and Smart Mobility Strategy – putting European transport on track for the future, COM(2020) 789, supporting document SWD(2020) 331 final.

[9] Identifying the Drivers of Air Fares; An ICF report prepared for ACI EUROPE (May 3, 2018), p. 31. https://www.icf.com/insights/transportation/identifying-the-drivers-of-air-fares

*ADDITIONAL MATERIAL FOR REFERENCE BY THE WORKING GROUP*


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