



Notice on PRM charges at Dublin Airport

Commission Notice 5/2008

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Table of Contents

1.	Introduction	3
2.	Meaning of criteria in Article 8(4)	4
3.	Assessment of criteria in Article 8(4)	6
4.	Compliance with the Regulation	10

1. Introduction

- 1.1 The Commission for Aviation Regulation (the 'Commission') was designated as the National Enforcement Body (NEB) for Regulation (EC) No. 1107/2006 (Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air) hereafter "the Regulation" on 25 July 2008 by way of Statutory Instrument 299 of 2008 ('SI 299'), outlining the Commission's role as the NEB, in particular its powers of enforcement in relation to compliance or non-compliance with the Regulation. The Regulation itself came into force on 26 July 2008.
- 1.2 The overall purpose of Regulation 1107/2006 is to offer those persons who are the subject matter of the Regulation (hereafter "PRMs") with opportunities for air travel comparable to those of other citizens. It aims to standardise the assistance provided to PRMs at the flight reservation stage and in airports and on board aircraft. Regulation 1107/2006 provides that PRMs who are departing from, arriving at or transiting through an airport are entitled to receive specified levels of care and assistance whilst there. Airports are required to have designated points within the boundaries of the airport, both inside and outside terminal buildings, where disabled passengers or persons with reduced mobility can, with ease, announce their arrival at the airport and request assistance.
- 1.3 The Regulation allows for the PRM service to be provided by the airport itself, or subcontracted to a third party. Article 8(3) of the Regulation states that, in relation to the PRM service, "*The managing body of an airport may, on a nondiscriminatory basis, levy a specific charge on airport users for the purpose of funding this assistance*".
- 1.4 In early July 2008, the Dublin Airport Authority ("the DAA") engaged the firm of One Complete Solution (OCS) Ltd to provide PRM services at Dublin, Cork and Shannon Airports. The DAA indicated to airlines at the end of July 2008 that the PRM charge at Dublin, on a departing passenger basis, would be €0.33 per passenger over the period 26/06/08 – 31/12/08. The figure of €0.33 is based on an estimated 16.7 million departing passengers over this period and costs of €5.5 million to provide PRM services for an estimated 172,500 passengers.
- 1.5 With respect to the proposed PRM charge of €0.33 at Dublin, both the DAA and the airlines have requested that the Commission, in its role as the NEB, carry out an assessment of whether the proposed charge complies with the criteria set out in the Regulation: specifically, Article 8(4) which states that "*This specific charge shall be reasonable, cost-related, transparent and established by the managing body of the airport in cooperation with airport users*". The purpose of this Commission Notice is to present the Commission's current understanding of what each of these criteria mean in practice, and then propose the next step in ensuring the satisfactory implementation of and compliance by the DAA and users with Article 8 in the relation to the proposed PRM charge at Dublin Airport.

2. Meaning of criteria in Article 8(4)

2.1 As is the norm with EC Regulations where criteria are prescribed for enforcement bodies to apply, no definition of the criteria is provided to assist that process. In similar situations, the onus has been on the Commission, as the enforcement body, to arrive at a considered view as to the meaning and application of the criteria. This section sets out the Commission's view of how each of the criteria in Article 8(4) should be applied to the implementation of Regulation 1107/2006. In setting out its current understanding of the meaning of the criteria, the Commission has drawn on the recitals and articles of Regulation 1107/2006. Where possible and relevant, it has also considered standards previously published by the Commission with regard to Access to Installation Fees (see CP8/2004).

Reasonable

2.2 The standard applicable here is can be posed as follows: that the charge been set in a fair and balanced way and that it is commensurate with the provision of the assistance specified in Annex 1 to Council Regulation (EC) 1107/2006 which describes the assistance and arrangements which are the responsibility of the managing body of the airport. The Commission also believes that a reasonable charge is one, which is based on a reasonable forecast of relevant passengers. Furthermore, the charge should not serve to finance activities of the managing body of the airport other than those relating to the provision of PRM-related assistance.

Cost-related

2.3 The standard applicable here is that the charge is directly connected to the subject matter to which it is applied and is not inclusive of extraneous items or costs which cannot be regarded as being reasonably related to an item of infrastructure, equipment or personnel required for the provision of the assistance specified in Annex 1 of Council Regulation (EC) No. 1107/2006.

Transparent

2.4 The standard applicable here is as follows: is the basis on which the charge is derived clear and evident to all, will it bear scrutiny in all its elements and can be understood by the payees of the fees and any other interested parties.

Establishment of charge in cooperation with airport users

2.5 "Cooperation" to give it its normal meaning is the action or process of cooperating, i.e. working jointly towards the same end [goal] or assisting someone to comply with their requests.¹ In the case of the PRM charge, the goal in question is the activities to be performed as listed at Annex 1 to the EC Regulation. Therefore, the activities in question have effectively already been decided by the Regulation.

¹ Pearsall, Judy, (ed.), *Concise Oxford Dictionary*, 10th edition, Oxford University Press, 2001, at page 313.

- 2.6 Given that price is a function of cost, the matters to be decided in cooperation would appear principally to be the costs of manpower and equipment required to provide agreed service levels.
- 2.7 The PRM service levels themselves are set out at a minimum in European Civil Aviation Conference (ECAC) Doc 30 Code of Good Conduct in Ground Handling for Persons with Reduced Mobility. Article 9(2) of Regulation 1107/2006 states that, with regard to quality standards for assistance, full account shall be taken of these internationally recognised policies and codes of conduct. Therefore, the PRM service levels have also been decided, at a minimum (although the service levels defined in the DAA-OCS contract may deviate from this level).
- 2.8 Ultimately, the responsibility for leading this process of cooperation in the setting of PRM charges rests with DAA. The DAA is responsible, as managing body of Dublin airport, to lead a process whereby they and the carriers work jointly to establish the charge to be levied to pay for PRM assistance. A process of cooperation would be one where airlines are invited by the DAA to give feedback on the level of services to be provided, manpower, equipment and costs or to comment on tenders that dealt with such matters.
- 2.9 The Commission does not interpret the 'cooperation' objective in the regulation to require full agreement on all points of the consultation. While the DAA is responsible for leading the process of cooperation, the Commission believes that there is also a significant onus on airlines to partake in such a process. If the Commission found evidence that the DAA had sought to engage the airlines in a cooperative process as part of a consultation, but the airlines, through their behaviour, did not behave in a cooperative manner, then the Commission would be unlikely to conclude that the DAA has not complied with the Regulation – or, to put it more simply, genuine cooperation in the setting of PRM charges is a two-way affair.

3. Assessment of criteria in Article 8(4)

3.1 This section sets out the Commission's assessment of the DAA's compliance with the criteria in Article 8(4) of the Regulation. In advance of doing so, we present a brief summary of recent correspondence and discussions between the Commission and the DAA and the Commission and the airlines.

Background

3.2 On the 1 September 2008 the DAA met with the Commission to discuss issues relating to the implementation of Regulation 1107/2006. The DAA indicated that some airlines had raised questions as to the basis for the proposed PRM charge at Dublin airport. Specifically, airlines were questioning the transparency of the process leading to the setting of the proposed €0.33 PRM charge. During this meeting the Commission told the DAA that, given the fact the Commission had only recently been designated as the NEB, it did not have the information necessary to reach a view on whether the charges satisfied the criteria set out in Article 8(4) of Regulation 1107/2006. The DAA proceeded to hand over copies of what it considered to be material relevant to our assessment of the charge.

3.3 The material handed over by the DAA on 1 September included the following: email and other correspondence between airlines and the DAA, feedback from various PRM consultation meetings (including meeting minutes), presentations from the DAA to airlines and other interested parties, a copy of the OCS contract (including service level agreements) and correspondence between the Department of Transport and the DAA on the PRM regulation and associated charges. The material covered the period from the commencement of the DAA-led consultation process on the PRM charge (October 2007) up to the point where airlines were beginning to question the basis for the PRM charge (September 2008).

3.4 In the DAA's view, it has complied with the criteria for the charge as set out in Regulation 1107/2006, arguing that the material handed over at the meeting of 1 September is evidence of such.

3.5 At around the same time the Commission met with the DAA, we also received (or were copied on, in the case of correspondence directed to the DAA or other parties) correspondence from several parties questioning the basis for the proposed €0.33 charge. This included correspondence from airlines directly, but also representative groups such as the Airline Operators Committee (AOC) at Dublin Airport and the Dublin Airport Consultation Committee (DACC).

3.6 On 16 September 2008, the Commission met with the Dublin AOC PRM Sub Committee ("the AOC") to get feedback on the DAA consultation process leading up to the setting of the €0.33 PRM charge at Dublin airport. It appears to the Commission that the AOC has been identified by airport users as the appropriate entity to cooperate with DAA on this charge, per Article 8(4) of the EC Regulation emphasises cooperation with airport users, "through the Airport Users Committee where one exists or any other appropriate entity." Without prejudice to its assessment of the PRM charge,

the Commission believes that the views expressed by the AOC at this meeting can be used to summarise the views of airlines more generally on the proposed PRM charge:

- The AOC spoke about its dissatisfaction with the DAA's handling of the PRM tender process, claiming that airlines were effectively excluded from the process and were not given any real opportunity to input to it.
 - The AOC contrasted the PRM consultation process with the CUTE process where airlines worked actively with DAA to find the best service provider. The AOC feel that this kind of cooperation could have had a very positive impact on the PRM tender process, given the practical experience held by each of the airlines in relation to day-to-day PRM management. Specifically, the AOC wanted to have input on PRM equipment, staffing and manpower levels as these were the factors that would determine the cost.
 - The AOC stated that the first time they were made aware of PRM costs was at the notification meeting on 14 July 2008.
 - The AOC accepted that OCS was providing a better service than the previous incumbent service provider at Dublin airport. However they said that the service was not necessarily three times better and therefore did not warrant, what they believed to be, a threefold increase in the charge.
 - More generally the AOC wanted the DAA to develop a tender protocol which they abide by in every tender situation for the future. This protocol would clearly establish the amount of cooperation expected between parties regardless of the tender subject.
 - In the opinion of the AOC, the optimal solution to the current disagreement over the proposed €0.33 charge would be for the DAA to break down the PRM charge in detail with only the costs pertaining to the airlines passed through to them and the other PRM "terminal" related costs absorbed by the DAA.
- 3.7 Following this meeting, on the 19 September the Commission received an information pack from the AOC, consisting of a number of emails between its members and the DAA, which it claims supports its views as outlined in the previous bullet points. All of this material was previously provided by the DAA in the documentation handed over to the Commission at the meeting on 1 September 2008. More recently (21 and 24 November 2008), two airlines (Aer Lingus and Ryanair) have formally requested that the Commission review the proposed PRM charge.

Assessment

- 3.8 The Commission was designated as the NEB for Regulation 1107/2006 after the end of the consultation on the PRM charge itself. This means that any assessment of the consultation on the PRM charge must necessarily rely on documentary evidence of the process and on different parties' *ex-post* versions of various meetings and events, sometimes long after the event in question has taken place.

- 3.9 There are certain difficulties that can apply to any ex-post assessment e.g. relying on parties' recall of past meetings or events. Therefore, the Commission's current understanding of the PRM charge relies principally on the documentary evidence provided to it by parties. For example, while the AOC version of the DAA consultation process described above clearly shows a degree of dissatisfaction on the part of its members, the Commission would be reluctant to rely solely on such statements in its assessment. Therefore, at its meeting with the AOC, the Commission requested that the AOC forward any relevant documentary evidence to it which, the AOC believes, support its views on the consultation process. As noted above, this information was forwarded to the Commission on the 19 September 2008.

Establishment of charge in cooperation with airport users - assessment

- 3.10 Having carefully reviewed all of the information provided in respect of the consultation process leading to the propose PRM charge in Dublin, it appears to the Commission's that the DAA did not cooperate with airport users in the manner intended in the Regulation which states that the charge should be "established" in cooperation with users.
- 3.11 As noted above, a process of cooperation would be one where airlines are invited by the DAA to give feedback on the level of services to be provided, manpower, equipment and costs or to comment on tenders that dealt with such. While the Commission accepts that there was consultation with the airport users on service levels – the process falls somewhat short of one where users were able to be actively involved in the tender process leading to decisions on manpower and equipment requirements, and ultimately the likely costs of the various service level options. Crucially, the Commission is of the view that such consultation must take place *in advance of airport users being simply informed of what the final charge might be for a now un-negotiable level of service.*
- 3.12 The Commission believes that such a level of involvement from airport users would have been particularly relevant in the current situation where airlines had, for some years previously, procured services similar to the PRM service from another supplier (Fernley) at Dublin airport. The Commission does not make any direct comparisons between the previous services procured by some airlines and the newly contracted OCS service – indeed, both the airlines and the DAA highlight the differential service levels. However, the very fact that the new service is replacing a pre-existing service means that airport users, and in particular airlines, would have some expectation of costs which would influence their judgement of and willingness to pay a new charge, albeit for a different level of service.

Reasonable - assessment

- 3.13 The failure to discuss with users potential costs of different service levels makes it difficult to be certain that the proposed charge represents a reasonable charge - for example, it may include costs for services that users would never have wanted had they had been afforded an opportunity to consider the cost implications of that service. Furthermore, the Commission believes that to the extent that the OCS costs appear not to have been

analysed in cooperation between the parties, it is not possible to conclude that the charge is a reasonable one.

- 3.14 However, it is also important to point out that certain aspects of the reasonable criterion appear satisfied by the proposed PRM charge. For example, it would appear that the services provided by the charge cover at least the specified services as set out in Annex 1 of the Regulation. Also, given that the DAA proposes to return any potential over-collection of revenues attributable to an over-forecast of PRMs, it would seem fair to assume that, on an ongoing basis, the charge is based on a reasonable forecast of PRM passengers.

Cost-related - assessment

- 3.15 The DAA has provided the Commission with the charging schedule outlining the agreed costs for the OCS supply of PRM services in Dublin. The Commission has reviewed these costs, along with the proposed charges and expected demand levels as set out by the DAA in its presentation of 7th July 2008 to the airlines: "Consultation on PRM Charge associated with Regulation EC 1107 / 2006".
- 3.16 On the basis of the evidence reviewed, the Commission's view is that the proposed €0.33 PRM charge at Dublin airport represents a direct pass-through of the costs being charged by OCS to DAA for the provision of the agreed PRM services at Dublin airport. There is no evidence of any mark-up on OCS costs being passed through to airport users.
- 3.17 It appears, therefore, that the proposed PRM charge accurately reflects costs OCS is charging DAA for these services, and is therefore a cost-related charge.

Transparent - assessment

- 3.18 The Commission's understanding of 'transparent' in this context, coupled with the need for cooperation would tend to suggest that airport users should have sight of the basis upon which the charges were made – i.e. service levels and costs – in advance of being informed of the final PRM charge.
- 3.19 Due to the shortcomings previously alluded to regarding cooperation, users do not have an understanding of how the costs relate to the service offering that OCS is providing, and in particular, how they might vary had a different service offering been sought. It is also possible that, had the cost consultation involved airlines to the extent that the Commission feels is consistent with the intention in the regulation, the DAA might not now be in the situation where airlines are requesting sight of information in the contract that OCS appears unwilling to divulge.
- 3.20 In that context, it appears to the Commission that the proposed PRM charge does not satisfy the transparency criterion.

4. Compliance with the Regulation

- 4.1 The question for the DAA and Airlines is how this matter can now be resolved in a manner that is both fair and reasonable, as well as being consistent with the criteria as set out in Regulation 1107/2006, as well as the Regulation itself more generally.
- 4.2 The Regulation calls for cooperation between the airport managing body and airline users to cooperate in relation to this aspect of providing assistance to their disabled passengers and their passengers with reduced mobility. It is therefore open to both DAA and Airlines to re-evaluate the rationale behind the charge as proposed by reference to the criteria set out in the Regulation in light of the Commission's current thinking as set out in this notice. The AOC, at its meeting with the Commission on 16 September, indicated a willingness to seek out a solution to the current impasse, beginning with it gaining a better understanding of how the current charge relates to the costs of the services provided.
- 4.3 By virtue of Regulation 4 under S.I. 299/2008 the Commission may issue general directions to air carriers, their agents, tour operators or the managing bodies of airports in relation to compliance with the Regulation. Such a direction is binding upon those to whom it is issued. Given that the charge for provision of assistance to passengers under the Regulation is to be set in cooperation between airport managing body and users, it is the Commission's view that any such direction on compliance should be binding on both the airport managing body and users.
- 4.4 The Commission's current thinking on this matter is set out in this notice. Prior to issuing any binding direction on this matter the Commission calls on both the DAA and Airport users to make representations on the views on implementation and compliance with Article 8 of Regulation (EC) No. 1107/2006 as set out in this Notice. Representations should be marked "CN5/2008" and addressed to:

Commission for Aviation Regulation,
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The Commission requests that representations be made to it by Friday 9 January 2009.

- 4.5 The Commission will respond to those representations by the end of January 2009.