



Implementing the Airport Charges Directive in the UK

CAA Emerging Thinking

December 2010

Summary

Background

1. The aim of European Directive 2009/12/EC is to establish a common framework for regulating the essential features of airport charges and the way they are set. The Directive is designed to regularise consultation and information exchange between airports and airlines when charges and services are determined, and when airport investment plans are developed, and to establish a framework which ensures that airport users and airlines put processes in place in order to reduce the potential for tensions between airports and airlines. Commonly referred to as the Airport Charges Directive (ACD), the requirements will apply to all airports in the United Kingdom with more than five million passengers per annum. The ACD must be transposed into UK law by 15 March 2011.
2. The CAA launched a project in September 2010 in order to assist industry in implementing the requirements of the ACD. The intention of the project is to provide clarity on the requirements of the ACD where that is deemed to be beneficial, and to provide detail on the expectations of the CAA as the body responsible for enforcing its requirements. The CAA considers that the development of non-binding guidance should assist those airports and airport users that are seeking greater clarity on the requirements of the ACD.
3. The CAA conducted an industry workshop on 14 October 2010 to discuss a range of implementation issues. In addition, the CAA has organised a range of discussions with airports and airlines to garner their views on how best to implement the ACD, as well as reviewing the regulation of consultation and information provision that is currently in place in the aviation sector.
4. While the CAA is undertaking this project, the Department for Transport (DfT) is currently considering how to transpose the ACD into UK law. The CAA and DfT are working closely to ensure that the process of transposition and implementation is as seamless and straightforward as possible. The DfT will itself be consulting shortly on transposition, in which it will set out its own latest thinking on the ACD.

Purpose of this paper

5. This paper sets out the CAA's 'emerging thinking' around how it might implement the ACD in the UK. It is designed to inform UK airports and their users which will be affected by the ACD, and to elicit views from the industry on the CAA's proposals for implementation. The CAA intends to develop guidance for the industry on how it will implement the ACD, building on this emerging thinking paper and the responses to it. The intention of the CAA's consultation at this stage is to help the CAA ensure that final guidelines are fit-for-purpose and reflect the practical realities of the UK market.

Structure of this paper

6. The remainder of this paper is structured in five chapters.

- Chapter 1 sets out the CAA's overall approach to implementing the ACD, and places that in the context of the UK airport market.
- Chapter 2 describes the CAA's proposed implementation of the scope of the ACD, as described in the Directive's Article 1 Subject Matter, and the key Definitions, as described in Article 2.
- Chapter 3 sets out the CAA's emerging thinking on the ACD's requirements against airports discriminating against users (Article 3) and on the provision for the differentiation of services and charges (Article 10).
- Chapter 4 sets out the CAA's emerging thinking on the processes for consultation, described in the ACD at Article 6 (in respect of charges) and Article 8 (in respect of new infrastructure).
- Chapter 5 sets out the CAA's emerging thinking on the ACD's requirements for transparency of information provided by the airport to its users (Article 7.1) and vice versa (Article 7.2) in the context of charges consultations, and on the information to be provided by the airport in consultations on new infrastructure plans (Article 8).

Next steps

7. This paper is intended to facilitate discussion with stakeholders in the lead up to a formal consultation in the first quarter of 2011. There will be an opportunity to discuss its contents either directly with the CAA or at a second CAA workshop, which is planned to be held early in 2011 following the publication by the DfT of the draft statutory instrument that will be the implementing legislation for the ACD in the UK.
8. Stakeholders wishing to attend this workshop should confirm attendance with Susie Talbot at Susie.Talbot@caa.co.uk or 020 7453 6213. Susie Talbot should also be contacted if you are unable to attend but would like to be added to the circulation for papers and notification of website.
9. Stakeholders can provide comments on this document in a number of other ways including by submitting written material to the CAA, or through meetings with CAA staff. In the first instance, we encourage you to contact:

James Mackay
Head, Regulatory Implementation
Economic Regulation Group
t: 020 7453 6233 / e: james.mackay@caa.co.uk
10. Any written responses to this document should be sent, if possible by email, to airportsreview@caa.co.uk, by 7 January 2011. Alternatively, comments may be posted to:

Susie Talbot
Economic Regulation Group
CAA

45-59 Kingsway
London WC2B 6TE

11. The CAA will acknowledge all responses. It expects to make responses available on its website for other parties to read as soon as practicable after the period for written comments has expired. Any material that is regarded as confidential should be clearly marked and included in a separate annex which, subject to further discussion with the author and subject to the criteria the CAA has established for treating information as confidential, will not be published.

1 CAA approach to implementing the Airport Charging Directive

- 1.1 The Department for Transport has indicated that it intends that the CAA be the nominated independent supervisory authority responsible for the application and enforcement of the Airport Charging Directive (ACD)¹ in the UK. This chapter describes the CAA's overall approach to implementing the ACD in the UK. It is based on the CAA's understanding of the current operation of the airport market here, informed by recent discussions with airport and airline stakeholders. It is also based on the CAA's understanding of the terms of the ACD, informed by discussions with legal and policy advisors from the Department for Transport. The CAA sets out its emerging thinking based on the text of the ACD, on the understanding that the DfT intends very largely to transpose the key definitions and requirements into UK legislation, by means of a statutory instrument, on a draft of which the DfT intends to consult shortly. (For the sake of brevity, all references to the ACD should be taken to include reference also to the implementing statutory instrument.)
- 1.2 The CAA's view, which has been supported by a number of recent investigations and policy reviews², is that UK airport market is one in which, very largely, competition between airports provides the basis for the efficient supply of services and facilities to airlines, passengers and freight shippers. Competition is likely to continue to play a significant role. Indeed, there are factors that should increase the degree of inter-airport competition including BAA's divestment in 2009 of Gatwick Airport, and the prospects of further divestment of Stansted Airport and one of Glasgow and Edinburgh Airport in the coming years. Further, continued developments in the airline market and the ability to manage aircraft fleets across Europe are likely to increase competitive pressure on airports over time.
- 1.3 The CAA therefore considers that the effective operation of a competitive airport market in the UK is the primary means by which airport users will receive cost-effective access to airport capacity, services and facilities. The ACD itself provides a common framework for consultation and achieves a number of goals described in recital 2 as the "basic requirements in the relationship between airport managing bodies and airport users". These are subsequently elaborated in the Directive as requirements on airports to provide "information on how and on what basis airport charges are calculated" (recital (13)), and that "airport charges should be non-discriminatory" (recital (11)). The transparency requirements of the ACD are designed to reduce the asymmetry of information between airports and their users, and vice versa, for the better operation of the airport market. They should also allow airport users to understand better if the airport is engaging in conduct that could be viewed as anti-competitive in nature.

¹ European Directive 2009/12/EC on airport charges, 11 March 2009

² Office of Fair Trading Market Study on UK Airports, 2006; Competition Commission Market Investigation of BAA's Airports; DfT Review of Economic Regulation of Airports, 2008-2010

- 1.4 The CAA recognises that, in specifying a range of objectives with regard to consultation and transparency, the ACD will require an additional layer of regulation, over and above what already exists in the UK via the Airports Act 1986 and the operation of the EC Treaty and EU competition law. Nevertheless, in implementing and subsequently enforcing the ACD, the CAA will continue to have close regard to competitive market outcomes, and will wish to judge any alleged breach or shortcoming with respect to the ACD in light of the market positions and behaviours of the respective airports and airlines. In other words, the CAA will focus on information exchange and consultation. The CAA will also consider the need to regulate more intrusively where market power problems are identified. The only sensible way to interpret the discretion the CAA might have when it considers more intrusive regulation is in a way that is consistent with the EC Treaty and EU competition law. The focus of the CAA is therefore to seek to support the delivery of outcomes that would be typically expected in a well-functioning airport market.
- 1.5 While the CAA will enforce the ACD with the aim of enhancing consultation where need be, the CAA will take into account the current operation of the largely competitive market which exists in the UK between airports and their users, and will consider how implementation could lead to unintended consequences that could impact on the level of competition in the market. The CAA will weigh up all relevant evidence about the operation of the relevant airport market when assessing any alleged breach of the terms of the ACD.
- 1.6 With regard to the regulatory burden on airports and airlines to comply with the terms of the ACD, the CAA's view is that the objectives of the ACD can be met at least cost to the industry by using, wherever possible, information and consultation processes which already exist, rather than requiring their creation from scratch. For example, the use by an airport of existing, hitherto internal, management information on cost structures and passenger forecasts might satisfy the transparency requirements without significant extra burdens. Similarly, the use by airports of existing user consultation groups might provide an effective way to meet the requirements for consultation procedures, provided the specific notice periods for consultation are adhered to. The CAA will expect the airport to record the process of consultation including the means by which airport users' views were solicited, information provided to airlines, other documents used in the consultation process, and records of meetings and other exchanges.
- 1.7 The CAA recognises that there are already extensive consultation mechanisms in place at the three price-regulated airports. The CAA will assess the current arrangements to identify if there are any gaps between current regulation and new requirements introduced by the ACD. The CAA expects the ACD will impose some additional consultation and transparency requirements at each of Heathrow, Gatwick and Stansted Airports, over and above that currently required by the CAA.

- 1.8 The CAA recognises that DfT is currently considering new legislation that may alter the CAA's approach. If new legislation is put in place the CAA will need to consider the approach taken to ensure it is consistent with new legislative requirements.

2 Scope and definitions

- 2.1 This chapter describes the CAA's proposed implementation of the scope of the ACD, as described in Article 1 Subject Matter, and the key Definitions, as described in Article 2.

Scope

- 2.2 The ACD's scope covers airports with an annual traffic of over five million passenger movements. This criterion will be measured by each airport's passenger traffic, as reported to the CAA and subsequently to Eurostat, for the 12 months up to 31 December. The CAA publish these data in mid-February the following year, at which point the CAA will also publish a list of those airports which fall within the scope of the ACD.
- 2.3 The CAA considers that airports which fall within the scope of the ACD, based upon the previous calendar year's traffic data, should then be subject to the ACD's requirements as soon as is practicable following the publication by the CAA of the data and the list of airports within ACD scope. On the basis that the ACD is transposed into UK law in March 2011, any consultation process that commences after that date would need to fully comply. The CAA recognises that airports may have existing consultation and/or charging revision processes which straddle the dates at which they fall within the scope of the ACD. The following table sets out the CAA's current thinking on how the introduction of ACD regulation should be phased in during the year.

Date	Action
January Year A	Airports report to CAA passenger traffic for January-December of the previous year (the reference year referred to as A-1).
Mid February Year A	CAA publishes Year (A-1) traffic data and list of airports with passenger numbers greater than 5 million, thus falling within ACD scope.
March Year A	For airports within ACD scope (as defined by Year (A-1) traffic), all ACD requirements come into force. However, airports typically set charges on a calendar or financial year basis. In those cases the airport will have commenced consultation whilst outside the scope of the ACD with the intention of implementing any changes in January or April of Year A. The CAA would propose not to require the airport to conduct a further full 4 month consultation with users, as required ordinarily by the ACD. For 2011, such a dispensation could potentially apply to all airports. For subsequent years, it would only apply to those airports that had grown above the traffic threshold in the reference year and thus came newly within the ACD scope.

Date	Action
March Year A	Earliest date on which an airport could commence 4 month consultation on any proposed changes to charges and need to comply with the requirements of the ACD
July Year A	Earliest date on which an airport could implement changes to charges, following 4 month consultation.
September Year A	Airports setting charges on a calendar basis must commence consultation no later than September.
December Year A	Airports setting charges on a financial year basis must commence consultation no later than September.
January (A +1)	Airports report to CAA passenger traffic for January-December Year A (the new reference year).
Mid February Year (A +1)	CAA publishes Year A traffic data and list of airports with passenger numbers greater than 5 million, thus falling within ACD scope. For those airports within ACD scope based on Year (A-1) but out of scope based on Year traffic, the ACD requirements would continue to apply up to end March Year (A+1), and then cease from 1 April.

- 2.4 As apparent from the table above, in practice some airports may have already commenced (while outside the ACD scope) consultation processes for airport charges coming into effect from the start of the financial year (from which point then within ACD scope). While the CAA has suggested above a pragmatic approach for dealing with such transitions to ACD regulation, it considers that there may be merit in exploring further the possibility of defining ACD scope on the basis of a smoothing of passenger traffic such as is the current practice in the Airports Act. Such an approach might reduce the number of transitions into and out of regulation for airports whose traffic is close to the ACD threshold of 5 million passengers per year. The CAA will be exploring this issue further with the DfT.
- 2.5 The ACD definition of airport charges (Article 2.4) is broadly similar to that applied under the Airports Act. In practice this means that the charges covered by the ACD are what are typically referred to as 'aeronautical charges'.
- 2.6 In keeping with the current definitions in the Airports Act the CAA therefore considers that the following fall within the scope of airport charges for the purposes of the ACD:
- Landing
 - Take-off
 - Aircraft parking

- Airfield lighting
 - Passenger processing and/or transit
 - Passenger security
- 2.7 The CAA notes however, that the definition in the ACD could cover charges that go beyond what is typically considered as an aeronautical charge by the airport. As such charges for services such as Fixed Electrical Ground Power (FEGP), stand entry guidance systems (SEGS) and air provided to aircraft may also be covered.
- 2.8 The CAA considers that the following fall outside the definition of airport charges for the purposes of the ACD: charges levied by reference to, or for the supply of -
- Ground-handling services in general, as defined by the Annex to the Ground-handling Directive, Council Directive 96/67/EC, including per bag charges for the use of airport baggage processing systems
 - Services for passengers with reduced mobility and/or disability
 - Air navigation services where provided directly by the airport
- 2.9 In the CAA's view, where any of these charges noted in paragraph 2.5 are bundled in with other airport charges, the airport may note that this is the case. It would not, however, need to decompose its overall charge to users to identify specifically these component parts.
- 2.10 The ACD definition of airport user (Article 3), as noted above, describes persons "responsible for the carriage of passengers, mail and /or freight by air". This includes aircraft that carry passengers and cargo and smaller air transport organisations belonging to the general aviation category, business aviation and air taxis. It excludes passengers and the end users of freight services.

3 Discrimination and differentiation

- 3.1 This chapter sets out the CAA's emerging thinking on the ACD's requirements against airports discriminating against users (Article 3) and on the provision for the differentiation of services and charges (Article 10) by airports.
- 3.2 The terms price discrimination and price differentiation are often used to describe similar issues³. Discriminating between different types of airport user and differentiating charges levied on them are both normal mechanisms the CAA would expect to observe in a well functioning market. Charges may differ for a number of reasons including the relative costs / value introduced by different airport users and the incentives the airport wants to use to develop its business.
- 3.3 The issue of discrimination or differentiation only becomes a concern if the airport is embarking on a form of conduct that is deemed to be unreasonable within the scheme of the ACD. This typically means the airport has taken a decision to discriminate between users or differentiate charges without reference to objective and transparent criteria. The concern for the CAA as a regulator is the risk that this type of behaviour could harm effective competition in the market. This distinction between legitimate differences in treatment and conduct which requires regulatory treatment is reflected in the provision of Article 10.1 of the ACD which carves out certain types of behaviour from a general prohibition on discrimination. The remainder of this chapter considers the issues of discrimination and differentiation in greater detail.

Discrimination

- 3.4 The Airports Act 1986 provides the CAA with powers to investigate and remedy a number of forms of conduct including unreasonable discrimination against an airport user or class of user or the unfair exploitation of a bargaining position. This enables the CAA to impose conditions on regulated airports to remedy or prevent the adverse effects caused by an airport's "unreasonable discrimination" against a class of user or particular users. The airport's actions may be in respect of "any trade practice, or any pricing policy", or "the granting of rights by virtue of which relevant activities may be carried on at the airport by any other person or persons".
- 3.5 The CAA set out its policy and processes for the use of s.41 of the Airports Act in its statement of 2006⁴. In this, it proposed to apply s.41 in a way that was in line with the application of the Competition Act 1998 and EC competition law. In particular, the CAA stated⁵:

³ The OECD defines price discrimination as follows "Price discrimination occurs when customers in different market segments are charged different prices for the same good or service, for reasons unrelated to costs. Price discrimination is effective only if customers cannot profitably re-sell the goods or services to other customers."

⁴ The CAA's use of section 41 of the Airports Act 1986 - The CAA's policy and processes, December 2006

⁵ Ibid, paragraph 3.11

The CAA agrees that it must base its investigations upon its powers and duties under the Airports Act, but it considers that these are sufficiently akin to those of the OFT when it applies competition law for it to have regard to the analytical framework that would be adopted by the OFT when handling comparable cases under the Competition Act. In practice, this is likely to result in decisions that would be consistent under both section 41 and national (and EC) competition law. The CAA would, however, remain open to argument, in any particular case, that its powers and duties may lead it to a different conclusion than would result from applying the Competition Act.

- 3.6 In other words, the CAA's implementation of its s.41 powers would follow the analytical framework established by the EC and UK competition authorities and the relevant courts. This would entail analysing the extent to which the airport in question had significant market power, or a position of dominance, in the relevant market⁶. Only if the market power/dominance threshold were crossed would the CAA then assess whether the airport's course of conduct was unreasonably discriminatory, or an abuse of a dominant position in the terminology of competition law. This is also consistent with current guidance from the EC Commission on Article 102 which focuses on the effect of behaviour rather than its precise form.⁷
- 3.7 The ACD specifies (Article 3) that: "Member States shall ensure that airport charges do not discriminate among airport users, in accordance with Community law. This does not prevent the modulation of airport charges for issues of public and general interest, including environmental issues. The criteria used for such a modulation shall be relevant, objective and transparent". As a complement to this non-discrimination provision, Article 10.1 specifically allows for the differentiation of services and charges: "The level of airport charges may be differentiated according to the quality and scope of such services and their costs or any other objective and transparent justification. Without prejudice to Article 3, airport managing bodies shall remain free to set any such differentiated airport charges".
- 3.8 The CAA's current thinking is that the cross-reference in Article 3 to Community law, along with the cross-reference in recital (18) that "This Directive should be without prejudice to the Treaty, in particular Articles 81 to 89 [now Articles 101 to 109] thereof [the competition regime]", give a clear steer that the non-discrimination provisions of the ACD should be implemented in line with EU competition law. Indeed, the CAA cannot take actions under UK law, including the ACD (once implemented) that would run contrary to the EC Treaty. The CAA already applies s41 in line with UK and EU competition law; the CAA considers that Article 3 of the ACD is already effectively implemented by means of the s.41 regime. As such, this aspect of the ACD has not introduced any new legal requirements in the UK other than introducing transparency and consultation obligations that make it easier for airport users to understand

⁶ For the avoidance of doubt, the CAA may not limit its investigation to whether an airport has significant market power as whole, as in some instances an airport may have significant market power in a particular market segment, for example, cargo flights or business aviation.

⁷ Commission Communication 2009/C45/02

charges and therefore to assess airports' compliance with existing competition law. CAA's view is that both the framework in s.41 and that set out in ACD restrict regulatory intervention to those situations where there is a risk to effective competition as set out in the relevant case law and guidance on abuse of a dominant position.

3.9 In practice, the CAA would propose to apply the non-discrimination provisions of the ACD in a broadly similar manner as it currently implements s.41:

- On receipt of complaint from an airport user, the CAA would conduct an initial investigation to establish the basis of the complaint and the context.
- On the strength of the evidence, the CAA may then proceed to a formal investigation.
- The first stage of such an investigation would be to define the market within which the alleged discrimination by the airport took place.
- Only if the CAA assessed the airport to have significant market power in the relevant market would the CAA proceed to the second stage of the investigation, to determine whether the airport had discriminated against users by abusing its market power.

3.10 In addition, under proposed amendments to the Airports Act airport users will have the additional protection against anti-competitive behaviour by an airport of being able to request a competition assessment by the CAA. If the CAA finds an airport to have enduring significant market power in a relevant market, then it may issue an economic licence on the airport where the benefits of doing so outweigh the costs. Such a licence would allow the CAA to apply detailed economic regulation on the airport, including where this is warranted, price regulation. The CAA is currently consulting with stakeholders on the competition assessment guidelines⁸ it would apply in conducting such assessments and in reaching the subsequent judgements on the requirement for price regulation of an airport under the Airports Act. The CAA works closely with the Office of Fair Trading (OFT) when considering competition issues under s41 of the Airports Act and has a Memorandum of Understanding that sets out how the two organisations work together when assessing issues in the airports sector.

⁸ CAA Competition Guidelines – Issues Paper, September 2010

Differentiation

- 3.11 Some firms are able to charge different prices to different customers for the same product. This is termed price discrimination / differentiation. In this context it is a more broadly drawn concept than the use of the term in the context of competition analysis. Price discrimination/differentiation is a common practice across a range of different markets and is not confined to airport markets. It is often observed in competitive markets. For example, airlines often charge different prices to customers depending upon the day of week and the time of the year – i.e. varying their charges by on- and off-peak.
- 3.12 The CAA therefore considers that the charging of different prices or the use of different terms of business where it is efficient to do so is a normal aspect of any well-functioning market, whether described as price differentiation or price discrimination. Different prices for the same or similar services and facilities are not *per se* anti-competitive or necessarily harmful to airport users' interests as to warrant regulatory intervention. The key test is whether the differentiation amounts to unreasonable discrimination, which in turn rests on upon an assessment of the market power of the airport in the relevant market and the effects of competition on end users⁹. In this regard, the CAA sees no current legislative or regulatory barriers in the UK to airports varying the quality and scope of particular airport services, terminals or parts of terminals, with the aim of providing tailored services or a dedicated terminal or part of a terminal", as specified in Article 10.1. The CAA considers that no additional measures are required in the UK to implement this aspect of the ACD.
- 3.13 In some cases, price differentiation is specified in the published airport charges tariff. Where such differentiation is by reference to clear criteria such as opening new routes, bringing a specified volume of traffic/passengers to the airport and flights at certain times of day or year. Clear criteria that reflect different costs of supply, service quality or the value brought by the airline are more likely to comply with the ACD.
- 3.14 The CAA recognises that, in practice, some users at some airports have been able to negotiate airport charges lower than those available via the published tariff (even taking account of differentiated prices on such tariffs). The CAA notes that long term deals between airports and airports users are a common feature of the UK market, and that there is nothing in the ACD from a regulatory point of view that requires deals that are currently in place to be re-opened. Any re-opening of previously negotiated deals would be purely a commercial matter between the respective parties. Once the ACD has come into force, the CAA believes that current and newly negotiated long-term deals are acceptable. The CAA considers that provided the existence of such negotiated deals and their overall rationale is made known by the airport to all users, then the terms of such deals need not be published by the airport for it to be compliant with Article 10.1. Examples of rationales which the CAA considers

⁹ The ability to price discriminate persistently can be characteristic of market power. Jones and Sufrin, EC Competition Law.

may meet the ACD requirements for “objective and transparent justification” include:

- sharing risk and reward over the long term and in establishing the necessary commitment to justify lower charges and / or to fund airport development; and
- discounting price that reflects the value to the airport of new routes and / or volumes.

The question of whether such deals amount to unreasonable discrimination could be investigated by the CAA, following any airport user complaint, under the regulatory framework that implements Article 3.

Access to capacity constrained facilities

3.15 Article 10.2 of the ACD also provides for users to have access to tailored services or facilities at an airport, and for a means of determining access to capacity-constrained facilities: “Member States shall take the necessary measures to allow any airport user wishing to use the tailored services or dedicated terminal or part of a terminal, to have access to these services and terminal or part of a terminal. In the event that more airport users wish to have access to the tailored services and/or a dedicated terminal or part of a terminal than is possible due to capacity constraints, access shall be determined on the basis of relevant, objective, transparent and non-discriminatory criteria. These criteria may be set by the airport managing body and Member States may require these criteria to be endorsed by the independent supervisory authority”.

3.16 In the UK, the DfT has concluded that, in implementing the ACD, it will not require the CAA as the independent supervisory authority to endorse the criteria for access to capacity-constrained airport facilities. Airports will thus be free to set their own criteria for access, subject to the general provisions of Article 10.2. In the CAA’s view, among the “relevant, objective, transparent and non-discriminatory criteria” which an airport might use to justify the allocation of capacity constrained facilities are:

- future growth prospects of a user at the airport;
- volume of business provided by the user to the airport;
- routes and/or types of passenger/freight served by the user from the airport; and
- transition costs associated with airport user moves.

3.17 The CAA also notes that access to some airports in the UK is constrained due to the availability of landing rights conferred through 'slot' allocation. For the purposes of the ACD, the CAA assumes that an airline must already have slot rights at the airport in question in order for the airline's request for access to capacity-constrained facilities to be considered by the airport under the terms of Article 10.2.

Summary

3.18 In summary, the CAA considers that discriminating between different types of airport user and differentiating charges levied on them are both normal mechanisms the CAA would expect to observe in a well functioning market. The ACD does not significantly change airports rights and obligations in this area. Indeed, price differentiation is often observed in a well functioning competitive market, for example in the way airlines differentiate ticket prices on different routes, and between passengers booking at different times on the same route. The key change that the ACD will introduce is the requirement on airports to make their justifications for any differentiation of charges "objective and transparent", without necessarily publishing the terms of the differential charges themselves. Continuity with the current UK regulatory regime, under s.41 of the Airports Act, will be secured by the that the CAA would need to assess an airport to have significant market power before it could consider whether any alleged discrimination against airport users was unreasonable within the scheme of the ACD.

4 Consultation and remedy

- 4.1 This chapter sets out the CAA's emerging thinking on the processes for consultation, described in the ACD at Article 6 (in respect of charges) and Article 8 (in respect of new infrastructure). The following chapter 5 considers the content of such consultations, as described by the ACD's transparency requirements in Article 7.
- 4.2 As set out in the summary to this paper, the CAA considers that in general the level of consultative dialogue between UK airports and their airline users to be adequate to meet the needs of each side. In large part, competition in the airport market provides adequate incentive on airports to deliver good value services and facilities to their users, as part of which airports will naturally keep their users informed of proposed changes in charges and of plans for new infrastructure. At a minority of airports, notably the three price-regulated airports Heathrow, Gatwick and Stansted, the CAA has introduced over a series of price controls greater regulation on the conduct of consultation between airport and airlines, largely covering investment plans and charges other than the core price-regulated airport charge. More recently, Aberdeen Airport has become regulated as to the conduct of its consultation on investment plans, following the Competition Commission market investigation into BAA's airports.
- 4.3 The main changes which the ACD will bring to the conduct of consultation on the level and structure of charges are to make such consultation automatic whenever an airport proposes to alter charges, subject to a defined timetable, and informed by defined sets of information from the airport to its users and vice versa. Notwithstanding these additional requirements, the CAA would expect airports and their users to seek to use existing consultation processes and forums wherever possible in order to comply with the ACD requirements as efficiently and effectively as possible. For example, Airline Operators' Committees, charges forums, or an exchange of letters are all legitimate forms of consultation, as are email and web-based forms of communication and information sharing. A key requirement on airports will be to document the means by which it has informed all users of proposed changes, how the airport has taken account of consultation responses and of the processes by which they can be consulted.
- 4.4 The ACD contains provision (Articles 6.3 and 6.4) for the independent supervisory authority (the CAA, in the UK) to adjudicate on any dispute on airport charges. The DfT has indicated¹⁰ that, using the discretion afforded to Member States in Article 6.5, it will not apply these articles in the UK, as it will be introducing, in parallel with the ACD implementing legislation, provision for the CAA to "examine, on a regular basis or in response to requests from interested parties, whether such airports are subject to effective competition" (Article 6.5(b)). The CAA in consultation with stakeholders is currently

¹⁰ At CAA workshop on ACD implementation, 14 October 2010

developing the approach that the CAA proposes to take in conducting such competition assessments¹¹.

- 4.5 With regard to the conduct of consultation on charges, Article 6.1 specifies that there shall be: “a compulsory procedure for regular consultation between the airport managing body and airport users or the representatives or associations of airport users is established with respect to the operation of the system of airport charges, the level of airport charges and, as appropriate, the quality of service provided. Such consultation shall take place at least once a year, unless agreed otherwise in the latest consultation. Where a multi-annual agreement between the airport managing body and the airport users exists, the consultations shall take place as foreseen in such agreement. Member States shall retain the right to request more frequent consultations”. In addition, Article 8 specifies that: “Member States shall ensure that the airport managing body consults with airport users before plans for new infrastructure projects are finalised”.
- 4.6 The vast majority of airports in the UK, and all those above the 5 million passenger threshold for the ACD, are already required (by the Civil Aviation Act 1982, section 35) to consult with users and other interested parties on “any matter concerning the management or administration of the aerodrome which affects their interests”. All airports within the scope of the ACD have to establish at least a consultative committee for airline users, along with a broader consultative group to liaise with local authorities and other neighbouring parties affected by the airport’s operation and development.
- 4.7 The CAA would expect that the existing airport user consultative committee would satisfy the ACD requirement for “a compulsory procedure for regular consultation between the airport managing body and airport users or the representatives or associations of airport users”. The terms of reference of such a consultative body may need to be modified, though, to ensure that the scope of consultation takes in “the operation of the system of airport charges, the level of airport charges and, as appropriate, the quality of service provided” (Article 6.1) as well as “plans for new infrastructure projects” (Article 8). The existing consultation procedures may also need to be augmented with a specific commitment from the airport to consultation “at least once a year, unless agreed otherwise in the latest consultation”.
- 4.8 With regard to the three price-controlled airports, the CAA considers that the existing regulatory requirements for consultation on so-called non-regulated charges are likely to be compliant with the ACD, in respect of these specific charges. Each airport would need to reconsider, though, with its users, whether its existing processes for consulting on the core regulated airport charges do meet the ACD’s requirements.
- 4.9 The ACD goes on to specify (in Article 6.2) the specific timing of consultation on charges: the airport must consult users at least four months before any

¹¹ CAA Competition Guidelines – Issues Paper, September 2010

proposed change in the system or level of changes, and publish its final decision with justification (taking into account users' views) no later than two months before the entry into force of the proposed change. Article 7 specifies the scope and content of information to be exchanged between the airport and its users as part of such a charging consultation.

- 4.10 The CAA considers that each airport and its users or their representatives are best placed to develop specific protocols on the precise conduct of consultation at each airport, compliant with the broad framework established by the ACD. For example, each airport and its users would need to agree the workings arrangements for consultative committees, the communications from such committees to the wider group of all users, and the extent to which representatives of users can make decisions on their behalf. The CAA does not intend to assess and approve *ex ante* the consultation arrangements put in place at each airport. However, each airport should retain sufficient written evidence of procedures put in place and agreement secured from users to such procedures to be able to demonstrate *ex post* to the CAA that it is compliant with the ACD, in the event of any user complaining of non-compliance. The CAA notes that if an airport receives no response from airport users during the consultation the airport can reasonably move forward with its plans. Provided an airport can demonstrate that it has taken reasonable steps to inform and consult with users, in line with ACD requirements, then an absence of consultation responses from some or all users should not in itself be grounds for non-compliance.
- 4.11 At the conclusion of consultation on charges, the airport and its users may not have reached agreement on proposed changes. In that situation, the ACD specifies that: "The airport managing body shall justify its decision with regard to the views of the airport users in the event that no agreement on the proposed changes is reached between the airport managing body and the airport users". This is a new regulatory requirement, which goes beyond what the CAA understands to be standard practice in the UK airports market. In order not to undermine the operation of that market, which in the CAA's view largely provides effective competition to the benefit of users, the CAA considers that airports could provide succinct justifications for charging proposals, without necessarily linking charges directly to identified airport cost structures. As noted above, each airport will need to retain sufficient records to demonstrate that it has provided a justification to airport users.

5 Transparency of information

- 5.1 This chapter sets out the CAA's emerging thinking on the ACD's requirements for transparency of information provided by the airport to its users (Article 7.1) and vice versa (Article 7.2) in the context of charges consultations, and on the information to be provided by the airport in consultations on new infrastructure plans (Article 8).
- 5.2 In line with the CAA's overall stance of seeking proportionate regulation which imposes least costs on the industry in order to achieve regulatory objectives, the CAA considers that the majority of the transparency requirements in Article 7 on airports and airlines should be able to be met by information already held by, and in some cases already published by, each party. The CAA would expect airports and airlines to comply with these requirements through the timely provision of existing data, which may have been prepared for internal business management purposes, rather than to incur additional costs for fresh data collation and presentation. However, the CAA recognises there may be some burden on airports.
- 5.3 The CAA also notes that the ACD has the potential to create a burgeoning industry of consultation at airports in the UK. The CAA does not believe the ACD has been introduced to require airports to provide detailed information regarding their respective businesses, and consultation should not be viewed as a means for users to demand growing amounts of detail from airports on the commercial operation of their businesses.
- 5.4 The CAA considers that the implementation of the ACD transparency requirements should not undermine the operation of competition in the UK airport market. An integral part of that market is commercial bargaining between airports and their users, the terms of which are typically confidential between the negotiating parties. To that end, the CAA accepts that airports or airlines may provide high-level summary information under a number of the transparency headings, where the party disclosing the information considers that a more detailed disclosure could jeopardise its commercial negotiating position. Indeed, to require airports to provide too much information could undermine the normal competitive tensions and negotiation that drive efficient outcomes in the market.

Airport transparency requirements

- 5.5 The airport transparency requirements (Article 7.1) are discussed in turn below. Where appropriate, the CAA sets out a template for the minimum scope and detail of information which would be likely to meet the requirements of the ACD.

(a) a list of the various services and infrastructure provided in return for the airport charge levied

- 5.6 The CAA considers that this requirement could be readily met by each airport's published conditions of use and any other general notices of services, facilities and charges. Where several charges are levied (as described above at 2.6 above), each would need to be described along with the associated services and infrastructure.

(b) the methodology used for setting airport charges

- 5.7 The CAA recognises that there is a variety of different methodologies for setting charges that may be applied across different airports, or across different charges at one airport. For each separately identified charge, the CAA would expect the airport to set out a succinct summary of the overall methodology for setting the charge, rather than a detailed numerical explanation. For example, the methodology for a particular charge may be:

- cost recovery;
- cost recovery plus contribution to overheads;
- incentive pricing to encourage or discourage use of a particular facility or service;
- priced to the demand curve, i.e. what the airport considers the market will bear.

- 5.8 For the core airport charges (those set by reference to aircraft and passengers movements), the CAA would expect the airport to indicate whether the totality of these charges were set on:

- a 'single till' basis, i.e. designed to at least cover the net costs of the airport, less commercial revenues (from retail, property, parking, etc) and revenues from other specific charges;
- a 'dual till' basis, where core airport charges are designed to cover the whole costs of airfield and terminal operations; or
- some intermediate position.

(c) the overall cost structure with regard to the facilities and services which airport charges relate to

- 5.9 The CAA's emerging thinking is that this requirement could be met by a relatively high-level statement, based largely on information which is likely to have been published as part of the airport's annual financial reports. Such a statement would allow airport users to understand in broad terms the "overall cost structure" in order to make informed comparisons between different airports, thus assisting the dialogue between airports and airlines and the operation of a competitive market. In the CAA's view, the ACD does not require airports to identify different components of their operating costs, nor to ascribe specific cost items to specific airport charges, as to do so could result in airports divulging commercially sensitive information. The purpose of this ACD requirement is not to allow airlines to obtain sufficient information to construct 'benchmark' comparisons of the component costs of airport operations. Competition between airports is the primary means by which airlines will

receive competitively-priced airport services, rather than via airline scrutiny of individual cost items. Current and prospective legislation contains provision for regulation to be applied where warranted.

5.10 An example of the scope of a cost structure statement is set out below:

	2010	2009
	£m	£m
Aviation income		
Core airport charges		
Other specified charges to airport users		
Commercial income		
Retail		
Car parking		
Property-related		
Other		
Total income		
Expenditure		
Wages and salaries		
Social security costs		
Pension costs		
Total employee benefit costs		
Other operating charges (inc. maintenance, rent, rates, utilities and other operating expenses)		
Total operating expenditure		
Depreciation		
Profit from operations before exceptional items		
Exceptional items		
Profit from operations		
Finance costs		
Profit before taxation		

(d) the revenue of the different charges and the total cost of the services covered by them

5.11 The CAA considers that the cost structure statement example above could provide the basic framework for meeting this requirement, with additional detail itemising the individual charges and (where relevant) the related costs. Where the airport has declared that certain charges are set on the basis of cost recovery (with or without overhead contribution), then the transparency statement should show such costs against the revenues. For other charges, notably the core per passenger and per aircraft movement, the sum of these revenues would be presented as covering the airport's overall costs, net of revenues from other specific charges to airlines and (in the case of a 'single till' charge) commercial revenues from retail and other activities.

(e) any financing from public authorities of the facilities and services which airport charges relate to

5.12 As far as the CAA is aware, this transparency requirement is not relevant to any of the airports in the UK which would currently fall within the scope of the ACD. Were it to be relevant, the CAA would expect that this requirement could be satisfied by existing public statements as to the nature of such public financing.

(f) forecasts of the situation at the airport as regards the charges, traffic growth and proposed investments

5.13 The CAA considers that this requirement could, as a minimum, be met by a statement referring to the year ahead, along the following the lines, with traffic forecasts segmented where feasible according to categories most relevant to the airport's business:

	2011 forecast	2010 actual
Aviation income		
Core airport charges (£m)		
Other specified charges to airport users (£m)		
Traffic		
Passenger movements (millions), of which:		
<i>Domestic</i>		
<i>International scheduled</i>		
<i>Charter</i>		
Aircraft movements (thousands)		
Proposed investments		
Investment costs (£m)		
List of major investment projects		

5.14 For Heathrow, Gatwick and Stansted Airports, the current price regulations and associated conditions require a significantly greater level of detailed information to be issued to airlines (varying between the airports) on each airport's capital

investment plans, including forecasts of investment, projects and underlying business drivers including traffic growth. They are also required to consult with users on forecasts for so-called non-regulated charges to airlines for specific services and facilities. In the CAA's view, these existing UK regulations more than satisfy the ACD's transparency requirements in respect of forecasts of non-regulated charges, traffic and investment projects. In addition, each airport's existing annual consultation with users on price-regulated airport charges would, in the CAA's view, meet the ACD's transparency requirements under this heading for such charges.

(g) the actual use of airport infrastructure and equipment over a given period

- 5.15 The CAA considers that this requirement could be met by the airport publishing the most recent readily available data on annual traffic, by passenger and aircraft movements. Where an airport has more than one terminal and/or a separate satellite or other passenger processing terminal facility, then it may choose to present data for each such terminal or facility.

(h) the predicted outcome of any major proposed investments in terms of their effects on airport capacity

- 5.16 The CAA considers that this requirement could readily be met by an airport issuing information to users which will have been collated for the purposes of planning the proposed major investment.

Airport user transparency requirements

- 5.17 In addition to the requirements on airports for transparency, the ACD also requires (Article 7.2) that airport users submit information to the airport managing body before every consultation. The CAA considers that users should, in general, be adequately incentivised by normal commercial pressures to make known their requirements for capacity, facilities and services at the airport concerned. The CAA does not, therefore, intend to become involved in the detailed regulation of the processes for such exchange of information, and would expect each airport and its users to devise a protocol for this. In the CAA's view, the key sanction against airlines failing to provide adequate information is that the airport concerned would be less able to provide the airport services subsequently demanded by that airline. For example, if an airport user was only prepared to provide short term seasonal or annual forecasts, then it would be commensurately more difficult for the airport to provide its own longer term forecasts of demand, capacity, investment and development plans, which in turn might influence the evolution of airport charges.
- 5.18 If an airline did not provide the required information to an airport prior to a consultation commencing, the CAA considers that, provided the airport could demonstrate that it had taken reasonable steps to solicit such information in time to inform the consultation, then it should be able to proceed on a 'best endeavours' basis with the information from users that it did have. In other

words, the lack of airport user information should not in itself undermine or invalidate an airport consultation, and airlines should not be able to veto a consultation by such means. Further, in assessing any complaint from a user about an airport's conduct of consultation, the CAA would give weight to the degree to which the airport user had engaged in the consultation process.

5.19 The airport user transparency requirements are discussed in turn below.

(a) forecasts as regards traffic

5.20 Where airlines are able to provide specific forecasts about their intended future traffic at an airport, then such information is likely to prove useful in enabling the airport to meet the airline's future needs as to capacity, facilities and services. The CAA recognises, however, that an airline may be unable to provide such a clear forecast, if its own future demand at that airport is particularly uncertain. Alternatively, an airline may be unwilling to reveal its own internal forecasts of traffic at a particular airport if that would prejudice its commercial negotiations with that airport. In either case, the CAA considers that an airline may by and large offer a neutral forecast, for example that for the year ahead its overall traffic (at the airport concerned, or in the UK market in general) is likely to be similar to that in the current year.

(b) forecasts as to the composition and envisaged use of their fleet

5.21 Similar comments apply to these forecasts as to those for traffic.

(c) their development projects at the airport concerned; and

(d) their requirements at the airport concerned

5.22 As noted above, the CAA considers that airlines have strong incentives to make such information known to the airport concerned, in order to be better served in future as to capacity, facilities and services. In order to assist the airport in assessing the commercial viability of airlines' development projects and requirements, and subsequently reflecting these in the airport's own investment plans and charging proposals, airport users are encouraged to provide specific and quantified information to each airport.

New infrastructure

5.23 Article 8 of the ACD requires that: "the airport managing body consults with airport users before plans for new infrastructure projects are finalised". As noted above, the CAA considers that each of Heathrow, Gatwick and Stansted Airports already fully complies with this requirement via their obligations and the incentives imposed by the CAA's economic regulation of each airport. For other airports, the CAA would expect the airport to maximise the use of existing processes. However the airport would need to be able to demonstrate clearly the process for consultation on new infrastructure projects. This should include the scope of consultation, the timing in respect of the evolution of plans, the

threshold size for projects subject to consultation, the level of detailed information to be provided on each project, etc. Such protocols should be appropriate to the scale of the airport and its investment plans, reflecting the level of resources available by airport and users to engage in such consultation, and should draw wherever possible on existing information produced for the airport's own management purposes. An example of such a protocol is provided by BAA Aberdeen Airport¹². The CAA believes each airport should consider, in conjunction with airport users, the most appropriate consultation requirements that reflect the situation at the airport.

5.24 The CAA notes that some new infrastructure projects could be covered under section 262 of the Town and Country Planning Act 1990. Airports covered by the ACD would be subject to these requirements. In practice, this means an airport can take forward new infrastructure projects without the need to seek planning permission under the Town and Country Planning Act 1990 unless the development relates to:

- The construction or extension of a runway;
- The construction of a passenger terminal the floor space of which would exceed 500 square metres;
- The extension or alteration of a passenger terminal, where the floor space of the building as existing at 5 December 1988 or, if built after that date, of the building as built, would be exceeded by more than 15%;
- The erection of a building other than an operational building;
- The alteration or reconstruction of a building other than an operational building, where its design or external appearance would be materially affected.

5.25 With regard to the ACD, this means that airports would need to consult with airport users on new infrastructure projects which may be exempted from the planning permission process, and thus not subject to any other statutory consultation process. On the other hand, though, airports need not necessarily consult on every infrastructure project. Rather, as noted above, the airport would need to provide clear information to airport users on the threshold used to determine which new infrastructure projects are captured by consultation requirements. The CAA would expect airports at least to consult with airport users on projects associated with significant assets inside terminals which had a bearing on airline operations, such as check-in facilities and baggage systems, on airfield reconfiguration, such as taxiways and parking, and on significant surface access projects.

¹² Published at http://www.aberdeenaairport.com/assets//Internet/Aberdeen/Aberdeen%20downloads/Static_files/Consultation_Protocol.pdf