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### 2011-2016 Airport Charges at Brussels Airport Under Judicial Review

The Brussels Airport Company NV (i.e. the operator of Brussels Airport, hereafter “BAC”) has published the airport charges that BAC applies as from 1 April 2011 until 31 March 2016 (hereafter the “period 2011-2016”) for “regulated activities”.

The “regulated activities” are landing and take-off of aircraft, parking of aircraft, passenger use of airport installations, aircraft fuel supply, the security of passengers and airport installations.1

The process of fixing these tariffs is complex and it seems that the main (judicial) hurdle is yet to be overcome.

**Regulatory framework**

The regulatory framework regarding the tariff system (i.e. the calculation of the airport charges) and the tariff control formula (i.e. the calculation of the annual tariff review) of the regulated activities at Brussels Airport is laid down in a number of Belgian Royal Decrees.2

**Consultation process**

Every five years, after consultation with the airport users, the operator of Brussels Airport is under an obligation to propose a tariff system and a tariff control formula that it intends to implement for the next five years regarding regulated activities.3

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1 See art. 1, 3° of the Royal Decree of 21 June 2004 granting the operating license of Brussels Airport to the limited company BAC.

2 It concerns the following two decrees: (i) the Royal Decree of 27 May 2004 transforming the Brussels International Airport Company (BIA) into a private limited company; and (ii) the Royal Decree of 21 June 2004 granting the operating license of Brussels Airport to the limited company BAC.

The proposed system and formula must (i) reflect the incurred costs; (ii) guarantee a reasonable profit margin for the recovery of invested capital; and (iii) be in line with the tariff policy of reference airports.

*Regulator*

Both the proposed tariff system and the proposed tariff control formula must be submitted to the Regulatory Service on Rail Transport and on the Operation of Brussels Airport (hereafter the “Regulator”).

The Regulator is a government agency that supervises the operating license of Brussels Airport and in particular the airport tariffs that Brussels Airport is allowed to charge for the services it provides to passengers and airlines.

Under certain circumstances, the Regulator can require the proposed tariff system and/or the formula to be modified (e.g., if the tariffs would be discriminatory and/or non-transparent, if the formula violates the operation license, etc.).

Moreover, the proposed tariff control formula, as well as any modification of this formula is subject to the approval of the Regulator. If the formula is not approved by the Regulator, the latter is entitled to impose a different formula.

In addition, the tariff control formula, as well as any modification of this formula determined by the Regulator is subject to the approval of the Belgian Minister or Secretary of State responsible for Mobility (hereafter the “Mobility State Secretary”).

*Case at hand*

In October 2010, BAC submitted to the Regulator its proposed new tariff system and tariff control formula that it would like to apply during the period 2011-2016. This proposal contained a package of development plans for said period, including but not limited to the plan to build a new “Pier A West”, offering new gate positions for aircraft parking.

October 2010: BAC proposes a formula of “CPI + 0,9%”

To support its various development plans, BAC proposed the following tariff control formula:

(i) a yearly increase of its tariffs for regulated activities of 0,9% in excess of the consumer price index (hereafter “CPI”); and

(ii) the implementation of an additional tariff increase starting in April of the year in which the works regarding Pier A West would commence, at 0,25% for each 10 million Euro invested.

BAC also proposed new unit tariffs for among others landing and take-off, parking, passengers, assistance of passengers with reduced mobility and security.

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6 Articles 34 §4 and 35 §3 of the Royal Decree of 27 May 2004.
7 Art. 34 §3 of the Royal Decree of 27 May 2004.
8 Art. 34 §7 of the Royal Decree of 27 May 2004.
9 See the Regulator’s Decision “D-2010-02-LA” of 14 December 2010, p. 39-40 (unofficial translation).
December 2010: Regulator proposes a formula of “CPI – 0.55%”

On 14 December 2010, the Regulator decided not to accept the proposed tariff control formula and the tariffs that were submitted by BAC.

(i) As to the proposed formula of CPI + 0.9%, the Regulator held that the application of said formula would result in an unacceptable profitability of the regulated activities “which would exceed by far the acceptable and reasonable margin of 3 to 4%”. The Regulator also criticized the fact that a number of costs would have been wrongly allocated to airlines and passengers.

Therefore, the Regulator proposed an annual tariff revision of “CPI – 0.55%”.

In essence, the Regulator did not have any principal objections to the additional increase at 0.25% for each 10 million Euro invested in the Pier A West-works. However, the Regulator insisted on being provided with detailed information (offers, invoices, etc.) supporting such increase.

(ii) As to the proposed tariffs, the Regulator commented in particular on the proposed unit tariff at 2.12 Euro to be applied to each landing and take-off.

The Regulator took the view that the unit tariff should be reduced to 1.98 Euro.

The rationale behind this criticism is that in the period 2006-2011, BAC allegedly failed to spend approximately 27 million Euro of BAC’s budgeted investments for said period. According to the Regulator, this amount should be reimbursed by BAC, since the tariffs for the period 2006-2011 were calculated on the basis of a fully exhausted investment budget. The Regulator held that said amount of 27 million Euro could be reimbursed by reducing the unit tariff for landing and take-off charges to 1.98 Euro during the period 2011-2016.

January 2011: Mobility State Secretary fixes a formula of “CPI + 0.68%”

Rather than lodging an appeal against the decision of the Regulator with the Court of Appeal of Brussels, at the end of December 2010 BAC lodged an internal appeal (“willig beroep” / “recours hiérarchique”) with the Mobility State Secretary.

Following further discussions and investigation, the Mobility State Secretary decided on 12 January 2011 to “approve” a yearly tariff increase of CPI + 0.40%. The tariffs would be further raised over the period 2011-2016 by an annual increase equivalent to 0.28% on the basis of investments in various projects. In total, the annual tariff increase would amount to CPI + 0.68%.

BAC’s “List of charges and fees effective as from 1 April 2011” published on its website mentions a unit tariff at 2.12 Euro applied to each landing and take-off. It could be derived from this that the Mobility State Secretary did not agree with the Regulator’s view on reducing said unit tariff to 1.98 Euro and hence approved BAC’s proposed unit tariff at 2.12 Euro.
Proceedings before the Council of State

At the beginning of March 2011, the Regulator lodged an administrative appeal against the Mobility State Secretary’s decision of 12 January 2011 with the Council of State (“Raad van State” / “Conseil d’Etat”). This appeal seeks the suspension and annulment of said decision.

The petition of appeal is not publicly available. However, the Regulator’s website reveals that the Regulator’s main argument is that, contrary to the Regulator, the Mobility State Secretary would not have the (statutory) authority to impose a tariff control formula.\(^{14}\)

For the rest, the Regulator’s public comments are silent on the exact underlying legal arguments in support of its judicial action. It could be that the Regulator relies among others on article 34 §7 of the Royal Decree of 27 May 2004. Said article holds that a tariff control formula determined by the Regulator is subject to the approval of the Mobility State Secretary, but does not hold that the latter is entitled to (unilaterally) impose a tariff control formula.\(^{15}\)

In light of the above, there is currently legal uncertainty on the tariff revision formula to be applied as from 1 April 2012.\(^{16}\) If the Council of State would annul the decision of the Mobility State Secretary, it seems that the Regulator’s formula of CPI - 0.55% will at least provisionally apply.

At this stage, it is premature to estimate when the Council of State would render its judgment on the merits.

Brussels Airport Groundhandling Tender Procedure Conducted Under New Regulation

In light of the forthcoming selection of the groundhandlers having air side access at Brussels National Airport, the Belgian government issued a new Royal Decree dated November 6, 2010 (the “Decree”).\(^{17}\)


The Decree is an attempt to balance the interests of the various stakeholders at Brussels National Airport, including the airport users (i.e., the carriers), Brussels Airport Company, the groundhandlers (both those currently having air side access and those being denied such access), groundhandlers staff, etc.

Brussels Airport is currently organizing a tender procedure in view of selecting two groundhandlers for passenger services and for freight services. Proposals were due for end of March 2011 and the awards are expected for May 2011. At this date, Aviapartner and Flightcare each hold a seven year license (covering both passenger and freight services) which expires end of October 2011.

Below, a general overview of the Decree can be found.

The selection procedure for restricted groundhandling services

The restricted groundhandling services are put on the market by way of an invitation to tender, published in the Official Journal of the European Union.

Standard conditions or technical specifications to be met by the suppliers of groundhandling services are to be established following consultation with the Brussels Airport Users’ Committee.


\(^{15}\) Art. 34 §7 of the Royal Decree of 27 May 2004.

\(^{16}\) The publicly available documents on the Regulator’s appeal before the Council of State are silent on the unit tariff for landing and take-off charges. As mentioned above, BAC applies a unit tariff at 2.12 Euro while the Regulator decided on a unit tariff of 1.98 Euro. It is likely that the Mobility State Secretary approved BAC’s unit tariff at 2.12 Euro per decision dated 12 January 2011 and hence that the Regulator’s appeal before the Council of State equally concerns said unit tariff.

\(^{17}\) See Royal Decree dated November 6, 2010 regarding access to the ground handling market at Brussels National Airport published in the Belgian State Gazette dated November 17, 2010.
The selection criteria to be laid down in the standard conditions or technical specifications must be relevant, objective, transparent and non-discriminatory. The Decree specifically sets out that the following selection criteria are to be listed in the standard conditions or technical specifications:

- A quality system and safety management system;
- Guarantees regarding observance of the obligations on safety, security and the environment;
- Economic and financial guarantees;
- The staff deployed, staff training and the equipment used;
- The social policy and guarantees regarding labor legislation including collective bargaining agreements among others in the area of preserving employees’ rights in case of transfer of undertakings; and
- Guarantees to put equipment at the disposal of users and/or the airport manager when the selected candidate would be unable to deliver the groundhandling services.

Following consultation with the Users’ Committee, the suppliers of groundhandling services shall be chosen by Brussels Airport. Such selection remains subject to certification by the Belgian Aviation Authorities (see further).

A new selection is to take place in the following instances:

(i) At the end of the service period covered by the call for tenders (in this instance seven years covering 2011 till 2018);
(ii) In case of non-certification of the selected candidate by the Belgian Aviation Authorities;
(iii) When the selected candidate ceases its operations prior to the expiry of the service period covered by the call for tenders; and
(iv) When the business of a selected candidate is acquired by another selected candidate prior to the expiry of the service period covered by the call for tenders.

The number of selected candidates
While the Decree confirms the general principle of unlimited access to groundhandling, the Decree also makes use of the possibility provided by the Directive to restrict the number of service providers in a number of specific groundhandling categories:

(i) Fuel and oil supplies are limited to two providers.
(ii) For passenger flights, the following services are limited to two providers:
- Luggage handling;
- Catering transport; and
- Ramp handling (excluding crew transport between the aircraft and the airport buildings).

The number of service providers is increased to three if in the two years preceding the publication in the Official Journal of the EU of the call for tenders, the average number of passengers has reached or exceeded 24 million passengers. This threshold was not met at the time the current call for tenders was published, so the number of service providers will be limited to two.

18 By law, these selection criteria are deemed to be relevant, objective, transparent and non-discriminatory (see article 11 par. 1 lit. a. of the Decree).
19 The Decree also addresses the scenario where Brussels Airport would itself provide similar ground handling services and / or has direct or indirect control over an undertaking which provides such services and / or has an involvement in any such undertaking, in which cases the selection would be done by the Belgian Aviation Authorities (“Directoraat-generaal luchtvaart” / “Direction générale transport aérien”).
In 2010, the number of passengers at Brussels National Airport amounted to 17.2 million, a 1.1% increase compared to 2009. The all time passenger record stands at 21.6 million for 2000, while the current airport infrastructure would be capable to welcome 28 million passengers on a yearly basis.

(iii) For freight flights, the following services are limited to two providers:

- Ramp handling of full freight flights (excluding crew transport between the aircraft and the airport buildings); and
- Physical handling of freight and post between the aircraft and the airport buildings, both for departures, arrivals and transit flights.

The number of service providers is increased to three if in the two years preceding the publication in the Official Journal of the EU of the call for tenders, the average weight of freight has reached or exceeded 650,000 ton. This threshold was not met at the time the current call for tenders was published, so the number of service providers will be limited to two.

In 2010, total freight stood at 476,100 ton, up by 6% compared to 2009. By comparison, annual freight was at 639,400 ton in the regional airport of Liège, while Brussels National Airport lost significant DHL traffic over the last years.

Self handling

Self handling is defined as a situation where a user (i.e., carrier) directly provides groundhandling services to itself without entering into a contract with a third party for the provision of such services.

For the purposes of the Decree, users do not qualify as a third party:

- in case one party holds a majority share in the other party; or
- in case one and the same entity has a majority share in both parties.

The Decree guarantees the possibility to undertake self handling except in the event that the Minister with competence in aviation matters would impose restrictions. According to the Decree, self handling can be limited up to two users in respect of the following services:

- Luggage handling;
- Ramp handling of passenger flights;
- Ramp handling of full freight flights;
- Fuel and oil supplies;
- Physical handling of freight and post between the aircraft and the airport buildings, both for departures, arrivals and transit flights; and
- Catering transport.

Restrictions imposed on self handling (if any) do not apply, among others, to the following:

(i) Crew transport between the aircraft and the airport buildings falls outside the scope of ministerial restrictions; and

(ii) So called “integrators” are not caught by ministerial restrictions.

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22 Interestingly, tonnage generated by “integrators” (for a definition, see further footnote 25) is excluded for the purposes of calculating total annual tonnage.
24 At the time this article was finalised, no relevant Ministerial Decree was published in the Belgian State Gazette.
25 Integrators are defined as users (i.e. carriers) (i) providing door step to door step services; and (ii) providing handling services to aircraft belonging to the integrator in ownership, through a lease or financial lease or aircraft operated under an international franchise or aircraft otherwise integrated in a transport concept (see art 2, 8° of the Decree).
Certification by the Belgian Aviation Authorities

The selected groundhandlers and those users opting for selfhandling are under an obligation to obtain a provisional or definitive certification by the Aviation Authorities within six months as of the entry into effect of a Ministerial Decree setting out the requirements regarding a variety of matters including:

- The financial situation of the undertaking concerned;
- The insurances with adequate cover;
- Safety and security of installations, aircraft, equipment, and/or people;
- Staff training;
- Protection of the environment;
- Observance of applicable labor laws;
- Reporting system on incidents; and
- The quality system and safety management system used.

The certification can only be denied, suspended or withdrawn in case the selected groundhandler or the selfhandler clearly does not meet the standards required and such for reasons attributable to such groundhandler or selfhandler.

A groundhandler effectively selected by Brussels Airport, which subsequently fails to secure certification by the Aviation Authorities, loses its selection automatically and without any indemnification. In such scenario, Brussels Airport will need to organize a new selection procedure for the remaining duration as set under the initial selection procedure.

Further ministerial limitations

In case of a lack of space or capacity at Brussels National Airport, the Decree leaves the possibility for the Minister with competence in aviation matters:

(i) to limit the number of service providers to one in respect of the above mentioned restrictive groundhandling service categories (i), (ii) and (iii); and

(ii) to limit the number of service providers in respect of the groundhandling service categories other than those mentioned above. In this event, the average annual number of passengers and the average annual weight of freight will determine whether there are two or three candidates to be selected as set out above.26

Finally, in case of a lack of space or capacity, the Decree also leaves the possibility to the Minister with competence in aviation matters to limit the number of self handlers in respect of groundhandling service categories other than those mentioned above.27

A ministerial decision limiting access to the groundhandling market needs to be well motivated and should also list the measures to be taken in view of removing the obstacles encountered (i.e., space or capacity constraints). The decision needs to be notified to the European Commission three months prior to becoming effective and, as a general rule, cannot last longer than three years.

Inability to offer groundhandling services

In case the selected service providers are “unable”28 to offer groundhandling services, Brussels Airport Company or a third party appointed by it, is entitled to perform groundhandling services for the benefit of the airport users. Prior provisional or definitive certification from the Aviation Authorities or prior approval of the executive officer of the Aviation Authorities is required.

Also, in this same scenario, the users themselves can apply self handling provided they have received the provisional or definitive certification from the Aviation Authorities or the prior approval of the executive officer of the Aviation Authorities.

26 To our knowledge no use was made of this possibility so far.
27 To our knowledge no use was made of this possibility so far.
28 The most likely scenario which comes to mind is a strike of the staff of a selected groundhandler.