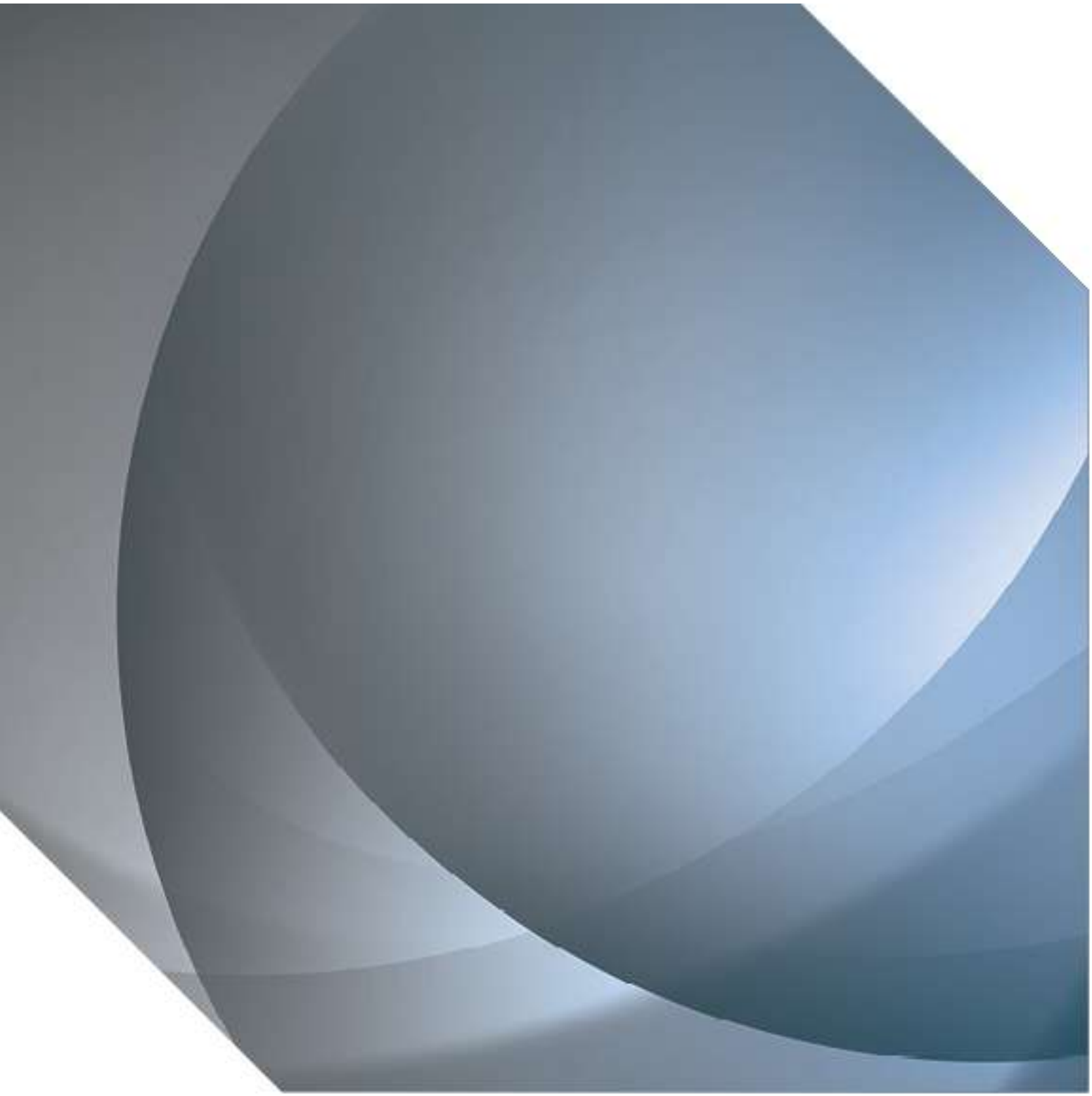
Guidance on the application of the CAA's powers under the Airports Charges Regulations 2011: Consultation response document

CAP 1344



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Guidance on the application of the CAA's powers under the Airports Charges Regulations 2011: Consultation response document

1. The Airport Charges Regulations 2011 (ACRs)[1] are secondary legislation which transpose the Airport Charges Directive (the directive)[2] so that it applies in the UK. They apply to all airports with more than 5 million passenger movements per year. There are currently nine such airports in the UK:

   - Heathrow;
   - Gatwick;
   - Manchester;
   - Stansted;
   - Luton;
   - Edinburgh;
   - Birmingham;
   - Glasgow; and
   - Bristol.

2. The ACRs set out certain obligations on airports and users with regard to exchanging information and on airports with regard to consultation on airport charges. The ACRs also require airports to set non-discriminatory charges and to fairly allocate scarce capacity. Since the repeal of Section 41 of the 1986 Airports Act, the ACRs are the main sector-specific legislation on this subject.

3. The CAA is the nominated national independent supervisory authority under the ACRs responsible for investigating complaints about breaches of the ACRs. If we find a breach, we can issue a compliance order, but are not obliged to. A compliance order can require the airport to change its behaviour and award damages to those who have suffered loss because of the infringement. Whether we issue an order or not, those who consider they have suffered as the result of an infringement can take Court action for damages.

1 The Airport Charges Regulations 2011.

2 Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges.

4. In April 2015, we launched a consultation on draft guidance to advise airport operators, airport users and other stakeholders of how we intend to interpret, monitor and enforce the obligations on airport operators and airport users, to inform stakeholders of what to do if they consider there has been a breach of the ACRs, and how we will handle complaints. The deadline for responses to the consultation was 30 June 2015. In order to give stakeholders more time to respond, this deadline was later extended to 7 July 2015.

5. We received nine responses from:

- Birmingham Airport;
- Bristol Airport;
- Edinburgh Airport;
- Gatwick Airport;
- Heathrow Airport;
- Manchester Airport Group (MAG);
- Virgin;
- IATA (KLM mentioned it agreed with IATA's response); and
- James Chan (Aircraft Owners and Pilots Association).

6. This document summarises responses to the consultation and gives our views on the responses, including whether they have contributed to us amending the draft guidance.

7. The responses are available on our website.

Our approach to the ACRs

8. In the consultation we set out our approach to the ACRs. We said that in our view promoting competition was usually the most effective way to improve outcomes for passengers and airport users. Our approach, therefore, was to seek to give airports and users the confidence to reach commercially negotiated outcomes where these are mutually beneficial and do not discriminate between users.

9. In the draft guidance we reminded dominant airports that they have a special responsibility to ensure that their conduct does not distort competition.

10. We did not consider that the ACRs should be interpreted in a way which would create a quasi-regulated structure for other airports. For example, where airports are not regulated by licence we would not mandate a level of transparency similar to that at the licensed airports.

11. In addition, where we find a breach of the ACRs, we noted that we were unlikely to issue a compliance order unless we judged that the breach had an impact on competition and thereby an impact on consumers.

12. Our approach to the details of the ACRs, stakeholder responses to our consultation, our view on the responses, and whether they have caused us to change our guidance are set out in more detail below.

13. Our final guidance is on our website.

Definition of airport user

14. In the ACRs, an airport user is defined as "in relation to any airport, a person responsible for the carriage of passengers, mail or freight by air to or from the airport".

15. We asked in our consultation how we should interpret the definition of airport user in the ACRs. This definition includes airlines operating commercial services whether scheduled, charter services, all-cargo or mail flights. We said, in our view, it would also include some general aviation (GA), such as business aviation, air taxis and air ambulances.

Responses

16. Generally, respondents agreed with our interpretation. Bristol thought there should be clarity over flight training, and that it might be appropriate to differentiate users by size (either aircraft size or percentage of airport's business). AOPA said that pilots (private and commercial) who are not carrying passengers or cargo should be considered to be users.

17. While agreeing with our interpretation, IATA mentioned that GA traffic was neither significant to, nor drove capital investment at, airports covered by the ACRs. It thought that while transparency should be extended to GA, a balance was required in consultations so that they were not carried off track for example by business aviation users representing a small share of traffic and airport revenue.

18. Virgin mentioned that the ACRs were directed in relation to all primary users at an airport including GA.

19. We consider that Heathrow's comments (discussed below) that GA users should only be entitled to receive information under the ACRs if they have used the airport in the past year is relevant here as it essentially raises the issue of which parties can be considered to be users of the airport in question.

CAA view

20. We are required to recognise the rights of airport users as defined under Regulation 3(1) of the ACRs. We consider that any user, whether regarded as GA or not is a user under the ACRs. However, a party that has not used the airport in question cannot be considered to be a user of that airport.

21. Notwithstanding our view that all users are entitled to the benefits of the ACRs, we note and agree that GA traffic may not be significant or drive investment at an airport. We consider that its needs may be different to those of commercial traffic. As airports should tailor their consultations to the needs of particular users they should consider how best to do so, including holding separate meetings with GA users to those with commercial airlines, when that would be appropriate.

Changes to guidance

22. We have amended paragraph 2.7 to say that the definition 'encompasses general aviation as well as commercial aviation'. Previously it said 'some general aviation' with examples of GA that would be regarded as users.

23. We have added a new paragraph, 2.8, to clarify the guidance to make it clear that a party that has not used the airport in question cannot be considered to be a user of that airport.

Information Provision

24. The ACRs require users to provide airports with details of their expected use of the airport each year and airports to provide users with a range of financial and operational information that allows them to see how airport charges are set.

25. In 2014, the European Commission, reporting on the implementation of the Directive, found that users were generally satisfied with transparency at UK airports and the consultation procedure at larger airports in the UK. Given this general satisfaction with information provision in the UK, in our draft guidance we said we did not intend to provide detailed guidance on how airports and users should exchange information and the detail of information required. In particular, we did not intend to provide pro-formas or templates that airports and users should use. (We had previously provided a template in our Emerging Thinking document published in 2010[3].)

26. We were mindful that if we specified the information required and the arrangements for the exchange of information too precisely, we would risk

3 Implementation of the Airport Charges Directive in the UK - CAA emerging thinking (December 2010)

unintended consequences that could reduce rather than enhance the level of information provision and user satisfaction.

27. Where the ACRs require a user to provide information to an airport, we thought airports should take a proportionate approach in their information requests , particularly towards GA users.

28. We said that while some of the required information in relation to the airport would be in the airport operator's statutory accounts, not all of it would always be included. When information was confidential airports which are listed on public securities markets would need to comply with the applicable disclosure regulations if they released the information into the public domain.

29. We also said that when airports were willing to negotiate commercial deals with airlines, they should disclose that they were willing to negotiate with users, and should be prepared to disclose their overall rationale for making such deals. We thought that airports should disclose the identity of those users with which they had made such agreements. However, we considered they should not disclose the key commercial details of negotiated agreements to other users, as disclosure could be anti-competitive and was likely to reduce the number of such agreements. This could lead to passengers losing the benefit of the lower fares and increased service levels they could expect to receive if beneficial agreements are made.

30. We said we would apply the ACRs in a way that enhanced competition rather than potentially discouraging it.

Responses

31. Birmingham and Bristol agreed that stringent guidelines were not required. They thought each airport should be responsible for specifying and substantiating the reasoning behind any increases to its published tariff. Both thought the information provisions were not burdensome for airports, but doubted that the information they provided was useful to users. They noted that users rarely responded to formal requests for information, but they had regular dialogue with most airlines using the airport, so they received useful information about their short-term plans anyway.

32. MAG agreed with our overall approach on information provision, including that we should apply the ACRs in a way that encourages competition. In particular, MAG mentioned that airports should not be required to disclose key commercial details of negotiated agreements. They considered such agreements to be beneficial for passengers, airlines and airports as they typically encouraged airports and airlines to develop additional services increasing competition and choice.

33. IATA and Virgin did not share the general satisfaction with the level of transparency at UK airports. They thought that the level of transparency, accuracy, timeliness and quality of information provided by some airports needed to improve. Specifically, IATA mentioned that airports had not always provided a clear answer to questions about the methodology used for determining airport charges.

34. IATA also thought that larger airports did not need information on the requirements of every single user as they may not make a material difference to the development of the airport's facilities and services. It said that airports had consolidated historical traffic data for every airline and that most airports had developed robust forecasting models anyway. It thought that, together with proper airline engagement and consultation for new investment, airports had sufficient information for planning investment. IATA did not see the need to establish a process for imposing penalties on airport users for failing to provide information to airports.

35. IATA suggested that where it was necessary for an airport to share confidential information with airlines so they could understand the rationale for a charging proposal, they should use non-disclosure agreements.

36. Edinburgh thought the guidance itself should mention the principle that the ACRs should not be interpreted in a way which would create a quasi-regulated structure for airports. It also said that it found the principles, commentary and examples in our Emerging Thinking document of 2010 useful in structuring the information to be provided to users.

37. AOPA thought that airports should be required to consult GA in addition to airlines. Heathrow said that GA users should only be entitled to receive information under the ACRs if they had used the airport in the past year.

CAA view

38. We note that Birmingham, Bristol and IATA considered that the provision of information by airport users to airport operators may not necessarily provide the airport with information that it does not already hold, either from its regular dialogue with users or from its experience of operating the airport. Where this is the case, we would suggest that airport operators and users consider making use of the provision in Regulation 10 not to follow the process for users providing information to the airport when users all agree that it is unnecessary to do so.

39. As the process for imposing penalties on airport users for failing to provide information to airports is set out in Regulation 16, we have no discretion to decide whether there should be such a process.

40. We consider that airports should provide information to all users, including GA users. We understand that airports may not always find it easy to identify and

communicate with all GA users. As such, we consider that airports should use appropriate tools to identify the parties who are their users. In this context, we consider that Heathrow's suggestion that it should send information to GA users who have used the airport in the past year is a sensible approach to identifying the parties who are actual users of the airport. However, in our view airports should also send the information to other GA users who request it even if the ACRs do not require it. An alternative would be for airports to place the information on its website, along with a notification to known GA users and relevant GA representative bodies of where to find it.

41. We note that IATA and Virgin considered that the level of transparency, accuracy, timeliness and quality of information provided by some airports needed to improve. The timescale provided for the provision of information is in the ACRs, as is the requirement for airports to provide the methodology they use to set charges. Information given should be accurate. We consider that the amount of detail that an airport should provide would vary according to the degree of market power it holds. Licensed airports are already required to provide more granular information than other airports. If a user considers that the information provided by a particular airport is not detailed enough to allow it to show how charges have been derived, the user, in the first instance, should discuss their requirements with the airport. We do not consider that we should set more specific guidance about the nature of information provided by airports, as that will vary between different airports depending on the circumstances.

42. However we do agree that non-disclosure agreements could be used to achieve the transparency required by the ACRs when it is necessary for an airport to disclose confidential information to users.

43. We also agree that it would be useful to confirm in the guidance that the ACRs should not be interpreted in such a way to create a quasi-regulated structure for non-licensed airports.

Changes to guidance

44. We have amended paragraph 4.5 to clarify the guidance so that airports can use appropriate tools to work out who its users are and to mention ways in which airport operators may communicate with GA users

45. We have added a new paragraph (1.15) to say that the ACRs should not be interpreted to create a quasi-regulated structure for non-licensed airports.

Consultation

46. Unless they agree otherwise, the ACRs require airports to consult with airlines over the level and structure of airport charges each year. Apart from in exceptional circumstances, airports have to propose the next year's charges four months in advance of their introduction and publish their final charges two months before they come into force. Airports are required to have regard to users' comments and justify the charges they set if they are not agreed with users.

47. Given the European Commission's finding that airlines were generally satisfied with the consultation procedures at larger airports in the UK, we did not comment in detail on the consultation requirements. We recognised the required timelines, and noted that an unexpected increase in security arrangements that would have a material effect on an airport's costs, could be an exceptional circumstance that would justify increasing charges with less than the normal notice.

48. To avoid discouraging negotiated agreements, which in our view generally lead to lower prices and better service standards, we proposed that the consultation requirements should apply to an airport's published charges, but not to negotiated deals with individual users.

49. The ACRs require airports to consult users on the provision of major airport infrastructure, but do not define what constitutes a major infrastructure project. We gave broad guidance on what would be major infrastructure, such as a new runway, or terminal, or significant work in existing terminals or airside. In the draft guidance, we expected airports to provide users with clear information on what they considered to be major infrastructure projects.

Responses

50. Birmingham and Bristol said that many of their commercial arrangements with airlines, while based on the published tariff, included negotiated rebates or incentives. They did not see the value in the consultation required by the ACRs for airports of their size and doubted whether their users valued it either.

51. IATA and Virgin thought airports should be obliged to carry out transparent and robust consultations that adequately took account of user views. They thought that the quality of consultation was often questionable, with a lack of information, and characterised by insufficient time being built into the process to enable changes in response to user comments. They thought we should set clearer guidelines on the depth of consultation and how airports should take on board user views.

52. Heathrow requested clarity on the obligation on airports to 'advertise' that they are willing to receive information from all airport users. It was unclear what

lengths an airport would need to go to comply with the guidance. For example, would it be sufficient to place the consultation notice on its website?

53. MAG thought it was important for an airport to know the views of its users on proposed developments. However consultation on major projects was an iterative and gradual process. High level engagement and consultation was often needed at an early stage of a project, at a point where the airport only had limited information. It thought it could be counter-productive for us to set prescriptive requirements around what is required at each stage of a project.

54. Edinburgh, Gatwick and Heathrow thought that airports should not have to identify the users they had entered into negotiated agreements with. Edinburgh and Gatwick said that the transparency required by the ACRs concerned the reasons for differentiating prices and not the identity of the airline in question. Heathrow said that requiring notification of all agreements regardless of value or importance could discourage low value arrangements.

55. Edinburgh suggested some changes to the text of the guidance to make it clearer. These were:

- paragraph 5.5 - to add the word 'with' to the second line to say 'we expect that airport operators will also consult *with* users on a bilateral basis where appropriate'; and
- paragraph 5.6 - in the second line to replace 'we would not expect airport operators to disclose to all users the key commercial details of such agreements if in doing so they could potentially infringe competition law' to 'we would not expect airport operators to disclose to all users the key commercial details of *individual negotiated* agreements *as to do so could be anti-competitive*'.

56. Edinburgh considered that disclosure of key commercial details of negotiated agreements was likely to be non-compliant with confidentiality clauses between the airport and airlines.

CAA view

57. We note that Birmingham and Bristol did not find the annual consultation process useful, and thought that their users did not do so either. Where this is the case we would suggest that airport operators explore with users the possibility of making use of the provision in Regulation 10 not to follow the process for annual consultations when all users agree that it is unnecessary to do so.

58. We note the views from airports about whether they should be required to identify the users with which they have negotiated agreements. We included this point in the draft guidance because we did not want a user to be unaware that an airport had negotiated agreements with one, or more, of the other users at the

airport. However, we recognise that individual disclosure is not specifically required by the ACRs and have been persuaded that it is unlikely that users would be unaware of the existence of a negotiated agreement with another user at an airport. Given this we no longer consider that disclosure would add sufficient value for users to warrant its inclusion in the guidance.

59. We agree with MAG that consultation on major projects that will take several years to complete will be an ongoing process, as more information becomes available and decision points in the project are reached. We do not consider, therefore, that it is necessary for us to prescribe the details of an airport's consultation with users about such infrastructure.

60. On an airport 'advertising' that it is willing to receive information from all users on their needs, we consider that airports should contact all users. However, it may not be possible for an airport to identify all potential GA users, so we consider that placing information on the airport's website, with links provided to representative bodies (including GA organisations) and known users would be a practical way for an airport to comply with this requirement.

61. We agree with Edinburgh's suggested changes to the text in paragraph 5.5 and have also made some changes to paragraph 5.6 to take account of its comments.

Changes to guidance

62. We have amended paragraphs:

- 5.5 - to say 'consult with users';
- 5.6 - to say that disclosure of key commercial details of 'individual negotiated agreements...could breach competition law', and to remove the requirement for airport operators to disclose the names of users they have negotiated agreements with; and
- 5.13 - to add a footnote about possible ways of consulting with GA users'.

63. We have added a new paragraph 5.21 to say that consultation would be an ongoing process for major projects that will take several years to complete.

Differentiation of charges and discrimination

64. The ACRs allow airports to vary their airport charges for reasons relating to the general and public interest (such as the environment). In our consultation we said that if an airport varied its charges for these reasons, it needed to be able to demonstrate why the different charges contributed to the general or public interest concerned. In the draft guidance we mentioned the good practice principles for airports to use when setting charges to encourage quieter flights set out in our 'Managing Aviation Noise' publication in 2014[4].

65. Under the ACRs an airport must not discriminate between users when setting airport charges. Therefore, other than for demonstrable public interest or general interest reasons, when an airport was providing an equivalent product to users, at an equivalent cost of supply, it should charge users an equivalent price.

66. If an airport differentiates its charges between users, the ACRs require it to be able to provide relevant, objective and transparent justification for doing so. In our draft guidance we listed some possible relevant or acceptable reasons for airports differentiating charges: differences in quality or scope of service, differences in the allocation of fixed and common costs, differences in commercial revenues generated by different users, and encouraging a more efficient use of the airport. Where an airport differentiates its charges we expected it to have robust, quantitative evidence to support its relevant justification for doing so.

67. In our draft guidance, we noted that the ACRs allowed differentiation in negotiated commercial agreements, including multi-annual bilateral contracts, such as when a user committed to provide a certain level of traffic to the airport for a number of years. We stated that such a differentiation was permitted by the ACRs on the basis that it would reduce the volume risk faced by the airport which, in turn, may reduce the airport's cost of doing business. If an airport could provide a valid and evidenced objective justification for any differences we would not interpret such a differentiation of charges as discriminatory.

68. An airport with a dominant position has a special responsibility to ensure that its conduct does not distort competition. In investigating such airports, we said we would place particular attention on the need for them to demonstrate that their charging structures were objectively justified and did not put particular users, or classes of users, at a competitive disadvantage.

69. We said we would refer to case law (especially in relation to competition law, the ACRs and the directive) to assist in assessing whether an airport was discriminating and whether charging differentiation was appropriate.

4 Managing Aviation Noise

70. Finally, under the ACRs, where an airport provides a differentiated service that cannot be provided to all users, we confirmed that the allocation of the service must be according to relevant, objective, transparent and non-discriminatory criteria.

Responses

71. IATA and Virgin agreed that when an airport provided an equivalent product to users, at an equivalent cost of supply then users should be charged an equivalent price.

72. Respondents had different views on the degree of market power held by airports. Birmingham and Bristol said that often airlines had significant bargaining power as they were able to place aircraft at many alternative airports. IATA and Virgin thought that competition between airports either did not exist or was very limited, as passengers preferred to travel from their local airport and airlines faced significant switching costs. IATA said that commercial deals could only be acceptable in a truly competitive environment.

73. Respondents also had different views on the possible justifications for airports charging differentiated prices mentioned in the draft guidance. Gatwick noted that, although we had listed some possibilities, the list was not closed, and there could be other potentially valid reasons. Gatwick agreed that traffic commitments and contributions to commercial revenues could be reasonable justifications. Virgin and IATA did not regard peak pricing as valid, because, in their view, it was ineffective in addressing capacity issues and redistributed costs between airlines arbitrarily. IATA also regarded pricing based on the elasticity of demand as unfair as it considered that users would have no alternative but to pay the higher charges..

74. Virgin and IATA thought that airports should only use noise and emissions charges to raise funds to cover the cost of abatement measures. IATA also said that ICAO's balanced approach required any noise-related measure to be preceded by a comprehensive assessment of its cost-effectiveness.

75. Some respondents commented on the amount of evidence airports needed to provide to show their charges were not discriminatory. Edinburgh and Gatwick said this could be achieved by airports disclosing their overall rationale for negotiated settlements. Gatwick thought the draft guidance over-emphasised the importance of airports providing quantitative evidence, as there could be circumstances where robust evidence was available, but was not quantitative. Gatwick also said that the obligation on an airport not to discriminate was one of result and not dependent on its publication of evidence.

76. IATA said, in its experience, airports often failed to separate clearly the direct and indirect costs for different infrastructure, so it was not clear whether there

was any hidden discrimination when airports charged different prices for different infrastructure.

77. Gatwick said that paragraph 6.19 of the draft guidance gave a very broad brush summary of case law on discrimination which could be misleading. It thought there was no need for such a summary of case law.

78. Virgin thought the reference to established case law should include decisions that had been taken under the European directive in other Member States.

79. Edinburgh suggested including in the guidance the broad principle mentioned in our consultation document that 'the guidance seeks to give airports and users the confidence to reach commercially negotiated outcomes when these are mutually beneficial and do not discriminate between users'. It also suggested some amendments to the text: to link paragraph 6.3 with paragraphs 6.7-6.16, and to paragraph 6.17 which it considered was too narrow in focus when compared with all the potential reasons that could justify differentiated charges.

CAA view

80. We do not comment on the degree of competition faced by any particular airport in the guidance.

81. We do not consider peak pricing or pricing based on demand elasticity to be unacceptable in principle. Offering cheaper prices to airlines that operate at off-peak times or to those with higher demand elasticities can increase the amount of traffic at an airport and thus improve the efficient use of capacity. Neither method redistributes charges arbitrarily, nor are they non-compliant with ICAO principles or ICAO's Airport Economics Manual.

82. The ACRs and the directive both allow airports to modulate airport charges for issues of public and general interest, including environmental issues. We, therefore, do not agree that noise and emission charges should only be used as a last resort, nor that they should necessarily be limited to raising funds used to cover the costs of abatement measures. Such a limitation is not contained in either the ACRs or the directive. We also note that ICAO principles recommend, but do not mandate, limiting noise and emission charges to the cost of ameliorisation measures.

83. We agree that whether charges are discriminatory is a matter of fact rather than one of transparency. Airports, however, are subject to the transparency requirements of the ACRs as well as the non-discrimination requirements. We note that the list of possible justifications in the draft guidance is not exhaustive, nor can it be, as an airport could find other valid justifications for differentiating prices. Although case law is useful in identifying potential justifications, an airport might find other innovative charging structures that are not discriminatory.

84. We consider that justifications for differential charging would have a quantitative aspect in most circumstances, but we accept that there can be qualitative justifications as well.

85. While we have not made all of the specific textual changes to the guidance suggested by Edinburgh, we agree that some of them would make the guidance clearer on the range of possible justifications for differential charging and the need to evidence them.

86. We agree that the references to case law in paragraph 6.19 of the draft guidance are too broad brush. Any review of case law would need to be longer and more detailed to take into account the particular detail of each case. A summary would also be of limited use unless it was updated each time a new case was decided, and would be no substitute for reading the cases themselves. We have, therefore, decided not to include a summary of case law in the guidance. We agree that decisions under the directive in other Member States should be considered as relevant case law for the ACRs.

Changes to guidance

87. We have amended paragraphs:

- 6.4 - to clarify that airports need to develop their charging proposals with the provisions of Regulation 14 in mind so that they are able to provide objective justification for differences in charges when they are challenged;
- 6.6 - to clarify that decisions taken under section 41 of the Airports Act 1986 and decisions taken in other Member States under the European directive are case law we will refer to in assessing discrimination under the ACRs;
- 6.7: to clarify that the list of possible objective justifications in paragraphs 6.9 to 6.16 is not an exhaustive list; and
- 6.17 to clarify that there could be qualitative justifications for differential charging.

88. We have deleted the former paragraph 6.19 that gave a brief summary of some European case law.

Complaint handling

89. In the draft guidance we set out a process for investigating alleged infringements of the ACRs The process included disciplines around case management and disclosure. Before deciding on whether there had been an infringement we said we would provide a Statement of our Preliminary View to the airport and user (or users) concerned. They would have the opportunity to make representations on the Statement, which, depending on the nature of the case, may include representations at an oral hearing

90. We noted that although we would use the same process to investigate any alleged infringement, the time taken was likely to vary according to the complexity of the issues. For example, we expected issues around discrimination to be more complex than those around consultation. We said that at the start of an investigation we would inform the parties of an indicative timetable for the case.

Responses

91. Most respondents supported our process for case handling. IATA and Virgin mentioned that its effectiveness could not be assessed until it had been used, and suggested that once the process had been used for a case we should carry out a lessons learnt consultation. They thought it unclear whether a successful appeal would lead to the charges level being corrected at the airport concerned.

92. Heathrow said we should require a greater level of evidence from a complainant to substantiate its allegations.

93. Edinburgh suggested some amendments to the text in the draft guidance, to:

- amend paragraph 7.6 to mirror the wording in the ACRs to say that we 'must investigate a complaint ‘from another airport operator which claims its business has been *materially* harmed by the alleged failure to comply with the ACRs'; and
- include in paragraph 9.11 a bullet describing the exemptions under the Freedom of Information Act 2000 relating to disclosure of confidential information (held under a legal duty) and trade secrets and other commercially sensitive information.

CAA view

94. We agree with IATA and Virgin that a process can only be judged once it has been used, and that when we complete a case we should consider whether the process could be improved.

95. If we find that an airport had infringed the ACRs, we could issue a compliance order that could order the airport to change its behaviour and/or pay damages. A

change in behaviour could include changing its airport charges. However, as the UK has a system of economic regulation that includes controlling the level of charges if appropriate, we consider that a compliance order is more likely to involve changes to the structure rather than to the overall level of charges.

96. While we expect complaints to be well evidenced, we consider that requiring a particular level of evidence from a complainant would not be appropriate. The amount of evidence that we would expect would depend on the circumstance of the case and, sometimes, on the identity of the complainant. For example, a commercial airline should be better resourced to provide evidence than a small GA user.

97. We consider that Edinburgh's suggested changes to the guidance would make it clearer.

Changes to guidance

98. We have amended paragraphs:

- 7.6 - to clarify that our obligation to investigate a complaint alleging non-compliance with the ACRs relates to someone on whom airport charges have been levied or another airport operator which claims its business has been 'materially harmed' rather than' harmed'; and
- paragraph 9.11 - to add that we are not required to disclose information which is exempted if it is confidential information (held under a legal duty), trade secrets and other commercially sensitive information.

Enforcement

99. If an airport is infringing the ACRs, or has infringed them and is likely to do so again, we can impose a compliance order requiring the airport to change its behaviour so it complies with the ACRs, and/or remedy any loss or damage to anyone who has suffered from the infringement. For past infringements, which we consider unlikely to be repeated, a compliance order could require the airport to remedy any loss or damage. Anyone who considers they have been harmed by an airport not complying with the ACRs can claim damages through the courts. Claims can be made whether or not we have investigated the matter.

100. In the draft guidance we said that in considering whether to impose a compliance order we would have regard to the impact of the order on consumers and whether it would reverse any detrimental effects on competition between users. In particular we said we would be unlikely to award damages unless we considered that the infringement of the ACRs had adversely affected competition or consumer interests.

101. Where a user has not provided the required information to an airport we can impose a penalty on the user of up to £5,000. We would be unlikely to consider taking enforcement action unless a complaint is raised with us by an airport operator. In the draft guidance we said that as knowledge of the requirements of every single user was unlikely to make a material difference to the development of an airport's facilities and services, we would take a proportionate approach to enforcing the requirements. We would be unlikely to impose a penalty unless the airport or another user had complained to us.

Responses

102. Birmingham thought that enforcement seemed heavily weighted in the airlines' favour, with little incentive for an airline to provide the required information. However, it also mentioned that ongoing discussions with airlines meant that this information was generally available without the consultation process.

103. Heathrow said that guidance on our information gathering powers should mention that our powers can only be exercised in respect of information that is 'relevant' and 'reasonably required' for our functions under the ACRs.

104. Virgin thought it important for us to utilise our powers robustly to ensure that airports were not setting their charges arbitrarily.

105. IATA saw a compliance order as a last step. It thought our approach to compliance should focus primarily on encouraging meaningful engagement on charges with the provision of sufficiently transparent information.

106. IATA and Virgin thought it was important for us to monitor non-licensed airports' compliance with the ACRs.

CAA view

107. We do not consider that enforcement is heavily weighted in airlines' favour. The ACRs allow us to impose financial penalties on users that do not provide the required information to airports.

108. We agree meaningful engagement with the provision of sufficiently transparent information is preferable to imposing a compliance order. However, where that is not achieved and users complain to us we will use our powers robustly where there is a need to do so.

109. We have a risk based approach to regulation. We do not intend to routinely monitor every airport and user's compliance with every aspect of the ACRs.

110. We agree with Heathrow that our information gathering powers are limited to information that is reasonably required for our functions under the ACRs.

Changes to guidance

111. We have amended paragraph 9.3 to say that our information gathering powers are limited to information that we may reasonably require for the purpose of performing our functions under the Act.

Other issues

112. In our draft consultation we asked whether there was anything that was not covered in out guidance that should have been.

Responses

113. Birmingham and Bristol thought that the 5 million annual passengers threshold under the ACRs was too low. Given the significant bargaining power of airlines and the competitive market in the UK, they considered a higher threshold of at least 10 million annual passengers would be more appropriate.

114. Gatwick noted that our duties in the ACRs were those in section 39 of the Airports Act 1986.

115. AOPA mentioned that larger UK airports set airport and mandatory handling charges in an opaque manner that had the effect of eliminating the lighter side of GA flights although their runways were not fully utilised. He thought there should be a mechanism that incentivised the use of slots that were not taken up by larger airlines.

CAA view

116. We note Bristol and Birmingham's views on the threshold under the ACRs. The threshold follows that in the directive and cannot be varied unilaterally in the UK.

117. We note Gatwick's comments on our duties. As we consider that our duties under the Civil Aviation Act 2012 provide a better focus on the interests of end users than those in the Airports Act, we have informed the Government of our preference for the duties to be aligned with those under the 2012 Act.

118. We note AOPA's comments. The ACRs are not concerned with users' access to airports. Instead they are concerned with prices and access to differentiated services at an airport of users that have accessed that airport. Therefore, the guidance will not comment directly on access.

Changes to guidance

119. None.