

## Section 1: Background and Introduction

- 1.1 The European Commission Sustainable and Smart Mobility Strategy (SSMS) and its Action Plan<sup>1</sup> lay down the foundation for how the EU transport system can achieve its green and digital transformation and become more resilient to future crisis. To achieve these objectives, the SSMS includes the revision of Directive 2009/12/CE on Airport Charges.
- 1.2 The Thessaloniki Forum of Airport Charges Regulators is tasked with 1) working on and making recommendations for a better common implementation of the Directive 2009/12/EC on Airport Charges (hereinafter the “ACD”) and 2) promoting best practices in economic regulation of airports<sup>2</sup>. The ACD requires Member States to assign responsibility for supervising the setting of airport charges to Independent Supervisory Authorities (hereinafter referred to as the “ISAs”).
- 1.3 Within the scope and objectives of the ACD, this working paper deals with the powers of the ISAs.
- 1.4 Section 2 provides a summary of the ACD requirements. Section 3 provides an overview of the powers of the ISAs as implemented by some Member States. These may include the inquiry, data gathering powers and enforcement tools that ISAs can use to ensure compliance with ACD requirements. Section 4 addresses the potential shortcomings identified by ISAs as regards their empowerment and which can potentially lead to an inefficient application of the ACD. Finally, Section 5 provides recommendations on how national legislation, where appropriate, can further empower the ISA to achieve an effective application of the Directive.
- 1.5 This paper has been produced by a Working Group of the Thessaloniki Forum of Airport Charges, taking into consideration the views of the airport and airline communities, which have been consulted. In preparation of this paper, an investigative survey was sent to ISAs. The findings of this paper are mainly based on the 19 responses received. The drafters of this paper are the ISAs from Bulgaria, Germany, Greece, Ireland and Spain.
- 1.6 This report has been adopted by the Thessaloniki Forum on 7 September 2023, Brussels.
- 1.7 This report does not represent the views of the European Commission and does not in any way change the requirements of the ACD or national laws.
- 1.8 This report should not be used as a limitation or constraint for Member States to apply their own methodologies, having regard to specific circumstances, regulation or other

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<sup>1</sup> European Commission Communication on a Sustainable and Smart Mobility Strategy – putting European transport on track for the future, 9 December 2020, see Communication and Action Plan here: [https://eur-lex.europa.eu/resource.html?uri=cellar:5e601657-3b06-11eb-b27b-01aa75ed71a1.0001.02/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:5e601657-3b06-11eb-b27b-01aa75ed71a1.0001.02/DOC_2&format=PDF)

<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0012&from=EN>

reasons as established in article 1.5 ACD.

- 1.9 This report will be kept under review and changed as and when deemed necessary by the Thessaloniki Forum.

## Section 2: Context

- 2.1 The ACD sets common principles for the levying of airport charges at airports and its purpose is to govern the relationship between airport and airport users as regards the fixing of airport charges. The EU legislature by adopting a common framework, has sought set basic requirements in the relationship between airport managers and users, such as the transparency of charges, consultation of airport users and non-discrimination among airport users, as it is apparent from the recitals 2, 4 and 15 in the preamble to the Directive.<sup>3</sup>

- 2.2 In particular, recital 2 explains that the ACD aims to establish a common framework that regulates the essential features of airport charges<sup>4</sup> and the way they are set, as in the absence of such regulation, basic requirements and objectives in the relationship between airport operators and airport users may not be met.

Among the objectives<sup>5</sup> of this common framework established by the ACD are:

- a. to ensure fairness in the process of setting charges;
  - b. to contribute to fair competition between EU airports through a common charging framework and principles;
  - c. to promote transparent charging systems applicable to users of airport infrastructure; and
  - d. to generate and maintain sufficient revenues to sustain and complete airport infrastructure at an optimal level.
- 2.3 Furthermore, according to the 2019 Evaluation of the ACD, the Directive aimed to tackle two problems: (i) the existence of diverging charging systems in the Member States that lack clear transparency in the way in which they are built up; and (ii) the possibility for some airports to extract prices and terms that would otherwise not be

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<sup>3</sup> Please see Judgement of the CJEU of 12 May 2011, Case C-176/09, *Luxembourg*, 39 and 40. ECLI: EU:C:2011:290

<sup>4</sup> According to article 2.4 for the purposes of this Directive “airport charge” means a levy collected for the benefit of the airport managing body and paid by the airport users for the use of facilities and services, which are exclusively provided by the airport managing body and which are related to landing, take-off, lighting and parking of aircraft, and processing of passengers and freight. These activities, for which the airport has the right to levy airport charges subject to the common principles set in the ACD, are referred to in these paper as “regulated” activities.

<sup>5</sup> Please see Staff Working Document on Charges on the Evaluation of the Directive 2009/12/EC on airport charges, SWD (2019) 289, p.11-12.

achieved in a competitive market<sup>6</sup>.

- 2.4 In order to attain its objectives and prevent these problems, the Directive contains a set of requirements and principles that are transposed by national legislation.
- 2.5 Irrespective of the form of economic oversight adopted at a national level, the ACD requires Member States, in the first place, to ensure that airport charges are not discriminatory, and where modulations are in place that these are relevant, objective and transparent (art.3 ACD).
- 2.6 It also requires Member States to ensure that consultations between airports and airlines take place with respect to the charging system in place, the level of the airport charges and, as appropriate, the quality of the service provided (art.6.1 and 6.2 ACD). Further, according to article 8, Member States shall ensure that the airport managing body consults with airport users prior to the finalisation of any plans for new infrastructure projects.
- 2.7 Finally, Member States should nominate an independent supervisory authority (ISA) to ensure the correct application of the measures taken to comply with the Directive and to assume at least the task assigned under article 6 ACD. The ISA shall intervene in case of conflict and decide on the justification of the tariffs (art 6.3 and 6.4 ACD); Member States may decide not to apply paragraphs 3 and 4 if mandatory procedures are in place to determine the tariffs or assess that airports are subject to effective competition (Article 6.5 ACD). For this purpose, the procedures, conditions and criteria shall be relevant, objective, non-discriminatory and transparent and the ISA's decisions shall have a binding effect (art.11 and 6.4 ACD). Member States must ensure that the ISA exercises its powers impartially and transparently (11.3). Recital 12 also states that the intervention of that authority is meant to ensure that the decisions are impartial as well as to ensure proper and effective application of the Directive.
- 2.8 The ACD principles and objectives have been incorporated into the national regulatory frameworks of Member States in diverse ways. Since the legal instrument chosen by the EU is a Directive, Member States have the choice of method for implementation provided that the objectives and requirements intended by the Directive are attained. Moreover, the Member States have also different regulatory traditions, civil, administrative and procedural national systems, as well as the features and scale of airports, which lead to different ways to attain the objectives of the ADC with no “one size fits all solution”. In addition to this, article 1.5 of the ACD allows the Member States to put in place additional regulatory measures that are not incompatible with the requirements of the Directive. In this context, the role of the ISA cannot be limited to a degree that it cannot effectively carry out its role under the Directive.
- 2.9 As explained by the CJEU<sup>7</sup> (in the context of the independence of the national regulatory authorities) “*it follows from article 288 TFEU that the Member States are*

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<sup>6</sup> Please see Staff Working Document on Charges on the Evaluation of the Directive 2009/12/EC on airport charges, SWD (2019).

<sup>7</sup> Judgement of the CJEU of 2 September 2021, Case C-718/18 *Commission v Germany*, 118-119. ECLI: EU:C:2021:662.

*required when transposing a directive, to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of ways and means of ensuring that the Directive is implemented. That freedom of choice does not affect the obligation imposed on all Member States to adopt all measures necessary to ensure that the directive concerned is fully effective in accordance with the objectives which it seeks to attain.*<sup>8</sup> Thus, while the Member States enjoy autonomy as regards the organization and the structuring of their ISAs, that autonomy must, nevertheless, be exercised in accordance with the objectives and obligations laid down in the Directive.

- 2.10 In the case of the Independent Supervision Authorities within the ACD, the objectives and obligations are apparent from its articles and the recitals in its Preamble.<sup>9</sup> Thus, together with the basic principles underpinning the ACD of non-discrimination, transparency and consultation, modifying the system or level of airport charges requires the setting by the Member State of relevant, objective, non-discriminatory and transparent procedures, conditions and criteria, and the supervision of an independent authority.
- 2.11 In the assessment of what can be considered relevant and objective, insight can be found in the Recitals in the Preamble of the ACD that make reference, *inter alia*, to:
- The principle of cost-efficiency in the operation of airport facilities and services (1),
  - ICAO Council's policies on airport charges that include "*inter alia the principles of cost relatedness, non-discrimination and an independent mechanism for economic regulation of airports*" (9),
  - The recovery of cost as a defining feature of the airport charges (10),
  - The transparency requirements of the ACD as a means to provide air carriers with an insight of the cost incurred by the airport and the productivity of an airport's investments (13), and to make monitoring of infrastructures costs possible and with a view to providing suitable and cost-effective facilities at the airport (14),
  - The ability of the airport manager to apply airport charges corresponding to the infrastructure and/or the level of service provided and the air carriers' legitimate interest to require services from an airport managing body that correspond to the price/quality ratio (15).
- 2.12 Also in relation to the necessary cost relatedness of the airport charges, the Opinion<sup>10</sup> of the Advocate General in *Lufthansa v Land Berlin*<sup>11</sup>, affirms, in particular, that "*The*

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<sup>8</sup> Judgement of CJEU of 19 October 2016, *Ormaetxea Garai and Lorenzo Almendros*, C-424/15, 29,30 ECLI:EU:2016:780.

<sup>9</sup> "*In accordance with settled case-law of the Court, the scope of those provisions must be determined by taking into account both the terms in which they are couched and their context, as well as the objectives pursued by the legislation of which they form part (see, in particular, judgments in Lundberg, C-317/12, EU:C:2013:631, paragraph 19; SFIR and Others, C-187/12 to C-189/12, EU:C:2013:737, paragraph 24; and Bouman, C-114/13, EU:C:2015:81, paragraph 31) and, in the circumstances of this case, the history of that legislation*" Judgement of the CJEU of 1 July 2015, Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland*, 30. ECLI:EU:ECLI:EU:C:2015:433.

<sup>10</sup> Opinion of Advocate General Campos delivered on the 27 June 2019, p.41 ECLI:EU:c:2019:548.

<sup>11</sup> Judgement of the CJEU of 21 November 2019, Case C-379/18 *Lufthansa v Land Berlin*, 41-43. ECLI:EU:C:2019:1000.

*economic relationship between the airport managing body and the users is to be based on a balance between the charges and the costs which they are intended to finance.<sup>12</sup> The user must therefore have access to a mechanism for challenging charges, the level of which exceeds that balance, that is to say, which represents a burden that is clearly disproportionate to the costs of the service or the use of the facilities”.* This is why, article 7 ACD sets the information on how and on what basis airport charges are calculated and make it part of the compulsory consultation procedure (see recital 13).

- 2.13 In sum, the Directive requires that ISAs are effectively empowered to enable them to discharge their functions under the Directive and attain its goals. The purpose of this paper is to describe the main powers of the ISAs that, in the view of the Thessaloniki Forum, are necessary for the effective regulatory oversight functions and to reach the objectives of the ACD. The paper also analyses any potential shortcoming as regards the ISAs current empowerment and therefore, the attainment of the Directive’s goals.

### Section 3: Overview of Current ISA Roles and Powers

- 3.1 Across Member States, the various ISAs currently have diverse roles and powers in relation to regulatory oversight activities. ISAs derive their powers from the ACD as transposed at national level, and several ISAs have additional roles and powers set out in national legislation. Most ISAs are the sole regulatory authority for overseeing airport charges in the region. Two Member States also have several ISAs that oversee different regions or airports.
- 3.2 Thus, some ISAs implement additional regulatory measures as provided for by Article 1(5) of the ACD. In several Member States, the level of revenue per passenger that an airport may collect through Airport Charges is overseen by the ISA, for example through price cap regulation. In some Member States, additional regulatory measures are implemented by an entity or body other than the ISA.
- 3.3 In most states, the ISAs, and the parties to the airport charges consultations cannot determine or appeal the economic regulatory framework itself since it is set in legislation. In almost all Member States, it is possible to appeal the decisions of the ISAs made within the national framework.

#### Consultation process

- 3.4 Article 6 of the ACD requires a regular consultation process between the airport operator and airport users. Most ISAs act as an observer in this process and/or verify *ex post* that the requirements of the Directive have been met. Some take a more active role by, for example, establishing the rules/guidelines, or acting as a mediator.

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<sup>12</sup> “See, *inter alia*, recitals 1 “the cost of which they generally recover through airport charges” and 10 “an airport charge is a levy that is designed and applied specifically to recover the cost of providing facilities and services for civil aviation” of the Directive. Particularly telling is recital 15: ‘airport managing bodies should be enabled to apply airport charges corresponding to the infrastructure and/or the level of service provided as air carriers have a legitimate interest to require services from an airport managing body that correspond to the price/quality ratio”.

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Through these guidelines, the ISA can require a disaggregation of the minimum (adequate) amount of information to be shared as required by the Directive.<sup>13</sup>

- 3.5 The Thessaloniki Forum has previously published its specific recommendations for this consultation process in the paper '*Consultation and Transparency*'<sup>14</sup>.

*Setting of the tariffs*

- 3.6 Most ISAs are responsible for setting, approving and/or reviewing the final airport charges, or their overall maximum level, for a given regulatory period. Other ISAs have a narrower role as they do not make a decision on the final charges and are primarily responsible for supervision of the consultation process. In some of these cases, the ISA's powers relate to defining the methodology by which the airport operator sets charges, while others may be involved only when there is a complaint or dispute between users and the airport operator.
- 3.7 Few ISAs are fully responsible for developing and implementing the charging system (for example, price cap regulation or rate-of-return regulation). In several cases, additional regulatory measures, or certain aspects of such measures, are defined in the legal framework by the Member State and thus outside the remit of the ISA. In one case, the relevant parameters for tariffs are set by the airport operator. Similarly, in some cases, features which may have an impact on the tariffs, such as concession agreements, are not within the remit of the ISA. Some ISAs have the power to issue non-binding advice, on its own initiative or when being consulted.
- 3.8 If the ACD procedural requirements are not followed, the decision of the airport manager establishing the level of airport charges can be challenged by users. Most ISAs would also have powers to intervene *ex officio*; In relation to other key principles of the ACD such as cost relatedness, transparency, and non-discrimination, most, but not all ISAs have powers to take action to enforce these and, in certain cases, only in case the users appeal to the ISA.

*Quality of services and airport investments*

- 3.9 Many ISAs play a relatively minor, if any, role in relation to oversight of service quality levels and/or investments by the airport operator. The smaller number of ISAs which play a more active role in setting the price levels and implement economic regulation in this respect, are generally empowered to play a more active role in the area of investments and quality of services. Some other ISAs may also intervene if there is a complaint or appeal, or if negotiations between the airlines and airport fail.
- 3.10 Thus, relatively few ISAs oversee the promotion of efficient investment management of airports. Some ISAs may intervene in the case where there is evidence of inefficient

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<sup>13</sup> For example, the Spanish ISA, CNMC, requires the airport manager (AENA) to provide for the financial year results and the forecast of (i) the breakdown of the revenues and costs of each of the airport charges, including operating expenses, amortization and cost of capital, and (ii) the breakdown of the cost structure of the public charges operating costs.

<sup>14</sup><https://ec.europa.eu/transparency/expert-groups-register/core/api/front/expertGroupAdditionalInfo/29018/download>

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investment management, and, for example, provide from the exclusion from the RAB of non-justified investment.

#### *Power to request information*

- 3.11 During the consultation process, some ISAs have the power to be actively involved and can set the topics and the minimum level of information to be shared, while others do not have this power. In some cases, the minimum level of information required is set by legislation. Most, but not all, ISAs do have access to information shared during the consultations (either directly or upon request).
- 3.12 Regarding powers to acquire further information to, for example, assess whether airport charges are based on efficient costs, some ISAs have access to this information, while others do not. In some cases, the powers may be limited by the material produced by the airport operator, i.e. the ISA may not be able to acquire all necessary underlying data and materials to make its own assessment from first principles.
- 3.13 Although queries/data requests are made for regulated activities, some ISAs hold the power to request data on non-regulated activities (such as commercial revenues) depending on the scope of their powers and goals. Some ISAs have a general power to be provided with any information which it might reasonably require in the performance of its functions. In that sense the ISA is legally entitled to require any information relevant to its role and is not limited to any specific material.
- 3.14 The majority of ISAs can only request information from airlines in the case that it is part of the consultation material or if there is a complaint about charges. Even when such information may be requested, most frequently, penalties may not be imposed on airlines if they do not provide it. In relation to airlines' own obligations under Article 7(2) of the ACD, some, but not all, ISAs have powers to enforce these.
- 3.15 Several ISAs have identified potential limits to the information that they can require to allow them to effectively carry out their role. Some ISAs powers are limited in having access to the necessary information from airports under concession agreements. Some have stated that they have no legal power to verify that the cost allocation principles and dual till are respected. In one case the ISA stated that airports are reluctant to share strictly confidential information. Another ISA has limits to the information that can be accessed on non-regulated activities. One ISA states that the inability to compel airlines to provide information can be a limitation. Another ISA states that sometimes there are limitations on the information an airport can provide depending on the cost accounting structure of the airport.

#### *Enforcement powers*

- 3.16 Thus, in case of disputes between the users and the airport managing body regarding consultation process, the charges or incentives, the issue can generally be brought to the ISA for consideration. In most cases, users can appeal to the ISA in relation to matters within the scope of the ACD.
- 3.17 While quite a few ISAs do not see limitations in their national frameworks, for the ones

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which do, the shortcomings range variously. Several ISAs highlight lack of enforcement powers in relation to their ability to deliver a decision affecting the level of airport charges. In some cases, the role of the ISA to ensure cost efficiency, assess investment levels and/or the quality of service, or to ensure that charges are transparent and non-discriminatory is limited. Another ISA points to difficulties stemming from the division of regulatory powers across numerous entities, stating that the roles of each entity should be more clearly defined and it must be assured that the entities will cooperate. One ISA reports difficulty in proving that charges are discriminatory. Another ISA states that the appeal process is too time consuming, taking several years for a final decision to be reached. One ISA states that it is not possible to differentiate services within its framework.

- 3.18 The enforcement powers of the ISAs are also varied. Some ISAs can impose financial penalties, while others can enforce other legally binding decisions. Several ISAs will first issue a notice to the airport operator which may then be followed by a fine if this notice is not complied with. Alternatively, if the initial notice is not complied with, at least one ISA may advise the Government that the airport operator's licence should be reviewed/withdrawn.
- 3.19 In the case that the ISA considers that charges are not cost related, are discriminatory, or are not transparent, there is a variety of enforcement actions available to the individual ISAs. In some cases, the charges may not be approved by the ISA, the ISA may issue alternative charges or order the airport operator to issue alternative charges, further consultation may be required, or an investigation can be carried out. Again, in some cases, ISAs require an appeal or complaint to be made before it is empowered to act and are limited to the petitum of the parties.
- 3.20 If information to which the ISA is entitled is not provided by the airport operator, the ISA can generally either take enforcement action and/or decline to approve the airport charges until the information is provided. Some ISAs have the power to impose penalties in such cases. Most ISAs hold the power to request more information from the airport authority. Some ISAs require an appeal or complaint to be made to request further information. Some ISAs may also issue a directive to the airport outlining the steps required by them, while others may set the charges such that they are not based on agreement of all stakeholders.
- 3.21 While ISAs may request information from airport users, only a small number have actions available to them if the users do not comply. However, if the information is being requested in the context of an assessment by the ISA of a complaint made by that same user, failure to provide required information may weaken the complaint and that, in itself, can create an incentive to comply with the request.

#### **Section 4: Potential vulnerabilities of ISA empowerment as regards to the objectives of the ACD**

- 4.1 As explained in paragraph 2.8, and as is clear from section 3, the transposition of the



ACD into the national legal frameworks has been diverse, using different regulatory tools to achieve the Directive's objectives. This is a reflection of the diverse civil administrative and procedural national systems as well as of the features and scale of airports in Member States. This is why the empowerment of the ISA with a concrete set of powers may vary from one Member State to another as there may already exist another way in their legal system to achieve the same goal or policy objective.

- 4.2 In this section, we explore the potential vulnerabilities of the current national regulatory frameworks while considering the goals of the ACD.<sup>15</sup> The section will also present the deficiencies identified by the ISAs that replied to the questionnaire.<sup>16</sup>
- 4.3 We then explore the optimal empowerment of the ISAs to this effect when their national legal systems do not address the issue and/or potentially fall short in their provisions, which substantiates the recommendations of the Forum in section 5.
- 4.4 Given the different regulatory models chosen by Member States to implement the ACD, the Forum recognises that there is “no one size fits all” approach to achieve optimal empowerment under the ACD. The role and powers of the ISAs need to be adjusted to the regulatory model adopted. It is also important to note that, if an ISA is empowered to have a particular role or take particular actions, it is appropriate that ISA exercise such powers when necessary<sup>17</sup>.

*Powers & Independence of the ISA in relation to the introduction of additional regulatory measures (art. 1.5 & 11.3 ACD)*

- 4.5 The ACD requires that the Authority in charge of ensuring the correct application of the ACD requirements exercise its powers impartially and transparently.
- 4.6 In order to avoid a conflict of interest, articles 11.1 and 11.3 of the ACD require that the ISA is legally distinct from and functionally independent of any airport managing body, and air carriers. Such authority may be the same as the entity entrusted by a Member State with the application of the additional regulatory measures referred to in article 1.5 of the ACD, including the approval of the charging systems and the level of airport charges. The Member States that retain ownership of airports, airports managing bodies or air carriers shall ensure that the functions relating to such ownership or control are not vested in the ISA.
- 4.7 The situation at EU level in this regard is diverse. Some nominated ISAs are part of the Ministries that directly hold ownership or manage the airport. In these cases, the impartiality and independence required by the ACD can still be achieved by other

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<sup>15</sup> Please see Staff Working Document on Charges on the Evaluation of the Directive 2009/12/EC on airport charges, SWD (2019) 289, p.11-12.

<sup>16</sup> We have not dealt in this paper with the suggestion of some ISAs that there should be a differentiation of the missions of the ISA depending on the airport market power or on the complexity of the regulation (dual till, etc.) as this would require a change in the Directive but we agree with the view that the ISA missions have to be exercised proportionately and when necessary.

<sup>17</sup> Please see the TF document on “Remedies available to ISAs to address potential misuse of significant market power by airports. December 2019” <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&do=groupDetail.groupDetail&groupID=3084>

means permitted by the ACD such as clear structural division<sup>18</sup> and/or enhanced transparency requirements to have effective independence. For example, apart from the firewalls put in place, an ISA in this position should deliver decisions carefully reasoned following the ACD criteria and make them publicly available.

- 4.8 In other cases, the nominated ISAs do not share any links with the ministries or offices, which hold ownership of the airport manager, but the ministries involved in the ownership/management of the airport are the ones responsible for the introduction of additional regulatory measures under Article 1.5 ACD (i.e. economic regulation).<sup>19</sup>
- 4.9 In any event, the role of the ISA is key to ensure that airport charges modifications are relevant, objective, non-discriminatory and transparent as stipulated by the ACD.
- 4.10 The situation is different across Member States: some ISAs decide the form of economic regulation and/or have power of decision on the key parameters of the regulation of the airport charges introduced under Article 1.5; while some ISAs have the right to issue a non-binding report on those key parameters, and other ISAs are not involved in the process. In this context, in reply to the questionnaire, some ISAs have noted that the goals of the Directive would be better achieved if they were to be empowered in relation to such matters, or at least empowered to deliver their opinion.
- 4.11 According to article 1.5 of the ACD, the Directive shall be without prejudice to the right of each Member State to apply additional regulatory measures that are not incompatible with the ACD, including economic oversight measures.
- 4.12 However, when the role of the ISA is limited to supervise ex post the charges set by the airport manager in respect of compliance with aspects of economic regulation already set in place, the ISA may not be able to ensure the correct application of the measures taken to comply with the Directive and to assume at least the task assigned under article 6 ACD, as required by article 11 ACD. Although ex post supervision by the ISA tends, in general, to be an adequate solution in terms of the application of the ACD, it rises specific issues in this context.
- 4.13 Indeed, if the additional regulatory measures have the ability to impact the level of the airport charges, the adoption of the measures without any intervention from the ISA may not be compatible with the provisions of the Directive in the context of possible conflicts of interests such as the one referred to above in paragraph 4.8. Unless the ISA could, at least, give its impartial and transparent view before the approval and implementation of the key parameters of the economic regulation mechanisms that have a material impact on the level of airport charges, it may not

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<sup>18</sup> For similar reasons if the ACD forbids that functions relating to ownership and control of airports and airlines are vested on the ISA, the ISA should not be dependent either of the entity that is vested with those functions. The authorities responsible for each task should be different for example, they should depend on different Ministers.

<sup>19</sup> This leads to the situation in which the effective economic regulator is the owner of the regulated facility and has a direct interest in the performance of the airport, and potentially in maximizing its profits.

have another way to ensure that the Directive requirements are applied.

- 4.14 Following the same reasoning in case the national regulation would not consider this ISA's opinion *per se* binding, when the authority responsible for deciding these additional parameters would not follow the ISA's advice, it should at least reason the economic rationale to deviate from the ISA's opinion and make this rationale publicly available. This is what we call in this paper the ISA's "Strong Power of Opinion".
- 4.15 In this way, both impartiality and transparency requirements of the ACD would be met as the role of the independent authority ensuring that airport charges modifications are relevant, objective, non-discriminatory and transparent as required by the ACD is guaranteed. On the contrary, if the ISA is not effectively involved in the process and the levels of the airport charges are defined by the regulation set by the Member State, the ISA's intervention may become irrelevant, which would not be compatible with the Directive.
- 4.16 The key parameters of the regulation that may have an impact on the airport charges and could demand the above-mentioned ISA's assessment (or "strong power of opinion") are the methodology used for cost of capital (WACC), cost allocation, operational costs estimations, traffic forecasts, planned investments, asset base, till system<sup>20</sup>, depreciation methods as well as service quality standards. It should also include relevant parameters of any concession agreements with a similar effect on airport charges.
- 4.17 The ISA's advice in this context should aim to verify that the airport charges are defined according to cost-relatedness and effectiveness, transparency and relevance, and non-discrimination and are subject to consultation. In this regard, the ISA's objective should be to ensure that the regulatory model for the airport charges promotes efficiency (Recital 1 and 14), investment and service quality, and takes into account possible modulations relating to environmental issues or other general public interest considerations.

#### *Role of the ISA in the Consultation process*

- 4.18 Articles 6.1 and 6.2 of the ACD require that a regular consultation procedure between airport managing body and 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 the service provided. Changes to the system or the level of airport charges must be subject to such consultation before they are applicable, and 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.
- 4.19 Where appropriate, ISAs should be facilitators of this transparency exercise. ISAs can help to improve the transparency of the process, balance the power of the airport

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<sup>20</sup>Please see the Thessaloniki Forum 2021 paper on Airport till structure and Cost Allocation, paragraphs 3.7 and 3.8.  
<https://ec.europa.eu/transparency/expert-groups-register/core/api/front/expertGroupAdditionalInfo/40590/download>.

manager vis-à-vis its users, and encourage airlines to engage more productively in the process. To this end, ISAs participation in the process in an observer role can be important in order to make the consultation more meaningful and useful for the parties involved.

- 4.20 With regard to the content of the consultation process described in article 7 of the ACD, although some ISAs consider that their national framework is sufficiently clear, other ISAs find that the Directive requirements sometimes need clarification in the national laws transposing them. To this end it may not be feasible to wait until the Directive or the national framework incorporate the needed clarifications (and it may not be advisable for fixed legislation to enter into such a degree of detail).
- 4.21 For this reason, in order to make the consultations more meaningful and effective, the ISA should have a role to decide the level of information that airports and airlines need to exchange in compliance with article 7, article 6.1 and 6.2 ACD and to issue guidance and or/decide, where appropriate, on the information that needs to be exchanged before the consultation starts and order further the procedure if necessary.<sup>21</sup> This should include the deadlines and the format in which information must be provided.
- 4.22 For these clarified requirements to be useful, effective ways to enforce them must be available. However in many cases, ISAs are not able to impose a sanction on the airport managers and/or airlines that do not comply with the information exchange requirements, or do not have other effective means to enforce their decisions such as the non-approval of the modification of airport charges (which will prevent the entry into force of the modified charges) or the approval of airport charges directly by the ISA<sup>22</sup>.
- 4.23 Finally, if the ISA does not have access to all the information exchanged by the parties during the consultation process, including confidential data, it may not be able to deliver on its task. This is why it is important that the ISA has access to all the information needed to perform its duties, including access to confidential data. In this case it is also important that the legal framework ensures the confidential treatment of such data.
- 4.24 The Thessaloniki Forum published in 2016 its *Recommendations on Consultation and Transparency*, which addresses in more detail the information required during the consultation process among other issues<sup>23</sup>.

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<sup>21</sup> The intervention of the ISA is necessary only when the information requested by national law or art. 7 of the ACD needs further disaggregation or needs to be specified to make the consultation process meaningful. For this purpose, the ISA will complement the national framework information requirements only when needed. This includes the need to adapt to different circumstances, i.e. the CNMC has included in the consultation process the extra costs derived from COVID-19 that according to Law have to be part of the calculation of the Spanish airport charges and were not initially contemplated in the estimated cost of the multiperiod regulation.

<sup>22</sup> Some ISAs have suggested that the refusal to provide information during the consultation process may allow the ISA to prescribe a new round of consultations and one ISA has suggested that it could limit the right of appeal of users that have not provided any information to support the airport manager traffic and costs estimations.

<sup>23</sup> <https://ec.europa.eu/transparency/expert-groups-register/core/api/front/expertGroupAdditionalInfo/29018/download>

*Role of the ISA in the setting of annual tariffs*

- 4.25 According to article 6.3 of the ACD “*Member State shall ensure that in the event of disagreement over a decision on airport charges taken by the airport managing body, either party may seek the intervention of the ISA referred to in Article 11, which shall examine the justification for the modification of the system or the level of airport charges*”. Moreover, Article 6.4 ACD establishes that the decision of the airport manager shall, if brought before the ISA, not take effect until that authority has examined the matter and has issued a decision. According to Article 11.7, the decision of the ISA shall have binding effect, without prejudice to parliamentary or judicial review.
- 4.26 In addition, Article 6.5 of the ACD provides that “*A Member State may decide not to apply [Article 6] paragraphs 3 and 4 in relation to changes to the level or the structure of the airport charges at those airports for which it*” organizes a mandatory procedure under national law whereby 1) airport charges or their maximum level, shall be determined or approved by the ISA (Article 6.5.a), or 2) the ISA first examines whether such airports are subject or not to effective competition and, on the basis of such examination, the airport charges shall be determined or approved by the ISA (Article 6.5.b)<sup>24,25</sup>.
- 4.27 In both cases described by the ACD, the ISA will need to have access to all the information relevant to take a decision. This may entail more information than that which is exchanged by the parties during the consultation process.
- 4.28 As explained in paragraph 4.17, the decision of the ISAs on the level of the airport charges should be consistent with the principles in the ACD of transparency, non-discrimination and objectivity (relevant and cost relatedness).
- 4.29 However, some ISAs have identified as a deficiency the lack of sufficient powers in relation to the determination of the level of airport charges (see paragraph 3.17). In some cases, ISAs may be limited in their ability to assess whether the proposed level of charges is justified in relation to cost efficiency, quality of service and the planned level of investment. Also, in the answers to the questionnaire, some ISAs refer to limited empowerment to ensure that charges are transparent and non-discriminatory. Moreover, relevant parameters affecting the level of the charges may be set by the airport operator, concession agreements and/or through national legislation. The introduction of such parameters may limit or frustrate the effectiveness of the ISA’s power of intervention and decision-making.

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<sup>24</sup> An ISA suggested that a differentiation in the power exercised by the ISA could ideally be implemented to adapt the regulatory model to the market power and/or complexity of the airports: for example, airports falling into the regulation of the ISA could be only airports operated with a dual till and/or significant market power. For other airports above 5 MPAX, the ISA would only have a role in case of disagreement.

<sup>25</sup><https://ec.europa.eu/transparency/expert-groups-register/core/api/front/expertGroupAdditionalInfo/36344/download>

- 4.30 Since Recitals 1 and 14 ACD<sup>26</sup> make specific reference to the need for airport facilities and services to be suitable and cost effective and many ISAs have outlined the need to take into account cost-efficiency in their assessment of the justification of the airport charges, efficiency would be one of the relevant and objective criteria that may justify a modification in the level of charges and/or modulation of the airport charges required by article 3 ACD.
- 4.31 In this regard, some ISA's have noted in their answers to the questionnaire that there are relatively weak efficiency incentives<sup>27</sup> currently provided by their national regulatory frameworks, and the role of the ISA in this regard can be limited. In some cases, the ISA can apply a price cap model designed to create an efficiency incentive, while other ISAs can give a non-binding opinion on the framework in which they can take into account efficiency considerations. Some ISAs cannot base their decision on the justification or the authorisation of airport charges on cost-effectiveness reasons or not consider themselves in a position to advise or decide on the matter, given their national frameworks and even their current level of expertise in the field.
- 4.32 However, an independent authority able to ascertain that airport charges are both cost related and cost efficient would be best placed to secure fairness in the process of setting charges on the basis of a common framework, which should be the objective of the national transposition of the Directive and any additional regulatory measures introduced by Member States under Article 1.5 of the Directive. This also means that the cost and efficiency of the airport investments must be assessed when they are to be included in the regulatory asset base (RAB) (see also 4.42 - 4.43).
- 4.33 As explained in paragraphs 4.16, one way to make sure that the impact of the key parameters (or of the concession) on the level of airports charges meets the ACD requirements that the ISA must enforce is to entrust the ISA with, at least, "a Strong power of opinion" before they are approved. This is consistent with the Recommendations of the Forum on section 5 of the paper "Concession agreements

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<sup>26</sup> Recital 1 establishes that Airport managing bodies providing facilities and services for which airport charges are levied should endeavour to operate on a cost-efficient basis. Furthermore, Recital 14 state that Airport managing bodies should inform airport users about major infrastructure projects and such information should be provided to make monitoring of infrastructure costs possible and with a view to providing suitable and cost-effective facilities at the airport concerned. Article 7 ACD includes in the information that need to be provided in the consultation process a list of items in order to assess the justification for the airport charges modifications which involves the cost of the services provided: "(a) a list of the various services and infrastructure provided in return for the airport charge levied; (b) the methodology used for setting airport charges; (c) *the overall cost structure with regard to the facilities and services which airport charges relate to*; (d) *the revenue of the different charges and the total cost of the services covered by them*; (e) any financing from public authorities of the facilities and services which airport charges relate to; (f) forecasts of the situation at the airport as regards the charges, traffic growth and proposed investments; (g) the actual use of airport infrastructure and equipment over a given period; and (h) the predicted outcome of any major proposed investments in terms of their effects on airport capacity.

<sup>27</sup> For example, the national regulatory framework may decide that the airport charges should cover all the cost for all regulated activities and may not give an incentive to the airport manager to out-perform or the RAB may include investments that are not cost effective.

and ISA supervisory powers” approved on the 27th February 2022 (in particular see key points 5.46 and 5.47).<sup>28</sup>

- 4.34 The ISAs’ decisions on the level of airport charges should be enforceable, without prejudice to judicial or parliamentary review as per Article 11.7 ACD. This means that, notwithstanding the Member State’s choice of airport regulation and the ISA’s role within the scope of the ACD (art.6.3 or art.6.5 a) and b), an ISA should be able to meaningfully ensure, in practice, that the level of airport charges is set in accordance with the ACD criteria<sup>29</sup>. Depending on the Member State’s choice, this can be done in different ways: by the ISA approving or setting the airport charges and/or their maximum level, by the ISA setting the (procedural and substantial) principles and criteria according to which charges must be determined and, then, verify that those principles and criteria have been correctly applied by the airport managing body in setting the charges, by the ISA not approving/authorising the airport proposals, by the ISA deciding a dispute on the tariffs previously approved by the airport, or even by the ISA supervising the tariffs set in concession contracts.
- 4.35 To that purpose the ISAs need to be able to obtain all the information needed to fulfil their tasks and to make their decisions enforceable and, when necessary, should be able to apply different measures according to their national legislation. For example, the ISAs should be able to impose fines of a sufficiently deterrent level in case of non-compliance of their decisions and/or, alternatively, ISAs should be able to enforce their decisions in other ways equally effective as might be provided for by national legal systems, such as the non-approval of modifications of tariffs by the ISA, and other ways equally effective.
- 4.36 An Airport user should not be restricted by national law in making a complaint to the ISA on the consultation process or the requirements of the airport charges as set in the ACD. In particular, the ISA should not be limited in the scope of the decision (for example, in some Member States ISAs can only decide conflicts based on non-discrimination allegations). ISAs should also be able to decide on issues in relation to all ACD requirements, even if they have not been specifically raised in a conflict. ISA should also be able to ensure transparency and non-discrimination in the access to the infrastructure (i.e. a specific terminal, different levels of quality of services), if consistent with the form of oversight chosen by the Member State.
- 4.37 Some ISAs have pointed out that the deadlines to make their decisions are too short, which may require a change in the Directive. Some others considered that the appeal to the Courts makes the whole process unduly long. In those cases, it would be ideal if the decision of the ISA could be applied at least provisionally until the Court decides, so the regulatory intervention of the ISA takes place in the moment that it is needed

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<sup>28</sup><https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=en&meetingId=34694&fromExpertGroups=true>

<sup>29</sup> This does not suggest that the Thessaloniki Forum recommends price regulation. It merely describes the outcome of the intervention of the ISA within the framework of the ACD as it has been incorporated in the different national systems. The Forum does not intend to recommend a particular one of these alternative ways used by the ISAs.

by the market and therefore is effective and relevant.

*Role of the ISA as regard the quality of services and services' differentiation.*

- 4.38 According to the ACD, airport charges may reflect the level of services to which airport users are entitled in return for airport charges. Airport charges should then reflect the level of service standards, should not be discriminatory and should allow for a differentiation of services (articles 3, 9 and 10 ACD). We refer to the 2018 Thessaloniki Forum of Airport Charges Regulators paper *“Non-discrimination under the Airport Charges Directive”*<sup>30</sup>.
- 4.39 When the ISA exercises its powers with regard to airport charges, it may need to be able to take into account quality of service considerations.<sup>31</sup> It is currently possible in many Member States for the ISAs to decide on the grounds of the quality of the services in case of conflict. However, it is at the moment of the definition of the quality standards of the airport at a more general level and of the impact that meeting these standards will have on the future airport charges that an intervention of the ISA would be most timely, as has been flagged by some ISAs<sup>32</sup>.
- 4.40 Some ISA have pointed out the importance of giving at least a consultative role to the ISA in respect of requests from airlines for service differentiation.

*Role of the ISA as regards the airport investments*

- 4.41 Investment is a component that serves as a basis for determining the system or the level of airport charges levied. That is why Article 7 of the ACD includes as part of the content of the airport charges consultation procedure required by Article 6.1 ACD: *“f) a forecast of the situation of the airport as regards the charges, traffic growth and proposed investments”* and *“h) the predicted outcome of any major proposed investments in terms of their effect on airport capacity”*. Also, according to Article 8 of the ACD, the airport managing body should consult with airport users before plans for new infrastructure projects are finalised.
- 4.42 In practice, information on planned investments is generally part of the consultation process, but ISAs are not often responsible for assessing the need for an investment and/or its costs, in their national legal frameworks. Alternatively, for example in the case of one Member State, the ISA has no power to decide on the RAB projected by the airport, except in extreme cases of unnecessary investments where the ISA can decide that the airport is not allowed to capitalize this cost in the RAB.

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<sup>30</sup><https://ec.europa.eu/transparency/expert-groups-register/core/api/front/expertGroupAdditionalInfo/38500/>

<sup>31</sup> For this purpose, ISA may take into account the recommendations of the Airport Users' Committee according to Art. 5 of the EG-directive 96/67/EC.

<sup>32</sup> For example, in the case of Spain, quality standards and the bonus/malus impact on the annual tariffs according to the airport performance is defined in the pluriannual framework approved by the Council of Ministers for the next 5 years (DORA). In this case, as explained in paragraph 4.12 to 4.17, ISA's advice before the DORA is approved should be mandatory and binding, or at least, a “strong opinion” taking into account the impact of the quality of services performance in the final airport charges.



- 4.43 The impact of investments on the RAB and, therefore, on the level of airport charges, is what triggers the need for an independent authority<sup>33</sup> to be empowered to exercise oversight of the proposed investment on the basis of the criteria and objectives<sup>34</sup> set in the ACD Directive.<sup>35</sup> This is why the ISA would have, at least, the power and/or obligation to deliver an opinion on the proposed investment before it is approved. In other words, given that ISAs should be empowered to ensure that airport charges are justified, ISAs should be able to assess the items that form part of the cost base of the airport tariffs<sup>36</sup>. This does not mean that ISAs should design the investment plan for the airport but rather that the ISAs should have the powers to effectively promote efficiencies in investments to avoid gold-plating. This could be achieved by empowering the ISA to partly or fully exclude the investment from the RAB in case it is not justified or at least should be able to have a mandatory opinion on the matter (Strong Power of Opinion). For this opinion to be more effective, the timing may be important.
- 4.44 The same reasoning applies when the investments are decided in a multiannual framework (including concession agreements). ISAs should be empowered to give a binding or at least a “Strong Opinion” as described in 4.14, as long as the approved investments have an effect on the airport charges.<sup>37</sup> Also, as key parameters of the economic regulation mechanism, they should be subject to consultation with airports users following the logic of art. 7 and 8 ACD that includes the consultation on the forecast of the proposed investments and their predicted outcome in terms of their effect on airport capacity.

*Information needed by the ISA to meet the objectives of the ACD*

- 4.45 As it is apparent from sections 3.11 to 3.15 above, some ISAs do not have access to all information needed to exercise its powers as required by article 11.7 ACD.
- 4.46 This could prove to be a very serious limitation of the effectiveness of the ISA powers and thus contrary to the optimal application of the ACD. As explained in paragraph 4.23 and 4.35, if the ISA does not have access to all the information exchanged by the parties during the consultation process or to all the information necessary to make its assessment on the level of the airport charges or to decide a conflict, it may not be able to deliver on its tasks effectively.
- 4.47 The information that the ISA could need for those purposes may include information beyond that which is exchanged with the users during the consultation, and

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<sup>33</sup> The intervention of an authority independent from airports and airlines can help to avoid situations of restrictions of competition in relation to the available or future capacity.

<sup>34</sup> For example, incentive mechanisms should be designed in order to guarantee that investments are conducted as efficiently as possible (in terms of costs, and timeframe), and ISAs should verify compliance of achievements with planned investments.

<sup>35</sup> This it is not the case in some Member States (see recommendation 5.10).

<sup>36</sup> Recital 14 says that facilities need to be suitable and cost-effective.

<sup>37</sup> The same reasoning applies where the investments are the consequence of executive decisions (for example environmental regulations requiring new investments). Airports will be more and more confronted with the need of performing short or mid-term investments required by environmental regulations or decisions, which enhances the need for such oversight.

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information from the airlines. It may also include information on non-regulated activities of the airport if relevant. For example, in case of dual till or hybrid models, the ISA needs this information in order to assess whether costs have been properly allocated.

- 4.48 The ISA may need access to in-depth information needed to thoroughly evaluate cost relatedness and efficiency of the charges. This might include, but is not limited to, access to financial and cost allocation models, operational data, methods of setting the charges and assumptions underlying the calculations.
- 4.49 The airport manager and/or the airport users should not deny the ISA the access to information considered confidential if relevant to assessment. Member States must ensure that the ISA is required to take reasonable steps to protect confidentiality of the data.
- 4.50 Finally, as explained in 4.35, the ISAs need to be able to obtain all the information needed to fulfil their tasks and for that purpose they need to make their decisions for information request enforceable. This may be done with different measures according to national legislations, e.g. by the ability to impose fines to a deterrent level in case of non-compliance of their decisions when needed and/ or, by other ways equally effective as might be provided for by national legal systems, such as the non-approval of modifications of tariffs by the ISA.

## **Section 5: Key points and recommendations for the full effectiveness of the ACD**

### *Key points*

- 5.1 The ACD sets common principles for the levying of airport charges at airports with the purpose to govern the relationship between airport and airport users as regards the fixing of airport charges. By adopting this common framework, the EU legislature has sought to improve the relationship between airport managers and airport users and to avoid failure to meet certain basic requirements in that relationship, such as the transparency of charges, consultation of airport users and non-discrimination among airport users, than may arise from the position of strength in which airport managing bodies may find themselves in relation to airport users in the fixing of the airport charges. This leads to an independent authority being assigned an important role, ensuring the proper and effective application of the Directive.
- 5.2 Accordingly, article 11 obliges Member States to nominate an independent supervisory authority responsible for ensuring the correct application of the measures taken to comply with the ACD and to assume, at least, the tasks assigned under article 6 (11.1) and to guarantee its independence of any airport managing body and air carrier (11.3). This ISA should be able to decide on the justification of the tariffs in case of conflict (art 6.3 and 6.4 ACD), though Member States may depart from this obligation if mandatory procedures are in place to determine or approve the tariffs (art 6.5 ACD). To this purpose the procedures, conditions and criteria shall be relevant, objective, non-discriminatory and transparent (art.11 ACD). Member States also must ensure that the ISA exercises its powers impartially and transparently (11.3). In

addition, Recital 12 also states that the intervention of that authority is meant to ensure that the decisions are impartial as well as to ensure proper and effective application on the Directive. Finally, according to article 11.7 the decisions of the ISA are to have binding effect.<sup>38</sup>

- 5.3 In their assessment of the compatibility of the consultation process and the airport charges with the requirements of the ACD, ISAs should be able to take into account the objectives and obligations apparent from ACD articles and the Recitals in its Preamble.
- 5.4 The incorporation of these main requirements of the Directive into the national regulatory framework has not been homogeneous, given that Member States have the choice of methods for the implementation of the Directives and the power to approve additional regulatory measures compatible with the ACD objectives (art.1.5 ACD). Notwithstanding this freedom of implementation, Member States must ensure that the national ISA is adequately empowered to achieve an effective application of the Directive.
- 5.5 However, various shortcomings have been identified as regards the ISAs current empowerment and the goals of the ACD that affect role of the ISA in the setting of the level of the tariffs, the consultation process, the access to the information required and the enforcement powers with regard the ISAs decisions.
- 5.6 At the same time, it has been outlined the need to hear the opinion of the ISA on the key parameters that shape the application of economic regulation before they are adopted by the Member State or the competent authority, as their impact in the future airport charges may preclude the ISA from effectively exercising the powers entrusted to it by the ACD, contrary to articles 11.6 and 1.5 of the Directive.
- 5.7 While the Directive does not prejudice the right of Member States to apply additional regulatory measures (which may include economic oversight measures, such as the approval of charging systems and the level of charges, including incentive base charging methods or price cap regulation), art. 1.5 clearly establishes that these measures should not be incompatible with the ACD or other relevant provisions of Community Law. In other words, the role of the ISA must not be limited to a degree that it cannot contribute effectively to the objectives of the ACD.<sup>39</sup>
- 5.8 In light of the above-mentioned considerations and taking into account the limitations identified by the ISAs in sections 3 and 4, we recommend the following measures that would allow the ISA to ensure the effective application of the measures taken to comply with the ACD and to assume, at least, the tasks assigned under Article 6.
- 5.9 The measures put in place by both the Member States and the ISAs to that end should be proportionate: they should be appropriate for attaining the legitimate objectives

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<sup>38</sup> Judgement of the CJEU of 21 November 2019, Case C-379/18 *Lufthansa v Land Berlin*, 41. ECLI: EU:C:2019:1000.

<sup>39</sup>“In construing a provision of European Union law, it is necessary to consider the objectives pursued by the legislation in question and its effectiveness” (Case C-19/08 *Petrosian* [2009] ECR I-495, paragraph 34).

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pursued by the legislation at issue and its effectiveness and should not go beyond what is necessary to achieve them.

- 5.10 Finally, this section contains recommendations of measures to be put in place by Member States and/or ISAs, in case they are appropriate and necessary depending on the form of oversight adopted in particular Member State.

*Recommendations on the role of the ISA in relation to the consultation procedure*

- 5.11 According to art. 11.1, the ISA shall ensure the correct application of the measures taken to comply with the Directive which, in relation to articles 6.1 and 6.2, include, first of all, a regular consultation procedure between airport manager body and airport users. Secondly, the ISA shall ensure that the airport managing body justifies its decision with regard to the views of the airport users in the event that no agreement on the proposed changes is reached.

- 5.12 In this context the ISA can have a role, irrespective of the specificities of national legal frameworks, to issue guidance on the consultation process requirements, ensuring that the consultation process is conducted in a meaningful manner, at the very least creating guarantees for:

- non-discriminatory participation in the discussion of all users and their representatives (both individual users of the specific airport whose charges are being consulted and associations of airport users);
- their due legal standing (i.e. the representative powers of those airport users present at the discussions, and the manner in which these representative powers must be demonstrated and proved);
- the level of detail (disaggregation) of the minimum amount of information to be provided under Article 7 of the Directive (content and format);
- the manner in which information will be exchanged;
- the time limits and means to ensure that the information is fully discussed by both parties;
- the right of users to make recommendations on the proposed system and level of airport charges and the transparency of their consideration in the final decision;
- the way in which the airport manager body must justify its decisions with regard to the views of the airport users in particular in the event that no agreement on the proposed charges is reached.

- 5.13 When considered useful the ISA could participate in the process in an observer role.

- 5.14 In case of disagreements between the airport manager and users over the consultation process, the ISA should be able to decide, where applicable, including in respect of complaints on the requirements mentioned in 5.12.

- 5.15 In order to fulfil these tasks ISA should have access to all information exchanged during the consultation process, including confidential information that will be treated by the parties and the ISA respecting confidentiality rules.

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- 5.16 ISAs should also have the power to enforce its decisions on the consultation process<sup>40</sup>, regarding, for example, the clarification on the information that must be exchanged and the timelines and format, the disputes resolution and the information requests, according to the national law which may entail imposing sanctions, non-approval of the tariffs where needed or other equally effective measures according to national legislations.
- 5.17 ISA should be able to make sure that airport users are consulted also in case the level or the airport charges is pre-defined in the regulation set by the Member State or the airport manager (economic regulation, multi-annual frameworks, concession or other regulatory measures).

*Recommendation on the role of the ISA in relation to the level of the tariffs (approval of the tariffs or supervision of the airport tariffs)*

- 5.18 Notwithstanding the Member State's choice of airport regulation and the ISAs role within the scope of the ACD (art.6.3, art 6.4, 6.5), an ISA should be able to meaningfully ensure, in practice, that the level of airport charges is set in accordance with the ACD criteria.
- 5.19 The ISA must be able to assess the justification of the level of airport charges based on the ACD requirements of consultation, transparency, non-discrimination and objectivity read in light of the Recitals in its Preamble. Therefore, this includes a power to verify that the airport charges and their level are defined according to the principles of non-discrimination, transparency, relevance and objectivity (overall cost-relatedness and effectiveness), and that they have been subject to proper consultation.
- 5.20 This assessment should ensure that the level of airport charges complies with the Directive. Depending on the Member State's choice this can be done in different ways: by the ISA approving or setting the airport charges, by the ISA instructing the airport to set new charges, by the ISA not approving/authorizing the airport proposals, by the ISA deciding a dispute on the tariffs previously approved by the airport, or even by the ISA supervising the tariffs set in Concessions contracts.

Role of the ISA in case of additional regulatory measures

- 5.21 According to article 1.5 of the ACD, the Directive shall be without prejudice to the right of each Member State to apply additional regulatory measures that are not incompatible with the ACD, including economic oversight measures<sup>41</sup>.
- 5.22 In case the levels of the airport charges are defined in the regulation set by the Member State (economic regulation, multiannual frameworks, concession or other

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<sup>40</sup> This could be done, where applicable, also in the framework of a different administrative participation process.

<sup>41</sup> The Member State could also entrust the ISA to apply directly additional regulatory measures including economic oversight measures.

regulatory measures), the ISA must have room of maneuver left in order to ensure that the setting of the airport charges complies with the ACD requirements of consultation, transparency, objectivity of airport charges and independent supervision. This may require an assessment by the ISA on the compatibility with the ACD requirements of the key parameters that affect the tariffs and are decided ex ante in the regulation, including long-term regulatory frameworks or concessions.

- 5.23 In this context, Member States should, in the first instance, ensure that the ISA is consulted beforehand when the adoption of these additional regulatory measures have the ability to impact the level of the airport charges. As explained in paragraph 4.16 and 4.17, for that purpose the national body that adopts such measures should at least consult the ISA on the key parameters (WACC, cost allocation, till system, OPEX estimations, traffic forecasts, planned investment, RAB, depreciation methods, quality of services) of the economic regulation mechanisms before they are approved and implemented. Moreover, in case the national regulation does not consider the ISA's advice per se binding, when the authority responsible for deciding these additional parameters does not follow the ISA'S advice, it should at least make publicly available the economic rationale to deviate from the ISA's opinion (Strong power of opinion).

The justification of the level of airport charges

- 5.24 In its assessment on the level of airport charges, the ISAs assessment (including the assessment of the key parameters) should verify that the airport charges are defined according to cost-relatedness and effectiveness, transparency and relevance, and non-discrimination and are subject to consultation. In this regard, the ISA's objective should be to ensure that the regulatory model applied by the airport manager for the calculation of the airport charges takes into account efficiency, appropriate investment and quality of services, and possible modulations relating to environmental issues or other public interest considerations.
- 5.25 As airport charges are levied for the use of suitable and cost-effective facilities, the ISA's assessment of the justification for the modification of the level of airport charges or the mandatory opinion above mentioned should include cost relatedness and efficiency criteria.
- 5.26 To the extent that investments have an impact on the airport charges, the ISA should be able to assess the cost relatedness (and the efficiency) of the airport investments for inclusion in the Regulatory asset base. In this sense, an ISA should have a power to decide or at least issue a "Strong power of opinion" in relation to planned investments and its relationship with the efficiency of the airport charges.
- 5.27 In the assessment of the justification of the level of airport charges, the ISA should be able to take into account quality of service considerations such as the relationship between the quality of service provided and the price paid (price quality ratio) and legitimate requests for service differentiation. Where opportune, apart from the

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views of the airport and the individual airport users, ISA can take into account the recommendations of the Airport Users' Committee according to Art. 5 of the EG-directive 96/67/EC. Where necessary, the ISA should also be able to give a mandatory opinion, at the time when the quality standards are being defined, on the impact that meeting these standards will have on the airport charges.

- 5.28 When considering the justification of the airport charges, the ISA should be given the power to assess the application of cost allocation principles by the airport and the assessment of the application of the dual till or hybrid model. This may include the power to access to all relevant information on regulated and non-regulated activities in order to avoid, for example, cross subsidies or the allocation of non-justified cost to the regulated activities.
- 5.29 The ISA should be empowered to take into account environmental effects in the modulation of airport charges and other public and general interest issues following art.3 of the ACD according to relevant, objective and transparent criteria.

*Recommendation on the information needed by the ISAs to meet the ACD objectives*

- 5.30 The ISA should be given the power to have access to all necessary information from airports and airlines that the ISA may reasonably require to perform its duties and meet the ACD objectives. Of course, not all of this material will be required in all circumstances, but the ISA should be empowered to obtain it when it is required.
- 5.31 The information that the ISA could need for that purposes may include, but not necessarily be limited to:
- Access to all information needed to rule on an airport user's complaints and/or to approve or authorize the airport charges (beyond the information exchanged with the users during the consultation).
  - Access to relevant information on non-regulated activities of the airport. For example, in case of dual till or hybrid models, the ISA needs this information in order to assess whether costs have been properly allocated to the regulated activity or not and to prevent cross subsidization.
  - Access to airline information if relevant to the assessment, such as traffic forecast, fleet composition and envisaged use of their fleet, development projects and requirements at the airport.
  - Access to in-depth information needed to thoroughly evaluate cost relatedness and efficiency of the charges, as described above.
  - Access to confidential information. The ISA should be able to respect the confidentiality of the data and handle it accordingly and the Member States must ensure that the legal framework allows for the confidentiality of such data to be preserved.

- In particular, ISAs should not be restricted when it comes to accessing the ABC model.<sup>42</sup> They should have the power to access to airport's ABC model to verify the application of the till system, the cost allocation and the non-discrimination principle.

*Recommendation on the enforcement powers of the ISAs*

- 5.32 ISA's should be able to decide on complaints relating to non-compliance with the ACD requirements regarding the consultation process and the level of airport charges. If consistent with the form of oversight chosen by the Member State, the ISA should also be able to act supervising airport charges ensuring transparency and non-discrimination in the access to the infrastructure (i.e. for example when the airport manager charges different prices for different levels of qualities of services such a specific terminal, low cost/hub terminals, etc.).
- 5.33 In case of non-compliance with the ACD requirements, the ISA should also be able to take action ex officio and not just when requested by the airport users in the framework of a conflict, or to apply other legal mechanisms, provided in the national legislation.
- 5.34 The ISA's decisions should be enforceable, without prejudice to judicial or parliamentary review as per Article 11.7 and art. 6. Member States should establish ways that make sure the ISA decisions are followed.
- 5.35 This power to enforce the ISA's decisions, including the ISA's request for information, could consist of the imposition of fines in case of non-compliance, or by other ways equally effective as might be provided for by national legal systems, such as power of the non-approval of modifications of tariffs by the ISA, etc.
- 5.36 In case of appeal of the ISA's decisions, and as long as it is permitted by national law, the decisions of the ISA should be applied provisionally until the conclusion of the appeal process.

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<sup>42</sup> For further details on the ABC model, see 'Airport till structure and cost allocation', adopted by the Thessaloniki Forum in January 2021. <https://ec.europa.eu/transparency/expert-groups-register/core/api/front/expertGroupAdditionalInfo/40590/download>.