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Vai all'indice

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Vai all'indice

indice sommario

Saggi

Interventi

Fatti e misfatti

Giurisprudenza al vaglio

THE RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON AIRPORT CHARGES AND ITS REPERCUSSIONS ON THE ITALIAN LAW SYSTEM

ANNA MASUTTI

This article focuses on a ruling of the Court of Justice of the European Union recognising the sole competence of the Independent Supervisory Authorities in the determination of airport charges.

Through the analysis of the ruling at stake and the identification of the peculiarities of the Italian law system, the article provides an overview of the main barriers in the implementation of directive 2009/12/EU on airport charges in the Italian legal system.

1. *The reasons behind the Court of Justice's ruling* — On 21 November 2019 the Court of Justice of the European Union (CJEU) rendered a decision on airport charges ([1]) ruling on the competence of the Independent Supervisory Authorities (ISA) as referred to in EU directive 2009/12 ([2]).

([1]) CJEU 21 November 2019, C-379/18, in *Recueil générale*, 2019, 1 ss., a judgment requested for a preliminary ruling from the Bundesverwaltungsgericht — Germany — Deutsche Lufthansa AG v. Land Berlin; for an overview on airport charges see V. STAMATIS, *Airport Competition Regulation in Europe*, Vol. XII, Netherlands, 2016; E. ORRÙ, *ART ed ENAC: regolazione, vigilanza e controllo nel settore dell'aviazione civile con specifico riferimento ai diritti aeroportuali*, in *Dir. Mar*. I/2019, 65; G. MASTRANDREA-B. BIANCHINI, *Aeroporti e concessioni aeroportuali. I contratti di programma in deroga,* in *Libro dell'anno del diritto* 2013; E. TURCO BULGHERINI, *L'attuazione della direttiva 2009/12/CE sui diritti aeroportuali: l'ENAC e l'autorità di regolazione dei trasporti,* speech in the proceedings of the seminar of 26th November 2013, Rome, 2013, 64 ss.; S. BUSTI-E. SIGNORINI-G.R. SIMONCINI (a cura di), *I diritti aeroportuali*, in *L'impresa aeroportuale a dieci anni dalla riforma del codice della navigazione: stato dell'arte*, Torino, 2016, 229.

([2]) Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges. Airport charges are defined in art. 2, § 4, as «*a levy*

The dispute originated when an air carrier, in its capacity as an airport user, contested the approval of a new system of airport charges for a German airport managed by the Land of Berlin. The latter, as the ISA, authorised a new system of airport charges with effect from 1 January 2015.

The air carrier had brought an action for annulment of the above-mentioned authorisation before higher administrative Court Berlin-Brandenburg, which declared the action inadmissible on the ground that the air carrier lacked standing to bring proceedings for the purposes of the German code of administrative court procedure.

Based on an agreement between private parties (airport user and airport operator), the air carrier — arguing that the charges were too high and did not meet the Air traffic act's requirements, which govern the procedure for drawing up fee schedules ([3]) — considered that directive 2009/12 would not preclude the establishment of airport charges other than those approved by the independent supervisory authority under letter *a* of the first sentence of art. 6, § 5 of that directive.

When the air carrier brought the action before the Federal administrative court, two questions have been referred to the EU 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 directi-

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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».

([3]) The Commission staff working document *Evaluation of the Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges* {SWD(2019) 291 final} establishes that «*airport charges represent the main component of airports' aeronautical revenues, which in turn account for more than half of airports' revenues (55% in 2014, according to ACI-Europe based on results reported by 221 airports*». The Commission working document also underlines that «*airport charges represent an operating cost for airlines. A recent study undertaken by ICF for ACI-Europe estimated that airport charges represent between 3% and 17% of airlines' total costs. The report suggests that for main full service carriers and low cost carriers airport charges represent 3%-12% of total costs, while they represent a higher share for regional carriers, which account for a small proportion of airline passenger market. In contrast, Airlines for Europe (A4E) claim that airport charges account for about 20% of airlines' total costs*».

ve 2009/12, in particular art. 3, art. 6, § 3 to § 5 and art. 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 system 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 system are inequitable, compatible with the aforementioned directive ([4])?

Emphasising the first question, the CJEU had to decide if directive 2009/12, in particular art. 3, art. 6, § 5, lett. *a* and art. 11, § 1 and § 7, must be interpreted as precluding a national provision (i.e. German) allowing an airport managing body to determine, together with an airport user, airport charges different from those set by that body and approved by the independent supervisory authority.

The decision rendered on 21 November 2019 by the CJEU states that independent supervisory authorities' decisions on airport charges must be considered as binding ([5]).

Specifically, the CJEU established that a national provision, allowing an airport managing body to agree with an airport user airport charges different from those set by that body and approved by the relevant national independent supervisory authority, violates directive 2009/12 since it would undermine the principles of consultation, transparency and non-discrimination of airport users as laid down in directive 2009/12. Hence, if a national provision, in implementing the European directive, envisages a mandatory procedure — by virtue of which the system of airport charges has to be approved by an ISA — that procedure must be considered mandatory for all users and agreements establishing individual airport charges would go against the principles of consultation, transparency and non-discrimination stated explicitly in the EU airport charges directive.

Consequently, the ruling states that directive 2009/12, namely art. 3, art. 6, § 5, lett. *a* and art. 11, § 1 and § 7 «*must be interpreted as precluding a national provision that allows an airport managing body to determine, together with an airport user, airport charges different from those set by that body and approved by the independent supervisory authority, within the meaning of that directive*».

For the CJEU, directive 2009/12 regulates both the essential features of airport charges and the way they are set, indicating the role and the powers

([4]) See point 33 of the judgment.

([5]) See point 41 of the judgment.

of the ISA, as the sole authority responsible for ensuring the correct application of the measures taken to comply with the directive.

With regard to the second question, the CJEU had to decide whether the directive aims at precluding an interpretation of national law whereby an airport user is prevented from challenging directly the decision of the ISA approving the charging system, but can bring an action against the airport managing body before a civil court and can plead — in that action — only that the charges determined in the charging system that that user must pay are inequitable ([6]). In deciding it, the Court reaffirmed the principle that although the last sentence of art. 11, § 7 of the directive lends itself to being interpreted as authorising the Member States to choose between parliamentary and judicial review, the parliamentary review cannot compensate the lack of judicial review.

Indeed, the basic principles underpinning directive 2009/12 may simultaneously be regarded as obligations of the airport managing body and as rights on which airport users can rely in Court in their capacity as «*parties concerned*», within the meaning of article 11, § 7, dir. 2009/12. Hence, a judicial review based on objective elements must be ensured to the airport users. The Court does not clarify if this result can be achieved by granting airport users the possibility to take administrative legal action but it affirms that the national legislation does not undermine the right to effective judicial protection provided one or more legal remedies capable to ensure the respect for an individual's rights ([7]).

2. *Landmark ruling on airport charges and future European Union initiatives* — The CJEU confirmed that consultations between airports with more than five million passengers per year, or the leading airport in each Member State ([8]), and airlines shall take place while determining their charges.

([6]) See point 54 of the judgment.

([7]) CJEU 13 March 2007, C-432/05, *Unibet*, in *Recueil général*, 2007, 19, 20, paragraphs 47 and 53.

([8]) The airport charges directive applies to all airports in the EU which handle at least five million passengers per year or, for those Member States with no airport reaching this threshold, to the largest airport in terms of passenger movements in that Member State. The airport charges directive is incorporated into the EEA agreement, as well as in the air transport agreement with Switzerland. In 2017, 89 airports (out of which 83 are located in the EU) are covered by the directive, capturing 85% of the passenger and 84% of the freight traffic in Europe (see the Commission staff working document *Evaluation of the Directive 2009/12/EC*, 3, 4).

In its decision, the CJEU recognized that article 11, § 1 of dir. 2009/12 accords to ISA an important role*: «It is apparent from that provision that the independent supervisory authority is responsible for ensuring the correct application of the measures taken to comply with that directive and to assume, at least, the tasks assigned under article 6 of that directive. Recital 12 of Directive 2009/12 also states that the intervention of that authority is meant to ensure that the decisions are impartial as well as to ensure the proper and effective application of that directive. Moreover, the independent supervisory authority is to ensure compliance with the principle of non-discrimination, in accordance with the first sentence of article 3 of Directive 2009/12*» ([9]).

The Court has recognized that airports, in accordance with art. 6 of the directive, must consult the airlines on proposed changes and take their views into account before any decision on charges is taken.

Furthermore, the ruling clarifies that airport users should not be restricted from challenging the decision of an ISA in a civil court. Indeed, the CJEU stated that directive 2009/12 must be interpreted as precluding an interpretation of national law whereby an airport user is prevented from challenging directly the ISA's decision approving the charging system.

The CJEU's ruling is of a fundamental importance in the application of directive 2009/12 on airport charges to all European airports with more than 5 million passengers per year, thus ensuring that they are set through a fair process of consultation, including transparency and non-discrimination for airlines and passengers.

The European Union has already established that directive 2009/12 has not fully delivered its objectives and further measures are necessary in order to ensure the independence and powers of the ISA. Earlier this year the European Commission conducted an assessment of directive 2009/12 where it highlighted the need to strengthen the directive to protect consumers. There are still many airports that charge prices that would otherwise not be achieved in a competitive market. The assessment confirmed that airlines operate in a highly competitive market ([10]) and that reductions in airport charges are passed on to consumers in the mid-to-long-term ([11]).

([9]) See point 43 of the judgment.

([10]) Following liberalisation and deregulation of the internal market, competition between airlines has intensified in the EU which has forced airlines to pursue the rationalisation of costs. Nowadays the competition between low cost carriers and full-service carriers is higher than historically, with a convergence of the services offered among these operating models. In parallel, with the liberalisation in the EU, competition on international air services markets increased with third countries with the goal of opening access to cross-border markets; the EU-US Open Skies Agreement signed

3. *The importance of the CJEU ruling for the Italian law system* — In order to analyse the importance of the above principles, it is worth summarizing the peculiarity of the Italian law system which, in implementing the above mentioned directive, has granted to some airports the possibility to derogate to the airport charges as determined and approved by the Italian ISA, named Autorità di Regolazione dei Trasporti (ART).

3.1. *Peculiarities of the Italian law system* — In 2009 the Italian legislator, with the aim of boosting the upgrading of airport system infrastructures (namely airports with traffic exceeding eight million passengers per year «the Italian Main Airports»), introduced art. 17, paragraph 34-*bis* of law decree 2009/78 providing for a more favorable derogation scheme to determine airport charges (the so called «dual till» model). The authority for the enforcement of such mechanism was ENAC (Italian CAA), which implemented it by entering into a specific agreement, the so called «Programme Contract» (PrA), with the Italian Main Airports (Milan, Rome and Venice).

In 2012, pursuant to directive 2009/12, the ART was established as ISA with the power to approve charging schemes and level of airport charges. ART carries out economic regulation as well as supervisory tasks, approving the charges and including methods of multi-year pricing, which ensure annual inflation adjustments ([12]).

Nevertheless, the previous system of programme contracts with ENAC exceptionally continued to apply to the Italian Main Airports ([13]).

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in 2007 allowed any EU or US airline to fly between any point in the EU and the US. Some emerging third countries airlines (e.g. Gulf airlines, Turkish Airlines) have increased, and continue to increase, their services to Europe (see the Commission staff working document *Evaluation of Directive 2009/12/EC*, 22).

([11]) In Europe, the market for the provision of air passengers and air cargo services is generally considered competitive. Therefore, it is expected that increases in airport charges or conversely lower airport charges would be, at least in part, passed through by airlines to passengers (see the Commission staff working document *Evaluation of the Directive 2009/12/EC*, 5).

([12]) ART Advisory Board, *Report of the Advisory Board 2018 Benchmarking and Regulation in the Transport Sector*, December 2018.

([13]) In this regard, see article 22, paragraph 2 of law 2012/35: «*The transposition of Directive 2009/12/EC on airport charges* […] *in any case is without prejudice to the completion of the procedures in progress aimed at stipulating programme contracts with airport managing bodies, pursuant to articles* […] *17, paragraph 34-bis, of the law decree of 1 July 2009, 78*» and «*the validity period of the programme contracts entered into* […] *is established in compliance with the relevant national and European legislation and the respective pricing models*».

Only in 2019 the Italian legislator decided to intervene, conferring to ART the functions of a national supervisory authority also with regard to the programme contracts set forth in art. 17, paragraph 34-*bis* of law decree 2009/78 (art. 10 of law 2019/37). This is the result of the European Commission's formal notice against the Italian Government for failures in implementing the EU Airport Charges Directive 2009/12 ([14]). The Commission objected to the consultation procedure that aimed to regulate airport charges at five major Italian airports (namely Fiumicino and Ciampino in Rome, Malpensa and Linate in Milan and Venice airport) through contract agreements between airport management and the Italian Civil Aviation Authority (ENAC) where done in violation of art. 6 of the directive.

By means of law 2019/37 the Italian legislator decided to extend the ART's competence also to the airports of Milan, Rome and Venice, originally excluded from the competence of the ART ([15]).

Thus, the determination of airport charges' pricing scheme should be ([16]) now entrusted to ART (which is adopting charges models that are different from those applied in favor of the Main Italian Airports), so repealing the 2009 legislation which envisaged special terms for the Italian Main Airports.

The airports of Rome, Milan and Venice are claiming for the maintenance of the more favorable dual till regime applied to them in 2009 ([17]). Al-

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([14]) See Autorità di Regolazione dei Trasporti, VI *rapporto annuale dell'Autorità di Regolazione dei Trasporti, Camera dei Deputati, 25 giugno 2019*, on web site www.autorita-trasporti.it/wp-content/uploads/2019/06/ART-Sesto-Rapporto-Annuale-2019.pdf.

([15]) Infringement procedure 2014/4187 pursuant to art. 258 TFEU.

([16]) This conclusion has been challenged by the major beneficiaries of the «*more favorable mechanism*» in determining the airport charges (dual till).

([17]) The dual till system applied to the main airports is explained in an ENAC document providing that regulated tariffs have been established for large airport systems, taking exclusively into account the management and investment costs associated with aviation-related activities and services thus excluding, according to a dual till approach, commercial activities. In this regard, also considering the second recital of directive 2009/12/EC which explicitly allows «*Member State to determine if and to what extent revenues from an airport's commercial activities may be taken into account in establishing airport charges*». Directive 2009/12/EC has therefore given Member States full freedom of adopting either a dual till regime (no contribution to the regulated sector from commercial activities), a single till regime (full contribution to the regulated sector by commercial activities), or hybrid till regime (a regime established by law 248/05 and implemented by CIPE decision 38/2007, binding only the 50% of the extra margin). From this perspective, ENAC has carried out a review of the hybrid till regime, identified by art. 11-*nonies*, lett. *e* of law 248/05, providing for

though they do not seem to be against the attribution of the competence to ART, they apparently would like ART's competence to be limited to the safeguard of the correct application of the measures adopted in accordance with directive 2009/12, without playing a role in the determination of the airport charges models.

Indeed, the airport charges models that ART is currently proposing for all the Italian airports ([18]) seem less favorable than the dual till model applied for the Italian Main Airports. It appears that ART is oriented toward the hybrid till models, instead of the dual till ([19]).

PrA an exemption from the application of a dual till regime which, in turn, is counterbalanced by the obligation for the abovementioned operators to bind the 50% of the extra margin arising from the exclusive performance of commercial activities to the self-financing of investments to be made in the regulated sector (aviation): «*Le tariffe regolamentate sono state determinate per i grandi sistemi aeroportuali tenendo in considerazione esclusivamente i costi di gestione e di investimento relativi alle sole attività e ai soli servizi aviation, con esclusione dunque delle attività commerciali, secondo un approccio di tipo dual till. In proposito, anche alla luce del secondo considerando della direttiva 2009/12/CE che espressamente prevede "la possibilità per gli Stati membri di determinare se ed in quale misura tener conto, nel fissare i diritti aeroportuali, delle entrate risultanti dalle attività commerciali di un aeroporto". La direttiva 12/2009/CE ha dunque lasciato piena libertà agli Stati membri rispetto all'adozione di un sistema di dual till (nessuna contribuzione al settore regolamentato da parte delle attività commerciali) o di single till (integrale contribuzione al settore regolamentato da parte delle attività commerciali) o di semi single till (regime delineato dalla legge 248/05 e concretamente definito dalla delibera CIPE 38/2007 che vincola il solo 50% dell'extra margine commerciale). In tale ottica l'ENAC ha operato una rivisitazione del regime di semi single till, individuato dall'art. 11 nonies, lettera e) della legge 248/05, prevedendo nei CdP in deroga l'applicazione di un regime di dual till controbilanciato dall'obbligo, per i gestori citati, di vincolare il 50% dell'extra margine, derivante dallo svolgimento in esclusiva di attività commerciali, all'autofinanziamento di investimenti da realizzarsi sul settore regolamentato (aviation)*», see *ENAC dossier economico 2012*, 15, www.enac.gov.it/ContentManagement/information/N1951129653/ENAC_DossierEconomico.pdf.

([18]) ART, deliberation n. 92 of 2017, on web site www.autorita-trasporti.it/consultazioni/consultazione-pubblica-per-la-revisione-dei-modelli-di-regolazione-dei-diritti-aeroportuali-approvati-con-delibera-n-92-2017/?lang=en.

([19]) It is worth highlighting that «*the Directive does not impose a particular charging system or regulatory model, but allows Member States to take into account the national specific conditions, provided that the provisions of the Directive are fully applied. It is thus left to the Member State or ISA to set its specific form of economic regulation or to not introduce any economic regulation at all. For those setting economic regulation, it can vary according to the till applied (single till, dual till or a hybrid till). In a single till system, revenues from aeronautical and commercial activities are combined in one regulatory till. In a dual till system, revenues from the airport's commercial activities are not taken into account but only aeronautical activities are taken into consideration when setting charges which means that essentially airport charges have to account for the full cost of aeronautical infrastructure. In a hybrid system, the airport is obliged*

3.2. *The current role of ART in establishing the airport charges* — The current Italian framework regulation, in reaffirming that ART is the sole Italian ISA, adopts broad wording in conferring to ART competences on airport charges, including those of drafting pricing models. In fact, in 2019 the Italian legislator entrusted ART with all the functions of national ISA with respect to the so-called derogating contracts for the Italian main airports. Specifically, ART has been entrusted with the following functions, as provided by the law:

— economic regulation of airport charges,

— the power to draft pricing models through art. 71, paragraphs 2 and 3, law decree 2012/1, as converted into law 2012/27 ([20]).

While directive 2009/12 envisages that the national ISA must exercise — at least — the tasks assigned under art. 6, the implementing Italian law, in giving ART broader competences than those envisaged in the directive, assigns ART also the duty to draft «pricing models» (art. 71, paragraph 3 and art. 78). These 'pricing models' are deemed to be binding in light of article 11, § 7 of directive 2009/12 which provides that the decisions of the ISA have binding effect.

Therefore, ART's functions are both regulatory — since it operates as a national ISA (art. 36, paragraph 2) in the drafting of «*pricing models*» — and administrative, which includes supervisory tasks and sanctioning powers (art. 36, paragraph 2).

Among the reasons behind the 2019 legislative reform there is the acknowledgement that there was no longer the need to incentivize the growth of the national airport system.

The derogating rules established a temporary mechanism (dual till) in order to support the improvement of the Italian main Airports infrastructures so as to align them with the European standards. This is a target that now appears to be achieved.

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to transfer a part of the non-aeronautical proceeds to the regulatory till. Airlines tend to be in favour of a single till approach, arguing that the airport's commercial activities are a result of the traffic which airlines bring to the airport and therefore they should also benefit from profits made through commercial activities in the form of reduced charges. Airports on the other hand tend to argue that the single till does not provide any incentive for the airport to develop commercial activities, stifling the growth of its economic activity» as stated by Commission staff working document *Evaluation of the directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges* {SWD(2019) 291 final}.

([20]) In this regard, art. 10 of law 2019/37 has been introduced in order to overcome the infringement procedure 2014/4187. This article entrusts ART with the power to determinate airport charges also in respect of Rome, Milan and Venice airports.

4. *Final remarks* — The CJEU judgement is clear in establishing that the airport authorities cannot depart from the system of airport charges as approved by a national ISA empowered by law to establish a mandatory procedure for the determination or approval of airport charges, pursuant to art. 6, § 5, lett. *a* of dir. 2009/12 ([21]).

It is worth to highlight that the Italian derogating rule of 2009 ([22]), assuming it is still in force, would be considered in breach of European law. Indeed, if an airport managing body was allowed to determine — via the derogating scheme introduced by the 2009 law — airport charges using pricing models not previously approved by the ART, it would not comply with the «*mandatory procedure*» pursuant to directive 2009/12, as per CJEU's ruling. Moreover, such a rule would favour only a few users, thus infringing the principles of non-discrimination and transparency set forth in artt. 3 and 7 of the directive ([23]).

Finally, regarding the incentives and marketing support paid by airports and/or local authorities to airlines, the fact that ART is the competent authority for airport charges does not mean that it prevents these commercial practices envisaged by the EU.

This circumstance is confirmed by the ART in its recent hearing at the Italian Parliament ([24]). ART, in considering these commercial agreements, makes a reference to its models where recalls general principles of transparency, accounting separation and non-discrimination in their application.

([21]) See point 38 of the judgment.

([22]) Article 17, paragraph 34-*bis*, law decree n. 78/2009.

([23]) See point 48 of the judgment.

([24]) *Audizione dell'Autorità sul settore aeroportuale, 4 febbraio 2020, Camera dei Deputati – IX Commissione Trasporti*. The CJEU in its decision recognized that art. 11, § 7 of dir. 2009/12 provides that the decisions of the independent supervisory authority have binding effect, without prejudice to parliamentary or judicial review, as applicable in the Member States. That is what it happened in Italy when Italian legislator ratified directive 2009/12. Law decree 2012/1 requires that the charges models are approved by the ART after obtaining the opinion of both the Minister of infrastructure and transport and the Minister of economy and finance.