Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 27 June 2019 [1]

Case C-379/18

Deutsche Lufthansa AG
v
Land Berlin
Interveners:
Berliner Flughafen Gesellschaft mbH,
Vertreter des Bundesinteresses beim Bundesverwaltungsgericht

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(Reference for a preliminary ruling — Air transport — Airport charges — Protection of airport users' rights — Whether it is possible to agree charges different from those approved by the independent supervisory authority — Remedies — Jurisdiction of the civil courts — Compatibility with Directive 2009/12/EC)

1. Directive 2009/12/EC [2] requires airport managing bodies to charge 'users' (that is to say, those engaged in the carriage of passengers, mail or freight by air) [3] fees for use of the facilities and services which the former provide to the latter.

2. The questions raised by the referring court are concerned, in short, with the approval of those airport charges, either by the independent supervisory authority ('supervisory authority') or by the managing body of each airport. The referring court also wishes to ascertain how and before which entity the user can challenge those charges.

1 Original language: Spanish.

2 Directive of the European Parliament and of the Council of 11 March 2009 on airport charges (OL 2009 L 70, p. 11; 'the Directive').

3 I shall use the term *user* in this sense, to the exclusion, therefore, of passengers that use airport facilities and services (to whom the airlines then pass on the charge).

I. Legal framework

A. EU law: Directive 2009/12

3. Article 2 ('Definitions') provides:

'For the purposes of this Directive:

1. "airport" means any land area specifically adapted for the landing, taking-off and manoeuvring of aircraft, including the ancillary installations which these operations may involve for the requirements of aircraft traffic and services, including the installations needed to assist commercial air services;

2. "airport managing body" means a body which, in conjunction with other activities or not as the case may be, has as its objectives under national laws, regulations or contracts the administration and management of the airport or airport network infrastructures and the coordination and control of the activities of the different operators present in the airports or airport network concerned;

3. "airport user" means any natural or legal person responsible for the carriage of passengers, mail and/or freight by air to or from the airport concerned;

4. "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;

…'

4. Article 3 ('Non-discrimination') states:

'Member States shall ensure that airport charges do not discriminate among airport users, in accordance with Community law. This does not prevent the modulation of airport charges for issues of public and general interest, including environmental issues. The criteria used for such a modulation shall be relevant, objective and transparent.'

5. Article 5 ('Common charging systems') provides:

'After having informed the Commission and in accordance with Community law, Member States may allow an airport managing body to apply a common and transparent charging system at airports serving the same city or conurbation, provided that each airport fully complies with the requirements on transparency set out in Article 7.'

6. Article 6 ('Consultation and remedy') prescribes:

'1. Member States shall ensure that a compulsory procedure for regular consultation between the airport managing body and airport users or the representatives or associations of airport users is established with respect to the operation of the system of airport charges, the level of airport charges and, as appropriate, the quality of service provided. Such consultation shall take place at least once a year, unless agreed otherwise in the latest consultation. Member States shall retain the right to request more frequent consultations.

2. 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. To that end, the airport managing body shall submit any proposal to modify the system or the level of airport charges to the airport users, together with the reasons for the proposed changes, no later than four months before they enter into force, unless there are exceptional circumstances which need to be justified to airport users. The airport managing body shall hold consultations on the proposed changes with the airport users and take their views into account before a decision is taken. The airport managing body shall normally publish its decision or recommendation no later than two months before its entry into force. The airport managing body shall justify its decision with regard to the views of the airport users in the event that no agreement on the proposed changes is reached between the airport managing bodies and the airport users.

3. Member States shall ensure that in the event of a disagreement over a decision on airport charges taken by the airport managing body, either party may seek the intervention of the independent supervisory authority referred to in Article 11 which shall examine the justifications for the modification of the system or the level of airport charges.

4. A modification of the system or the level of airport charges decided upon by the airport managing body shall, if brought before the independent supervisory authority, not take effect until that authority has examined the matter. The independent supervisory authority shall, within four weeks of the matter being brought before it, take an interim decision on the entry into force of the modification of airport charges, unless the final decision can be taken within the same deadline.

5. A Member State may decide not to apply paragraphs 3 and 4 in relation to changes to the level or the structure of the airport charges at those airports for which:

(a) there is a mandatory procedure under national law whereby airport charges, or their maximum level, shall be determined or approved by the independent supervisory authority; …'

7. In accordance with Article 7 ('Transparency'):

'1. Member States shall ensure that the airport managing body provides each airport user, or the representatives or associations of airport users, every time consultations referred to in Article 6(1) are to be held with information on the components serving as a basis for determining the system or the level of all charges levied at each airport by the airport managing body. That information shall include at least:

(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.

…’

8. Article 11 (‘Independent supervisory authority’) provides:

‘1. Member States shall nominate or establish an independent authority as their national independent supervisory authority in order to ensure the correct application of the measures taken to comply with this Directive and to assume, at least, the tasks assigned under Article 6. Such an 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), including with the approval of the charging system and/or the level of airport charges, provided that it meets the requirements of paragraph 3 of this Article.

…

7. When undertaking an investigation into the justification for the modification of the system or the level of airport charges as set out in Article 6, the independent supervisory authority shall have access to necessary information from the parties concerned and shall be required to consult the parties concerned in order to reach its decision. Without prejudice to Article 6(4), it shall issue a final decision as soon as possible, and in any case within four months of the matter being brought before it. This period may be extended by two months in exceptional and duly justified cases. The decisions of the independent supervisory authority shall have binding effect, without prejudice to parliamentary or judicial review, as applicable in the Member States.

…’

B. German law

1. Verwaltungsgerichtsordnung (Code of Administrative Court Procedure; ‘VwGO’)

9. In accordance with Paragraph 42(2), unless the law provides otherwise, an action under administrative law is permissible only if the applicant claims that his rights have been infringed by an administrative act or by the refusal or failure to adopt one.

2. Luftverkehrsgesetz (Law on air traffic; ‘LuftVG’)

10. Article 19b(1) governs the system of airport charges. The airport managing body is to submit this for approval to the licensing authority, which is to approve the system if certain requirements are met.[4]

11. Paragraph 19b(3) sets out the procedure for authorising the system of charges as comprising the following stages:

– The airport managing body must submit the draft system of charges, or any amendment thereto, together with the reasons for it, to the airport users at least six months prior to its entry into force.

– The application for authorisation must be submitted to the licensing authority at least five months prior to the entry into force of the system of charges. The application must be reasoned and take into account any objections raised by users.

4 The charges must comply with appropriate, objective, transparent and non-discriminatory criteria; the services and infrastructure charged for must be clearly defined; the charges must be calculated on the basis of cost and set in advance; all users must have the same form of access to the services and infrastructure; different charges may not be imposed without objective justification.

– Authorisation must be granted if the charges are proportionate to the anticipated operating costs and serve to ensure the efficient provision of services. That examination may be dispensed with if the airport managing authority and the users have reached agreement on the system of charges.

3. Bürgerliches Gesetzbuch (Civil Code; 'BGB')

12. Paragraph 315 of the BGB, concerning contracts, provides:

– Where performance is to be determined by one of the contracting parties, it must in cases of doubt be determined at the equitable discretion of the party in question.

– Performance must be determined by way of a declaration made to the other contracting party.

– Where performance is determined in this way, the determination is to be binding on the other contracting party only if it is equitable. If it is not, it must be made by judgment.

II. Procedure before the Court of Justice

13. The order for reference was received at the Court of Justice on 8 June 2018.

14. Written observations have been lodged by Deutsche Lufthansa, Berliner Flughafen Gesellschaft, Land Berlin, the German and Polish Governments and the European Commission. With the exception of the Polish Government, all of the aforementioned parties attended the hearing held on 11 April 2019.

III. Facts of the dispute and questions referred

A. Background

15. On 25 June 2014, the company managing Berlin-Tegel airport (Berliner Flughafen Gesellschaft mbH) submitted to Land Berlin, of which the supervisory authority formed part), a draft schedule of airport charges for authorisation.

16. On 13 October 2014, the supervisory authority granted the authorisation requested, in accordance with Paragraph 19b of the Law on air traffic.

17. Deutsche Lufthansa sought to have that authorisation annulled in an action brought before the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg, Germany).

18. By judgment of 22 June, that court dismissed the action on the ground that Deutsche Lufthansa lacked standing to bring proceedings (under Paragraph 42(2) of the VwGO), since the authorisation was not capable of infringing its rights.

19. Deutsche Lufthansa brought an appeal on a point of law (*Revision*) before the Bundesverwaltungsgericht (Federal Administrative Court, Germany), which has referred the following two questions to the Court of Justice for a preliminary ruling.

'(1) Is a national provision which provides that the system of airport charges decided upon by the airport managing body must be submitted to the independent supervisory authority for approval, without prohibiting the airport managing body and the airport user from setting charges different from those approved by the supervisory authority, compatible with Directive 2009/12/EC …, in particular Article 3, Articles 6(3) to (5) and Article 11(1) and (7) thereof?

(2) Is an interpretation of national law whereby an airport user is prevented from challenging the approval of the charging scheme by the independent supervisory authority, but can bring an action against the airport managing body and can plead in that action that the charges determined in the charging scheme are inequitable, compatible with the aforementioned directive?'

20. The referring court states that, on the basis of its own case-law,[5] the authorisation would not be legally binding for the purposes of the setting of charges. Paragraph 19b of the LuftVG creates a public-law relationship only between the supervisory authority and the airport managing body in its capacity as recipient of the authorisation. As the link between the managing body and the airport users is governed by private law, the remuneration agreed between the parties is valid even in the absence of the authorisation.

21. It explains that, according to civil case-law, it falls to the civil courts, which exercise powers of review as to equity under Paragraph 315 of the BGB, to review the amount of the charges at issue.

22. Nonetheless, it could be argued that the administrative courts have jurisdiction to hear and determine (and, hence, that the applicant has standing to bring) a direct action against the aforementioned authorisation in the following cases:

– if the authorisation were regarded as laying down between the parties unalterable standard contract terms such as to prevent them from agreeing charges different from those indicated by the supervisory authority;

– if Paragraph 19b of the LuftVG granted airport users individualised protection such as to confer on them a direct interest superior to that held by the public in general.

23. The referring court goes on to say that, in the light of the judgment in *CTL Logistics*,[6] it is open to question whether Paragraph 315 of the BGB is a suitable vehicle for satisfying the requirements of the Directive. If airport users were found not to have a right of action under civil law to protect their rights, they would have no alternative means of defending their interests, which would be contrary to the principle of effective judicial protection laid down in the German Basic Law.

24. It points by way of a solution to an interpretation of Paragraph 19b of the LuftVG, consistent with the (German) Constitution, that would have the effect of recognising users as having standing to bring proceedings under Paragraph 42(2) of the VwGO.

B. Preliminary observations

25. The information contained in the documents before the Court indicates that, in Germany, it is the supervisory authority which authorises airport charges. The user is able to challenge the authorisation only *indirectly*, by way of an action under civil law, meaning that any finding upholding such an action would be of benefit exclusively to the user itself. The airport managing body, on the other hand, is able to challenge the authorisation *directly*, by way of an action under administrative law.

5 It takes as its reference the judgment of 8 July 1977, which concerned Paragraph 43 of the former air traffic licensing regulation.

6 Judgment of 9 November 2017, C-489/15, 'judgment in *CTL Logistics*', EU:C:2017:834.

26. In that context, the referring court's doubts revolve around whether the administrative courts might have jurisdiction to hear and determine a challenge which a user (an airline) brings *directly* against a system of charges approved by the supervisory authority. This would be the case if the parties were unable to negotiate prices different from those established by that authority and if the judicial defence of users' rights conferred on the civil courts were considered incompatible with the Directive.

27. The Court of Justice cannot embark upon an interpretation of provisions of domestic law, nor determine which national courts have jurisdiction to determine which matters or what rules govern the standing of applicants in the corresponding civil or administrative proceedings. It can, however, provide guidelines on the interpretation of EU law that will enable the referring court to draw the necessary inferences.

28. Before I turn to analysing the two questions referred for a preliminary ruling, I think it appropriate to consider whether the Directive grants airport users a legitimate interest in objecting to the way in which charges have been set.

C. Whether users have a legitimate interest in challenging airport charges

29. During the gestation of the directive on airport charges, the Commission framed its proposal within 'a wider initiative that places the focus on airports and that [sought] to promote efficient airport operations and the optimal use of scarce capacity'.[7] In particular, it pointed to the importance of charges for the efficiency of the airline business.[8]

30. The competitiveness of EU air carriers therefore stands at the centre of the design of the airport charging system.[9]

31. The options available to the Commission were, inter alia, as follows:

– to give the Member States competence to regulate this matter;

– to provide for maximum intervention, that is to say a regulatory system uniformly applicable throughout the EU under which airport charges would be determined and collected in accordance with a single method of calculation;

– to establish, as an intermediate position, a general framework, informed by a number of common principles, that would make it easier for national regulators to adapt the Directive to national circumstances.[10]

32. It was the third option, as set out in recital 2 of the Directive,[11] that prevailed. So it is that, when it comes to charges, the relationship between airport managing bodies and users must comply with a number of basic principles that are defined in the text of that directive.

7 Proposal for a Directive of the European Parliament and of the Council on airport charges (presented by the Commission) SEC(2006) 1688; SEC(2006) 1689; COM(2006) 820 final.

8 'EU air carriers operate in a strongly cyclical economic environment with increased international competition … The entire aviation supply chain should become as competitive as possible in order to ensure the continued competitiveness of the whole EU economy. Airport charges are an important link in this chain as they account for between 4% and 8% of the major EU carriers' operational costs.'

9 The German Government is aware of this when it recognises in its observations (paragraph 54) the importance of the level of charges both to airports and to air carriers as a factor in the latter's choice of destinations.

10 Focus paper on the impact of the Proposal for a Directive of the European Parliament and of the Council on airport charges (presented by the Commission). SEC(2006) 1688, paragraph 6.2.2. (http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2006/1688/COM_SEC(2006)1688_EN.pdf).

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33. Those principles are, more specifically, non-discrimination, transparency and participation by those concerned in the procedure.

34. As regards *non-discrimination*, Article 3 of the Directive provides that charges must not be such as to 'discriminate among airport users'. This is a rule the purpose of which is to guarantee fair competition between the air carriers using the airport, thus making it impossible for some carriers to be favoured over others in such a way as to enable them to overtake their competitors by offering services that are more attractive to the market. [12]

35. As regards the *participation of users* in the charge-setting procedure, Article 6 of the Directive requires that consultations between users and managing bodies be held periodically — at least once a year — (paragraph 1) and in the event of any change to the system or the level of airport charges (paragraph 2). [13]

36. The final decision adopted may take two forms, as provided for in Article 6 of the Directive, depending on whether:

– the airport managing body is competent to agree the charges (paragraph 2). In that event, its decision is open to appeal, with suspensory effect, to the supervisory authority;

– competence to 'determine or approve airport charges or their maximum level' lies with the supervisory authority (paragraph 5(a)). In that event, the consultation procedure provided for in paragraphs 1 and 2 of Article 6 [14] will have taken place before the proposal which, in Germany, the airport managing body will submit to the independent authority.

37. Finally, the Directive calls for *transparency* in Article 7. Although that provision refers only to the consultations under Article 6(1), the principle of transparency also applies to the procedure for changing the system or the level of charges set out in paragraph 2. This is why the airport managing body is required to submit the proposed change to the users, 'together with the reasons for the proposed changes'.

38. At the same time as it calls for charges to be subject to the principles which I have just listed, the Directive refers in Article 6 to the *remedies* available to airport users for challenging decisions of the managing body which, in their opinion, do not comply with those principles.

39. Those remedies are correlative to the rights granted to users. If the Directive states that they must be guaranteed informed participation in the decision-making procedure (to the extent that, if the managing body takes issue with their claims, it must issue a reasoned decision), it is at the same time conferring on them a *right* that must be respected. The EU legislature's wish was that the position of users should operate as an indispensable element in the adoption of the final decision.

'It is necessary to establish a common framework regulating the essential features of airport charges and the way they are set, as in the absence of such a framework, basic requirements in the relationship between airport managing bodies and airport users may not be met.'

12 During the legislative procedure, that rule was supplemented to make it clear that the principle of non-discrimination did not prevent the introduction of modulations to charges on objective and transparent public-interest grounds (Legislative Resolution of the European Parliament of 15 January 2008 on the Proposal for a Directive of the European Parliament and of the Council on airport charges (COM(2006) 0820 — C6-0056/2007 — 2007/0013(COD)). Article 3 of the Directive refers to those modulations on the basis of 'relevant, objective and transparent criteria'. In a similar vein, the Directive allows the level of charges to be varied in the event of different infrastructures or levels of service. However, these cannot be offered in a discriminatory manner (recital 15 and Article 10 of the Directive). Access is to be decided upon on the basis of objective criteria to be 'developed by an airport managing body'.

13 If no agreement is reached, the airport managing body is required to justify its decision with regard to the views of the users.

14 The consultations do not end with the provisions contained in Article 6: according to Article 11(7), 'when undertaking an investigation into the justification for the modification of the system or the level of airport charges as set out in Article 6, the independent supervisory authority shall have access to necessary information from the parties concerned and shall be required to consult the parties concerned in order to reach its decision'. Therefore, be it in the context of an appeal against the decision of the airport managing body or in the course of the decision-making process itself, the supervisory authority must take into account the opinion of the airport users.

40. The same is true of the principles of transparency and non-discrimination: any breach of those principles may be relied on by users and, if appropriate, lead to the annulment of the decision approving the charges. If the latter is, for example, contrary to (the requirement of) equality as between air carriers, there is little doubt that the carrier adversely affected by that discrimination will have a remedy against it.

41. That potential remedy may also tackle other components of the system of charges introduced. The 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.[15] 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.

42. Article 6 of the Directive provides that appeals against decisions of the managing body, where this is competent to approve charges, are to be brought before the supervisory authority. That provision does not say, however, that the decision adopted by that authority in adjudication of such appeals may itself be challenged before the courts.

43. We have to look to Article 11(7), *in fine*, of the Directive to find a reference to the judicial review of acts issued by the supervisory authority. In accordance with that provision, the decisions of that authority 'shall have binding effect, without prejudice to parliamentary or judicial review, as applicable in the Member States'.

44. The wording of the final sentence of Article 11(7) of the Directive poses at least two problems:

– The first is that paragraph 7 is concerned, in principle, with a specific type of act of the supervisory authority, not with all such acts.[16] In particular, it is confined to acts adopted after an 'investigation into the justification for the modification of the system or the level of airport charges …'.

– The second is that the literal wording of that provision would appear to allow Member States to subject the decisions of the supervisory authority to parliamentary rather than judicial review.[17]

45. To my mind, those problems can be resolved, at a higher level, by reference to the provisions of EU primary law. As a general rule, the second subparagraph of Article 19(1) of the TEU requires Member States to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law'. To much the same effect, Article 47 of the Charter of Fundamental Rights of the European Union states that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy'.

46. Inasmuch as the Directive confers on airport users both a legitimate interest and genuine subjective rights, the application of those two provisions of higher-ranking law compels Member States to introduce procedures to ensure the effective judicial protection of such users in this specific field.

15 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'.

16 The Proposal for a Commission Directive included all acts adopted by the supervisory authority.

17 This second problem does not arise in Germany, which has established a system for the judicial review of decisions adopted by the supervisory authority. The issue now, as the referring court points out, is whether the procedures for exercising that review are governed by the Directive. At the hearing, the Commission recognised that parliamentary review was not an alternative to judicial review, which must always remain available to users.

47. The point of uncertainty raised by the referring court is whether the mechanism just so provided for in German law is sufficient to provide effective judicial protection for the rights and interests which the Directive confers on airport users.

D. Whether the managing body and the users may agree charges different from those approved by the supervisory authority (first question referred)

48. As I have already explained, under the German system, the airport managing body issues a proposal and the supervisory authority approves the airport charges.

49. The German legislature thus opted for the alternative provided for in Article 6(5)(a) of the Directive. In keeping with that option, it is bound to recognise the decisions of the supervisory authority as having binding effect, since this is the consequence that justifies and gives useful effect to the scheme of the Directive.

50. It would make little sense for Article 5 of the Directive to call for a 'common and transparent charging system' at airports serving 'the same city or conurbation' if it were permissible for individual agreements to fall outside the application of that provision in relation to one or more users.

51. Such individual agreements would not only detract from the *common* nature of the charging system but would also, from the point of view of transparency, introduce a number of insurmountable distortions.

52. After all, users are to have access to information on 'the components serving as a basis for determining the system or the level of all charges levied at each airport by the airport managing body' (Article 7(1)).[18] Such components include, for example, details of costs and charges. There would be no point in providing information on, for example, the revenue from the various charges and the cost of the services covered by them (Article 7(1)(d)) if that parameter were dispensed with after the charging system had been approved.

53. Even when providing for services to be 'differentiated', as it does in Article 10, the Directive sets out general grounds for so doing, but does not permit customisation in relation to certain users. Under that provision, the managing body may offer personalised services, in which case the level of charges may vary 'according to the quality and scope of such services and their costs or any other *objective and transparent justification*'. Those 'differentiated airport charges', however, form part of the same general system that is approved (in Germany) by the supervisory authority, which predetermines the content of that system, the components of which are not subject to individualised negotiation.

54. At the hearing, there was some discussion about whether the airport managing body and users can agree charges where the supervisory authority approves the *maximum level* of such charges (Article 6(5)(a), *in fine*, of the Directive). The question would be whether, in such circumstances, the charges could be negotiated individually or would have to be negotiated with all of the airport users.[19]

18 Article 6(2), in reference to changes, talks about 'the reasons for the proposed changes'.

19 I do not think that this discussion is relevant to the settlement of the present case, since, according to the order for reference, the supervisory authority approved the airport managing body's proposal, which would mean that no maximum level was laid down. At the hearing, it was emphasised that the scale of charges consists of various components, each capable of economic valuation, the sum of which makes up the final result. Charges below the maximum will necessarily comply with these parameters.

55. The arguments set out above militate in favour of an answer in the affirmative, provided that: (i) the maximum laid down is observed; (ii) the negotiation is in any event collective; (iii) any air carrier is able to benefit from the same charge as has been granted to one or more other carriers at a level below the approved maximum; and (iv) the airport managing body's agreement with users is subject to subsequent review by the supervisory authority. Only in this way are the principles that inform the Directive, in particular non-discrimination, safeguarded. [20]

E. The German system of judicial protection and its compatibility with the Directive (second question referred)

56. The key features of the German system, as they are set out in the order for reference, can be summarised as follows: [21]

– The rules of civil law govern the contractual relationship between the users and the airport managing body.

– Disputes over charges between the two parties must be resolved before a civil court. The court will adjudicate on the basis of 'equitable criteria', seeking to strike a balance between the objective economic interests of each contracting party by reference to the subject matter of the agreement and the significance of the performance for which the price (charge), which must represent reasonable consideration, is levied.

– The airport managing body enjoys a margin of discretion in determining the 'reasonable consideration'. The civil court attempts to achieve contractual equity: if it takes the view that the charges are too high, it may indicate an equitable amount for them, with *ex tunc* effect.

– The court's decision has only *inter partes* consequences. [22]

57. Since the national mechanisms for protecting the rights of airport users are not harmonised, each Member State is competent to establish those mechanisms in accordance with the principle of procedural autonomy and the further principles of equivalence and effectiveness.

58. Prima facie, the system of judicial protection designed by the German legislature could be regarded as legitimate if Paragraph 315 of the BGB provided a procedural framework for defending users' rights that were appropriate from the point of view of both process (information, consultation and participation) and substance (non-discrimination and consistency between charges and costs).

59. To my mind, however, it is not.

60. The foregoing summary description supports the inference that the system designed by German law for challenging airport charges is the same as that which was examined in the judgment in *CTL Logistics*, which was concerned with similar issues in the context at that time of German railway infrastructure charges. The parallels between the two systems require us to take that precedent as a point of reference, given that the issue in that case too was the application of Paragraph 315 of the BGB to resolve the disputes in question.

20 The German Government appears to accept this as a matter of fact when, in its written observations (paragraph 35), it states that it is possible to depart from the scale of charges provided that the maximum level laid down by that scale is observed and account is taken of the principles of transparency, objectivity and non-discrimination

21 Paragraphs 22 and 38, essentially.

22 Notwithstanding that other users, on becoming aware of the civil court's judgment, may bring their own actions in order to benefit from the same relief.

61. By way of objection to the notion of extrapolating the case-law established in the judgment in *CTL Logistics* to this dispute, it has been argued that the rules governing railway infrastructure usage and the system of railway infrastructure usage charges are not comparable to the rules and system applicable to airport charges.

62. It is true that there are regulatory differences between the railway and aviation sectors. Whereas, in the case of the former, Directive 2012/34/EU[23] covers both the allocation of railway infrastructure capacity (and service facilities) to railway undertakings and the setting of charges, in the aviation sector, the legislation appears to be more disparate. An examination of the foundations of the two bodies of legislation, however, shows that the similarities are greater than the differences when it comes to charges.

63. In both cases, (railway or airport) facilities have limited capacity and that capacity has to be made available to users in a non-discriminatory manner. Both sectors retain the distinction between the infrastructure and services which the administrator (railway infrastructure manager or airport managing body) must make available to the user (railway undertaking or air carrier), on the one hand, and the services that may be provided by a third party (railway service facility operator or groundhandling agent), on the other.

64. The systems of railway and airport charges share an undeniable parallel in relation to the principle of non-discrimination.[24] A corollary of the requirement of equality as between user undertakings is the need for decisions on charges to affect all those concerned in the same way. The guarantee of a unity of approach to the setting of charges means that there must be a supervisory authority that has the last word.

65. The same parallel is present in the function of that supervisory authority. In the railway sector, its powers are similar to those which have already been described in relation to airport charges. In particular, Articles 55 to 58 of Directive 2012/34 deal with the regulatory body before which undertakings providing services may challenge (Article 56) the system of charges or the level or structure of those charges.

66. I take the view, therefore, that a comparison of the legislative rules governing charges in the railway area and the airport sector respectively reveal an index of coincidence such as to all allow the judgment in *CTL Logistics* to be applied to airport charges.

67. Starting from that premiss, I shall highlight how the answer given by the Court of Justice in the judgment in *CTL Logistics* can be transposed to this case. The reasoning on which that judgment is based is articulated through seven successive arguments (paragraphs 69 to 102), of which I shall focus in particular on four.

68. First, the Court of Justice held that 'the assessment of fairness in each particular case runs counter to the principle of non-discrimination enshrined in Article 4(5) and recital 11 of Directive 2001/14'. In order to substantiate that assertion, it went on to say that, 'by insisting exclusively on the economic rationality of the individual contract, the application of Paragraph 315 of the BGB disregards the fact that only if the charges are set on the basis of uniform criteria can it be ensured that the charging policy is applied in the same way to all the railway undertakings'.[25]

23 Directive of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32). This repeals Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29).

24 So far as concerns airport charges, Directive 2009/12 refers to this principle in Article 3. In the case of railway charges, Directive 2012/34 refers to it in Article 29(3): 'Infrastructure managers shall ensure that the application of the charging scheme results in equivalent and non-discriminatory charges for different railway undertakings that perform services of an equivalent nature in a similar part of the market'.

25 Judgment in *CTL Logistics*, paragraphs 70 and 74.

69. Now, that same logic leads to the conclusion that, in the case of airport charges, the dispute resolution mechanism applied by the civil courts, which is based on equitable criteria and judgments effective only *inter partes*, is not consistent with the *common* system and the principle of non-discrimination set out in Article 3 of the Directive.

70. Secondly, 'various decisions of independent civil courts, possibly not harmonised by the case-law of the higher courts, would take the place of the unity of the review carried out by the competent body, subject, if appropriate, to a later review carried out by the courts hearing the actions brought against that body's decisions, which are the administrative courts, … The result is a juxtaposition of two non-coordinated routes to decisions, which is in clear contradiction of the objective pursued in Article 30 of Directive 2001/14'. [26]

71. The position is similar in the airport sector. The unity of approach exhibited by the supervisory authority, whether in approving the system of charges directly itself or overseeing by way of appeal the system approved by the airport managing body, is compromised by a system which does not allow the acts of that authority to be challenged directly by users and provides instead for individual civil actions having *inter partes* effects. [27]

72. Thirdly, under the two-route system for challenging railway charges, the supervisory authority was not compelled to bring the system of charges into line with the decision of the civil court, in accordance with Paragraph 315 of the BGB, since 'no obligation of that sort flows from the provisions of Directive 2001/14 concerning the regulatory body'. [28]

73. The same is true of airport charges. The supposition that the regulatory authority 'should merely react to individual decisions already given by the civil courts on the basis of Paragraph 315 of the BGB' [29] is, in this sector too, contrary to the task conferred on the supervisory authority.

74. Fourthly, the Court of Justice emphasised that, in the railway sector, applying the mechanism based on jurisdiction under two branches of law '[would not uphold] the fact that the decisions taken by the regulatory body are binding on all parties concerned, as follows from the second subparagraph of Article 30(5) of Directive 2001/14. … It would run counter to that principle for judgments delivered by the civil courts, if necessary on the basis of criteria set by the legislation concerning the calculation of charges, to have effects only on the parties to the disputes brought before those courts'. [30]

75. That argument is, once again, applicable to disputes which users may raise with respect to airport charges, in the absence of *erga omnes* effects on the part of the civil-law judgments that dispose of them.

76. It falls within the remit of the civil court, according to Paragraph 315 of the BGB, to make a modulation *ex aequo et bono* to the synallagmatic aspects the contractual relationship. On that basis, it could even assess the proportionality as between the costs of the service provided and the price (charge).

26 *Ibidem*, paragraph 87. The underlying situation is assessed in more detail in the Opinion of Advocate General Mengozzi in *CTL Logistics* (C-489/15, EU:C:2016:901), points 1 and 9.

27 According to the order for reference, since the administrative-law relationship is regarded as existing only between the supervisory authority and the airport managing body, the latter alone has standing to bring an action under administrative law.

28 Judgment in *CTL Logistics*, paragraph 91.

29 *Ibidem*, paragraph 92.

30 *Ibidem*, paragraph 94.

77. It is, however, logical to assume that the jurisdiction of a civil court would not extend to other crucial aspects of the process that culminated in the approval of the charge, such as matters relating to the formation of the will of the decision-making body or any formal defects that may have been relevant to the shaping of the content of the administrative decision. [31]

78. Accordingly, users — whom the German civil courts deny standing to challenge before them decisions adopted by the supervisory authority — would not be able to apply to any court to obtain a review of those elements, which are of a markedly administrative nature and play a decisive role in the approval of charges.

79. Neither is there any indication that the effects of a civil-law judgment given in an individual dispute can be extended to other users. It would seem that the only avenue available to other users would be to bring new actions before the civil courts. The effectiveness of the Directive would thus be dependent upon individual users' decisions to bring successive claims, which would themselves be subject to uncontrollable contingencies. This does not guarantee the preservation of a common system of charges based on non-discrimination, transparency and the participation of users.

80. It follows from the foregoing that users must have available to them a judicial remedy that enables them to challenge a decision of the supervisory authority without restrictions.

81. At the hearing, some of the parties raised the objection that allowing users to challenge the decisions of the supervisory authority before the administrative courts might paralyse the collection of airport charges, given the procedural rules on the suspension of acts under appeal.

82. That objection is untenable. First, it would fall to the national legislature to introduce, in this as in other sectors, the procedural rules necessary to avoid a widespread paralysis in the levying of charges. Secondly, as one of the parties recognised at the hearing, the supervisory authority is empowered under the national legislation in force to require the payment of such charges in any event, notwithstanding any challenge to its decisions before the courts, if this is necessary on public-interest grounds.

IV. Conclusion

83. In the light of the foregoing lines of reasoning, I propose that the Court of Justice respond to the Bundesverwaltungsgericht (Federal Administrative Court, Germany) as follows:

(1) Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges precludes the airport managing body and airport users from agreeing airport charges at variance with those approved by the independent supervisory authority.

(2) Directive 2009/12 precludes the application of national legislation, such as that at issue in this dispute, which, according to the prevailing interpretation established by case-law, confers jurisdiction on the civil courts to dispose on a case-by-case basis and in accordance with equitable criteria claims brought by users in connection with airport charges approved by an independent supervisory authority, and, at the same time, prevents airport users from challenging the decisions of that authority directly.

31 As was made clear at the hearing, the procedure provided for in Paragraph 315 of the BGB is confined to analysing the equitable balance between the respective acts of performance of the parties but does not extend to examining the authorisation approving the system of charges.