

Recommendations on market power assessments to ensure that economic regulation of airports in the EU is appropriately targeted.

Background

1. The goal of the Aviation Strategy¹ is to strengthen the competitiveness and sustainability of the entire EU air transport value network. 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.
2. The Thessaloniki Forum of Airport Charges Regulators is tasked with working on and making recommendations for a better common implementation of the 2009/12/EC Directive on Airport Charges (the "ACD"). The ACD requires Member States to assign responsibility for supervising the setting of airport charges to Independent Supervisory Authorities ("ISAs").
3. The Commission has asked the Forum to 1) provide recommendations to the Commission on how market power assessments should best be used to ensure economic regulation of airports in the EU is appropriately targeted; and, if deemed necessary, 2) provide ISAs with recommendations on best practices in conducting market power assessments. The working group will also provide advice to support the European Commission in developing its understanding of the way in which market power assessments are currently being used in aviation and other sectors. It is not within the scope of the working group to investigate the market power of airports in Member States or to discuss possible regulatory measures where significant market power is found.
4. This report focuses on providing recommendations to the Commission on how these economic market power assessments ("MPAs") should best be used to ensure economic regulation of airports in the EU is appropriately targeted. The report will provide 1) an introduction to MPAs and 2) recommendations on MPAs.
5. The recommendations herein have been formulated by the MPA 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 (BE) (represented at federal level), Germany (DE) (represented at federal level and by the Land Hessen), Spain (ES), France (FR), Greece (EL) Ireland (IE), Italy (IT), Poland (PL), the United Kingdom (UK) and the Netherlands (NL). This report has been adopted by the Thessaloniki Forum on November 17th 2017. This report will be considered by the European Commission (DG MOVE) as part of its evaluation of the Airport Charges Directive.

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

Caveats

6. The recommendations do not represent the views of the European Commission and do not in any way change the requirements of the ACD.
7. This report should not be used as a limitation or constraint for Member States to apply their own methodologies when circumstances, regulation or other causes recommend it.
8. These recommendations will be kept under review and changed as and when deemed necessary by the Thessaloniki Forum.

1. Introduction to Market Power Assessments

9. The assessment of market power of an airport requires an analysis of the competitive constraints faced by the airport in the relevant market. The starting points for this analysis is the definition of the relevant product and geographic market(s) in which the airport operates.² For the assessment of the market power, the market position of the airport is analysed in line with the guidance of the EU Commission on this subject.³ Competitive constraints arising from both the demand side and supply side are taken into account to evaluate the ability of the airport to increase its charges above the competitive level.⁴
10. The definition of market power in this report corresponds with the definition of significant market power which has been defined under the principles of EU competition law and rulings of the Court of Justice. Significant market power has been defined under Community law as “*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.*”⁵

² A relevant *product market* comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. The relevant *geographic market* comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas'. European Commission (1997), Commission Notice on the definition of relevant market for the purposes of Community competition law, OJEC, 97/C 372/03, para 7 and 8.

³ See for instance: European Commission (1997), Commission Notice on the definition of relevant market for the purposes of Community competition law, OJEC, 97/C 372/03

⁴ European Commission (1997), quoted, para 17 and 18. See also T-355/13 *easyJet vs. Commission*, ECLI:EU:T:2015:36, T-162/10 *Niki vs. Commission*, ECLI:EU:T:2015:283 and Commission Decision of 27 February 2012 in case COMP M.6663 Ryanair/Aer Lingus III As a practical application, see also study of German Airport Performance, commissioned by the Netherlands Competition Authority (NMa) (April 2010), The economic market power of Amsterdam Airport Schiphol, page 11

⁵ Case 27/76 *United Brands v Commission* [1978] ECR207. This definition has also been used in other cases under article 102 TFEU, which declares illegal abuses of a dominant position. In community law the term significant market power is used in situations where companies operate either individually or jointly with others

In this report also the terms dominance or dominant position are used. For the purposes of this report these terms also mean significant market power.

11. The use of these concepts is widespread in the application of general competition law throughout the EU and also outside the EU. Market power assessments are seen as a good way to determine the market power of a specific company as a supplier of a certain good or service.

Current use of market power assessments

12. The Airport Charges Directive applies to airports serving over 5 million passengers per annum (mppa).⁶ For these airports the ACD prescribes a set of minimum regulatory requirements on the setting of airport charges regarding consultation, transparency and non-discrimination.⁷ The ACD allows Member States to apply additional regulatory measures.⁸ Member States are empowered to decide whether it is necessary to impose economic regulation⁹ on airports which have less than 5 million passenger movements per year (mppa). For airports above a 5 mppa threshold Member States may consider that more measures are necessary than the minimal requirements of the ACD. In these circumstances Member States may decide to carry out an MPA to determine the need for (further) regulation but this is not mandatory. Only when indicated in national law MPAs may be obligatory.
13. The Airport Charges Directive also allows Member States to carry out MPAs for airports in order to decide whether or not certain airports require further economic regulation, as an alternative to applying the dispute resolution provisions in article 6 (3 and 4) of the ACD.¹⁰
14. National competition authorities (NCAs) and DG Competition at the level of EU can also carry out an MPA for airports, either in specific competition cases or in an advisory capacity.¹¹
15. To date, only a few ISAs have already made use of MPAs for airports, as the EU legislation does not require an assessment of market power before applying economic regulation. In some jurisdictions, market power assessments are not undertaken for instance because national law determines which airport should be subject to economic regulation.

⁶ The ACD also applies to the airport with the highest passenger movement in each Member State

⁷ For the purpose of this report we refer to this as conduct regulation, which reflects the current requirements in the ACD

⁸ See ACD Article 1(5). This article allows Member States to apply additional regulatory measures that are not incompatible with the Directive or other relevant provisions of Community law with regard to any airport managing body located in their territory

⁹ Economic regulation includes a wide range of regulatory measures for example price control, non-discrimination, quality of service monitoring. etc

¹⁰ See ACD Article 6(5) (b)

¹¹ ISAs can also be NCAs or have concurrent competition powers with the main NCA

Example MPAs in the telecommunication industry

16. Market power assessments based on competition law principles are also used in sector specific regulation in order to decide whether economic regulation is necessary, for instance in the telecommunication industry. This system was introduced in EU telecommunications legislation in 2002.¹² For the sake of harmonization of regulation and convergence of European telecommunications markets, the Commission introduced a list of predefined recommended telecom markets.¹³ Currently there are only four wholesale markets subject to regulation.¹⁴ These markets are defined on the basis of competition law principles. The decision to include them on the list was based on the so-called three-criteria test.¹⁵ This means that the list contains only those markets where regulation is likely needed in order to maximize consumer benefits.
17. National regulatory authorities may identify other markets than the ones listed in the Recommendation¹⁶ ; however when identifying markets other than those set out in the Annex, national regulatory authorities should demonstrate, and the Commission will verify, that the so-called three-criteria test is satisfied.¹⁷
18. If the national regulatory authority concludes there is significant market power in a telecom market, this decision will be automatically followed by some sort of economic regulation. The exact content of the regulation depends on the possible competition risks as a result of market power. The list of measures include transparency and non-discrimination, cost orientation, access, and price (economic regulation) obligations. These measures can be varied from fixing prices to the obligation of giving access at a reasonable price. For instance, if there is a risk for high retail prices the authority may impose an obligation on the company which has significant market power to allow other providers to use its network to offer competing telecom services.

¹² Framework Directive 2002/21/EC

¹³ ANNEX to the EC recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC

¹⁴ ANNEX to EC recommendation of 9 October 2014 (2014/710/EU)

¹⁵ "The wholesale markets listed in the Annex may have such characteristics as to justify ex ante regulation because overall they meet the following three cumulative criteria, which have also been used to identify markets susceptible to ex ante regulations in the previous versions of the Recommendation. The first criterion is the presence of high and non-transitory barriers to entry. [...].The second criterion addresses whether a market structure tends towards effective competition within a relevant time horizon. [...]. The third criterion is that the application of competition law alone would not adequately address the market failure(s) concerned. [...]" Paragraph 11, Commission Recommendation of 9 October 2014 (2014/710/EU)

¹⁶ Paragraph 21, EC recommendation of 9 October 2014 (2014/710/EU)

¹⁷ Paragraph 21, EC recommendation of 9 October 2014 (2014/710/EU), p. 83

2. Recommendations on market power assessments for Airports

19. This section presents the recommendations to the Commission on the best way to use market power assessments to ensure economic regulation of airports in the EU is appropriately targeted.
20. The Forum recommends that MPAs are a good tool to assess the extent to which an airport has, or is likely to acquire, significant market power. Therefore, MPAs can play a useful role in deciding which airports may require economic regulation and in which form.
21. Nevertheless, several practical and institutional aspects should be carefully considered and addressed when MPAs are more embedded in a framework of regulation. The practical aspects include the administrative burden of undertaking MPAs. Some of these aspects will be addressed in the remaining part of this report.
22. The Forum considers that general recommendations on undertaking MPAs would be a useful tool to facilitate a greater use of MPAs and to ensure further economic regulation of an airport is appropriately targeted to the MPA of that airport. A second report will elaborate on this subject, where useful and appropriate, with reference to the Commission's various guidelines on competition law, market definition and assessment of market power. The report will seek to explain the various practices on these matters and will also contain examples of applications relevant for the airport sector, in so far as it is useful for the actual implementation of MPAs.¹⁸
23. The Forum is not recommending that the ACD needs to be reviewed or that market power assessments should be made mandatory in any future revision of the ACD. Instead the Forum makes some recommendations on issues that should be considered, before proposals that encourage greater use of MPAs are developed.

Which types of airports should be subject to MPAs?

24. MPAs should not have to be carried out for all airports. Possible criteria to determine which types of airports should be subject to MPAs are discussed below.
25. The Forum recommends that there should be a threshold below which, or another criterion/set of criteria to define when, MPAs should not be normally needed. The most preferred option is using a threshold – for instance the number of passenger movements – to determine which airports should or should not be considered for MPAs. However, the possibility of embedding MPAs in a framework for airports below a certain threshold should – on request of interested parties and if justified - not be ruled out.

¹⁸ See for example: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997Y1209\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31997Y1209(01)) for guidelines on Market Definition and [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52002XC0711\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52002XC0711(02)) for guidelines on the assessment of market power in the Electronic Communications sector. Further information on the EC's notices and guidance is available from www.ec.europa.eu/competition/index_en.html

26. It is important to note that when a threshold is used it needs to be feasible to test whether such a threshold has been reached. This means that the verification should be practical and there should be readily available objective, and if possible, quantitative data (such as number of passengers, only airports in a geographical area etc).
27. For example, a regime could be envisaged whereby the current 5 mppa threshold (or another considered appropriate) is used for conduct regulation¹⁹, and a higher threshold – such as 10 million passengers or another threshold considered appropriate – is used to introduce the possibility of further regulation.²⁰ If an airport is above this higher threshold, it may be that either a) it is subject to a specific form of further regulation unless an MPA is performed and its outcome is that the airport does not require further regulation; or b) further economic regulation is only introduced if the outcome of the MPA is that the airport requires further regulation. The choice between these options is up to the Member State. For airports between 5 and 10 mppa the intensity of regulation could result from the outcome of the MPA itself. In general for airports belonging to this class conduct regulation could be sufficient.
28. A regime of this sort would take into account that the regulation of an airport is calibrated to the degree of market power the airport holds. It may be appropriate to adjust the intensity of regulation according to a combination of thresholds (or other criteria)²¹ and the outcome of MPAs. This approach also takes into account that the costs of imposing conduct regulation for airports may be relatively low while the costs of undertaking MPAs are relatively high.
29. The Forum notes that the regime and the thresholds outlined above were provided just for illustrative purposes. Also, ISAs could still retain a level of discretion about when it would be appropriate to undertake MPAs. Further investigation with the participation of the Forum on the desirability and feasibility of options to determine which airports should be subject to an MPA is recommended.

Predefined recommended markets

30. The Forum sees benefit in predefining recommended starting (focal) product market for the purpose of market definition. It can help ISAs to establish product markets more efficiently for the required purpose and it also may help to improve the enforceability and the legal certainty of regulation. The use of recommended markets means that ISAs will generally use the recommendation as a starting point. In justified cases the ISAs would have discretion to diverge from the recommendations if specific conditions and the evidence available to the individual assessment suggest that to be more appropriate.

¹⁹ For the purpose of this report conduct regulation is defined as economic regulation with an emphasis on consultation and transparency, and reflects the current requirements in the ACD

²⁰ For the purpose of this report further economic regulation is economic regulation that goes further than the conduct regulation required in the ACD

²¹ Possible other criteria could be the case of congested airports, very high market share of the airport within the catchment area, no significant market share of airline/s (that may show countervailing power) or the role of the airport for the area or the country, such as belonging to a network or a hub etc. In this respect, the Forum realizes it can be very difficult to find decisive criteria

31. While it may be possible to recommend product markets, the Forum does not consider it will be possible to recommend specific geographic market(s) as those are more likely to vary from case to case. The partial geographical overlap of the catchment areas with other airports also makes it impossible to recommend specific predefined geographic markets. However, it will be possible to issue guidance on methods and types of evidence ISAs could take into account when defining geographic market(s), with reference to the Commission's guidance on relevant markets in competition law.

Assessment of proportionality of (specific) obligations

32. The main purpose of the assessment of proportionality is whether sector specific regulation will result in benefits, as compared to a situation where only general competition law (or also the minimum conduct regulation in the Airport Charges Directive) is applied.
33. The Forum recommends that if the outcome of an MPA is that the airport is dominant, there should first be an assessment of proportionality to determine whether it is deemed necessary to impose further regulation. An assessment of proportionality may address specific (sub)questions. One of the possible (sub)questions is whether competition law is sufficient to address the risk of abuse of that significant market power in that specific instance. Another is whether the benefits of sector specific regulation exceed the adverse effects (including extra costs) of sector regulation in that specific instance. The option that some sort of regulation will always be applied if an airport is found dominant may also be considered.
34. The Forum also recommends that any regulatory measure that is to be imposed should be proportionate to the dominance/ risk of abuse of that dominance that the regulation is trying to address. All the options starting from light to heavy regulatory measures should be considered (such as transparency, non-discrimination, minimum quality standards, consultation procedures, monitoring, price control, regulatory accountability, rules on admissible OPEX, CAPEX, profit sharing rules and single-till/dual till).

Outline of institutional aspects of MPAs

35. There are several institutional aspects that come into play when introducing MPAs to determine dominance of airports. Those include, for instance, appeal mechanisms, administrative burden, and knowledge and expertise to carry out MPAs.

When to undertake MPAs?

36. The Forum recommends that there should not be an automatic requirement to undertake market power assessments. In instances where an airport has not yet been subject to a market power assessment, one should only be undertaken in response to requests from interested parties (that provide reasonable evidence that an MPA should be undertaken), or if the ISA considers it would be appropriate to undertake one.
37. In instances where an airport has already been subject to an MPA, the Forum recommends that MPAs should not be automatically repeated in a fixed timeframe but only when the ISA determines that there has been an identified material change of circumstances since the

previous MPA, possibly brought to its attention by interested stakeholders. This is because MPAs are resource intensive for the ISA and for key stakeholders, and that market conditions affecting airports are fairly stable. This might make it less necessary to repeat the MPA in a predetermined timeframe.

Who should undertake MPAs?

38. It could be beneficial and efficient for ISAs to have the power and the ability to carry out MPAs when deciding whether or not to introduce or to remove further economic regulation. Following that, with clearly defined powers and authority, and – if legally necessary – established under the control of the national parliament, the ISA should have the ability to judge which obligations and remedies suit the situation of the airport best. There are good experiences with ISAs in the EU which have combined powers and the ability to carry out MPAs and determine further economic regulation.²²
39. In the case that the ISA has the means and ability to perform MPAs it should be empowered to carry them out and decide on the outcome and possible remedies. It should also have the possibility to ask the national competition authority to issue a non-binding report on the subject. In any case it is desirable that the ISA and the national competition authority cooperate on such decisions, regardless of where the expertise lies. Nevertheless, a single organisation or department should be responsible for the final decision and it should be clear on which legislation – competition or sector specific – decisions are based.

²² In telecom regulation in almost every Member State in the EU these powers are combined in one authority. A similar choice has been made under the application of merger control in EU competition law. In case remedies are imposed in a merger control case, the competition authorities both have the ability to carry out an MPA and to determine the remedies