# ACI EUROPE RECOMMENDED PRACTICE 02/2016

## Interpretation of Articles 6, 7 & 8 of the Airport Charges Directive

*(Interpretation of Articles 7 & 8 adopted by the Board of ACI EUROPE on 20 January 2016 – Interpretation of Article 6 adopted by the Board of ACI EUROPE on 18 May 2016)*

## Introduction

Europe's airports have produced an airport industry interpretation of Article 6 (Consultation & Appeal), Articles 7 (*Transparency*) & 8 (*Consultation on New Infrastructure*) of the Airport Charges Directive. This pan-industry view provides Recommended Practices as to how these Articles of the Directive should be interpreted by EU airports, and should support the work of the Thessaloniki Forum, which has been charged by the European Commission to work on such issues[1].

ACI EUROPE believes that in markets where regulatory oversight of airports is genuinely necessary, a constructive and reasonable interpretation of the Directive may help facilitate a useful and informative two-way dialogue between airports and their airline clients, and this document reflects that position.

This text reflects an interpretation of the standard provisions of the Directive. Individual national authorities have implemented the Directive into local legislation in different ways, and this common position does not attempt to take into consideration more specific implementations or elaborations. **It may be that specific local legislation or practices override or make non-applicable certain elements of this common position in certain jurisdictions**. For example, in the case of multi-year agreements, annual consultation may not be appropriate. Where an airport operator is quoted on the stock market and is obliged to respect specific practices on information disclosure, any implementation of Article 7 of the Directive (concerning Transparency) must reflect these obligations.

It should also be remembered that, on the whole, the Directive is functioning well across the EU, with the European Commission's 2014 Communication noting that "*at this early stage […] a number of the main objectives of the Directive have already been achieved*" and with specific problems in individual countries to be addressed via notification of the concerned Member States & infringement procedures, if necessary[2]. In jurisdictions where the implementation is working well in practice, significant changes to the regulatory context may be neither necessary nor desirable.

In particular, at many smaller airports which are still within the scope of the Directive, competitive market forces clearly prevail, with airport-airline interactions primarily taking place via bilaterally-negotiated commercial contracts, with compliance with the Directive in practice occurring in parallel. At such airports, a minimum basic legal interpretation of the Directive is more appropriate.

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[1] '*An Aviation Strategy for Europe COM/2015/0598 final*' European Commission, December 2015

[2] '*Report from the Commission to the European Parliament and the Council on the application of the Airport Charges Directive*', European Commission, 2014

European airports hope this common position will aid the work of the Thessaloniki Forum, and that this will ultimately result in a more genuinely-constructive dialogue between airports and airlines.

However, in order for this to be achieved, it will be essential that the Thessaloniki Forum remains firmly within the scope of the Directive. It is essential to remember that the current Directive is a product of the democratically-determined standard decision making process of the European Union, with the final text agreed by the European Commission, the Council and the Parliament. In order to avoid circumventing this legitimate and established decision making process, the Thessaloniki Forum will have to remain within the scope of the Directive. Specifically, the creation of any guidelines for practices which are not foreseen within the Directive would not be appropriate. For example, the Directive is explicitly neutral on the issue of the regulatory till, does not countenance specific forms of more elaborate regulation and specifically protects the right of Member States to have airport networks and systems.

As well as lacking democratic legitimacy, any attempts to go beyond the scope of the Directive would transform the work of the Forum from a technical to a political nature, and would incentivise both airports and airlines to adopt diverging and non-negotiable positions on issues where there is no established EU legislative position. This could undermine the chances of a constructive industry dialogue, with both sides retreating to standard opposing positions, and a return to the dynamic of conflict which has marked airport-airline relations on a political level.

## Interpretation of Article 6 of the EU Airport Charges Directive (Consultation & Remedy)

**Timeline & Information Provision**

A clear timeline should be provided to participants, outlining the number and date of meetings, as well as the planned dates for the distribution of supporting documentation. This timeline should be provided with sufficient notice, so as to allow participants to attend. The timeline may subsequently need to be amended, according to the requirements of participants.

The exact length of the consultation process, as well as the number of meetings, should be determined on a local basis. However the consultation timeline should reflect the deadlines specified in the Directive – any proposals to change the level or system of airport charges should be submitted at least 4 months ahead of the proposed implementation date. The final decision should be published at least 2 months before this date.

Depending on local circumstances it may be more appropriate to circulate supporting documentation either in advance of a formal consultation meeting, or else at the start of a consultation meeting itself, to ensure that the material can be fully explained and set in its proper context.

Where it is decided to provide this documentation only at the start of the meeting, the airports should provide a clear mechanism to solicit airline feedback, which allows sufficient time (at least 10 working days) for the airlines to review & discuss internally before providing their feedback. This feedback may be provided via another consultation meeting, or via written communication.

Supporting documentation should include all that is specified in Article 7 of the Airport Charges Directive, and, where new infrastructure is also being consulted upon, Article 8 of the Directive. See relevant sections of ACI EUROPE Recommended Practices for the interpretation of these Articles.

**Process**

Both airport users AND their representative associations can participate in consultation meetings, depending on the regulation at each country, and receive the supporting documentation. However representative associations must first submit a signed mandate, specifying exactly which airport users are being represented in the consultation process. Where there are differing views between an airport user and its mandated representative association, this divergence should be recorded in the meeting minutes. If an airline association is not explicitly representing any airport users in the specific consultation process, then it should not be allowed to participate.

All consultation meetings should be chaired by a representative of the airport operator. The airport operator should keep minutes of each meeting, and make these freely available to all participants.

It may be helpful for the airport operator to invite a representative of the Independent Supervisory Authority (ISA) to observe the consultation meetings. However, to ensure the ISA remains in a position as an impartial entity in the event of an appeal, it is essential that the representative's role in the consultation meetings is limited strictly to that of an observer.

It may also support the consultation process for the airport to have informal discussions with airlines on a bilateral basis ahead of the formal consultation process, to better understand their needs and wants.

Airports in Europe conduct airport charges consultations either in the national or in the English language, depending on the preferences of the majority involved in the process. Where consultation meetings are conducted in the national language, it may help the consultation process for core supporting documentation to be provided in English, to further facilitate non-based airlines to engage in the process via correspondence.

However in some jurisdictions, the final formal documents outlining the future structure and level of airport charges have legal force, and must therefore be in the native language(s) of the jurisdiction in question. The airport should provide an English translation – however in case of conflicts the original document will take precedence.

In instances where the airport's planned final proposal differs substantially from its initial proposal, following feedback from airport users, it should circulate this planned final proposal to airport users, and allow an additional round of feedback from airlines, prior to making the final decision. This would be particularly be the case if some airlines may not have been in a position to anticipate that such substantial changes to the initial proposal would be made.

**Appeals**

While the Directive specifies some timelines, including the length of time available to the ISA to consider an appeal, there is currently no time limit within which an appeal must be made.

Airlines should be required to make an appeal within 20 working days of the airport publishing its final decision on airport charges. Given airline participation in the consultation process, as well as all the information already provided to the airlines by the airport, this provides ample time the airlines to make an appeal.

When considered with the requirements that airports must publish a decision 2 months prior to entry into force, and the requirement that ISAs should provide at least an interim decision on any appeal within 4 weeks, this would ensure that at a minimum an interim ISA appeal decision would be available, prior to the entry into force of any initial airport operator decision on airport charges.

Any interim ISA appeal decision should be valid, until a final ISA decision has been made, to allow the change in airport charges to proceed. If any subsequent final decision by the ISA varies from its interim decision, this final ISA decision should subsequently come into force within a 2 month period. When putting this final decision into force, there should also be provisions to rectify any under- or over-payment of airport charges made under the previous interim decision.

To incentivise genuine engagement in the consultation process and to ensure fair treatment within the airline community, the ISA should attach greater weight to those appeals which:

- Are justified with coherent arguments & where possible backed by evidence – unsubstantiated opposition to a decision should not be sufficient grounds for an appeal;
- Are made by airlines which have supplied the information as required under Article 7 (2) of the Directive;
- Are made by airlines which have been actively constructively involved in the consultation process;
- Concern issues which were specifically raised during the consultation process.

These provisions would reduce the degree of uncertainty and regulatory risk, while still ensuring a clear and effective implementation of the provisions of the Directive.

As with the consultation process, both airlines and airline representative associations should be allowed to make an appeal concerning the airport's final decision on airport charges. However a clear framework is required to facilitate this. Airline representatives should be required to provide a mandate for any appeal, specifying exactly which airlines they are representing in the appeal. This mandate should be signed by a representative of each of the concerned airlines. It is essential to have a clear an understanding as possible, as to what airlines support (and what airlines might oppose) any potential appeal.

# Interpretation of Article 7 of the EU Airport Charges Directive (Transparency)

**General Information**

Airports should provide airlines with a clear description of the facilities and services covered by the proposed airport charges. However, a list of services and infrastructure not covered by airport charges is potentially limitless. It may be more appropriate to list additional charges for aeronautical-related services & infrastructure which are separate from airport charges.

Where applicable, it may support the consultation process for airports to state to airlines what till is applied when setting airport charges. However this is an issue specific to national regulatory frameworks, and so in such instances the Independent Supervisory Authority may be better placed to provide this information.

Airports should provide to airlines at a minimum a qualitative explanation as to the methodology used to calculate the proposed level of airport charges. However in instances where the local regulatory framework involves a specific formula for the calculation of airport charges, then the Independent Supervisory Authority may be best placed to provide this explanation to airlines.

Although not a requirement of the Airport Charges Directive, the provision of annual reports, audited accounts and ownership information to airlines by airports may support the consultation process.

**Process for Provision of Information**

Airports in Europe conduct airport charges consultations either in the national or in the English language, depending on the preferences of the majority involved in the process. Where consultation meetings are conducted in the national language, it may help the consultation process for core supporting documentation to be provided in English, to further facilitate non-based airlines to engage in the process via correspondence.

However in some jurisdictions, the final formal documents outlining the future structure and level of airport charges have legal force, and must therefore be in the native language(s) of the jurisdiction in question. The airport should provide an English translation – however in case of conflicts the original document will take precedence.

Airports should facilitate the participation of airline representative bodies such as IATA in the consultation process, alongside the airlines they represent, even if this is not strictly speaking a requirement of the Airport Charges Directive. However such representative groups should first produce a signed mandate indicating clearly which airlines they are representing in the specific consultation process.

Where there are diverging views between an airline and its mandated-representative, these should be explicitly stated, noted in the minutes, and an explanation provided for the divergence by the airline and/or the airline representative body. If an airline association is not explicitly representing any airport users in the specific consultation process, then it should not be allowed to participate.

This approach is essential if a clear understanding of users' needs is to emerge from the consultation process. Often airlines have different views which the airport operator must reconcile. This is made more difficult when representative groups have positions which contradict the stated views of some of their members, and so this situation must be actively managed to ensure a constructive and genuinely useful process.

**Operating Costs**

Airports should provide to airlines headline figures for the 5 or 6 key categories of operating costs.

Although not a strict requirement of the Directive, the provision to airlines of further information concerning the drivers of cost changes (e.g staffing levels, regulatory requirements, service level changes, etc.) may also support the consultation process.

Although not a requirement of the Directive, it may support the consultation process for airports to provide information on costs spanning a 5 year period (1 year historic, the current year, and a forecast for the 3 following years) during an annual consultation process.

The forecasts for the 3 years of future costs should be provided for information and context purposes, and it should be understood that such forecasts are subject to revision and refinement as more information becomes available. To avoid duplication the focus of the consultation should be on costs for the immediate year, as these will directly impact airport charges.

**Capital Costs (Depreciation, Capital Assets & Costs of Capital)**

Airports should provide airlines with details on the depreciation method used, the rationale for this choice, as well as details of any changes in the depreciation methodology used, since the last consultation process.

Airports should apply internationally applied standards of accounting, or alternatively, an explanation in instances where other accounting standards are more appropriate.

Where applicable, airports should explain to airlines the composition of the asset base, in line with Article 7(1)(a) of the Directive, as well as details of any revaluations/impairments or the details of any asset sales and the impact on the asset base. Where applicable, airports should also confirm to airlines whether or not the asset base includes assets under construction.

Although not a strict requirement of the Directive, it may support the consultation process for airports to provide airlines with the high-level methodology used to determine the airport's cost of capital.

However the experience of European airports has been that discussions with airlines on the cost of capital have been unproductive, with the incentives faced by both sides creating a zero sum game. It is difficult to envisage how in depth consultation on this topic can be genuinely constructive. Ultimately, the Airport Charges Directive is concerned with prices, not profitability. As an

independent business an airport operator is required to remunerate both investors and/or creditors for the capital necessary to provide suitable infrastructure for passengers and airlines. Typically in Europe airports currently do not earn a return on investment which is above global averages. When this return does cover the associated cost of capital, it is only barely so.[3]

**Aeronautical Revenue**

Although not a requirement of the Directive, it may help the consultation process for airports to provide an overview of aeronautical revenues for 5 years (1 historic, 1 present & 3 future) as part of the annual consultation process, with historical and present aeronautical revenues presented according to individual airport charge[4].

The forecasts for the 3 years of future revenues should be provided for information and context purposes, and it should be understood that such forecasts are subject to revision and refinement as more information becomes available. To avoid duplication the focus of the consultation should be on revenues for the immediate year, as these will directly concern airport charges.

**Airport Networks**

For airport networks, the operator should provide at least a figure for the overall costs at each individual airport in the network with more than 5 million passengers per annum (mppa) (or the largest airport in the country), as well as a breakdown of aeronautical revenues according to each airport charge[5], also for each of the individual airports in the network with more than 5mppa (or the largest airport in the country).

**Structure of Airport Charges**

Airports should explain to airlines any change in the structure of airport charges.

However, any structure of airport charges which is common to all airlines will have a different impact upon individual airlines, according to the airlines' operating models, load factors, fleet mix and other operational characteristics. This is inherent in the system of agreeing a common set of airport charges for all airlines, and it is for airline management to structure their operations so as to benefit from specific charging structures. Airports cannot become 'stuck in the middle' of inter-airline disputes concerning airport infrastructure.

[3] '*ACI EUROPE Economics Report 2013'* p. 30 & '*ACI EUROPE Economics Report 2014*' p.32
[4] As defined in Article 2 (4) of the Airport Charges Directive
[5] As defined in Article 2 (4) of the Airport Charges Directive

**Level of Service**

Where airlines and an airport have successfully concluded service level agreements, under Article 9 of the Airport Charges Directive, details of these service quality levels should be defined in the agreements.

**Traffic Forecast**

Airports should provide to airlines the details of the method used to forecast future traffic.

Although not a strict requirement of the Airport Charges Directive, it may support the consultation process for airports to provide airlines with details of any significant deviation from previous traffic forecasts already provided.

**Provision of Information by Airlines**

Article 7 (2) of the Directive specifically requires airlines to provide information to airports, concerning their traffic forecasts, development projects and requirements at the airport. As has been documented[6], this requirement is not yet being fully achieved. Clarity from airlines as to their plans is essential if airport operators are to best meet future infrastructural needs, and if the consultation process is to be a genuine two-way dialogue.

In light of the constructive position put forward by European airports concerning their transparency requirements under the Directive, a similar approach by airlines would help ensure optimal outcomes. European airports are ready and available to work with the Thessaloniki Forum and the airline industry to better define what these information requirements should be.

## Interpretation of Article 8 of the EU Airport Charges Directive (Consultation on New Infrastructure)

**General Principle**

Consultation with users on new infrastructure is very important for airports, not just to comply with regulatory requirements, but also to ensure that the optimal return is derived from these important and often substantial investments. However it remains essential that the final decision on capital expenditure remains with the airport operators, for several reasons:

- **A coherent and consistent investment strategy is needed to ensure efficient airport development.** Airlines come and go, and adjust their operations frequently. Only the airport operator is in a position to find the right balance between meeting immediate (and possibly temporary) needs versus long-term infrastructural needs;

[6] '*Evaluation of Directive 2009/12/EC on airport charges – final report*' Steer Davies Gleave report, September 2013, para 3.134

- **Airlines often have conflicting needs at an individual airport.** This cannot be allowed to result in stalemate or a halt in necessary infrastructural development –the airport operator needs to be able to advance with necessary investment for the travelling public, even if it does not always benefit all airlines equally;
- **Airlines' interests are not always aligned with the travelling public.** For example at capacity constrained airports, airlines are incentivised to block capacity expansion, to allow them to continue to charge higher air fares than would otherwise be the case.

**Definition of 'New Infrastructure'**

'New infrastructure' can be considered as capital expenditure which is financed by airport charges (as defined in the Airport Charges Directive) and which includes:

- New facilities that create additional capacity (passenger, aircraft, landside access);
- Investment in existing facilities to create additional capacity, increase service quality levels (to both passengers and airlines) or improve operational efficiency;
- Facilities to comply with regulatory or legal obligations.

In the interests of promoting a meaningful and constructive consultation process with airlines, this definition goes beyond a strict legal interpretation of 'new' infrastructure.

**What New Infrastructure is in Scope for Consultation?**

It is neither practical nor desirable to consult on every individual minor item of capital expenditure. It is for the individual airports and airlines to determine locally how best they want to allocate their time and attention during the consultation process. For example, during years with little capital expenditure, it may make sense to focus discussion on other elements of the overall consultation process.

As a general approach however, it may be useful to consult on the largest capital investment projects which collectively account for **60%** of the value of the airport's proposed annual/multi-year capital expenditure programme.

**When Should Consultation Occur?**

Consultation on new infrastructure should occur before the final decision is taken by the airport operator to proceed with the plans in question – i.e. before the granting of final approval for the project by the Board.

**Consultation Process**

- If consultation on new infrastructure does not take place as a separate process, it should at a minimum occur as part of the regular consultation process as outlined in Article 6 of the EU

Airport Charges Directive. Information required under Article 7 (h) of the Airport Charges Directive concerning '*any major proposed investments'* may therefore be provided in the context of either the regular consultation process, or the separate consultation process specifically on new infrastructure. The information provided by airports within the 'Supporting Documentation' (see below) is sufficient to fulfil this requirement of the Directive;

- A clear timeline should be provided to participants, outlining the number and date of meetings, as well as the planned dates for the distribution of supporting documentation. This timeline should be provided with sufficient notice, so as to allow participants to attend. The timeline may subsequently need to be amended, according to the requirements of participants;
- Supporting documentation should be provided sufficiently in advance of deadlines to ensure that airlines have at least 10 working days to review, discuss internally and submit their own views;
- Both airport users AND their representative associations can participate in consultation meetings, depending on the regulation at each country and receive the supporting documentation. However representative associations must first submit a signed mandate, specifying exactly which airport users are being represented in the consultation process. Where there are differing views between an airport user and its mandated representative association, this divergence should be recorded in the meeting minutes. If an airline association is not explicitly representing any airport users in the specific consultation process, then it should not be allowed to participate;
- As well as being forward-looking, consultation meetings should also encompass previously-discussed investment projects, and explanations provided for any deviations from expected outcomes;
- The Airport Masterplan can be presented to participations in the consultation meetings, to provide the context for individual capital investment projects, but the Airport Masterplan cannot be subject to the consultation process itself[7];
- All consultation meetings should be chaired by a representative of the airport operator;
- The airport operator should keep minutes of each meeting, and make these freely available to all participants.

**Supporting Documentation Required**

For each project within the scope of consultations, a 'project summary' document should be provided, detailing:

[7] When the Airport Masterplan is being devised and/or updated, it is of course important that the airport operator consult with users to best understand their long-term future needs, in so far as this is possible. However opening up the Airport Masterplan to consultation on an annual or other regular basis, would undermine the objective of creating a strategic long-term plan for the airport infrastructure. It is for this reason that the Airport Masterplan should not be subject to specifically the regular consultation process foreseen by the Airport Charges Directive.

- The drivers for the project (e.g. capacity, service quality, regulatory compliance, etc.) and the expected output of the project;
- The forecast costs of the project and the projected impact on airport charges (where relevant);
- The position of the project within the wider Airport Masterplan;
- The forecast timeline of the project (when airport users will begin to pay where relevant, the construction period, when the new infrastructure will come into operational use);

Alongside individual 'Project Summary' documents, a review of recently-completed new infrastructure should also be provided, where this new infrastructure was previously subject to consultation. This review document should contain an assessment as to what degree the originally stated-objectives of the projects have been realised. Specific explanations should also be provided, when project costs are 10% greater or less than initially forecast.