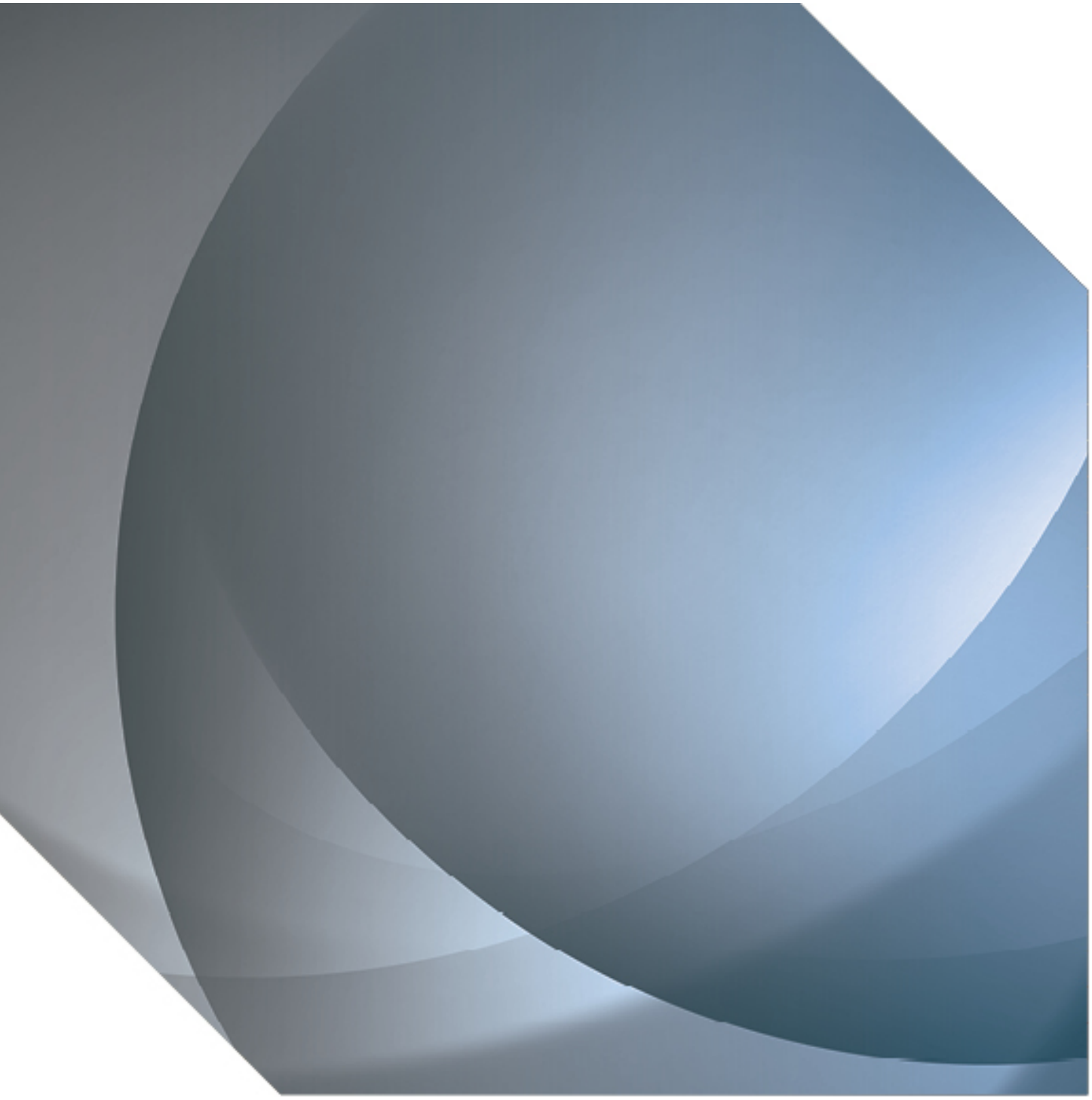
Guidance on the Application of the CAA's powers under the Airport Charges Regulations 2011: A Consultation

CAP 1290



Guidance on the application of the CAA's powers under the Airport Charges Regulations 2011: A Consultation

1. The Airport Charges Regulations 2011 (ACRs)[1] are secondary legislation which transpose the Airport Charges Directive (2009/12/EC)[2] so that it applies in the UK. They apply to all airports with more than 5 million passenger movements per year. There are currently nine such airports in the UK:

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

2. The ACRs set out certain obligations on airports and users with regard to exchanging information and on airports with regard to consultation on airport charges. The ACRs also set requirements relating to the differentiation of airport charges and the avoidance of discrimination. Since the repeal of Section 41 of the 1986 Airports Act, the ACRs are the main sector-specific legislation on this subject.

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

1 The Airport Charges Regulations 2011.

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

4. In 2010 we produced an "emerging thinking" document[3] in anticipation of the legislation. But we have not yet provided any formal guidance to stakeholders on the ACRs. This is because companies continued to submit such complaints under Section 41 rather than the ACRs. However, Section 41 was repealed with effect from April 2014.

5. We are, therefore, now consulting on draft guidance to inform stakeholders of what to do if they consider there has been a breach of the ACRs, and how we will handle complaints. It also clarifies the interface between the ACRs and our wider competition law powers. Our draft guidance is available on our website at www.caa.co.uk/CAP1291.

6. This document summarises the draft guidance document and mentions issues you might particularly want to consider in any response. You are not, however, restricted to commenting on these issues and we would welcome your views on any aspects of this draft guidance. Please can you send any responses to economicregulation@caa.co.uk no later than 30 June 2015.

7. We will publish responses on our website after the end of the consultation period. If there are parts of your response that you consider to be commercially confidential, please can you clearly mark them as such and send us a non-confidential version that we can publish.

8. If you would like to discuss any aspect of the draft guidance please can you contact Rod Gander at rod.gander@caa.co.uk or telephone 020 7453 6225.

9. We will take all responses received into account when producing our final guidance.

Our approach to the ACRs

General approach

10. In our view, promoting competition is usually the most effective way to improve outcomes for passengers and airport users. Our approach, therefore, in the draft guidance, seeks to give airports and users the confidence to reach commercially negotiated outcomes where these are mutually beneficial and do not discriminate between users.

11. In the draft guidance we remind dominant airports that they have a special responsibility to ensure that their conduct does not distort competition. Two of the airports subject to the ACRs (Heathrow and Gatwick) are regulated by economic licence, as they passed the market power test in the Civil Aviation Act 2012.

3 Implementing the Airport Charges Directive in the UK - CAA Emerging Thinking

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

13. In addition, where we find a breach of the ACRs, we note that we are unlikely to issue a compliance order unless we judge that the breach has an impact on competition and thereby has an impact on consumers. This is the approach we followed in applying Section 41, for example in the case of the complaint by Aer Lingus against charges levied by Heathrow[4].

14. Our approach to the various individual aspects of the ACRs is set out in more detail below.

Definition of airport user

15. Airport users are defined in the ACRs as "in relation to any airport, a person responsible for the carriage of passengers, mail or freight by air to or from the airport". This definition therefore includes airlines operating commercial services whether scheduled, charter services, all-cargo or mail flights. Our view is that it also includes some general aviation, such as business aviation, air taxis and air ambulances. It is less clear whether the definition also includes other activities such as flight training. We do not consider that a private pilot carrying no passengers or cargo would be a user under the ACRs.

Question 1: Have you a view about which categories of general aviation should be included in the definition of airport users for the purposes of the ACRs?

Information Provision

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

17. In 2014, the European Commission reported on the implementation of the Directive. It found that users were generally satisfied with transparency at UK airports and the consultation procedure at larger airports in the UK. Given this general satisfaction with information provision in the UK, we do not intend to provide detailed guidance on how airports and users should exchange information and the detail of information required. For example, we do not intend to provide pro-formas or templates that airports and users should use.

4 Investigation under Section 41 of the Airports Act 1986 of the structure of airport charges levied by Heathrow Airport Limited - CAA decision (2014)

18. We are mindful that if we specify the information required and the arrangements for the exchange of information too precisely, we would risk unintended consequences that could reduce rather than enhance the level of satisfaction. It could also lead us to policing whether airports and their users were complying with the guidance, rather than responding to complaints about compliance with the ACRs themselves or investigating more substantive issues.

19. Where the ACRs require a user to provide information to an airport we intend to encourage airports to take a proportionate approach, particularly towards general aviation users.

20. As far as disclosure by airports is concerned, we consider that some of the required information will be in the airport operator's statutory accounts. However, in some cases, the information goes beyond what would normally be in the accounts, such as the degree of disaggregation required or the provision of forecasts. We consider that some of this information may be confidential and airports which are listed on public securities markets will need to comply with the applicable disclosure regulations if they release it into the public domain.

21. When airports negotiate commercial deals with airlines, our approach is that airports would have to disclose that they are willing to negotiate with users, and should be prepared to disclose their overall rationale for making such deals. However, we do not consider they should be required to disclose the key commercial details of negotiated agreements they have with users. We consider that disclosing prices and other key details of such arrangements could be anti-competitive and is likely to reduce the number of such agreements. This could lead to passengers losing the benefit of the lower fares and increased service levels they could expect to receive if beneficial agreements are made.

22. The ACRs could be interpreted to require a higher level of disclosure and could justify a more prescriptive approach. However, our view is that this would not be appropriate. Among other things the recitals to the Directive state that it should be implemented “without prejudice” to the competition articles in the EU Treaty. So we believe that we should therefore apply the ACRs in a way that enhances competition rather than potentially discouraging it.

Question 2: Have you any comments on our approach in the draft guidance to the provision of information by either (a) users, or (b) airports?

Consultation

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

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

25. To prevent potential harm to competition, we propose that the consultation requirements should apply to an airport's published charges, but not to negotiated deals with individual users. As negotiated agreements are more prevalent at the smaller airports, this approach should also reduce the burden on such airports compared to a more prescriptive approach.

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

27. Overall, our draft guidance largely reinforces the text in the ACRs without much additional interpretation. We believe airports and their users will continue to consult in a sensible manner and comply with the ACRs without us providing more detailed rules.

Question 3: Have you any comments on our approach to consultation obligations in the draft guidance?

Differentiation of charges and discrimination

28. The ACRs allow airports to vary their airport charges for reasons relating to the general and public interest (such as the environment). If an airport varies its charges for these reasons, it needs to be able to demonstrate why the different charges contribute to the general or public interest concerned. In the draft guidance we mention the good practice principles for airports to use when setting charges to encourage quieter flights we set out in our 'Managing Aviation Noise' publication in 2014[5].

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

30. The ACRs require airports to be able to provide relevant, objective and transparent justification for differences in charge. Possible acceptable reasons for airports to differentiate charges include: differences in quality or scope of service, differences in the allocation of fixed and common costs, differences in commercial revenues generated by different users, and encouraging a more efficient use of the airport. Where an airport differentiates its charges we would expect it to have robust, quantitative evidence for doing so.

31. In our draft guidance, we note that the ACRs allow differentiation in negotiated commercial agreements, including multi-annual bilateral contracts, such as when a user commits to provide a certain level of traffic to the airport for a number of years. In the guidance, we state that such a differentiation is permitted by the ACRs on the basis that this would reduce the volume risk faced by the airport which, in turn, may reduce the airport's cost of doing business. Provided that airports provide a valid and evidenced objective justification for any differences we would not interpret such a differentiation of charges as being discriminatory.

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

33. We will refer to case law (especially in relation to competition law, the ACRs and the European Directive) to assist in assessing whether an airport is discriminating and whether charging differentiation is appropriate.

5 Managing Aviation Noise

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

Question 4: Have you any comments on our approach to the differentiation of charges and determining whether there has been discrimination under the ACRs?

Complaint handling

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

36. We note that although we would use the same process to investigate any alleged infringement, the time taken is likely to vary according to the complexity of the issues. For example, we expect issues around discrimination to be more complex than those around consultation. At the start of our investigation we shall inform the parties of an indicative timetable for the case.

Question 5: Have you any comments on our process for handling cases in the draft guidance?

Enforcement

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

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

39. Where a user has not provided the required information to an airport we can impose a penalty on the user of up to £5,000. As the ACRs are primarily designed to place obligations on airports, not users, we intend to use the power to penalise users sparingly. In the draft guidance we say that as knowledge of the requirements of every single user is unlikely to make a material difference to the development of an airport's facilities and services, we would take a proportionate approach to enforcing the requirements. We would be unlikely to impose a penalty unless we have received a complaint from an airport or another user.

Question 6: Have you any comments on our approach to enforcement in the draft guidance?

Question 7: Is there anything that we have not covered in our guidance that you think we should?