

Non-Discrimination under the Airport Charges Directive

1. Introduction

- 1.1 The goal of the Aviation Strategy is to strengthen the competitiveness and sustainability of the entire EU air transport value network.¹ Tackling limits to growth in the air and on the ground, in particular by boosting the efficiency of airport services, is one of the three key priorities that the Commission has identified.
- 1.2 The Thessaloniki Forum of Airport Charges Regulators is tasked with 1) working on and making recommendations for a better common implementation of the Directive 2009/12/EC on Airport Charges (the "ACD") and 2) promoting best practices in economic regulation of airports.² ³ The ACD requires Member States to assign responsibility for supervising the setting of airport charges to Independent Supervisory Authorities ("ISAs").
- 1.3 Charging strategies of all airports subject to the ACD must be Non-Discriminatory. The charging strategy must therefore be justifiable in accordance with the ACD, in a way which is relevant, objective, and transparent. Variation in airport charges may be due to cost relatedness, service quality or scope, or other justifications such as incentivising efficient behaviour. The charging strategy should be consulted on as per Article 6 of the ACD.
- 1.4 In this paper, the Forum first provides recommendations on Non-Discrimination in the context of the charging strategy of airports.
- 1.5 The forum then sets out an example of an effective process for investigating a complaint relating to discrimination.
- 1.6 These recommendations have been formulated by the Working Group of the Thessaloniki Forum on Airport Charges, taking into consideration the views of representatives of the airport and airline communities. Members of the working group are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Switzerland and the United Kingdom.
- 1.7 This report has been adopted by the Thessaloniki Forum on 23 November 2018.

¹ https://ec.europa.eu/transport/modes/air/aviation-strategy_en

² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0012&from=EN>

³ Throughout this document: Airport refers to the Airport Managing Body or the Airport Authority. User or Airline refers to airlines operating or planning to operate at the airport during the period in which the charges being consulted on will be applicable (airlines planning to operate should formally notify the airport of this intention prior to the consultation). ISA refers to the Independent Supervisory Authority referred to in the Airport Charges Directive and designated by the individual Member State.

2. Caveats

- 2.1 The recommendations do not represent the views of the European Commission and do not in any way change the requirements of the ACD.
- 2.2 The scope of this paper does not include arriving at a position on whether the ACD should be reviewed.
- 2.3 This report should not be used as a limitation or constraint for Member States to apply their own methodologies or procedures when circumstances, regulation or other reasons require it.
- 2.4 These recommendations will be kept under review and changed as and when deemed necessary by the Thessaloniki Forum.
- 2.5 Assessments of charging strategies, including incentives and/or discounts, are done on a case by case basis.
- 2.6 Bilateral contracts between an airport and an airline are discussed in this paper. Member states may decide not to allow bilateral contracts or to have specific rules on bilateral contracts.

3. Background and Definitions

Airport Charges and Non-Discrimination

- 3.1 Article 2 of the ACD defines an Airport Charge as “a levy collected for the benefit of the airport managing body and paid by the airport users for the use of facilities and services which are exclusively provided by the airport managing body and which are related to landing, take off, lighting and parking of aircraft and processing of passengers and freight.”
- 3.2 Typically, Airport Charges are offered as a menu of individual charges paid in exchange for the use of different services and infrastructure at the airport. As well as the standard menu of charges, many airports also offer “incentive schemes” which affect Airport Charges, typically taking the form of rebates or discounts to incentivise traffic growth or efficient behaviour. In some Member States, Airport Charges can also be agreed as part of bilateral contracts between the airport and individual users. For the purposes of this paper, the Forum refers to the combination of all elements relating to Airport Charges, including the menu of charges, any rebates or discounts, incentive schemes or bilateral contracts (including Service Level Agreements) as the ‘charging strategy’.
- 3.3 Article 3 of the ACD states that “*airport charges should not discriminate among airport users, in accordance with Community law*”.

Variation in Airport Charges under the ACD

- 3.4 The ACD notes two types of variation of Airport Charges: modulation and differentiation. While the ACD does not explicitly define these terms, it does set out their respective purposes with regard to pricing. Article 3 states that the modulation of airport charges is “*for issues of public and general interest, including environmental issues.*” Article 10 states that “*the level of airport charges may be differentiated according to the quality and scope of such services and their costs or any other objective and transparent justification.*”
- 3.5 Airports refer to incentives (also called “incentive schemes”) in a broad sense. Incentives offered at EU airports typically offer discounts or rebates to users in exchange for:
- Reduction of noise and/or emissions
 - Growth in traffic
 - Increase in routes and/or flight frequencies
 - Efficient use of infrastructure (off peak use, higher load factors, etc)
- 3.6 In some cases, incentives as described by airports could be defined as modulation and/or differentiation under the ACD; how a charging strategy should be viewed may depend on the justification(s) given by the airport. It can be concluded that modulation and differentiation are not mutually exclusive and may overlap.
- 3.7 The Forum thus refers to ‘variation’ with the intention of covering any such elements of a charging strategy in a non-specific way. The following are examples of the overlap

between modulation and differentiation:⁴

Type of Variation	Modulation	Differentiation
Standby aircraft parking discount	Public interest, if minimising disruption for travellers is in line with stated government policy.	Service related discount (eg if stands cannot be used for passenger operations).
Reduced charges for non-airbridge served stands	Public interest, if the unbundling of Airport Charges is in line with stated government policy.	Service/cost related variation

Bilateral Contracts

- 3.8 A bilateral contract can be defined as a commercial agreement between an airport and a user. Such agreements often include volume or growth-based incentives for the user; for example, step changes in airport charges payable in reverse proportion to the volume of passengers delivered. Bilateral contracts may also set out the quality or scope of service to be provided.
- 3.9 The ACD does not explicitly define or make any broad statements in relation to bilateral contracts.

Service Level Agreements

- 3.10 Article 9 of the ACD allows airports to conclude Service Level Agreements (SLAs) with users. These are a form of contract which set out the service level that should be provided in exchange for an agreed level of airport charges. The level of airport charges may be tied to the performance of the airport and/or the airline against Key Performance Indicators (KPIs). These KPIs could include measures relating to passenger satisfaction, baggage delivery, delays, queue times at various processors, etc.

Common Charging Systems

- 3.11 The ACD allows for airport charges not to vary within airport networks (Article 4) or airports serving the same city or conurbation (Article 5), despite the fact that there may be differences in the costs of providing the associated services or variation may be justifiable, or even warranted, based on other reasons. Article 5 requires that common charging systems at airports serving the same city or conurbation fully comply with the requirements on transparency set out in Article 7. Article 4 does not explicitly reference the Article 7 transparency requirements, though it does note that the common charging system must be transparent.

⁴ Note that these are examples. The Forum is not suggesting that these justifications would be valid in all circumstances.

4. Recommendations on the Use of the ACD to Assess Non-discrimination

Variation in Airport Charges

- 4.1 Elements of a charging strategy may be justifiable in different ways. The ACD categorises variation according to the justification; it is sensible, given the overlap between modulation and differentiation, to assess charging strategies in the same way regardless of the categorisation. The forum recommends that charging strategies be assessed based on the validity of the justification provided.
- 4.2 Airport charging strategies should be justifiable in accordance with the ACD. The ACD explicitly allows for certain justifications: Issues of public or general interest (Article 3), a common charging system in certain circumstances (Articles 4 and 5), differentiation according to the cost, quality, or scope of airport services provided (Article 10).
- 4.3 A grounding in stated government policy is required in order to justify an element of a charging strategy on the grounds of public or general interest under Article 3. Beyond this, it is for individual ISAs to determine the allowed scope of Article 3 based justifications, such as whether a grounding in any government policy is sufficient or whether it must relate specifically to an element of government aviation policy.
- 4.4 Article 10 also references '*any other objective and transparent justification*'. The validity or otherwise of a proposed justification is for assessment by the ISA, on a case-by-case basis. However, it can be expected that as well as differences in the cost, quality, or scope of services provided, behavioural or efficiency incentivisation would also be a valid justification under Article 10.⁵ For behavioural or efficiency based justifications, the ISA should, with reference to the evidence provided, consider whether:
- Efficiencies have been, or are likely to be, realised as a result of the charging strategy.
 - The strategy is indispensable to the realisation of the efficiencies.
 - The likely efficiencies outweigh any likely negative effects on competition and consumer welfare.
 - The strategy does not eliminate effective competition by removing all or most existing sources of actual or potential competition.

Recommendation 1: Treatment of Charging Strategies when assessing Non-Discrimination

The Forum recommends that Discrimination should be considered as the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. To demonstrate Non-Discrimination, all elements of a charging strategy must be justifiable in accordance with the ACD. An unjustifiable lack of variation in a charging strategy may also be discriminatory.

⁵ An example of a behavioural incentive might be in relation to reducing noise pollution.

- 4.5 It is important to stress the point that the ACD allows for the variation of Airport Charges. Some airport users have expressed the view that charges are not varied appropriately, and thus do not match different business models as well as they could. As part of the ex-post evaluation of the ACD, the 2017 study for the European Commission by Steer Davies Gleave states that *“the lack of detail over the definition and application of the Non-Discrimination principle may sometimes have hindered airports to introduce differentiated services”*. Airports can vary their charges while still complying with Non-Discrimination requirements; indeed, an unjustifiable lack of variation is discriminatory in the same way as unjustifiable variation.⁶
- 4.6 When assessing Non-Discrimination under the ACD, ISAs should be guided by the principles of Article 102 of the Treaty on the Functioning of the European Union (TFEU) which states that abuse by one undertaking of a dominant market position is prohibited in so far as it may affect trade between Member States.⁷
- 4.7 Such abuse, in particular, may consist of *“applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.”* Under Competition law, any airport that has a dominant position has a special responsibility to ensure that its conduct does not distort competition.
- 4.8 The definition of discrimination for this working group corresponds with the principles of European competition law and rulings of the European Court of Justice.
- 4.9 Most ISAs have no role in relation to State Aid. However, airports which receive state funding should ensure that the charging strategy complies with the common rules on State Aid. Article 107 of the TFEU states that *“...any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”*

Relevance, Objectivity and Transparency

- 4.10 In general, it is necessary but not sufficient for the justification(s) for a particular element of a charging strategy to be valid in principle under the ACD. The ACD sets out three criteria by which to assess the justification: Relevance, Objectivity, and Transparency (“the ACD Criteria”). Evidence relating to this element of the charging strategy must also be set out in a way which satisfies these criteria in order to demonstrate Non-Discrimination. The ACD does not define the criteria.
- 4.11 Two exceptions to this rule are justifications under Articles 4 and 5. Article 4 explicitly allows for common charging strategies at airport networks, if permitted by the Member State. Article 5 provides that Member States may allow for common charging strategies at airports serving the same city, provided that the Transparency

⁶ For example, bundled charges may be discriminatory as they do not give the option to pay for each airport service separately, instead services are bundled together. The bundle must be paid for in full, or not at all.

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT>

requirement is complied with.

- 4.12 Relevance implies that the factors set out are applicable to the circumstances in question. For example, if the stated justification is to improve the efficiency of the use of airport infrastructure, an off-peak discount would be relevant to achieving this aim.
- 4.13 Objectivity implies that the relevant factor(s) has been assessed in a fair, balanced and repeatable way. To continue the example of the off-peak discount, it should be demonstrable that the magnitude of the discount is proportionate and that this has been assessed fairly and reasonably.
- 4.14 Transparency implies that the reason(s) behind the prices charged are clear to all so that users can establish that they are being treated fairly. The justification, and analysis with reference to the applicable ACD Criteria, is set out in consultation in accordance with Article 6.

Recommendation 2: Working Definitions of Relevant, Objective and Transparent

The Forum recommends that ISAs may use the following definitions of each criteria:

Relevant: The factors set out are applicable to the circumstances in question. They are factors that should be rightly taken into consideration in justifying varied charges.

Objective: The relevant factors have been assessed in a fair, balanced and repeatable way.

Transparent: The reasons and analysis underlying the charging strategy and the level of charges are clear to all so that users can establish if there is a justifiable complaint. The justification and criteria are made obvious and bear scrutiny in all elements, including any Terms and Conditions attached to elements of the strategy.

- 4.15 Article 10 further states that *“in the event that more airport users wish to have access to the tailored services and/or [...] [terminals] than is possible due to capacity constraints, access shall [also] be determined on the basis of relevant, objective, transparent and non-discriminatory criteria.”*
- 4.16 The forum recommends that a similar approach is taken with regards to ensuring Non-Discriminatory access to differentiated services. Where there is a limited supply of a differentiated service, the airport may seek to regulate demand through its charging strategy, or alternatively may allocate use of the facility according to rules which are fair and justifiable.⁸ The forum recommends that any such justification should be assessed in accordance with the Relevant, Objective, and Transparent criteria, as defined above. The justification may be related to operational factors or other objective reasons, which may include:⁹
- Infrastructural or operational factors relating to the routes and the type of

⁸ Without prejudice to the provisions of the Slot Regulation, where relevant:

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1993R0095:20050730:EN:PDF>

⁹ Adapted from:

<http://publicapps.caa.co.uk/docs/33/CAP1343GuidanceontheapplicationofACRpowers.pdf>

- passengers served by the user at the airport
- Efficiency in the use of the airport facility, if this varies across different users
 - The costs associated with airport users moving locations (e.g. between terminals);
 - Capacity constraints or slot criteria that defines access to differentiated services
 - Other operational requirements

Consultation and Transparency

- 4.17 The forum has previously published recommendations relating to consultation and transparency under Articles 6 and 7, and would refer back to that paper.¹⁰ Airport charging strategies, and level of charges, should be consulted on under Article 6. Airports should show that variation is available to airlines on a non-discriminatory basis. It may not be necessary to consult on every element of the charging strategy at every consultation, but rather focus on elements which the airport is proposing to change, or existing elements specifically requested or questioned by users. Terms and Conditions attached to any elements of the charging strategy form part of the strategy, and thus should form part of the consultation, particularly if amendments are proposed.
- 4.18 Policy in relation to bilateral contracts (including SLAs) varies somewhat across ISAs. In many cases, parties to the contract will want to maintain confidentiality, as the provisions may contain commercially sensitive material. Some ISAs do not allow such contracts at all, due to concerns over Transparency and Non-Discrimination. Other ISAs believe that they are an effective way for airports to meet the requirements of users, and may require only that the details are made known to the ISA in the context of an investigation; the ISA can then ensure that the contract is not discriminatory under Article 3. Finally, some ISAs take a hybrid approach through, for example:
- Requiring transparency with regards to the broad subject matter of any contract, without requiring disclosure of detailed provisions.
 - Requiring disclosure of the detail of the contract only where it may lead to cross-subsidisation, ie the contract may either be self-funding and confidential, or else it must be justifiable in accordance with the ACD in the same way as any other element of a charging strategy, including the requirement for Transparency.
- 4.19 Airports should be able to show at consultations that elements of the charging strategy are justifiable according to the ACD (with the potential exception of bilateral contracts, if this is permitted by the ISA). The benefits of a particular element of a charging strategy may include indirect benefits; for example, a volume discount may lead to cost savings generated by economies of scale and/or increased commercial revenues.

¹⁰ <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=29018&no=1>

5. Non-Discrimination Process, Assessment Process and Examples

What could ISAs be doing proactively?

Recommendation 3: Guidelines on Non-discrimination under the ACD

If necessary, ISAs may proactively issue guidance and provide advice to airports and airport users. Such guidance will naturally relate to the specific Member State in question. ISAs may, for example:

- Issue guidance on the powers it has, who the ACD provisions apply to, what are the key ACD requirements, the specific processes in place at the Member State in question, etc.
- Provide advice to industry on what is acceptable to ensure that charging strategies are not discriminatory– what is and is not allowed, or principles for compliance (based on case law and competition law guidance).
- Provide advice to potential complainants on how to make a complaint regarding discrimination to the ISA, and on other initial steps that may be helpful before formally complaining.
- Encourage airports to inform all users on whether they are prepared to negotiate bilateral contracts. If that is the case, encourage airports to be prepared to disclose the rationale for making such contracts and indicate the nature/scope of such prospective or actual contracts.

What does a good process and assessment look like?

- 5.1 It should be noted that the procedure in some Member States involves ex-ante approval of the charging strategy, while others carry out ex-post assessments on receipt of a complaint. The forum is not recommending either approach as preferable.
- 5.2 The text below is a suggested ex-post process that ISAs can consider adopting, including the information which would be required to facilitate the process. This could be done with modifications to the process or timeline, taking account of national legislation or circumstances specific to the Member State in question. In some circumstances, it may be appropriate to issue a final decision without issuing a statement of preliminary view, if the ISA is satisfied that all parties have had sufficient opportunity to make representations on the issues being addressed by the decision.

Example of a process to assess a complaint of Discrimination

In advance of carrying out an assessment, ISAs should encourage complainants to:

- Seek to resolve matters through direct discussions with the airport before asking the ISA to intervene.
- Speak to the ISA to discuss any concerns on whether airport charges comply with non-discrimination under the ACD.
- Consider whether the issue of concern may have been the subject of a previous decision under the ACD or other legislation.
- Gather as much evidence and information as possible to support the complaint.

Complaints should be made in writing. The information that the ISA would expect to see in a complaint is set out below.

Having decided to carry out a formal assessment, the ISA should:

1. Publish notice of the Investigation

ISAs should publish a notice of a decision to conduct a formal investigation, if allowed by national legislation. The notice would set out the nature of the alleged infringement.

2. Timeline of the Investigation

The time taken to complete the investigation is likely to vary according to the complexity of the issues involved. At the start of the investigation, ISAs should inform the parties involved of the indicative timeline for the case. The ISA should endeavour to complete the investigation in a timely manner.

3. Information Gathering

Once a formal investigation has been opened, the ISA should use its information gathering powers, which may vary among Member States, to collect further information where necessary. In the first instance, ISAs should seek information from the respondent subject of the investigation and from the complainant(s). ISAs may also seek information from appropriate parties.

4. Statement of Preliminary View

Before deciding whether there has been an infringement of the ACD, the ISA should provide a Statement of Preliminary View (SPV) to the complainant(s) and respondent concerned. The SPV should set out the ISAs preliminary position regarding the alleged infringement, including the key elements of law and the facts that have led to that conclusion, so that the respondent is clear what case it is addressing. If the ISA suspects there has been a breach of Non-Discrimination under the ACD, the SPV should also include the ISA's preliminary view on what action (if any) the ISA is considering taking and why.

Actions available to ISAs may vary according to their national legislation, however, they could include making a decision requiring the airport to take appropriate steps. Such steps include, for example, rectifying the relevant airport charges and directing compliance with the ACD, and remedying any loss or damage sustained.

5. Parties' Rights to Make Representations

ISAs should provide parties with an opportunity to make representations in relation to the SPV. The parties who are sent the SPV should be given access to relevant information, subject to appropriate confidentiality arrangements, so that they can comment on the evidence that has led to the ISAs preliminary view and gather evidence that might support their own case in respect of the SPV.

The parties should be asked to make written representations to the ISA on the SPV. Depending on the nature of the case, the ISA may also allow parties to develop their position on the statement through representations at a formal meeting.

6. Subsequent Evidence

Should subsequent evidence come to light after the parties' written representations (and, if applicable, spoken representations at the formal meeting), the ISA should notify them of the new evidence and the ISA's views on it by a letter of facts or a supplementary SPV and allow them a further opportunity to comment on it before the ISA takes a final decision.

7. Withdrawal of a complaint

It may be appropriate and helpful for parties to a complaint to continue to discuss the matters concerned and, if possible, to agree a resolution themselves. If the parties would find it helpful, ISAs may be willing, where appropriate, to facilitate these discussions. If the parties reach agreement and the complainant withdraws its complaint, the ISA may decide not to investigate the matter further.

8. Publishing decisions

Where the ISA makes a decision, it should set out the final conclusion based on the key elements of law and all the evidence, facts and representations received from interested parties along the process. ISAs should normally publish the decision on their website. ISAs should take account of issues about the confidentiality of information when publishing its decision.

Information required to facilitate the process

- 5.3 A written submission to ISAs should contain the following information in order to be treated as a reasoned complaint of discrimination.

Information on the complainant and subject of the complaint

- Details of the complainant: Name and contact details (address, phone number, and e-mail address) of the complainant. This should contain details of a person authorised to discuss the detail of the complaint.
- Details of the respondent.

Details of the complaint

- 5.4 The complainant should set out the reasons for making the complaint, including a detailed description of the behaviour it considers to infringe Non-discrimination under the ACD. In particular, the following information should be provided:
- the part of the ACD it considers is being infringed;
 - a summary of events with relevant dates, including details of any relevant contact between the complainant and the respondent (for example, meetings, phone calls, e-mails);
 - reasons why it considers the respondent's behaviour to infringe non-discrimination under the ACD;
 - the effects of the behaviour on the complainant and any adverse effects of the behaviour on other parties; and

- action sought: Details of any action which the complainant wishes the ISA to take. This should include an explanation of whether (and, if so, why) the complaint is urgent.

Factual evidence supporting the complaint

- 5.5 The complainant should provide all available evidence (that is, information which the complainant already possesses, or which is readily accessible to it) supporting the complaint.
- 5.6 This may include copies of the relevant documentation (for example, contracts, notes of phone conversations, e-mails, minutes of meetings) and details of any person who can testify to the facts set out in the complaint.

Non-confidential version of the complaint

- 5.7 Any confidential information should be clearly marked. The complainant should also submit a non-confidential version of the complaint with the confidential material redacted using robust and reliable techniques. The complainant should justify any confidentiality requirement to the satisfaction of the ISA.