

Concession agreements and ISAs supervisory powers

1. Background & Introduction

- 1.1. The European Commission Sustainable and Smart Mobility Strategy (SSMS) and its Action Plan¹ lay down the foundation for how the EU transport system can achieve its green and digital transformation and become more resilient to future crises. To achieve these objectives, the SSMS includes the revision of Directive 2009/12/EC on Airport Charges (the “ACD”).
- 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 (hereinafter the “ACD”) and 2) promoting best practices in economic regulation of airports². The ACD requires Member States to assign responsibility for supervising the setting of airport charges to Independent Supervisory Authorities (hereinafter the “ISAs”).
- 1.3. The purpose of this paper is to check whether and how, ISAs powers and duties according to the ACD can be exercised when airports are operated under concession agreements as defined by Directive 2014/23 on the award of concession contracts³ (hereinafter the “Concession Directive”) and similar frameworks with analogous effects⁴.
- 1.4. The paper is divided in 4 chapters. The first provides an overview of the main relevant features of the ACD and of concession agreements, allowing chapters 3, 4 and 5 to detail the different areas of potential friction between those two frameworks. Chapter 3 is dedicated to the consultation between the airport managing body and airport users or the representatives or associations of airport users (hereinafter the “user consultation procedure”). Then, chapter 4 deals with investments and the quality of the services provided by the airport managing body. Finally, chapter 5 relates to the setting of airport charges.
- 1.5. This paper has been produced by the 2021 Working Group of the Thessaloniki Forum of Airport Charges regulators, taking into consideration the views of the airport and airline communities. In preparation of this paper, an investigative survey was sent to 27 ISAs. The findings of this paper are partly based on the responses of 17 ISAs to this survey. The ISAs who participated in the preparation of this paper are those of France, Greece, Ireland, and Portugal.
- 1.6. This report has been adopted by the Thessaloniki Forum in January 2022.
- 1.7. This report does not represent the views of the European Commission and does not in

¹ European Commission Communication on a Sustainable and Smart Mobility Strategy – putting European transport on track for the future, 9 December 2020 (see Communication and Action Plan here).

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

³ Directive 2014/23/EU of the European parliament and of the council of 26 February 2014 on the award of concession agreements.

⁴ Frameworks not submitted to the rules of the Concession Directive and not having the Concession Directive as its legal basis, for example similar provisions contained in law rather than in a contract.

any way change the requirements of the ACD.

- 1.8. This report should not be used as a limitation or constraint for Member States to apply their own methodologies, having regard to specific circumstances, regulation or other reasons as established in Article 1 (5) ACD.
- 1.9. This report will be kept under review and changed as and when deemed necessary by the Thessaloniki Forum.

2. Context

2.1 To define properly the scope of this paper, it is convenient to start with a brief recall of the main likely sticking points between (i) the role and powers of the ISAs and the intervention of users in the context of the ACD and (ii) the main features of concession agreements.

➤ **The role and powers of ISAs and the intervention of users in the setting of airport charges according to the ACD**

2.2 Airports are regulated where it is most likely that market power can be used and therefore, market mechanisms are substituted to avoid monopoly rents and anti-competitive practices. The ACD sets common principles for regulating airport charges in European Union, as a set of minimum regulatory requirements for the levying of airport charges: Transparency, non-discrimination, consultation, and correspondence between airport charge and infrastructure and/or the level of services provided.

2.3 As defined in the ACD, a safeguard to ensure that those principles are being complied with, is the establishment of an ISA in every Member State.

A mandatory user consultation procedure and two different types of procedures for ISA intervention.

2.4 Firstly, as defined in Article 6, par.1 and 2 of the ACD, a compulsory user consultation procedure shall be ensured. This procedure is applied by all Member State airports regulated under the ACD.

2.5 Then, as defined by the provisions of paragraphs 3 and 4 of Article 6, Member States can lay down a procedure for resolving disagreements on the airport charges proposal that can occur between the airport managing body and the airport users. Most Member States that responded to the investigative survey stated that they have implemented this procedure.

2.6 Alternatively, as defined by the provisions of paragraph 5 of Article 6, Member States can establish a procedure whereby the ISA shall determine or approve airport charges and their modulations or their maximum level. According to the replies received to the investigative survey, few Member States choose to implement this procedure. In particular, some Member States ISAs have also those powers either through the determination of the maximum charge per passenger that the airport may set or through ex-ante approval of airport charges by the relevant ISAs if an airport asks for

a change of its airport charges.

In many Member States ISAs are also given additional powers

- 2.7 First of all, in many Member States, ISAs have power to launch an infringement procedure and eventually to sanction the airport managing body in case of a failure to comply with its tariff regulation obligations. Moreover, one ISA has the power to set the amount of charges after a period of 24 months during which the airport managing body has not had its tariffs certified.
- 2.8 Second, to ensure an effective control of ISA over the setting of tariffs, most ISAs have the power to request additional information (and one ISA has this power at any time even outside the procedures provided for in Articles 6, paragraphs 3&4 or 5, of the ACD). Moreover, one ISA has the power to determine the criteria for the financial reporting and to impose accounting and corporate separation of integrated companies. One ISA has the power to set, by a regulatory act, the principles to which the allocation rules of costs and products between the regulated and non-regulated perimeters shall obey.
- 2.9 Third, it can be noted that one ISA has the power to propose the suspension, revocation, or withdrawal of the concession agreement. Another ISA is empowered, in case of a change in the ownership of the airport managing body, issue an opinion on the economic capacity of the applicant.

➤ **Concession agreements within the meaning of the Concession Directive**

- 2.10 The main features of concession agreements are recalled by article 5 of the Concession Directive which states that the award of a concession agreement *“shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. **The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible**”*. Then, as the concessionaire is exploiting the airport, he is the one that will set and collect airport charges, within the national and European regulatory framework. The Concession Directive defines the competitive procedure to be followed for the award of a concession agreement to ensure effective and nondiscriminatory access to the concessions market for all European companies.
- 2.11 According to the responses that we received from the investigative survey sent to all the ISAs, only some of the airports within the scope of the ACD, that as at 2019 met the requirement of the 5mppa threshold provided for under the Directive, are currently operated through a concession agreement within the meaning of the Concession Directive. According to the answers received to the investigative survey, in 4 Member States a total of 31 concession contracts have been concluded for the operation of an airport.

- 2.12 All these concession agreements have at least one thing in common: they are long-term agreements as their duration is around 40 years or more for some. This long duration is, according to the Concession Directive “*indispensable to enable the concessionaire to recoup investments planned to perform the concession, as well as to obtain a return on the invested capital*”⁵.
- 2.13 In some Members States, there is no concession agreement within the meaning of the Concession Directive but similar frameworks with analogous effects:
- In Belgium, Brussels Airport is operated under a license for which the rules are laid down by royal decrees and are to be considered as a “similar framework with analogous effects” compared to a concession agreement.
 - In Spain, Aena’s regulatory framework of operation has similar effects to a concession agreement. All Aena’s airports (including above and below 5 million passengers) are operating under the DORA agreement, which is a Council of Ministers Decree that establishes the economic rights and obligation of Aena in managing the network of airports.
- 2.14 Thus, on the one hand, under the ACD, regulation, through user consultation procedure and the supervisory powers of the ISA, is designed to prevent unfair and anti-competitive pricing as well as discriminatory charging among airport users. On the other hand, under a concession agreement, the airport managing body commits itself to making investments and bearing operating risks over a long period of time. The airport managing body will reasonably expect to obtain profit from the agreement and to ensure, to some extent, that their costs are covered through the concession period.
- 2.15 The purpose of this paper is then to examine whether the overlap of these frameworks has an impact on regulation based on ACD provisions, that is to say on the user consultation procedure and on the roles and powers of ISAs with respect to investments, quality of service and the setting of airport charges.

3. Consistency between concession agreements and the user consultation procedure

3.1 This chapter contains an overview of the potential impacts that concession agreements may have on the user consultation procedure. It begins with a description of the user consultation procedure under the ACD (i). The chapter also discusses the extent to which concession agreements can sometimes, depending on their provisions, interfere with this process (ii). At the end of the chapter, a series of examples of practices that could reinforce the effectiveness of the consultation process are presented (iii).

➤ The user consultation procedure according to the ACD

3.2 According to Article 6 paragraph 1 of the ACD, a user consultation procedure must be

⁵ Directive 2014/23/EU of the European parliament and of the council of 26 February 2014 on the award of concession contracts, whereas (52).

established concerning *"the functioning of the airport charges system, the level of airport charges and, where appropriate, the quality of service provided"*.

- 3.3 Additionally, Article 6 paragraph 2 of the ACD establishes that, wherever possible, changes in the system or level of airport charges shall be made in agreement between the airport managing body and the airport users.
- 3.4 It should also be pointed out that concerning the process of consultation the Thessaloniki Forum, in 2016, provided several recommendations on the process for consultation between airports and airlines required by the ACD as well as the principles that ISAs seek to apply in exercising their supervisory role⁶.
- 3.5 With respect to the user consultation procedure, the responses received to the mentioned investigative survey allows to conclude that all Member States do indeed ensure a regular consultation process between the airport managing body and airport users. In some cases, the consultation occurs every year, while in other cases, in particular when there is a multi-annual agreement, the consultation may occur within a period of 1 - 5 years. In all cases, ISAs ensure that there is a discussion between the airport managing body and airport users.
- **To what extent can concession agreements interfere with the user consultation procedure?**
- 3.6 At the airports under concession agreement, it was noted that in many cases the concession agreement contains a provision on consultations with a reference to applicable law. Also, at airports that have a similar regulatory framework with analogous effects to concession agreements, it was noted that national law imposes a pluriannual consultation and/or an annual consultation.
- 3.7 Therefore, concession agreements apparently do not interfere with the existence of a user consultation procedure, at least from an operational and procedural point of view. However, as will be developed in part 4 & 5, in some concession models, where the risk borne by the concessionaire is compensated by management independence and the freedom to set the tariffs (no co-management with airport users), some provisions of concession agreements may then reduce the effectiveness of the user consultation procedure.
- 3.8 Moreover, there are several ISAs that reported one difficulty with respect to the articulation of concession agreements with the users consultation procedure, which is related to the composition of the entities consulted, i.e., the concession agreements can, and some do, define the need to consult entities that are not exactly the same as the ones required by the ACD. Article 6 paragraph 1 of ACD establishes that airport users or the representatives or associations of airport users should be consulted regularly with respect to the operation of the system of airport charges, the level of airport charges and, as appropriate, the quality of service provided. In some of the cases presented the concession agreement establishes, on the one hand, a less

⁶ Thessaloniki Forum of Airport Charges Regulators (2016), "Recommendations on Consultation and Transparency".

extensive composition for the consultative body, for instance, the concession agreement establishes that only air carriers should be consulted and not all airport users, and, on the other hand, a more extensive composition for the consultative body, for example, the concession agreement establishes that also professional air transport organizations and local authorities should be consulted. Thus, such multiplication of consultation procedures may generate an additional burden for airport managing bodies and lead to a loss of efficiency and quality of consultation.

- 3.9 It also should be pointed out another difficulty reported which regards business secrecy. From the responses received to the investigative survey it can be concluded that some financial and economic information transmitted during the consultation procedure, as provided for by Article 7(3) of the ACD, is sometimes considered as confidential information and needs to be treated as such in consequence.
- 3.10 This is particularly noticed in airports under concession operated by listed companies. In these cases, the companies may invoke stock exchange regulation and refuse to disclose some important information to airport users, referring that it is considered “inside information” under EU Regulation No. 596/2014 of 16 April 2014. In view of the responses received to the investigative survey this had already happened in the context of a tariff approval procedure, although this “inside information” was eventually passed on the respective ISA.
- 3.11 Whenever the airport managing body is a listed company, this may be an issue, independently of the airport being under concession or not.

➤ **Examples of practices that could reinforce the consultation efficiency**

- 3.12 It should be noted the following examples of specific cases concerning ISAs and consultation:
- in many cases the ISA will only approve the changes in charges if a proper consultation has taken place before.
 - the consultation procedure may be cancelled by the ISA, where the exercise of its supervisory functions showed:
 - significant infringements of the procedure laid down in the regulation;
 - serious untruthfulness of the information provided to users and/or by users against evidence of existing documents or information, in particular with respect to the accounting report presented by the managing body and referred to the base year of the regulatory period.
 - Concerning business secrecy⁷, it should also be noted that there are some cases where the national law establishes that prior to the presentation, and when the

⁷ Issues concerning business secrecy are not exclusive to concession agreements.

airport is managed by a listed company, all participants in the consultation shall sign a confidentiality agreement if they wish to gain access to the information.

3.13 In the Forum's opinion, besides the recommendations already provided on the Thessaloniki Forum's document⁸, the consultation efficiency could be reinforced, for example, with the following practices:

- In order to ensure that the airport managing body consults airport users and meets the necessary requirements, ISA could:
 - (a) additionally monitor if the consultation in fact occurs and, if appropriate, attend the consultations/meetings;
 - (b) require minutes of every meeting, signed by the airport managing body and the airports users, in order to make its assessments;
 - (c) provide for a vote on the airport charging proposal;
- In order to ensure that the airport's managing body final decision takes into consideration the views and comments of airport users, at the end of the consultation period, the airports managing body shall send its final proposal regarding airport charges to airport users as well as to the ISA with the airport users' views/comments, and also with its answer/justification to each point of view/comment presented;
- In order to ensure the communication of information during the process of consultation, in particular at airports managed by listed companies, it should be guaranteed that anyone who receives information from the airport managing body, as well as their authorized representatives, signs a non-disclosure agreement, in whatever form, unless the airport managing body has given written permission otherwise.
- It also should be ensured that the information provided does not conflict with stock exchange regulations. Such process of determining what information is protected can be complex for the airport managing body, so if there is any doubt about the scope of the protected information, and in order to avoid the process being too burdensome for listed companies, it may be worthwhile for them to have prior discussions with the authorities to identify the type of information that can be passed on, under non-disclosure agreements, with users, taking into account the requirements of the ACD. It should be ensured that the information available to users is the same for airports under concession being operated by listed company and a non-listed company. In any case, a first step to ensure transparency could be to make all concession agreements public, as long as it does not interfere with the protection of business secrecy.

4. Consistency between concession agreements and ISAs supervisory powers with respect to investments and quality of service

4.1 It is important to assess the impact that certain provisions of the concession

⁸ Thessaloniki Forum of Airport Charges Regulators, 2016, "Recommendations on Consultation and Transparency".

agreements may have on investments (i) and quality of service (ii), as these are directly linked to the level of airport charges.

➤ **Investments**

- 4.2 Investments constitute a large portion of the regulated asset base in most airports, and consequently are also a key component of airport charges. This makes it important to ensure that all investments are cost efficient and appropriately take account of the needs of airport users. Particularly in the case of concession agreements, it is valuable to consider how this is ensured.
- 4.3 In most cases, concession agreements require that the concessionaire undertakes a certain level of investment at the airport. The extent of requirements varies across the different airports. In some Member States, a capital investment plan is agreed as part of the process of developing the concession agreement or specific projects are detailed in the agreement, while in others details are not planned, but a minimum level of investment is required to maintain service standards and ensure that the airport develops in line with national aviation plans. In at least one Member State, conditions for triggered investments may also be stipulated in a concession agreement.
- 4.4 In most cases, the ISAs are not involved in assessing the appropriateness of investment plans that are decided as part of concession agreements. However, in a number of Member States, the ISA does have a role in assessing whether the actual investments were implemented in line with the agreed investment plan and adjusting the tariffs based on compliance with the investment plan.
- 4.5 Pre-funding of certain investments is allowed within concession agreements in many states. In most cases, there are conditions under which this may occur. These provisions are largely in line with the policies outlined by ICAO in the Airport Economics Manual⁹ on this matter, in that they allow pre-funding only for large projects, the funding must be for a limited period of time and a limited proportion of the full cost may be funded. This approach can allow for a smoother profile of charges over time while funding larger projects. It is important that there are appropriate regulatory accounting requirements in place to enable monitoring of pre-financed project funds. In some cases, the ICAO guidelines are adapted to enforce a specific funding period or the level of allowed funding.
- 4.6 In some Member States, environmental investments may receive pre-funding with restrictions on the time period and the accounting of the associated income. In at least one Member State, pre-funding is allowed for all projects but must come from an airport development fund which is built up through a passenger tax that is permanently in place. There are some examples of investments receiving pre-funding across Member States. In at least one Member State, a new terminal has been pre-funded with the agreement of the airport user committee. A new airport was pre-funded in another Member State through charges at a nearby airport, but the

⁹ https://www.icao.int/sustainability/documents/doc9562_en.pdf

concession agreement and project have since been terminated. Overall, ISAs report that the pre-funding of investments is not a common occurrence.

- 4.7 ISAs tend to have little involvement with the capital investment plans associated with concession agreements, which may potentially conflict with the ISAs role in the oversight of airport charges in accordance with the ACD. The methodology by which a concessionaire will be required to recover or absorb any potential overspend on capital projects, or indeed how an underspend is dealt with, can have a considerable impact on the resulting airport charges.
- 4.8 Therefore, where the concession agreement provides for some investments, it can be valuable to consult users on the appropriateness of those investments during the negotiation of the concession agreement, and regularly throughout the concession agreement period. The ISA should be included in this process, potentially to offer their expertise in the case of a disagreement between users and the concessionaire. Similarly, the ISA may issue an opinion on the consultation and monitoring of the investment at any time that airport charges are revised. This can enable to ensure that all investments are proportionate and consistent with the objectives set in the national investment plans, to the benefit of airport users.. It is clear that the provisions for investments in concession agreements and the role of ISAs in the determination of airport charges may be reconcilable, but it is not the case that they are always coordinated. In order to give effect to the spirit of the ACD, it is necessary that there is flexibility within concession agreements to allow meaningful consultation to drive optimal outcomes in relation to investments.

➤ **Quality of Service**

- 4.9 In most cases, concession agreements contain some provisions regarding quality of service at the airport. Given that the ACD allows for service level agreements to be agreed between airport users and airport managing bodies, this raises questions of how such agreements are reconcilable with the concession agreements.
- 4.10 There are varying levels of involvement of the ISAs with the quality of service objectives in a concession agreement. In some cases, the concession agreements do not involve the ISA but instead are subject to the oversight of another entity within the Member State. In at least one Member State, the plan for the quality of service targets is drafted by the concessionaire, as well as details of any resources it intends to use to achieve these targets. This is then consulted on with airport users before being agreed in the agreement. Many concession agreements also detail a system of penalties associated with non-compliance with the quality of service performance targets. In some Member States, the ISA is then responsible for calculating the annual penalty due for any non-compliant airport. Broadly speaking, it does not appear to be common that the ISA is involved in the compliance with the quality of service levels agreed in the concession agreements. Although, in some Member States the quality charter is agreed in compliance with the concession agreement and therefore the ISA will be involved in compliance.
- 4.11 There are several ISAs that report the existence of service level agreements in airports

that are operated under concession agreements. In at least one Member State, the concessionaire must develop quality charters following consultation with the representative organisations of the airport users and the ISA. The consequences for non-compliance with service level agreements vary across countries, and the ISA is not always involved in ensuring compliance with the service level agreements. In some Member States, the ISA will only intervene in the case of a disagreement between the airport user and the airport. In other countries, the ISA is required to verify that the concessionaire is performing in line with the service level agreement and in a number of cases, they are also required to ensure that the concessionaire applies all incentives or penalties to the final airport charges. Some ISAs may enforce penalties on airports that do not comply with service level agreements. The ISA then ensures that a percentage of airport charges or revenue from regulated activities is returned to airport users. In other Member States the ISA may demand adjustments to the quality charters and refuse proposed adaptations that do not accommodate the quality of service level that was agreed upon.

- 4.12 In many cases, the quality of service provisions of the concession agreements are not combined with the service level agreements. As previously mentioned, in at least one Member State each agreement is subject to a different entity. However, there are several Member States where the service level agreements agreed between airlines and the concessionaire are defined in compliance with the concession agreement.
- 4.13 In examining the co-existence of service level agreements and quality of service provisions in concession agreements, several potential issues are relevant. Firstly, given that it is often the case that both agreements are developed somewhat independently of each other, how can consistency of objectives be ensured across both agreements; should it not be the case that the quality of service provisions in the concession agreement and the service level agreements are developed in tandem?
- 4.14 However, this further raises the question of what the incentive is for a concessionaire or an airline to conclude a service level agreement for an airport that has quality of service provisions in the concession agreement. If the quality of service objectives in a concession agreement are developed with the ISA and airport users, to ensure that they are reflective of user needs and the requirements at the airport, a service level agreement would likely not be required in most cases.
- 4.15 Finally, concession agreements are often agreed for a period of several years which raises the question of what happens in the case that user requirements change within this term. The agreements should therefore be defined in a way that allows for meaningful consultation between stakeholders so that the outcomes are in harmony with the aims of the ACD. It is important that there is a level of flexibility within concession agreements in relation to quality of service to ensure that they are in line with the requirements of users throughout the full period of the concession agreement.

5. Consistency between concession agreements and the powers of ISAs in relation to the

setting of airport charges

5.1 Concession agreements and prerogatives of ISAs and users presents some sticking points in the setting of airport charges. In particular, when concession agreements contain provisions impacting the setting of airport charges (i). In such a case, it is necessary that the ISAs and users can regularly revise these parameters in accordance with the objectives of the ACD. As shown by the responses to the investigative survey send to the ISAs, such a revision could intervene on a multi-annual basis (ii).

➤ **Two frameworks for setting airport charges with some sticking points**

5.2 Many concession agreements contain provisions governing the setting of airport charges(i), and these provisions, in the absence of sufficient room of manoeuvre, could potentially hamper the consultation of users and the exercise of their missions by the ISAs in accordance with the ACD (ii), while concession agreements, due to their duration and depending on their provisions, may not necessarily be the most effective tool to ensure fair and competitive pricing (iii).

Many concession agreements contain provisions governing the setting of airport charges

5.3 Concession agreements organise the delegation of the operation of airport public services to a third party, which is the airport managing body. As such, the managing body, generally private, must ensure all or part of the design, construction, financing, major maintenance, upkeep, and management of the infrastructure. In return, it has the right to collect fees from airport users. Because of the depreciation period of the initial or extension assets, concession agreements generally cover a period around 40 years or more for some.

5.4 Depending on the nature of the commitments made by the concessionaire and, more generally, the risks that are effectively transferred to it, its financiers expect accordingly high levels of profitability. Therefore, they sometimes require additional guarantees concerning the level of airport charges that may be collected, leading to the incorporation of tariff regulation mechanisms in the project documentation¹⁰.

5.5 These mechanisms are protean. They generally aim at defining ex ante target or price cap, sometimes explicitly defined based on costs, target profitability, and/or tariffs charged by comparable airports. It should be stressed here that in some models, practice shows that in the presence of a price cap, prices tend to be set close to the price cap, which tends to turn such a cap into a guarantee granted to the concessionaire.

5.6 For example, the following mechanisms can be found in the different concession agreements analysed:

¹⁰ Including in particular the concession agreement or other framework with analogous effects.

- The tariffs consider the results of an econometric model of costs plus a fair profit, while remaining aligned with the results of an analysis model of tariffs charged by comparable airports;
 - The maximum permitted level of return for each financial year is set and the method for determining fares is established;
 - The price cap and the corresponding airport charges are defined ex ante by a formula taking into account actual evolution of different criteria. In particular, a tariff freeze mechanism in case of a difference of more than 15% of the full touchdown cost of an A320-200 and an A330-200 compared to a list of 12 European airports;
 - A cap on airport charge rates is set for dual-till airport concession agreements;
 - A price cap on airport charges and the methodology for calculating this cap are set.
- 5.7 Risks sharing mechanisms provided by concession agreements may also tend to mitigate transferred risks and opportunities related, for example, to deviation between effective and forecasted traffic. In at least one Member State, overperformance related to traffic is compensated, thus curbing potential over pessimistic forecasting bias. Risks sharing mechanisms embedded in airport concession agreements may help reaching appropriate economic optimum and defining suitable incentives for airport users and managing bodies. In any case, tariffs should reflect the remaining risk borne by the airport managing body. For all these reasons, such terms and conditions would gain to be initially and regularly discussed with users, and, as the case may be, reviewed, by the ISAs in case of disagreement.
- These provisions are likely to impact the consultation of users and the exercise of their missions by the ISAs as provided for in the ACD*
- 5.8 Where there are provisions in the concession agreement relating to the setting of airport charges, it may be considered by the managing body that a proposal for changes in airport charges compliant with the concession agreement can hardly be challenged by users and ISAs.
- 5.9 However, in particular, in the presence of a concession agreement setting a price cap, the latter may result in insufficient room for manoeuvre and could potentially hamper the consultation of users and the exercise of their missions by the ISA. Indeed, the amount of the proposed airport charges tariffs, as long as it does not exceed the cap can only be questioned when the charges setting principles set by ICAO and included into the ACD are not complying with. Then, in some concession's contexts, airport charges can almost systematically reach this cap, without any debate on the merits of the latter, particularly regarding investments and/or quality of service.
- 5.10 In this configuration, the effectiveness of the consultation of users and of the intervention of the ISA can be questioned. On the one hand, users are neither consulted when the cap is set, nor are they in a position to question the validity of the cap during the consultation. On the other hand, the intervention of the ISA will not allow the comments of users to be considered either, since these same stipulations

will also lead to an impediment to the control carried out by the ISA, as regards the verification of the fairness and competitiveness of pricing. These difficulties were highlighted in the European Commission's evaluation of the Directive in 2019¹¹.

- 5.11 Yet, the capping of tariffs by the concession agreement does not necessarily make it possible to induce fair levels of remuneration when market forces are not sufficient in the absence of a mechanism for recalibration to actual costs.
- 5.12 Some airport infrastructures are regulated because of their natural monopoly. Indeed, when competitive mechanisms cannot be fully applied, it has been considered that it is economically useful to combat the risk of rent-seeking situations, which are materialised by profitability levels higher than the sole remuneration of the risks effectively transferred.
- 5.13 This may be symptomatic of the existence and use of some market power by the airport managing bodies to their advantage. Indeed, in a situation of perfect competition, the airport managing body's search for the optimum tariff¹² should generally lead him to charge prices which mimic the prices that would be charged by a company in a competitive environment.

Provisions setting airport charges over long periods of time may, depending on their wording, not necessarily be the most effective tool to ensure fair and competitive pricing

- 5.14 Stability provided by a concession agreement or a clear regulatory framework may decrease risk transfer to the airport managing bodies¹³. However, setting ex-ante price cap or price cap formulas for the whole concession duration may, depending on the mechanisms foreseen, induce higher transferred risk, the economic efficiency of which could and should be further questioned by ISAs.
- 5.15 Indeed, as the risk generally increases with the duration of the transfer, such durations are likely to increase the authorised return on capital, and ultimately the total sums paid by users, in the same way as insurance covering more risks. It is true that a moderate risk transfer can be a source of economic efficiency by encouraging the concessionaire to mitigate these risks. However, the risks incurred by the airport

¹¹ European Commission Staff Working Paper, "Evaluation of the Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges", 2019: "Concession agreements in place at EU airports (...) usually contain provisions relating to airport charges setting and often include main parameters for the charges setting process and the calculation of the level of airport charges. Other Member States adopted national legislation containing main parameters for the charges setting process and the calculation of the level of airport charge.

In order to comply with Article 1(5), these provisions and parameters should however not limit the airport charges setting process to such an extent that it would render the consultation as provided for in Article 6 and the consultation on new infrastructure in Article 8 meaningless or limit the scope for the intervention of the ISA pursuant to Articles 6(4) or 6(5) and Article 11".

¹² Maximisation of turnover and profit, taking into account the fact that fare increases may lead to a drop in patronage, e.g., by switching to competing offers.

¹³ With the approval of the ISA. Without ISA control at the stage of project documentation preparation, the ISA is not able to carry out its cost-effectiveness control task afterwards.

managing body over the life of a concession are difficult to quantify for both parties and cannot always be mitigated as they are partly exogenous. Transferring them is therefore costly and it may not be the case that the benefits to the user or the concession grantor compensate for this additional cost.

- 5.16 Furthermore, the duration of a concession agreement makes it difficult, if not impossible, to write a complete contract, as defined by Grossman and Hart (1986)¹⁴: in practice, contracts cannot cover all possible futures at the time of its signature. Long-term contractualisation is therefore likely to lead to formal or informal renegotiations of the contract, which can be a source of inefficiency for both the concessionaire and the users. On the one hand, they are a source of uncertainty and therefore of risk for the concessionaire. On the other hand, there is a risk of "hold-up" where the concessionaire, who has some bargaining power due to the requirements of public service continuity, could extract a rent. For this reason, regulation is necessary.
- 5.17 Moreover, the multiplication of regulation mechanisms, between tariff mechanisms provided for in the project documentation on the one hand, and the intervention of the ISAs on the other, could make it difficult to understand the overall regulation framework. It could then be sub-optimal to set the remuneration in the tender phase, for several decades, in such a situation of uncertainty. Indeed, bidders could legitimately overestimate the actual risk of the project and therefore ask for a higher capital remuneration than necessary. Clearly defining the role of ISAs in relation to airport charges in the ACD would help provide certainty of regulation.
- 5.18 Finally, a concession agreement, depending on its provision, spanning several decades may not be an appropriate framework for considering technological developments and productivity gains. The tariff provisions observed aim to guarantee a recovery of the projected costs over the coming year as well as a fair return on capital invested. Depending on the concession agreement provisions, the concessionaire will have little incentive to make these investments since the productivity gains will ultimately reduce the fees that he may charge. And consequently, in the longer term, in the absence of an adequate intervention by ISAs, users are affected by this reduced incentive to innovate: they do not benefit, or only with a certain delay, from innovations that would nevertheless make it possible to provide a better quality or lower cost service.
- 5.19 In this sense, responses to the investigative survey show that many concession agreements have anticipated those difficulties and were accompanied by multi-annual tariff adjustment mechanisms. In any case it is important that the parameters determining the setting of the airport charges tariffs can be regularly revised with involvement of the ISA as provided for by the ACD.

- **With regard to the objectives of the ACD: in case of concession agreement containing provisions impacting the setting of airport charges, a regular and**

¹⁴ Grossman, Sanford J.; Hart, Oliver D. (1986). [*"The costs and benefits of ownership: A theory of vertical and lateral integration"*](#). *Journal of Political Economy*. **94** (4).

effective intervention of users and ISAs is needed

- 5.20 As explained above, provisions of concession agreements impacting the setting of airport charges, according to their wording, may limit the role of users consultation and of ISAs intervention according to the ACD.
- 5.21 In such situations, it appears necessary to ensure that the parameters determining the level of tariffs are regularly reviewed by the ISAs, in close consultation with the users according to the objectives of the ACD.
- 5.22 This revision could occur on a multi annual basis (i) provided that certain conditions are met to ensure the effectiveness of this intervention (ii).

The revision by users and ISAs of the parameters impacting the setting of airport charges could intervene on a multi annual basis

- 5.23 The responses received to the investigative survey show that several national regulatory frameworks provide for multi-annual regulatory periods for the setting of airport charges:
- One ISA publishes a Model for the regulation of airport charges, which proposals for changes in airport charges must comply with. This Model is designed and intended to apply for a maximum period of four years.
 - In one Member State, the managing body and the users are trying to reach an agreement on the tariffs for airport charges. This agreement defines the period for which the amount of airport charges is fixed and the date on which negotiations for the next period should start, which may be a maximum of four years after the entry into force of the new airport charges. An annual consultation may be part of the agreement but is not mandatory.
 - In one Member State, where a multi-year regulatory period is in place, taking into account the interest of all the parties involved (airport managing bodies, airport users and ISA) some parameters of the airport charges are annually updated. For example, charges are updated, following an annual consultation, to consider the actual investments realized - which could be lower or higher than those foreseen in the multi-annual agreement - and by not changing other parameters (e.g. charging formulas, WACC).
 - The regulated period lasts 5 years in 3 different Member States. Different aspects related to airport charges, investments and quality of service are discussed and set at the beginning of this periods:
 - In the first one, at beginning of each regulatory period, the tariff control formula, the tariff system, and their evolution during the same regulatory period are fixed by the incumbent, after consultation with users.
 - In the second one, at the beginning of each regulatory period, after consultation with users and a non-binding opinion from the ISA, (i) the levels of quality of service and capacity standards for airport infrastructure integrated into the network, (ii) as well as the minimum service conditions for

such infrastructure, investments, and maximum revenue per passenger, based on efficient, non-discriminatory, and objective costs are set.

- In the third one, the regulation period will last five years when an additional agreement is concluded and annexed to the concession agreement. This agreement is concluded between the State and an airport managing body after consultation of users and the assent of the ISA. Where such agreement is concluded, it shall determine, for the period concerned, the conditions for the evolution of charges, considering in particular, forecasts of costs, revenue, investments and objectives relating to the quality of the public service provided by the airport managing body.
- 5.24 The use of a multi-annual period seems, to be an effective way for ISAs and users to intervene also in presence of a concession agreement.
- 5.25 This could allow a pertinent analysis of the parameters impacting the setting of airport charges by ISAs and users considering the economic cycles of concession agreements.
- 5.26 As provided for by in Article 6 paragraph 1 of the ACD, *“consultation shall take place at least once a year, unless agreed otherwise in the latest consultation”*. Users should therefore be informed every year on the evolution of capex, traffic and charges. However, despite the advantages of the annually consultations prescribed on the ACD, these appear to be enhanced, if agreed with airport users and allowed by the ISA, with addition of a multi-year consultation as annual regulation of airport charges does not appear to be well-calibrated to consider the economic cycles specific to airport concession agreements.
- 5.27 Indeed, as developed in part 4 of this paper, such a contractual framework is synonymous with major investments and the impact of these investments on airport charges is decisive. Consequently, they must be analysed and taken into consideration by users and ISAs in their entirety (opportunity, design, financing, depreciation) when setting the rates of airport charges, which is possible with a multi-year time horizon.
- 5.28 In addition, it can be noted that the use of a multi-annual regulatory period is beneficial to airport managing bodies, as it provides stability and legal certainty during the regulatory period. Indeed, as explained above, the regulatory stability provided by a multi-year regulation period will have a beneficial impact on the concessionaire's level of risk without the duration of this period being too wide, as may be the case in a concession agreement.

The need for an intervention of users and ISA compatible with the objectives of the ACD when required to analyse the parameters impacting the setting of airport charges on a multi annual basis

- 5.29 If setting airport charges tariffs on a multi-annual basis seems to complement well a mainly contractual framework, allowing the effective intervention of users and ISAs appears essential to enable them to analyse the fairness and competitiveness of pricing. The review of national regulatory frameworks presented above allows us to

identify several conditions for success.

- 5.30 First, to ensure effective intervention of users and of the ISA, provision could be made at the beginning of each multi-annual regulatory period for (i) a user consultation phase, which should be as transparent and complete as possible, and/or (ii) an intervention of the ISA by an opinion or a dispute settlement procedure decision, which should be as binding as possible.
- 5.31 For this intervention to be effective, and for the reasons set out before, the opinion issued by the ISA on this occasion should not be bound by any provision of the concession agreement and the ISA should (a) be provided with all relevant information, so as to (b) be in a position to analyse and to amend the level of airport charges proposed by the managing body, using the relevant methodology the ISA has decided to adopt.
- 5.32 Secondly, in addition to this essential intervention at the beginning of the regulation period, it is useful to foresee, during each year of the multiannual regulation period, (i) a more limited phase of consultation with users as well and (ii) an intervention of the ISA, also more limited and/or on request of users. The ISA and the users should also be able to comment on any changes to or termination of the agreement for each multi-annual period to ensure that these are in line with the terms of the agreement.
- 5.33 However, it should be stressed that the control of the ISA during the regulatory period can only be limited to the condition of an effective intervention at the beginning of the tariff period.
- 5.34 The purpose of this annual intervention is to ensure that the correct application of the predefined multiannual regulatory framework and, if necessary, to adapt it in the event of exceptional circumstances or excessive differences between the performance achieved and the forecasts made at the beginning of the period. It is therefore essential that users and the ISA have been able to analyse and discuss the validity of these forecasts.
- 5.35 In Spain, as detailed above, airport charges are regulated by the DORA for a period of five years. However, although the regulatory framework provides for the intervention of the ISA at the beginning of each regulatory period, this intervention is not effective since the ISA gives a non-binding opinion on the draft DORA. Moreover, although the ISA can make annual adjustments, these can have little influence on the actual level of charges, so that they are not sufficient to counterbalance the lack of effective intervention at the beginning of the regulatory period.
- 5.36 Similarly, in France, a legislative amendment limited the control exercised by the ISA during the multiannual regulatory period, at a time when multiannual regulation contracts concluded without any ISA's assent were still in force. Under these conditions, the ISA was asked to approve annual tariffs with particularly limited powers, without having been able to ensure at the beginning of the multiannual period that the regulation contract was complete.
- 5.37 If a lighter intervention of the ISA can be envisaged during the multiannual period, it

is only subject to the full and effective participation of the ISA and of the users in the conclusion of the regulation contract in order to ensure its completeness.

➤ **Key points**

- 5.38 Many concession agreements contain provisions relating to the setting of airport charges. As a proposal for the evolution of airport charges complying to the concession agreement is then difficult to question, such provisions are thus likely to hinder the consultation of users and the exercise of their missions provided for in the ACD by the ISAs.
- 5.39 Yet, given its long duration and depending on its provisions, the concession agreement may not necessarily be the most appropriate instrument for setting airport charges. In particular, setting the trajectory of airport charges or the methods for the setting of airport charges over approximately 40 years may entail a significant transfer of risk for the airport managing body, which necessarily results in a cost for the granting authority, ultimately borne by the user.
- 5.40 In such situations, it appears necessary to ensure that the parameters determining the level of tariffs are regularly reviewed by the ISAs, in close consultation with the users according to the objectives of the ACD.
- 5.41 The use of a multi-annual period seems, to be an effective way for ISAs and users to intervene also in presence of a concession agreement. This could allow a pertinent analysis of the parameters impacting the setting of airport charges by ISAs and users considering the economic cycles of concession agreements.
- 5.42 The review of national regulatory frameworks allows to identify several conditions for success of an effective intervention of ISAs and users during this period.
- 5.43 Contractual stipulations should always respect the principles established in Article 1, paragraph 5 of the ACD and as a whole the requirements established in the ACD, and in particular when these provisions affect the process of setting airport charges.
- 5.44 In any cases, provisions of concession agreements or of similar frameworks with analogous effect or of multi annual agreements, should never prevent ISAs from exercising in an effective way the powers granted by the ACD.
- 5.45 This should be preferably achieved by providing that the setting of airport charges is entrusted to the ISA under the law and should be reflected in the concession agreement as well.
- 5.46 In order to ensure consistency between airport charges regulation and concession agreements, the perimeter of activity of the granting authority and of the ISA should be clarified.
- 5.47 On the one hand, with the most binding intervention possible at the beginning of the period. To be useful, this opinion should not be bound by any stipulation of the concession agreement. In the absence of a binding opinion at the beginning of the

period, it should not be bound by the stipulations of the multi-annual regulation contract.

- 5.48 On the other hand, with a more limited intervention every year during the multi-annual period: verification of compliance with the multi-annual regulatory framework and, where appropriate, at the request of users following the consultation.
- 5.49 The revision of the ACD, could consider the impact of concession agreements on airport charges. In this regard, a stabilised regulatory framework is in the interest of all parties involved.

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