

Airport Charges Regulations 2011

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Gatwick Airport's response to the DfT's Airport Charges Regulations 2011 consultation document

Introduction

On 21 April 2011 the Department for Transport (DfT) published a targeted consultation on its draft Airport Charges Regulations 2011. It is the intention that the Regulations once implemented will transpose the EU Directive 2009/12/EU on Airport Charges (the Airport Charges Directive (ACD)) into UK law.

Below in Table 1 we set out our response to the various questions raised in that consultation.

Table 1: Gatwick Airport's responses to the consultation questions

<p>Question 1: Are you content with the provisions relating to definitions in the proposed regulations, especially those relating to the definition of airport charges?</p>
<p>The definitions appear to capture the essence of the definitions in the ACD. In terms of the definition of "airport charges" this excludes charges levied on customers at airports who are not operators of aircraft and therefore appears to be consistent with the ACD.</p> <p>However, the alternative approach of using the definitions of terms as defined in the ACD remains open to the DfT. This potentially would be preferable as this would avoid potential future legal disputes arising from the different definitions (between the ACD and the Regulations).</p> <p>In terms of the discussion of air navigation services we are confused by paragraph 6.12 and believe some of the language may be inverted.</p>
<p>Question 2: Do you have any comments on the explanation and comments set out above?</p>
<p>We have no comments on this part of the consultation document.</p>
<p>Question 3: Would you prefer airports to qualify for the Regulations to be based on a single year definition or an 'averaging' method based on an airport passing the threshold for two of the previous three years?</p>
<p>We do not feel strongly about this either way but given the DfT has stated it is taking a copy out approach, then using the single year figure would be more closely aligned with</p>

<p>the requirements of the ACD .</p>
<p>Question 4: Do you consider that these regulations reflect accurately and implement appropriately the Directive's processes and requirements relating to the setting of airport charges? Do you consider that the proposed arrangements are clear and workable? Please give reasons for your answers.</p>
<p>We have one comment related to the transposition of the consultation requirements of the ACD into the regulations:</p> <p>Regulation 7(1) – requires that an airport operator must give a notice to all airport users. We consider this might be unduly burdensome on airport users and discretion should be left to the airport operator to which users it requires information from. Our interpretation of the Article 7(2) of the ACD is that it does not require the airport operator to require information from all airport users. The risk arises from leaving this Regulation as it is of the airport operator unnecessarily requesting information from some airlines as it wants to avoid being in breach of its requirements and then airport users then having to use resources to provide information that is not necessarily wanted by the airport operator. Such inefficiencies would ultimately be passed on to end users. Only those airport users from which the airport operator requests information should be required to provide the requested information.</p>
<p>Question 5: What should the maximum level of fine be that the CAA can impose on airport users for failure to provide information?</p>
<p>The maximum level of any fine should demonstrably be set at a level to have a deterrent effect on airport users not fulfilling their obligations. Potentially the DfT could review financial penalty regimes in other sectors to inform its decision as to the maximum level of fine. To the extent that the maximum level of fine is shown over time not to have such a deterrent effect there should be a mechanism which allows it to be increased.</p>
<p>Question 6: Do you have any observations on how the obligation for an airline to provide information has been transposed?</p>
<p>We consider it important there is an enforcement mechanism in place. Article 7(2) requires that “Member States shall ensure that airport users submit information to the airport managing body before every consultation...” Without an adequate enforcement mechanism, the DfT would risk not fulfilling the requirement of Article 7(2).</p>
<p>Question 7: Do you have any concerns about the enforcement regime that is proposed for the purposes of these Regulations?</p>
<p>We have no comments in response to this question.</p>
<p>Question 8: Do you consider that these requirements comprise a satisfactory means of designating airports for price control for the purposes of the Airports Act 1986? The</p>

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<p>criteria relating to “whenever warranted” will be dealt with consistently with the existing policy on designation and we are therefore not looking for comments on its criteria.</p>
<p>We have no comments in response to this question.</p>
<p>Question 9: Are you content with the arrangements that have been made for the CAA to act as the “independent supervisory authority” in the language of the Directive?</p>
<p>Yes.</p>
<p>Question 10: Do you have any comments on the proposed powers and duties of the CAA?</p>
<p>No.</p>
<p>Question 11: Are you content with adopting the approach to confidentiality as set out in section 74 of the 1986 Act, in particular are there any additional disclosures of information that an airport might need to make?</p>
<p>Yes we are content.</p>
<p>Question 12: We would welcome the comments of respondents on any other aspect of the regulations and their effectiveness in transposing the Airport Charges Directive into UK law.</p>
<p>We note that the consultation document does not ask any questions related to Part 4: Setting charges and providing services (Regulation 13-15). We have a particular concern about Regulation 14 as currently drafted. Regulation 14(1) states that “Airport charges set by a regulated airport operator must not discriminate between airport users”. This differs from the ACD, which at Article 3 additionally includes “...in accordance with Community law”. The consultation document does not explain why this additional wording from the ACD has been omitted from the Regulations nor does the Impact Assessment seek to quantify the effect of this change.</p> <p>Our concern about Regulation 14 relates to the potential significant consumer detriment which could arise in the event that any form of discrimination is prohibited. As noted at paragraph 6.3 of the consultation document, non-discrimination is an established principle of Community law. That paragraph also cross refers to the CAA’s Emerging Thinking document, which it published in December 2010 and discussed the issue of discrimination.</p> <p>It is a well recognised economic principle, which is reflected in various competition case law that discrimination can be welfare enhancing and in the interests of consumers. Likewise, certain discrimination (but my no means all) by dominant firms can have a detrimental impact on competition, customers and/or consumers and it is such discrimination which is addressed by EU competition law. What is important when assessing discrimination is its effect on competition, customers and/or</p>

consumers and not the **form** that any discrimination takes.

Our concern is that as currently drafted Regulation 14 is very much a **form-based** test, rather than an **effects-based** test and it risks prohibiting welfare enhancing discrimination as well as discrimination which has a detrimental effect. This contrasts to paragraph 6.3 of the consultation document and section 3 of the CAA's Emerging Thinking document which both recognise the importance of the **effects** of any discrimination being assessed rather than the **form** any discrimination takes.

We consider that Regulation 14 should include the wording included within Article 3 so that it reads "Airport charges set by a regulated airport operator must not discriminate between airport users, in accordance with Community law". Such a change would be consistent with the DfT's stated approach of taking a copy out approach. Alternatively, Regulation 14 could be amended so that it reads "Airport charges set by a regulated airport operator must not unreasonably discriminate between airport users" Either of these changes should be welcome across the board by airport users and passengers as this would ensure that discrimination that has a detrimental effect is prohibited, while welfare enhancing discrimination is permitted.

If the DfT maintains the current wording of Regulation 14, the Impact Assessment should clearly identify the related costs and benefits of a decision not to fully transpose the wording of Article 3 of the ACD. This will ultimately demonstrate that there are potentially significant costs associated with excluding welfare enhancing discrimination, with no associated benefits, as detrimental discrimination would continue to be prohibited under the Article 3 wording.

We hope you find these comments helpful and constructive and we are happy to discuss these in more detail if you would find that useful. We are also happy for you to publish these comments on your website.