Two New European Directives on Airport Charges

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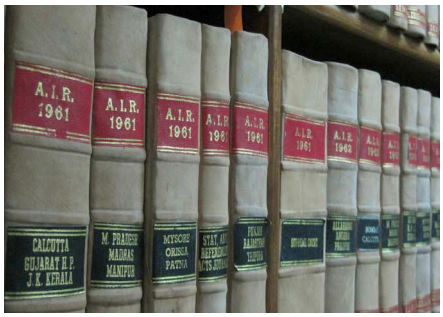
Airport Charges between Competition Law and Sector-Specific Regulation



In the past year, the European Communities' legislative adopted a Directive regulating airport charges;[1]; meanwhile, a proposal for a Directive on airport security charges was submitted for approval by European Parliament and the Council of Ministers[2]. Although in many economic sectors in which third-party access to infrastructure is essential, access charges have been regulated at the EU level, airport tariffs had so far escaped direct and general European legal scrutiny. Indirectly, and on a case-by-case basis however, airport charges have been the subject of the EU's attention, mainly in cases in which such charges were suspect from the view of European competition law. Now, finally, a common legal framework for setting airport charges has been devised, which will – at the very least – render such charges and the procedures leading up to their determination more transparent. Whether lower tariffs for the use of airport-related services will ensue from this new regulation, will be discussed in this contribution.

After a brief description of the background to airport tariffs and their regulation under EU competition law hitherto, this contribution will identify denominators common to both mentioned directives. Next, both directives and their impact on airport charges will be discussed, with a focus on their overlap with EU competition law. Finally, two questions will be answered; (1) to what extent do EU competition law and the new Directives overlap? (2), will the new legislation lead to lower charges for airport users?

by: Jochen Meulman

Historic Background: Regulation of Airport Charges by EC Competition Law

Although many variations in the way airports charge their customers for their services can be found, a typical airport distinguishes between landing and take-off charges and passenger-related charges. Take-off and landing charges, often in combination with parking charges, are generally imposed per (type of) airplane. The category 'passenger-related charges' can be subdivided into general passenger-handling charges and passenger security charges, although some airports combine the two into a single integrated tariff. General passenger-handling charges compensate for the costs of services such as baggage handling, services at check-in counters, flight information, lost-and-found, etc., but also a compensation for the use of terminal infrastructure by passengers. Passenger security charges, of course, compensate for the expenses involved with passenger security checks, such as strip searches, X-ray machines and detection gates.

Next to this, airports generally earn their income in a wide variety of ways, for instance through granting fuel concessions, concessions for ground-handling services and airline catering and, of course, by developing commercial activities around their primary product, offering aviation infrastructure. These activities are not regulated by the two new directives[3], but, every now and then, the behavior of airports in these commercial fields has been the subject of competition law interference[4].

All of the abovementioned types of charges have attracted the European Commission's attention in the past. In many – but certainly not all – cases, large airports enjoy a position of economic dominance in the sense of Article 102 TFEU (the former Art. 82 EC), which prohibits the abuse of such a position. The larger 'national' airports in particular often possess

some degree of monopoly power over their customers, which is why they are subjected to competition law regulation. In the mid-1990s, the Commission took several decisions relating to landing and take-off charges that were discriminatory in nature; price discrimination may qualify as abusive monopolist behavior[5]. It was found, inter alia, that airport tariffs frequently indirectly discriminated air carriers established in other Member States than the airport in question, for instance by introducing discount schemes in which high rebates were made conditional upon a number of flights performed, which would in practice often only benefit national ('flag') carriers. Such behavior would constitute an abuse of a dominant position under Article 102 TFEU as it raises a barrier for EU carriers to offer their services abroad.

Passenger-related charges have less often been reviewed under EC competition law, but were addressed in the case Scippacercola and Terezakis[6], in which two users of Athens airport filed an action for annulment against a Commission decision. In its decision, the European Commission had denied the users' request to open an investigation into excessive security and 'terminal facility' charges at the airport in question. Under Article 102 TFEU, not only discriminatory charging but also excessive charging by dominant market players is prohibited. The Commission rejected the complaint for several reasons, including that the security charges were a compensation for a service that was not economic in nature and could therefore not be addressed under Article 102 TFEU, which only applies to economic services provided by dominant companies. Complaints against other charges were rejected for a lack of Community interest.

If these two problems – price discrimination and excessively high prices – are found to be problematic under competition law, then the next question is whether the two new directives will ensure that these two phenomena will no longer occur, or will an additional task for competition law continue to exist?

The Airport and Airport Security Charges Directives: Common Denominators

Although until now, there seemed to be reasons to regulate airport charges by using competition law, what is striking about both the new directives is that their legal basis is Article 80, second paragraph, EC (now Article 100, second paragraph, TFEU). This legal basis in the EC Treaty is used for introducing measures in order to regulate European air and sea transport policies, not necessarily to prevent the abuse of a dominant position by airports or, for that matter, for any other reasons related to EU competition law. As we will see below however, some competition law principles, such as the duty not to discriminate, have permeated into both directives. The question now arises whether an airport that sets discriminatory charges will violate any one of the Directives, Article 102 TFEU or a combination of these; since the EU Court of Justice rendered judgment in the Deutsche Telekom case[7], in which it held that general competition law has an additional role to play next to sector-specific regulation, it is still unclear whether and in how far secondary Community legislation (e.g. regulations, directives) sets aside general competition law. Inversely, one may ask why airports' charges need additional regulation, as, in many cases, competition law can take care of some problems surrounding airport tariffs.

The Directives also share the same scope ratione personae. Their intention is not to regulate all airports within the European Union, but only airports of a certain size. Both documents only apply to airports serving more than 5 million passengers per year. Additionally, if an EU Member State does not have an airport of that magnitude within its borders, the largest national airport measured by number of passengers, also comes under the realm of the Directives. It is noteworthy that these conditions do not coincide with the conditions for a finding of a dominant position. For those airports also falling under the scope of Article 102 TFEU, this provision remains applicable next to the directives. The question remains though to what extent the different sets of legal obligations overlap. The answer to this question is important for airports in order to find out precisely what legal obligations rest on it.

In some sense, the aim of both directives is also the same. They both intend to harmonize procedures for setting charges and to set conditions the charges themselves have to meet, like their being non-discriminatory, transparent and objective. Finally, both Directives require Member States to establish or to appoint a supervisory authority where air carriers can file a complaint if the Directives (or rather, their national implementations) are violated by an airport coming under their scope.

Directive 2009/12/EC on Airport Charges

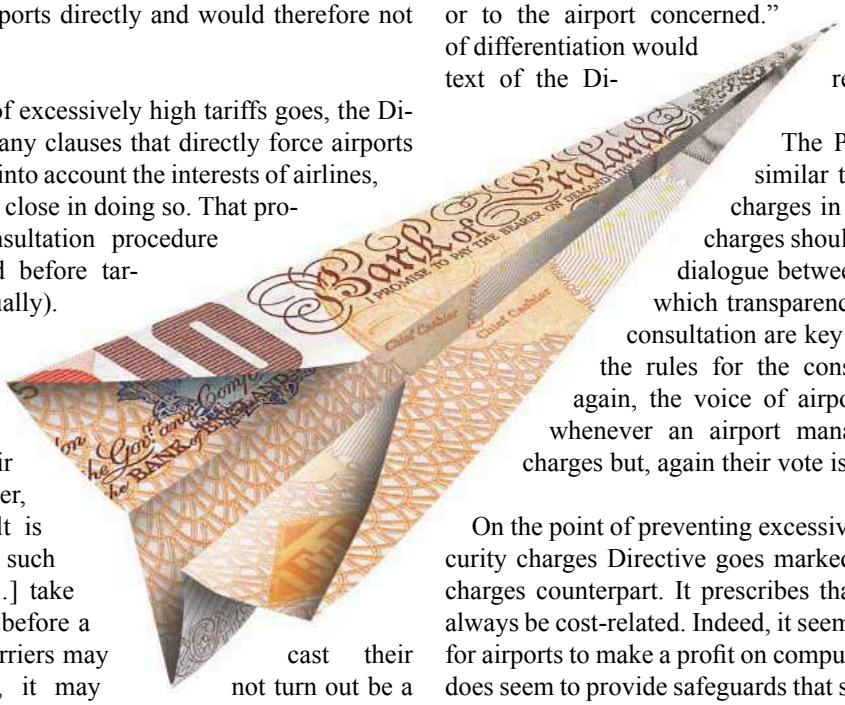
Directive 2009/12/EC overlaps with Article 102 TFEU in two ways. First of all, its Article 3 prohibits tariff discrimination between airport users, like Article 102 TFEU (sub c), which prohibits a monopolist 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. On the other hand, the Directive does allow differentiation of airport charges. Not only does Article 3 mention that that tariffs can be differentiated for reasons of public policy or for meeting environmental concerns, its Article 10 provides a broader framework within which differentiation is possible, and even wishful:

"[…] The level of airport charges may be differentiated according to the quality and scope of […] services and their costs or any other objective and transparent justification. Without prejudice to Article 3, airport managing bodies shall remain free to set any such differentiated airport charges."

Apparently, there is a difference when making differences between charges. What sort of differences would qualify as discriminatory and therefore, illegal and what differences can be qualified as differentiation? First of all, discrimination between nationality of passengers or air carriers would probably fall foul of Article 3 of the Directive insofar as it may be seen as a lex specialis of Article 12 EC, the general prohibition on nationality discrimination. Discrimination as to the identity of a carrier

is prohibited by Article 3 of the Directive itself. Any other tariff differentiation would be allowed according to Article 10 of the Directive, as long as it is justified by a difference in costs or '[…] any other objective and transparent justification.' The fine line between tariff differentiation and tariff discrimination is formed by the principles of objectivity (every airline should be able to qualify for a certain service or tariff if it meets objective criteria), relevancy (only relevant criteria can be used to introduce different services and charges, such as costs of service) and transparency (the criteria for differentiation should be accessible). However, it remains to be seen whether a given differentiation meets those criteria but, on the other hand, causes air carriers to suffer a competitive advantage vis-à-vis one another, there is room for application of Article 102 TFEU, although at first glance, one could say that this form of differentiation does not obviously benefit airports directly and would therefore not occur all too regularly.

As far as the regulation of excessively high tariffs goes, the Directive does not contain any clauses that directly force airports to lower tariffs or to take into account the interests of airlines, although Article 6 comes close in doing so. That provision prescribes a consultation procedure that should be followed before tariffs are set (at least annually). Paragraph 2 of Article 6 actually requires airport-managing authorities to consult air carriers on any changes in their charging system. However, the obligation to consult is mitigated by the fact that such bodies only have to '[…] take their views into account before a decision is taken.' Air carriers may cast their vote, but unfortunately, it may not turn out be a decisive vote in all cases. Therefore, the Directive does not guarantee that no excessive charges are set by airports, certainly when carriers possess insufficient bargaining power to effectively counter tariff proposals. In those cases, Article 102 TFEU might have an additional role to play, even though proving that tariffs are excessively high, prohibited by Article 102 TFEU sub a, is extremely difficult in practice.



Proposal for a Directive on Airport Security Charges

In order to identify whether there is an overlap between the proposal for a Directive on security charges and Article 102 TFEU, the first relevant question to ask is whether security charges fall under the scope of EC competition law at all. As mentioned above, the European Commission's view appears to be that they do not, but this may largely depend on the manner in which the levying of security activities is organized in different Member States, private or public, and whether there is any degree of public interference in the form of compensation for security costs[8]. The more public interference, the less likely it is that security charges qualify as remuneration for an economic service, a precondition for the applicability of EU competition law. The practice of security cost recovery still varies widely in Europe: some Member States finance security screening in whole or in part out of tax revenues, while in other Member States airports are left to fend for themselves. The only conclusion that can be drawn here is that the situation has to be assessed form Member State to Member State. In some Member States, there is a chance that the security charges set by airports are governed by the Directive as well as competition law, in others only the (implementation of the) Directive will apply.

With regard to tariff discrimination, there is one marked difference between the two Directives. Unlike the airport charges Directive, the Proposal does not articulate a difference between tariff differentiation and tariff discrimination. Its Article 3 only mentions that "Member States shall ensure that security charges do not discriminate between airport users or air passengers." Still, there seems to be some room left to differentiate security charges, namely between charges for passengers and other airport users and perhaps also between categories of airport users, defined in Article 1 as "any natural or legal person responsible for the carriage of passengers, mail and/or freight by air from or to the airport concerned." Whether the latter type of differentiation would stretch the limits of the text of the Directive remains to be seen.

The Proposal follows a pattern similar to the Directive on airport charges in determining how security charges should be set. It is also based on dialogue between airlines and airports, in which transparency, non-discrimination and consultation are key mottos. Article 4 contains the rules for the consultation procedure. Here again, the voice of airport users should be heard whenever an airport managing body sets security charges but, again their vote is not decisive.

On the point of preventing excessive charges however, the security charges Directive goes markedly further than its airport charges counterpart. It prescribes that security charges should always be cost-related. Indeed, it seems fair that there is no room for airports to make a profit on compulsory security checks. This does seem to provide safeguards that security charges will not be or become excessive in the sense of Article 102 TFEU – at least as far as such excessiveness could be caused by a high profit margin. From a cost perspective however, there are no guarantees that no unnecessary costs are incurred by airports which could similarly cause an excessive financial burden for passengers or carriers.

Conclusion

Both Directives discussed above appear to put in place rules that prevent discrimination between various categories of airport users, be it passengers or air carriers. As to the question what their prohibitions on discrimination have to add to other provisions of (primary) Community law, like Article 102 TFEU, is far from clear. There appears to be a significant overlap between that provision and the prohibitions on discrimination in the Directives. On the other hand, Article 102 sub c TFEU does contain one additional criterion, namely that any price difference should also cause trading partners to suffer a competitive disadvantage, which may suggest that this is not the provision for passengers to invoke as they normally do not compete with each other. Together, Article 102 TFEU and the Directives do seems to form a far from seamless web in which most forms of tariff discrimination, based on nationality, identity and costs underlying a specific service, could be caught, but it remains to be seen which of these legal instruments will apply, which one will prove effective and how these measures will interrelate.

As far as the lowering of tariffs, or rather, the prevention of excessive tarification goes, the Directive on aviation security charges has more to offer than its counterpart, although much depends on the question whether the compulsory consultation procedure will lead to effective airline participation in decision-making. The only loose end the security charges Directive has in this respect is that is does not prevent airports from spending too much on security checks. The lack of a guarantee that prices will not be 'too' high is not compensated for by Article 102 TFEU, as it is often invoked by parties dissatisfied with a monopolist's prices, but hardly ever successfully so.

Materially, the Directives and Article 102 TFEU overlap in their regulation of discriminatory and excessive tariffs. In their scope, they do not, as both Directives regulate all airports, not only the ones that occupy a dominant position. There appears to be room for co-existence, certainly if one considers that secondary Community law may not provide guarantees against primary Community law (i.e. the various Treaties establishing the EU and principles of Community law) interference[9]. For anyone dissatisfied with discriminatory or high airport tariffs; make sure to invoke the right (combination) of EC legal provisions.

About the Author

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Endnotes

1. Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges, OJ [2009] L70/11. Implementation into national law should take place before 15 March 2011.
2. Proposal for a Directive on aviation security charges (COM (2009) 217 final). The security charges directive is expected to be approved before the end of 2010.
3. These services do fall under the scope of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports OJ [1996] L272/36.
4. E.g.: CFI 16 January 2008, case T-306/05, Scippacercola and Terezakis v. Commission, ECR (2008) p.II-4, on appeal: ECJ 25 March 2009, case C-159/08 P (n.y.r.), in which the price of the fuel concessions and passenger s well as security service charges at Athens airport were questioned. See also the Italian competition authorities' intervention in case A376 Aeroporti di Roma - Tariffe aeroportuali (decision of 23 October 2008), in which abusive tariffs for letting office space to aviation operators and refuelling for cargo operators were found to infringe article 82 EC.
5. Comm. Dec. 95/364/EC of 28 June 1995, Brussels Airport, OJ [1995] L216/8; Comm. Dec. 1999/198 of 10 February 1999, Finnish Airports, OJ [1999] L69/24); Comm. Dec. 1999/199/EC of 10 February 1999, Portuguese Airports, OJ [1999] L69/31 (appeal: case C-163/99); Comm. Dec. 2000/521/EC of 26 July 2000, Spanish Airports, OJ [2000] L208/36. all cases involved discriminatory airport rebate schemes.
6. Case T-306/05, Scippacercola and Terezakis v. Commission, note 4 supra.
7. CFI 10 April 2008, case T-271/03, Deutsche Telekom AG v. Commission, ECR (2008), p II-477. In this case, discussion arose whether tariffs set by a telecommunications operator in accordance with an EC directive could nevertheless infringe article 82 EC (102 TFEU).
8. In its Decision of14 July 2009 in case 200120- easyJet (currently under appeal), the Dutch competition authority did apply article 82 EC (102 TFEU) to airport security charges at Amsterdam airport Schiphol.
9. See ECJ CFI 10 April 2008, case T-271/03, Deutsche Telekom AG v. Commission, ECR (2008), p. II-477, which concerns an appeal against a Commission decision finding an infringement of article 82 EC, despite the German telecommunications' regulator's (RegTP) approval of tariffs under a German act implementing Community legislation in the field of telecommunications.