

# The Regulation of Airport Charges

## Transparency Requirements for the Consultation and Approval of Airport Charges under EU Directive 2009/12/EC and Section 19b of the German Air Traffic Act

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*Even infrastructure providers unaware that they qualify for access price regulation wake up one day and have to accept that their monopolistic bottlenecks cannot be remedied adequately by virtue of the concept of 'essential facilities' under general competition law. The so-called 'three criteria test' that defines the requirements for regulatory intervention and is applied by the European Commission in the telecommunications sector appears to be relevant for airports as well. The first criterion is the presence of high and non-transitory entry barriers, whether of structural, legal or regulatory nature. Indeed, the relevant markets of airport infrastructure provision are exposed to these high and non-transitory entry barriers, in particular legal or regulatory hurdles. The second criterion admits only those markets which structurally do not tend towards effective competition within the relevant time horizon. The third criterion requires that the application of competition law alone would not adequately address the market failures concerned. Given the fulfillment of all three criteria of this test, it is not surprising that the regulation of airport charges was finally "kicked off" and – unlike what happened in other network industries before – not addressed in a national context but rather initiated by the Directive 2009/12/EC of 11 March 2009 of the European Parliament and of the Council.*

### I. Introduction: The European Union Directive's "Kick-off" for a New Regulatory Regime

The legal basis for the approval of airport charges in Germany is Section 19b of the Air Traffic Act<sup>1</sup> through which Directive 2009/12/EC was adopted into German law in May 2012. According to its provisions, approval is granted if charges are regulated according to appropriate, objective, transparent and non-discriminatory criteria.<sup>2</sup> In addition, for airports with more than 5 million passengers per year, the amount of the charges must be proportionate to the amount of the "anticipated actual costs" and the "alignment with efficient performance of services" must be "clearly recognisable".<sup>3</sup> With these two requirements in particular, the new Section 19b of the Air Traffic Act imposed for the first time substantive legal requirements on the approval of airport charges.

The starting point for the necessary reforms of the regulation of airport charges is the current unilateral fee determination by the airport operator. The authors

Beckers, Klatt and Kühling show in their study that major aviation hubs such as Frankfurt/Main and Munich as well as major secondary airports (Hamburg, Stuttgart, Köln/Bonn, Düsseldorf) in Germany generally hold a *de facto* regional monopoly according to the definition of the relevant geographic and product market, due to their location, function and infrastructure.<sup>4</sup>

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1 Air Traffic Act – *Luftverkehrsgesetz (LuftVG)*, available at: <http://www.gesetze-im-internet.de/luftvg/> (last accessed: 26 June 2014).

2 *LuftVG*, Art. 19b(1).

3 *LuftVG*, Art. 19b(3).

4 T. Beckers, J.-P. Klatt and J. Kühling, 'Entgeltregulierung der deutschen Flughäfen – Reformbedarf aus ökonomischer und juristischer Sicht' ('Fee regulation at German airports – necessary reform from an economic and judicial perspective'), 1 March 2010, Study ordered by the German Airline Association (the Bundesverband der Deutschen Fluggesellschaften e.V.), p. 54 ff.

Section 19b(3) No. 6 of the Air Traffic Act provides for a consultation obligation of the airport to the airport users (airlines) and specifies "documents and information" to be submitted to the airport users by the airport operator in good time before the consultation date. The listing found there (letters a-h) is not very specific in terms of its level of detailed and concrete information and leaves appropriate room for manoeuvre as to the meaning of adequate and proper transparency or which documents and information would have to be presented in order to create such transparency.

Transparency, however, is a basic prerequisite both for the airport users as well as for the approval authority to enable it to assess whether the charges in the charge schedule are regulated according to appropriate, objective, transparent and non-discriminatory criteria and whether there is "proportionality" between charges and costs or whether, regarding costs, "alignment with efficient performance of services" is "clearly recognisable" in the first place. This is particularly true in light of the fact that airports in Germany regularly use the "dual till principle" to determine relevant costs, i.e. by allocating costs and revenues to the "Aviation" and "Non-Aviation" sectors respectively.

Therefore, a critical look should be taken at the fact that in the legal reality in Germany – even after the implementation of the Directive within the legal framework of Section 19b of the Air Traffic Act – a procedure of unilateral charge determination by the airport operators followed by official approval predominantly continues to be practised. Although the Directive foresees the introduction of a substantial negotiation phase within national regulatory frameworks, the airlines' practical possibilities of exerting influence on the airport charges remain quasi in-existent.

This article identifies and offers justification for the proper transparency requirements that should be guaranteed in order to meet the airport operator's obligations with respect to the consultation of airlines and to the approval of airport charges in accordance with Section 19b of the Air Traffic Act by the approval authority in Germany. The authors establish the set of documents and information to be presented pursuant to Section 19b(3) No. 6 letters a-h in accordance with an interpretation of these provisions consistent with EU Directives, and they offer a detailed and concrete analysis of the current transparency requirements.

## II. The Requirements of Directive 2009/12/EC and of Section 19b of the Air Traffic Act

Directive 2009/12/EC and the German Air Traffic Act establish a number of requirements with the aim of guaranteeing the transparency of the determination of airport charges. Section 19b of the Air Traffic Act implements these requirements, though not fully satisfactorily.

### 1. Negotiation-based charge determination

Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges causes a decision-making transfer. While they were previously unilaterally determined and approved by the authorities, airport charges must now be negotiated bilaterally by the parties concerned: airport operators and airport users in a framework of regulatory equality. All changes in airport charges should primarily be the result of consultations undertaken "whenever possible in consultation with the airport management body and the airport users" in accordance with Article 6(2) p. 1 of the Directive. According to the Directive's provisions, the charges should thus be agreed upon as the result of negotiations between airport users and airport operators.

An independent national approval authority should only be called upon in a second step in order to approve the charge arrangements negotiated between airport operators and airport users (Art. 6(4)) or, in case of a disagreement, to examine the reasons for the changes to the airport charges (Art. 6(3)).

### 2. Dismantling information asymmetries – creating symmetry in negotiations

The Directive intends to create a "level playing field" for both parties by regulatory means.

Indeed, the procedural requirements of information transfer and the consultation cycles are intended to cause the party which has the stronger bargaining and knowledge position – that is, the airport operators that hold regional or local air traffic monopolies – to remove the information asymmetries in favour of material equality in negotiations. This way, airlines and airport operators can be put in the posi-

tion to take the charges primarily in a market-oriented manner. Although it is unable to remove the unequal distribution of market power between airport users and airport operators, this level playing field should at least make for fairer ground rules, giving rise to airport charges which take the interests of both parties into account. This simulation of material equality in negotiation derives from a regulatory "as-if competition" enclosed in the legal framework of the Directive.

Negotiations should be based on the transparent and comprehensible disclosure of airports' cost structures in order to improve the conditions for fair negotiations by creating symmetry between the negotiating parties. This should result in airport charges objectively constituting the (negotiated) *quid pro quo* of the services and the infrastructure provided.

### 3. Implementation deficit of the Directive in Section 19b of the Air Traffic Act

The consultation obligation of the Directive was implemented to the benefit of the airlines in the Air Traffic Act. However, the German procedure does not lead to a primarily negotiation-based result which takes performance and counter-performance in a market-based relationship created by regulatory means. Rather, it provides for a purely sovereign process under the authority of a supervisory body which does not allow for any primarily negotiation-based results. Even though it provides for regular consultations between the parties, these German provisions in Section 19b of the Air Traffic Act do not meet the minimum requirements of the Directive. Since Union law has precedence over national law,<sup>5</sup> Section 19b of the Air Traffic Act shall have to be interpreted in accordance with the Directive, causing its mechanisms to be threatened of inapplicability. To prevent such a development, the implementation deficits in the process design will have to be offset by, on the one hand, higher requirements concerning consultation, transparency, objectivity and, on the other, non-discrimination.

### 4. Presentation obligation to the supervisory authority

It is essential that the independent supervisory authority have access to all information relevant for the

determination of the airport charge. To enable the supervisory authority to undertake and ensure a cost allocation examination according to the costs-by-cause principle, the documents to be presented to the airport users prior to the consultation dates must be identical to the documents to be presented to the supervisory authorities in the course of the approval process.

The scope of information granted by the airport operator must also be identical for airport users and supervisory authority since the German legislature tightened the wording of the approval procedure. The public authority is only permitted to approve the envisaged charges schedule if (i) their assessment is comprehensively justified; and (ii) if charges are regulated according to appropriate, objective, transparent and non-discriminatory criteria (Section 19b(1) third sentence of the Air Traffic Act). Additionally, for commercial airports with a passenger movement volume of more than 5 million per year, the level of charges and the level of the anticipated actual costs must be proportionate and the alignment with efficient performance of services clearly identifiable.

For the purpose of interpretation in accordance with the Directive, it should also be noted that rules on trade and corporate secrets must not preclude the general need for information of public authorities in order to allow them to base their decision on the charge regulation on relevant information provided by the airports. In accordance with Article 7(1) of Directive 2009/12/EC and Section 19b(3) No. 6, the relevant documents must therefore be sent to the supervisory authority in any case. Corporate secrets and trade secrets can be taken into account as is customary in regulated industries, e.g. by redacting sensitive passages before passing them on to the other parties, the airport users, for inspection.

### 5. Uniform interpretation throughout Germany

Since Section 19b of the Air Traffic Act was passed to implement the EU Internal Market Directive

<sup>5</sup> The ECJ assumes a general obligation to interpret national law in conformity with community law according to primary law, see Joined cases C-397/01 to C-403/01, *Pfeiffer et al.*, [2004] ECR I-8835, para. 114. However a national court shall not apply the national rule in question at all if an interpretation or development of the law in conformity with community law is not possible; see Case C-157/86, *Murphy*, [1988] ECR I-673, para. 11.

2009/12/EC, its legal terms should be interpreted uniformly throughout Germany. The interpretation of Section 19b of the Air Traffic Act must consequently ensure uniform competitive terms for airport users within the entire single market. This also prohibits varying interpretations or applications of the rules of Section 19b of the Air Traffic Act in the various federal States of Germany, also having regard to the information and documents to be presented to comply with the consultation obligations of the airport operators in accordance with the Directive.

### III. Criteria for the verification of charges by airport users and supervising authorities under Section 19b(3) of the Air Traffic Act

If the procedure prescribed by Directive 2009/12/EC is intended to result in negotiation-based airport charges, the interpretation of the transparency requirement must be guided by the Directive and thus also by the recognised minimum standards of transparency of economic cost accounting, according to the cost-by-cause principle. The same principle applies under general EU competition law, within the framework of the relevant control procedures.

To comply with the uniform transparency requirements of the internal EU market under general EU competition law<sup>6</sup>, an essential methodical approach is to document cost accounting based on the cost-by-cause principle, in accordance with cost types, cost

centres and cost objects. Since this requirement applies even to "regulated industries", the application of Section 19b(3) third sentence of the Air Traffic Act must ensure compliance with this internal market standard of documented cost accounting, particularly in view of the fact that authorisation in accordance with Section 19b(1) third sentence of the Air Traffic Act shall be accorded only if charges are regulated in the charge schedule according to appropriate, objective, transparent and non-discriminatory criteria, as detailed below.

The Union legislator leaves it to the Member State to introduce further regulations on a binding charge standard, for instance an efficiency cost standard or a specific charge model (Article 1(5) of Directive 2009/12/EC). Germany did go beyond the Directive's minimum standards.

#### 1. Proof of "anticipated actual costs"

In a first step to justify the charge amount it has proposed, Section 19b(3) No. 3 of the Air Traffic Act requires the airport operator to present its anticipated costs in detail, according to the relevant cost types, cost centres and cost objects. Accounting documents should be derived directly from the airport operator's cost accounting system based on which the calculation of the charge price is made, not from separate cost models which deviate from the airport operator's customary cost accounting systems.<sup>7</sup> The basis for calculation must be prepared transparently and exhaustively for airport users. Compliance with the consistency requirement as regards cost methods prohibits inconsistent "cherry picking" between actual costs and imputed costs. Evidence should be provided on the basis of actual costs.<sup>8</sup>

#### 2. Alignment with efficient service performance standards

In a second step, the costs incurred by the airport operator in the next accounting period or 'anticipated actual costs' must be "recognisably aligned with efficient service performance standards".<sup>9</sup> If the anticipated actual costs presented by the airport operator in the accounting documents are significantly higher than the target costs of the efficiency cost model to be developed by the regulator based on an efficien-

6 See e.g. F. Montag and C. Liebenath, in: M. Heidenhain (ed.), *Handbuch des europäischen Beihilfenrechts*, 1. A. 2003, § 27 Rn. 6; L. Hancher and J.-L. Buendia Sierra, 'Cross-Subsidization and EC Law', *CMLR*, 1998, p. 901, 906 ff.; cf. S. Huber, J. Prikosovits, 'Universitäre Drittmittelforschung und EG-Beihilfenrecht', *EuZW* 2008, p. 171, 174; Case C-83/01, *Chronopost* [2003] ECR I-6993; C. Koenig, 'Auch Quersubventionen im kommunalen Konzern stehen auf der wettbewerbsrechtlichen Agenda!', *EWS* 1/2013, p. 1; M. Busch and C. Koenig, 'Aktuelle EU-beihilferrechtliche und wettbewerbsrechtliche Rahmenbedingungen einer indirekten Förderung des Breitbandausbaus mittels Quersubventionen', part 1, *BRZ* 3/2012, p. 131 ff. as well as part 2, *BRZ* 4/2012, p. 195 ff.

7 Cf. elaboration about telecommunications regulation in M. Geppert and R. Schütz, *Beck'scher TKG-Kommentar*, 4th edition 2013, § 34 TKG para. 10 f.

8 Cf. civil law requirements according to §§ 315 ff BGB established by OLG Düsseldorf, dec. of 2.8.2002, *Deutsche Lufthansa AG/Flughafen Düsseldorf*, U (Kart) 64/01, p. 3 ff.

9 In the original German: "Die Genehmigung ist zu erteilen, wenn [...] die Orientierung an einer effizienten Leistungserstellung erkennbar ist" (*LuftVG*, § 19b(3) No. 3).

cy corridor, namely to an extent to which "alignment with efficient service performance standards" can no longer be determined, the anticipated actual costs which form the basis of the charges must be corrected accordingly.

Section 19b(3) No. 3 of the Air Traffic Act does not necessarily justify a strictly analogous application of the network economy charge regulation rules according to Section 31(1) first sentence of the Telecommunication Act (Telekommunikationsgesetzes – TKG) and Section 21(2) of the Energy Economy Act (Energiewirtschaftsgesetzes – EnWG). However, the standard according to Section 19b(3) No. 3 of the Air Traffic Act, which goes beyond the scope of the implementation requirements of Directive 2009/12/EC, nonetheless requires an optimal estimation ("recognisable alignment...") of the charge regulation methods similar to the requirements on the efficient provision of services (kosteneffizienter Leistungserbringung – KeL) underlying Section 31(1) first sentence of the Telecommunications Act, Section 20(1) of the Postal Act, or Section 21(2) of the Energy Economy Law. The cost of an efficient provision of services (KeL) is defined as the long-term additional costs of provision of services, plus an appropriate surcharge for overhead costs independent from performance quantities if these overhead costs are unavoidable for the provision of services. Costs caused by inefficient facilities, bad investments, excess capacities, vacancies, etc. or by processes not exposed to competitive pressure may not be charged to the users via charges.

Thus, the KeL concept assumes that the price – on the basis of an "as-if competition" simulation – is formed, at least in a long-term market equilibrium, at the level of the costs of efficient provision of services, supposing that only an efficient company can survive in the market under competitive conditions. The regulatory basis of an "as-if competition" requires a proactive, *ex ante* interventional procedure and adequate regulation.<sup>10</sup>

### 3. Benchmarking and cost models

The "recognisability of alignment with efficient service performance standards" according to Section 19b(3) No. 3 of the Air Traffic Act can be established by international best-practice methods recognised in the network economies, on the basis of the bench-

marking of competitive prices. This is confirmed by the close terminological similarities between the wording of Section 19b of the Air Traffic Act and the alignment reference of the KeL standard according to Section 20(1) of the Postal Act. However, as regards the regulation of airport charges, only airports which are either exposed to a relatively high competitive substitution density in the respective relevant comparable markets can be considered as a reference for benchmarking, or airports which are effectively regulated at least according to the benchmark of "recognisability of alignment with efficient service performance standards", or which indicate such alignment ("best practices").

However, since there are only relatively few useful datasets on the efficiency costs of airport operators in a competitive environment, benchmarking alone often proves to be an inadequate in current practice to establish the recognisability of alignment with efficient service performance standards.<sup>11</sup> Even where appropriate international comparable market analyses are available to determine the target efficiency corridor to be pursued, a lower efficiency cost type should be objectively justified by means of cost models developed by economists. In sum, Section 19b(3) Nos. 3 and 6 of the Air Traffic Act create an obligation for airport operators to commission competent experts with the development of a scientifically sound cost model depicting the minimum efficiency markers of the regulation corridor.

### 4. Target efficiency corridor

The "recognisability of alignment with efficient service performance standards" does not require airport

<sup>10</sup> A. Groebel, 'Die Entgeltgenehmigungspraxis der RegTP – Erfahrungen aus dem Telekommunikationsbereich', in: TKMR – Tagungsband zum Workshop "Der Regulierungsentwurf zum TKG" – 15. Dezember 2003, Berlin, Institut für Energierecht Berlin e.V., p. 41 ff.

<sup>11</sup> Cf. decision of the British Civil Aviation Authority concerning a restricted use of the analysis of comparable markets (benchmarking); however at least a relative comparability of European airports is given for instance by comparing operating costs per passenger: "The CAA accepts that no benchmarking sample can be considered perfectly comparable with Heathrow and that there are uncertainties in the interpretation of top-down benchmarking evidence due to the difficulties of making direct comparisons between airports with different characteristics. Nonetheless, such evidence is helpful to assess the overall level of operating cost at an airport relative to its peers and can provide an indication of relative efficiency." (Civil Aviation Authority, Economic regulation at Heathrow from April 2014: final proposals, 2013, p. 99.)

operators to completely close the gap between their actual costs and their target efficiency costs. However, it does make mandatory the presentation of a target efficiency corridor on the basis of the Benchmarking analyses and cost models, as described above.

Section 19b(3) No. 3 first sentence of the Air Traffic Act emphasises the methodological duty of airport enterprises to present with full transparency the costs that shall arise in the next accounting period. If it becomes obvious that anticipated actual costs will deviate considerably from the costs of efficient performance of services, they shall have to correct the anticipated actual costs accordingly.

In addition, Section 19b(3) No. 6 letter c requires the airport operator to present specific data relating to its planned rationalisation in the consultation negotiations with airport users and for approval by the competent authorities. These include the corresponding planned costs, improved in their efficiency according to targets freely set by the airport operator within the efficiency corridor. These data must clarify the binding commitments that the airport operator is ready to make as to how and by when the cost-efficiency of hitherto inefficient facilities and processes shall be rationalised and improved in the next charge periods. These targets are to be used by the approving authority as compulsory minimum standards in future approval procedures.

## 5. Implications of the dual-till approach

Primarily, the dual-till approach does not take into consideration the revenues derived from the commercial activities in the non-aviation sector.<sup>12</sup> However, the dual-till approach requires a clear demarcation between aviation and non-aviation in terms of revenues, as well as a detailed cost allocation. If the justification of the allocation of each item to its cost type, its cost centre or its cost object does not clearly indicate to which sector (aviation or non-aviation) it belongs, in particular if they are overhead costs, it would open up too much room for manoeuvre for improper cross-subsidies, in

breach of the requirements of Directive 2009/12/EC and of Section 19b of the Air Traffic Act.

The dual-till approach is usually associated with greater complexity in the demarcation, in particular as regards the verification of the cost allocation according to the costs-by-cause principle. If a demarcation is made between aviation and non-aviation within the scope of dual-till, the requirements with respect to the breakdown of business expenses (cost types, cost centres, cost objects) are increased as well as the transparency requirements that the airport operator must fulfil vis-à-vis the airport users and the supervising authorities.

## 6. Verification by airport users and public authorities of the compliance of the cost allocation with the costs-by-cause principle

In a dual-till approach, costs must be appropriately allocated between the two service industries according to the costs-by-cause principle and the allocation system used must be presented objectively in a way which is transparently verifiable for third parties within the framework of user consultation. Justifications and evidence must be presented including allocation keys and assumptions used in the allocation of costs.

Since there may be incentives for the airport operator to allocate costs increasingly from the non-regulated non-aviation sector to the regulated aviation sector (which would be contrary to the "alignment with efficient service performance standards"), it is essential that the supervising authority increases the intensity of inspections, specifically with reference to the verifiability of cost allocation. Airport users and supervising authorities must at least be able to do random sampling checks to determine whether the allocation of costs is proper and appropriate, and not subject to the discretion of the airport operator.

Staff shortages with respect to capacities or expertise at the competent supervising authority do not justify less extensive inspection according to the predefined parameters on the transparent itemisation of cost data. For the purpose of effectively implementing the Directive, all required personnel and financial resources and organisational structures must be provided by the Member States in order to comply with the requirements of the Directive.

12 T. Beckers, J.S. Fritz, C. v. Hirschhausen and S. Müller, 'Privatisierung und Re-Regulierung der deutschen Flughäfen unter Berücksichtigung internationaler Erfahrungen', p. 42 ff. (available here: [http://www.trafficforum.ethz.ch/vwt\\_2003/beitraege/VWT19proceedings\\_contribution\\_63.1-63.87.pdf](http://www.trafficforum.ethz.ch/vwt_2003/beitraege/VWT19proceedings_contribution_63.1-63.87.pdf))

#### IV. The documentation and information to be presented by the airport operator in accordance with Section 19b(3) No. 6 letters a-h of the Air Traffic Act

In the documents submitted to airport users and supervising authorities for consultations regarding modifications of airport charges, none of the German airports examined by the authors (Munich, Düsseldorf, and Frankfurt) have submitted sufficiently precise and detailed information to allow negotiated charge agreements. Determinations and increases of charges are often not satisfactorily justified in accordance with the synallagmatic principle of equivalence, which goes hand in hand with the negotiation approach of Directive 2009/12/EC and is also embedded in recital 15 of the Directive and in Section 19b(3) No. 3 first sentence of the Air Traffic Act. In particular, such justifications are lacking with regard to the direct connection and the proportionality between the quality of services and the level of charges as well as between the anticipated actual costs and the level of charges. Without even mentioning the alignment with efficient service performance standards, in accordance with documented cost types, cost centres and cost objects accounting compliant with the costs-by-cause principle as provided by Section 19b(3) Nos. 3 and 6 letter c of the Air Traffic Act, the alignment with future costs is insufficiently documented in practice, with respect to the accounting period relating to the service performance.

The consultation documents consistently lack a transparent allocation of costs according to cost types, cost centres and cost objects that would allow to distinguish between the aviation-related costs to be covered by the airport charges and the non-aviation-related costs. Although, in some cases, – though according to a very coarse and insufficient pattern – an outline is provided of the composition of the total of the costs that must be covered by the payable airport charges, the numbers provided are not traceable as regards their accuracy, plausibility and affiliation with the aviation sector.

Where relevant information is provided, the “services and infrastructures” described in the consultation documentation generally amount to a performance catalogue of the airport operators in relation to the airport users since they are too vague and im-

precise. For example, there is no information on the exact number of facilities, utility vehicles, no information on runway, apron or terminal capacities on the air side and on the land side, nor information on the degree of utilisation and the amortised cost of the infrastructure facilities. Information on the number of employees or on their responsibilities and areas of operation or time-specific activities in various assignments is equally difficult to verify or is similarly unavailable.

Information is lacking throughout on the distribution of overhead costs, the determination of appropriate overhead cost keys, the allocation of assets, the determination of depreciations and return on investment, and thus on the determination of the costs of capital in their entirety which amount to 25% on average – even up to 50% in individual cases – of the total costs for the assessment of charges.

Presentations showing the extent to which the increase in passengers or aircraft movements lead to the utilisation of marginal cost effects within the framework of the “alignment with the costs of efficient performance of services” cannot be found in all consultation documents provided by German airports. Likewise, information on rationalisation measures or on the comparability of own costs with the costs of comparable reference airports or cost models is missing throughout.

It is generally not apparent from the information presented on determination of charges and regulatory practice in Germany that determination or changes to charges were actually the result of a negotiating process, or at least that users have had a significant influence on determination of charges on the basis of negotiations.

The authors conducted a comparative examination of transparency and fee regulation practices at selected international airports outside of Germany, particularly London-Heathrow, Dublin, Amsterdam Schiphol, Geneva, Zürich, Sydney (Australia). The regulatory approaches followed differ from one another. Generally speaking, however, the average regulatory intensity clearly stands out as much higher compared to the current German practice.

Costing and cost allocation by airport operators is done according to precise rules specified beforehand by the Regulator. The decisions made by the regulatory authorities at the above-mentioned airports, often taken after a complex regulatory procedure, present very detailed explanation of the justifications

and calculation methods in the light of the experiences of previous regulatory periods. In some cases, the approval decisions total more than 300 pages, and are thus much more precise and exhaustive than decisions taken by German authorities.

One thing all foreign airports considered here have in common, for example, is that the interest rates for determining the cost of capital (WACC = Weighted Average Cost of Capital) set and approved by the regulatory authorities are sometimes significantly lower than in the approval decisions for German airports. Thus, the regulated WACC before taxes is 5.73% in Amsterdam and 5.35% in London-Heathrow, while German approval authorities allow more than 9% in their decisions in some cases (Munich and Frankfurt 9.50%, Düsseldorf 9.19%).

The German deficit in law enforcement must be rectified as a matter of priority within the framework of the consultation procedure in accordance with the Directive.<sup>13</sup> The specification of the list of documentation and information to be presented contained in Section 19b(3) No. 6 letters a-h of the Air Traffic Act, as proposed below, should contribute to this.

### 1. Index of essential operating services and infrastructures provided in return for airport charges levied

With a clearly structured and detailed index and a precise specification of the infrastructure facilities and services to be provided by the airport operator, both the airport users and supervising authorities would be put in a position to examine whether the services and infrastructures to be compensated are clearly defined (Section 19b(1) third sentence No. 1 of the Air Traffic Act).

The overview and the specifications must clearly show the operating necessity of these infrastructure facilities and services as well as the essential operating assets which are necessary for the provision of airport services. They must also detail the costs corresponding to the degree of utilisation of these ser-

vices. To this end, the current degree of utilisation (capacity utilisation) of the individual essential operating infrastructure facilities and the other essential operating assets (Section 19b(3) No. 6 letter g of the Air Traffic Act) as well as the development of the degree of utilisation for the previous years should be presented empirically.

In detail, and for the periods referred to above, at least the following information and documentation should be provided:

- (a) Runway capacity: maximum and average number of aircraft movements per hour and per year;
- (b) Apron capacity: Total area and maximum simultaneously usable parking positions on the apron, divided according to size and facilities (such as GPU, refuelling, GFA connection etc.);
- (c) Airside terminal capacity: Total area and maximum simultaneously usable building positions divided according to size and category, apron areas of terminal processing positions;
- (d) Landside terminal capacity: Total area and maximum average number of passengers per hour and per year divided according to terminal areas as well as arrival and departure;
- (e) Capacity of luggage conveyor systems: Total area and maximum possible and average number of items of luggage per hour and per year as well as number of output conveyor belts;
- (f) Check-in: Total area and number of check-in facilities divided according to type (counter, self-service);
- (g) Average daily and annual availability of services a. to f.

### 2. Basic information for the presentation of the methods used to set charges and evaluate proportionality between charges and costs

The documentation and information to be presented by the airport operator must first include a justification for the level and the future development of the proposed charges including an indication as to when and under which conditions they should apply. A substantiated justification must in particular include a detailed air traffic-related revenue and cost forecasts as a comparison which indicates that air traffic operations can only be carried out economically by increasing the charges.

13 Concerning information procurement and process structuring, see also T. Beckers, J.-P. Klatt and J. Kühling, 'Entgeltregulierung der deutschen Flughäfen – Reformbedarf aus ökonomischer und juristischer Sicht' ('Fee regulation at German airports – necessary reform from an economic and judicial perspective'), Study of 1 March 2010 by order of the German Airline Association (the Bundesverband der Deutschen Fluggesellschaften e.V.), p. 44 ff.



In addition, the consultation documents must include at least the following information:

- (a) Overview of total turnover and total revenues of the airport enterprises, especially under dual-till conditions, broken down by aviation and non-aviation sectors, itemised in detail according to source and charge types or revenue types. Although Section 19b(3) No. 6 letter d of the Air Traffic Act only refers to the documentation of "revenues from the various charges and total costs of the services funded thereby",<sup>14</sup> such documentation is nonetheless completely transparent only if it is associated with an overview of the airport operator's total revenues, broken down by aviation-related (that is, primarily airport charges) and non-aviation-related revenues;
- (b) Overview of all aviation costs associated with the provision of the necessary airport services and their detailed distribution over cost types and cost centres as well as their allocation to the cost objects (the respective aviation product units);
- (c) Overview of non-aviation costs in order to be able to clearly and transparently prove and reproduce the separation of accounts within the framework of the application of dual till;
- (d) Transparent overview and explanation of all allocation parameters according to which, for example, percentage allocations of direct costs and overhead costs to air traffic-related and non-air traffic-related areas of activity are made. This applies with regard to area-related, personnel, facilities investment, vehicle, material and insurance costs etc. Distribution modes or distribution keys should be explained and substantiated in detail. The principle of cost-reflective pricing must be taken into account when allocating cost positions by means of the difference hypothesis. Allocation parameters should be set by the airport operator *ex ante* and explained transparently.

Costs must be transparently allocatable to the respective sectors (aviation and non-aviation) in order to take account of the requirement of cost orientation with regard to performance (Section 19b(1) No. 2 of the Air Traffic Act) and especially the requirement of proportionality of charges in relation to "anticipated actual costs" (Section 19b(3) No. 3 of the Air Traffic Act). The dual-till approach, in particular, requires a clear distinction between aviation and non-aviation both on the revenue side as well as on the cost side. Cost-related

documents should be derived directly from the airport operator's accounting system which the airport operator also uses to make its cost calculations for fee price formation, not from the cost models which are independent of the airport operator's customary accounting system.<sup>15</sup> The basis of calculation must be prepared completely and transparently for the airport users and the approving authority.

In relation to methods, costs that are relevant in determining the charges comprise the addition of operational expenses and investment expenses to essential operating assets plus the cost of capital on essential operating assets. Operational expenses are composed of essential operating material and personnel expenditure, as well as the costs of outsourcing to third parties for the provision of the essential operating infrastructure facilities and services, and must be presented in a properly transparent manner. For expenses involving essential operating assets, the methods of assessment and depreciation must be disclosed.

- (e) Demonstration that, and how, the imputed return on investment was determined methodically and specifically;
- (f) Demonstration that investment expenses in essential operating assets which can be factored in were not declared due until commissioning within the framework of the charge entitlement relating to this portion of the investment costs;
- (g) Indication of the prices of the assets/commodities used, since the scope of the capital tied up in assets is determined from this (along with the quantities used and the level and methods of depreciation).

### 3. Overview of the overall cost structure and recognisability of alignment with efficient service performance standards

As stated above, the airport operator must present documentation on the overall cost structure in good time prior to the consultation date in accordance with

<sup>14</sup> In the original German 'Erlöse der verschiedenen Entgelte und Gesamtkosten der damit finanzierten Dienstleistungen'.

<sup>15</sup> Cf. Elaboration about telecommunications regulation in Gerpert/Schütz, Beck'scher TKG-Kommentar, 4th edition 2013, § 34 TKG para. 10 f.

Section 19b(3) No. 6 letter c of the Air Traffic Act and prove the "recognisability of alignment with efficient service performance standards" as regards the amount of its costs, as required by Section 19b(3) No. 3 of the Air Traffic Act.

For this purpose, the following information and documentation must be presented to the airport users and the approval authority by the airport operator:

- (a) Marginal cost advantages due to (increasing) traffic volume developments in aircraft movements, MTOM (maximum take off mass), passenger numbers, transfer proportions as well as freight quantities; marginal cost advantages are an integral part of the "overall cost structure with respect to facilities and services" within the meaning of Section 19b(3) No. 6 letter c of the Air Traffic Act, particularly in view of the fact that especially marginal cost advantages indicate that the operator of a commercial airport is focused on efficient performance of services;
- (b) Cost models and comparable market considerations recognised by economic and regulatory authorities with regard to (international) reference airports which are exposed to relatively high competitive substitution density in the respective relevant markets, or where "alignment with efficient performance of services" is demonstrably apparent;
- (c) Justification of target efficiency cost data using recognised best-practice methods on the basis of comparable market analyses and cost models;
- (d) Subsequent comparison of the benchmarks determined in this manner, of the target efficiency costs, with actual costs;
- (e) Presentation of a target efficiency corridor and of the corresponding deadlines, in accordance with rationalisation measures proposed by the airport operator. Although "recognisability of alignment with efficient services performance standards" does not require the gap between actual costs and target costs to be closed completely, it does, however, dictate the presentation of a target efficiency corridor, which the airport operator will have to enter within strict deadlines, by implementing specified rationalisation measures improving the cost-efficiency of previously inefficient facilities or services;
- (f) Presentation of specific rationalisation planning data and the more efficient cost planning data which it entails;

- (g) Development of the successive targets to be reached within the efficiency corridor towards reaching a goal from the recognised best-practice methods on the basis of the comparable market analyses and cost models.

#### 4. Information on public financing of facilities and services which are relevant to charges

Section 19b(3) No. 6 letter e of the Air Traffic Act requires the provision of information on the financing by public authorities for facilities and services subject to charges, since they fall under the scope EU State aid law, in view of the severe consequences of the presence of non-authorised State aid within the meaning of Article 107(1) and Article 108(3) of the Treaty on the Functioning of the European Union. Accordingly, all relevant information and particulars on the public financing of airport facilities and airport services subject to charges must be presented by the airport operator in the consultation.

#### 5. Information on the anticipated development of charges and traffic volume.

The information on the anticipated development of charges at a commercial airport (Section 19b(3) No. 6 letter f of the Air Traffic Act) must, in addition to the information on intended investments, also be substantiated by information on expected (declining) marginal cost developments on the basis of (projected) traffic volumes (aircraft movements, MTOM, passenger numbers, transfer proportion, freight volume etc.).

#### 6. Information on the foreseeable result of projected major essential operating investments.

The investments planned to answer user demand and the associated projected costs relevant to charges (Section 19b(3) No. 6 letter h of the Air Traffic Act) should be presented for the coming years during the consultation. In this context, the projected changes in the degree of utilisation (capacity utilisation) of

the infrastructure facilities of the existing essential operating assets should be specified, with due regard to planned investments and commissioning dates. In addition, the airport enterprise must submit prognoses of the targeted increases in productivity, their effects on the costs relevant to charges, and the level of charges for the coming years.

## V. Rights of the parties involved, administrative procedure and administrative procedural steps

The rights of the concerned parties and the airport users' standing to bring proceedings in an administrative procedure or in administrative court proceedings must be determined based on an interpretation of Section 19b(1) and(3) of the Air Traffic Act compatible with Directive 2009/12/EC, considered the primacy of application of Union law. Whether, and to what extent, airport users have a subjective right in relation to the public authorities which offers third-party protection under Section 19b(1) and(3) of the Air Traffic Act must therefore be definitively determined by a precise exegesis of Directive 2009/12/EC.

Directive 2009/12/EC, in particular its Article 6(2) first sentence, grants airlines, as airport users, subjective participation rights in the procedure by which airport charges are set. Article 6(2) first sentence of the Directive, which cannot be derogated from by Member States (cf. Art. 6(5) first sentence), stipulates: "Member states shall ensure that, wherever possible, changes to the system or the level of airport charges are made in agreement between the airport managing body and the airport users."

Since Article 6(2) first sentence of Directive 2009/12/EC refers to the procedural guarantees available at the Member States level in national procedures ("the Member States shall ensure"), the legal term "agreement" must be interpreted in full compliance with the Directive in national law. In contrast to administrative decision-making "after consultation" with another public authority or person, according to which only an opportunity to present comments must be granted, an "agreement" in administrative law requires that the positive, or at least implied, consent of the other person or the other public authority must have been obtained before a legislative act is adopted.<sup>16</sup>

This rule is not only proper to German administrative law; rather, it is to be expected that a similar general principle exists in EU law on administrative procedures.<sup>17</sup> But if, in the light of this general principle of European law on administrative procedures, the "agreement" within the meaning of Article 6(2) first sentence of Directive 2009/12/EC specifically assumes the positive consent of the airport users to "whenever possible, changes to the system or the level of airport charges", Directive 2009/12/EC grants airport users the strongest subjective participation under administrative procedural law: the *status activus negociandi* in the procedure of the assessment of airport charges.

Due to the airport operators' obligation to justify themselves especially to the airport users (and not to the supervisory authority), airport users are equipped with a subjective right of *status activus processualis*<sup>18</sup> on the basis of Article 6(2) second sentence of the Directive, complementary to the *status activus negociandi* of the first sentence. Article 6(2) second sentence of the Directive thereby confirms the Union as well as the German principle of administrative procedural law that a procedure must provide formal safeguards for the subjective rights conferred by substantive law, in order to increase the practical effectiveness of the subjective rights of third parties.

Accordingly, since Directive 2009/12/EC indubitably confers subjective rights to the airport users, and considered the primacy of application of Union law, the airport users are granted the ability to participate as respondents in administrative proceedings under Section 13 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz – VwVfG), but at least as parties who must necessarily be involved by Section 19b(1) and (3) of the Air Traffic Act, interpreted in conformity with the Directive. Similarly, the airport users' have standing to bring pro-

16 An administrative act issued without the necessary agreement of a different administrative unit is illegal, but is not null and void (§ 44 Abs. 3 Nr. 4 VwVfG). The missing approval can be obtained at a later point in time (§ 45 Abs. 1 Nr. 5 VwVfG).

17 General principles of law are attained by the ECJ by legal comparison, however the national legal systems of the member states are not the source of law but the source of legal understanding, cf. as well Haratsch/Koenig/Pechstein, *Europarecht*, 8<sup>th</sup> edition, Munich, 2012, para. 334.

18 P. Häberle, 'Grundrechte im Leistungsstaat' in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)*, vol. 30 (1972), p. 43, 86.

ceedings before an administrative court under Section 42(2) of the Rules of the Administrative Court (Verwaltungsgerichtsordnung – VwGO).<sup>19</sup> This applies in particular to the ability to participate in administrative proceedings and the standing to bring proceedings before an administrative court of airport users in case of disputes about the scope as regards contents as well as the process parameters of the consultation obligations of the airport operators and the consultation rights of the airport users with respect to the transparent “documentation and information” to be presented in good time prior to the consultation date in accordance with Section 19b(3) Nr. 6 of the Air Traffic Act.

The transparency requirements concerning the “documentation and information” to be presented are subject to unlimited scrutiny by an administrative court for the purpose of effective and complete judicial protection in accordance with Article 19(4) of the German Constitution (Grundgesetz – GG).<sup>20</sup> Administrative Courts have full competence to decide on the comprehensiveness and the quality of the documents presented in accordance with Section 19b(3) No. 6 of the Air Traffic Act, though they must pay significant regard to the requirements of the Directive and to the rules in force in comparable regulated sectors and more generally under general competition law.

19 H. Neumann, ‘Rechtsgutachten zum Verfahren der Genehmigung von Flughafenentgelten nach der Neufassung von § 19b LuftVG - Beteiligungs- und Klagemöglichkeiten aus Sicht der Nutzer’, Jones Day, Frankfurt am Main, by order of the German Airline Association (Bundesverband der Deutschen Fluggesellschaften e.V.), 12 March 2013, p. 21.

20 BVerfGE 15, 275, 282; BVerfGE 73, 339, 373; BVerfGE 84, 34, 49; BVerfG NVwZ 2011, 1062, 1064.

The administrative court must undertake a comparison of the transparency requirements and the documentation actually presented, and make a comprehensive evaluation as regards their contents by calling upon the services of an expert, if necessary.

## VI. Conclusion

Even after the implementation of the Directive within the legal framework of Section 19b of the Air Traffic Act in Germany, a procedure of unilateral charge determination by the airport operators with administrative approval continues to be predominant in practice; the airlines’ practical possibilities of exerting influence by participating to the negotiation of charges remains unimproved, although Directive 2009/142/EC foresees the establishment of a substantial negotiation.

This deficit in law enforcement must be rectified as a matter of priority within the framework of the German consultation procedure, in accordance with the Directive. The specification of the list of documentation and information contained in Section 19b(3) No. 6 letters a-h of the Air Traffic Act, as proposed above, should contribute to this.

If the States’ supervisory authorities do not duly enforce the law, the airport users, who are equipped with subjective participation rights in relation to public authorities (with third-party protection) in accordance with Section 19b(3) No. 6 letters a-h of the Air Traffic Act, interpreted in accordance with the Directive, can enforce their rights by launching administrative proceedings with a supervisory authority and, if that attempt is unsuccessful, by going to the administrative courts.