



ACCESS FEES TO AIRPORT INSTALLATIONS

Consultation on the Implementation of the requirements of Statutory Instrument No. 505 of 1998 European Communities (Access to the Groundhandling Market at Community Airports) Regulations 1998

Commission Paper CP5/2004

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1 INTRODUCTION

1.1 Purpose of Consultation

Council Directive 97/67/EC (the "Directive") on Access to the Groundhandling Market at Community Airports of 15th October 1996 was transposed into Irish law by Statutory Instrument 505 of 1998, European Communities (Access to the Groundhandling Market at Community Airports) Regulations 1998 (the "S.I.") which was made on 16 December 1998. Under section 9(2) of the Aviation Regulation Act 2001 (No. 1 of 2001), the functions vested in the then Minister for Public Enterprise in respect of this S.I. were transferred to the Commission for Aviation Regulation (the "Commission") on its establishment in February 2001. This transfer of responsibility made the Commission the competent authority in the State for all matters relating to the Directive as transposed.

Section 14(3) of the S. I. provides that

"where access to installations gives rise to the collection of a fee, the latter shall be determined by the managing body of the airport and approved by the Minister in advance in accordance with relevant, objective, transparent and non-discriminatory criteria."

The functions ascribed to the Minister in respect of the approval of fees therefore fall to be carried out by the Commission by virtue of the 2001 Act.

Aer Rianta has recently made submissions to the Commission seeking prospective approval for the collection of a prescribed rental fee (annual and hourly rates) in respect of check-in desks at Dublin, Shannon and Cork Airports¹. Additionally, Aer Rianta has sought approval for the collection of a

¹ Aer Rianta have informed the Commission that it intends to seek retrospective approval of certain charges in relation to check-in desks and that it will make a

“per passenger fee” in respect of the CUTE facility (Common User Terminal Equipment) at Shannon airport.

The purpose of this Paper is to seek the views of interested parties in relation to these requests for approval in the context of the provisions of the S.I. and, more generally, in relation to the correct application, in framing an access fee, of the four relevant criteria by the managing body of an airport. The Paper also seeks views on the concept of an “airport installation”, the role of the Airport Users Committee in the context of the S.I. and the relevant principles that ought govern the Commission’s approach to establishing whether the prescribed criteria have been met by the managing body of an airport

The full text of the Directive and the S.I. are contained on the Commission’s website in the Groundhandling section.

1.2 Timetable for consultation

As this is a non-statutory consultation the Commission is setting a 14-day consultation period from the date of this Paper for the purposes of obtaining public comments. A return date of 31st August 2004 is hereby set for the receipt of responses. Replies which may be in electronic format or hard copy should be addressed to Ms Louise O’Dwyer, Commission for Aviation Regulation, Third Floor, Alexandra House, Earlsfort Terrace, Dublin 2. (louiseodwyer@aviationreg.ie) or at info@aviationreg.ie.

The Commission requests that this deadline be strictly adhered to.

supplemental application to the Commission seeking such retrospective approval in the future. Accordingly, the matter at issue in this application relates only to prospective approval of the relevant charges.

1.3 Indemnity

Any party submitting information to the Commission in response to a document inviting submissions acknowledges that the Commission intends to publish that information on the website of the Commission, in reports of the Commission and elsewhere as required or appropriate. Parties submitting such information to the Commission consent to such publication. Any party submitting information to the Commission shall have sole responsibility for the contents of such information and shall indemnify the Commission in relation to any loss or damage of whatsoever nature and howsoever arising suffered by the Commission as a result of publication or dissemination of such information either on its website, in its reports or elsewhere.

2. BACKGROUND

2.1 Groundhandling Directive

The primary purpose of the Directive was to facilitate the opening up of access to the groundhandling market, thereby promoting the development of effective competition in that market. Dublin, Shannon and Cork Airports are required to comply with all of the provisions of the Directive.

The main responsibility of the Commission is to authorise groundhandling operations and in this regard the Commission is the competent authority for the issuing of approvals to self-handlers² and suppliers of groundhandling services to third parties. Approval of the Commission must be obtained prior to engaging in these services. At present, there are 22 self-handlers and 36 third party handlers approved by the Commission. During 2003, there were 17 self-handlers and 20 third-party handlers operating at Dublin airport. At Shannon airport, there were 3 self-handlers and 12 third party handlers and at Cork airport there were 4 self-handlers operating and 8 third party handlers.

The Directive also deals with the issue of access to 'airport installations'. Groundhandling suppliers and self-handling users are entitled to have access to airport installations in so far as it is necessary to exercise their right to supply groundhandling services or to self-handle. In many instances, access to the installations will entail extra costs for the airport. Therefore, it is

² S.I. 505 of 1998 states that 'self-handling' means a situation in which an airport user directly provides for himself or herself one or more categories of groundhandling services and concludes no contract of any description with a third party for the provision of such services; and for the purposes of this definition, airport users shall not, among themselves, be deemed to be third parties where: (a) one holds a majority holding in the other, or (b) a single body has a majority holding in each.

permitted that the managing body be allowed to charge suppliers a fee. The imposition of such fees in Ireland requires the prior approval of the Commission under Regulation 14 of S.I. 505 of 1998.

Before considering the specific issue of approval of fees for access to airport installations, it is useful to look briefly at the situation which gave rise to the Directive. The European Commission published a consultation paper on groundhandling services in January 1994. This generated a wide range of responses. In June 1994, the European Commission indicated its intention to take an initiative aimed at ensuring wider access to the groundhandling market at Community airports. This resulted in the adoption of Council Directive 96/67/EC.

The adoption of Council Directive 96/67/EC on 15th October 1996 marked the beginning of the liberalisation of the groundhandling market at Community airports. The Directive provides for open access to airports by groundhandling service providers subject to certain conditions. Prior to the introduction of the Directive, the situation at Community airports varied widely. At most airports, only the airport authority or the national carrier were entitled to supply groundhandling services and self-handling was not always permitted. Therefore, the groundhandling market was regarded as not being in accordance with the rest of the air transport sector as it did not meet the requirements of competition policy under the Single Market.

It was recognised that groundhandling functions were essential to the proper functioning of air transport and that open access was consistent with the concept of efficient operations at Community airports. Groundhandling services represented a considerable portion of the operating costs of air carriers and many carriers were dissatisfied as costs for European carriers at that time were higher than for their American counterparts. It was considered that European airlines should be able to control their costs better as well as tailor their services to better meet the needs of their customers. It was also considered that there was a need for more specific rules to ensure

the smooth operation of the groundhandling market. It was against that background therefore that the Directive was adopted.

The Recitals to the Directive explain its wider purpose, drawing attention to the need to eliminate restrictions on freedom to provide groundhandling services in the Community; the need to seek reductions in the operating costs of airlines; and to facilitate improvements in the quality of service to airport users by opening up this aspect of the air transport market. Among the specific measures introduced to promote the liberalisation of the groundhandling market at Irish airports were the following:

- a system of requiring the approval of a public authority prior to engaging in the supply of groundhandling services or self-handling
- the establishment of an Airport Users Committee comprising representatives of airport users
- the imposition of a fee in relation to access to airport installations.
- provisions relating to centralised infrastructures.
- measures to limit the number of approved suppliers of each category of groundhandling services where access to the market and self-handling comes up against practical constraints (e.g. available capacity and space, security and safety).

The latter provision recognised the fact that if airports are to function properly they must be able to reserve for themselves the management of certain infrastructures which for reasons of complexity, cost or environmental impact do not permit division or duplication. Examples of such services are baggage sorting, de-icing, water purification and fuel-distribution systems. However, the centralised management of such infrastructures must be

transparent, objective and non-discriminatory and must not create an obstacle to their use by suppliers of groundhandling services or self-handlers.

Additional measures provided for in the Directive include the unbundling of the different activities of the managing body of the airport³, rules of conduct required to ensure the efficient operation of the airport and the recognition of the right to appeal.

2.2 More Recent EU Developments

In 2002, the EU Commission engaged a firm of consultants (SH&E) to undertake an analysis of the quality and efficiency of Groundhandling services at Community airports as a result of the implementation of the Directive. That Report was finalised in October 2002 and was published on the EU Commission's website, www.europa.eu.int. Additionally, the EU Commission initiated last year, a review of the Directive and a meeting took place with stakeholders and experts. However, the Commission is not aware that any further action took place in this regard.

2.3 Views of Commission

The Commission for Aviation Regulation is of the view that the approval procedure set out in S.I. of 1998 reflects the importance attached by the then Department of Public Enterprise to the liberalisation of the Irish groundhandling market and the mechanism serves to ensure that groundhandling companies are not subject to the imposition of fees which are anti-competitive in nature or which might have an anti-competitive effect by hindering access to the groundhandling market.

³ Decisions made by the airport authority must be genuinely and completely transparent especially if the airport authority supplies groundhandling and at the same time is responsible for the approval and co-ordination of groundhandlers. The European Commission advocates strict unbundling of groundhandling services from other airport activities by requiring the preparation of separate accounts.

Now that the first application by a managing body of an airport has been made in respect of securing approval for access fees, it is important from the Commission's perspective that the views and comments of interested parties are sought. It is envisaged that this non-statutory consultation process will assist in further informing the Commission's position and will serve to ensure that the purpose and spirit of the Directive is implemented as intended.

Neither the Directive nor the S.I. give any definition or description of what constitutes an "airport installation" and as such the scope of the type of fees which must be referred to the Commission for approval is not clearly defined. However, both the general view and the legal interpretation of the meaning of the term is that it means airport infrastructures and equipment made available by an airport.

2.4 Litigation in the Irish Courts

In 2002, Ryanair initiated a High Court action against Aer Rianta in respect of certain charges which Aer Rianta had imposed on the users of the airport and also in respect of the introduction of a Code of Conduct for airport users. The charges to which the airline objected included those in respect of check-in desk rental and an annual administration fee. These objections were based on the view that these charges were invalid as Aer Rianta had not sought the prior approval of the Minister as required under the S.I.

In its judgment of 20th February 2002⁴, the High Court held that if a fee was imposed which did not relate to access to an airport installation, then approval of the Commission under the S.I. was not required. In this case the Court held that check-in desks did not in its view, constitute "airport installations". The reasoning for this decision appeared to be based on Aer Rianta's functions under the Air Navigation and Transport Act 1998 as opposed to the particular provisions and scope of the Directive and S.I.

⁴ Judicial Review No. 801 of 2000

Ryanair subsequently appealed to the Supreme Court on the findings of the High Court that Aer Rianta was entitled to recover a rent in respect of check-in desks without first obtaining the approval of the Minister.

The Supreme Court (on 13th March 2003) although upholding the conclusions of the High Court in its findings on the other issues, in summary considered that in relation to the question of the check-in desks, it was not satisfied that the proper construction of Regulation 14 of the Groundhandling Regulations was so obvious that it could allow it to determine on the issue. Accordingly, it was decided that the European Court of Justice (ECJ) should be asked to make a preliminary ruling on the correct interpretation of Article 16 of the Directive (transposed by Regulation 14 of the S.I.).

Subsequently, with the agreement of both parties, a number of questions were referred to the ECJ which in essence asked the Court to confirm if a check-in desk was an installation within the meaning of the Directive and if so, whether a rent charged for the exclusive right to occupy a particular desk was a “fee” within the meaning of the Directive. However, the Commission is advised that the ECJ wrote to the Irish Supreme Court in January of this year advising it of a decision of the ECJ taken last year in the case of *Flughafen Hannover-Langenhagen GmbH v Deutsche Lufthansa*⁵ and enquiring whether in the light of that decision (and the related earlier Opinion of the Advocate General), the Supreme Court wished to have the questions set out in the referral specifically addressed by the European Court.

It was the position of Aer Rianta that it was sufficiently clear in the statements made by ECJ in the Lufthansa case –(that case addressed the sole issue of the validity of a fee for access to the market, as opposed to access to installations) – that a check- in desk was an installation for the purposes of the Directive. Consequently, the issue was re-presented to the Supreme Court in March 2004 and a declaration was made by that Court that

⁵ Flughafen Hannover-Langenhagen GmbH v. Deutsche Lufthansa AG, Case C-363/01

the increased charges in respect of the check-in desks were invalid and should be refunded to Ryanair.

2.5 Relevant findings in ECJ Decision

In dealing with the issues arising in that case, both the Advocate General and the Court emphasised the property rights of the airport operator and, in particular, its right to charge a rent for the exclusive use of its property. The Advocate General recognised the airport's right to make a profit on the economic services they provide and declared that,

"the fees collected should be determined according to "relevant, objective, transparent and non-discriminatory criteria".

None of these terms prohibits airports setting user fees in precisely the same manner as any undertaking which makes infrastructure available, having regard not only to the costs of its installation and upkeep, but also to a reasonable profit margin."

It was also recognised that,

"... the right of access to installations should be remunerated at a fair value, that is to say that it allows for the depreciation of the installations and the costs of management and that it provides airports with a reasonable level of profit."

Against the background of the outcome of the legal action, Aer Rianta have now submitted a request to the Commission for approval to implement the check-in desk charges as required under Regulation 14 (3) of the S.I.

3. AER RIANTA APPLICATION FOR APPROVAL OF CHARGES

Aer Rianta has submitted to the Commission an application seeking prospective approval of certain charges in respect of access to airport installations at the three state airports.

3.1 Aer Rianta Position

3.1.1 Dublin Airport

Aer Rianta has sought approval to levy the following charges at the corresponding levels:

Charge for:		€
Annual check-in desk rental		16,718.00
Hourly check-in desk rental		20.90

These are the charges of €15,237 and €19.05 introduced in January 2001, updated for inflation in 2001 and 2002.

Aer Rianta is of the view that these charges are significantly below cost having estimated that full cost recovery would require an annual rental charge of €64,751 per check-in desk. This includes the following:

1. A nominal post-tax return on capital employed of 10.5%;
2. Allocations of (historic cost) depreciation of terminal (based on square metres), check-in desk, CUTE and (outgoing) baggage sortation assets relevant to check-in;
3. Allocations of the following operating costs (based on FTEs or square metres of terminal space):

- CUTE;
 - Cleaning;
 - Electricity, Heating and Air Conditioning;
 - Maintenance;
 - Rates re surrounding areas (over and above those borne directly by operators);
 - Terminal staff costs;
4. Allocation for management and support staff, IT and margin.

Therefore, Aer Rianta’s position is that the proposed charges constitute an approximate 74% cost under-recovery.

3.1.2 Shannon Airport

Aer Rianta has sought approval to levy the following charges at the corresponding levels:

Charge for:		€
Annual check-in desk rental		8,000.00
Hourly check-in desk rental		19.05
CUTE per embarking passenger		0.23

Aer Rianta has also sought the right to adjust, on July 1st each year, the check-in desk charges for inflation during the previous calendar year.

Aer Rianta is of the view that these charges are significantly below cost having estimated that full cost recovery would require an annual rental charge of €43,687 per check-in desk. This includes the following:

1. A nominal post-tax return on capital employed of 10.5%;
2. Allocations of (historic cost) depreciation of assets relevant to check-in;

3. Allocations of the following operating costs (based on FTEs or square metres of terminal space):
 - Cleaning;
 - Electricity, Heating and Air Conditioning;
 - Maintenance;
 - Insurance;
 - Rates (over and above those borne directly by operators);
 - Telephones;
 - Terminal staff costs;
4. Allocation for management and support staff, IT and margin.

Therefore, Aer Rianta's position is that the proposed charges constitute an approximate 81% cost under-recovery.

Aer Rianta has sought approval for an unbundled charge in respect of CUTE at Shannon Airport, unlike at Dublin where the costs in respect of CUTE are included in the costings for check-in desks. Aer Rianta informed the Commission that, in September 2003, the Shannon Airport AOC was advised that users would have to contribute towards the contract for maintenance of the CUTE system and that, following consultation, the preferred and agreed contract option included a contribution from Shannon Airport check-in desk operators of €0.23 per embarking passenger.

3.1.3 Cork Airport

Aer Rianta has sought approval to levy the following charges at the corresponding levels:

Charge for:	€
Annual check-in desk rental	7,846.00
Hourly check-in desk rental	20.00

Aer Rianta also seeks the right to adjust, on July 1st each year, the check-in desk charges for inflation during the previous calendar year.

Aer Rianta is of the view that these charges are significantly below cost having estimated that full cost recovery would require an annual rental charge of €27,089 per check-in desk. This includes the following:

1. A nominal post-tax return on capital employed of 10.5%;
2. Allocations of (historic cost) depreciation of assets relevant to check-in;
3. Allocations of the following operating costs (based on FTEs or square metres of terminal space):
 - Cleaning;
 - Energy;
 - Maintenance;
 - Rates;
 - Terminal staff costs;
 - Insurance
4. Allocation for management and support staff, IT and margin.

Based on these cost allocations, the proposed charges would constitute a 71% cost under-recovery.

3.2 CAR Analysis

The Commission considered the level of the proposed charges relative to the relevant costings provided by Aer Rianta (sections 3.1.1 to 3.1.3 above). Those costings were verified by an analysis of line-by-line information sought by the Commission and provided by Aer Rianta at a much greater level of detail than that included in this document. Relative to those costings, the proposed charges are below-cost.

The Commission has also analysed the proposed charges using more de minimis costings. The latter exclude the return on capital and return of capital (depreciation) allocations in respect of terminal assets deemed, by Aer Rianta, as relevant to the check-in function. In other words, the de minimis costings exclude a return on and of capital in respect of the check-in desk and outgoing baggage sortation system assets themselves. The level of the proposed charges relative to these de minimis costings would still lead to the conclusion that they are materially below-cost.

The Commission has not sought to exclude elements of the operating costs from the de minimis costings but is satisfied that the cost-price margin is sufficiently large that such an exercise would not alter the conclusion. Therefore, the Commission is satisfied that the proposed charges are below any reasonable view of costs that might be taken.

4. REQUIREMENTS IMPOSED BY THE DIRECTIVE

4.1 Relevant Criteria

As stated previously, the four criteria which must be applied by the managing body of an airport in the context of determining the appropriate level of a fee for access to installations are:

- (1) Relevant
- (2) Objective
- (3) Transparent
- (4) Non-discriminatory

In terms of criterion (1), it is the Commission's understanding that the appropriate yardstick to be applied is the commonly accepted meaning of the term i.e. that the fee is directly connected (relevant) 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 that item of infrastructure or equipment or to the activity in question. Once this aspect of the test is satisfied the other factor to be examined is the actual cost structure and basis i.e. full cost recovery or a modified approach which recognises (in the overall context of the purpose and intent of the Directive) the commercial realities and rights of the service provider and the position of the groundhandler as a consumer of a monopoly service.

In relation to criterion (2), the test is that envisaged by the commonly accepted meaning of the concept i.e. that the fee has been set in a fair and balanced way and without any motivation on the part of the airport other than that expected of a commercial entity having statutory responsibilities to:

- meet its financial obligations;
- conduct its affairs in a cost-effective manner; and

- make a reasonable profit.

With regard to criterion (3), the test here is whether the basis on which the fees are derived is clear and evident to all, that it will bear scrutiny in all its elements and that it is understood by the payees of the fees and any interested party.

Criterion (4) has its origins in the European Treaty and is one of the primary principles on which the Community is founded. For the purposes of this exercise, the test to be applied in summary is whether “like situations are treated differently”, in other words is there any aspect of the setting of fees which is inequitable or preferential to any party who has an obligation to pay the fee. The Commission would in particular, welcome views on this factor in the context of the separate application for charges for the CUTE facility.

4.2 Compliance by Aer Rianta

It is the view of Aer Rianta that the criteria have been met by on the following basis:

- (1) **Relevant** – the fee is logically connected to what is being provided in consideration of the fee. In this case, the fee is being charged for check-in desk infrastructure to which access is being granted.
- (2) **Objective** - the charge is set in a manner undistorted by any prejudice on the part of the price setter. In this case, the fees were set following a process that recognised the need to minimise discontinuity for users rather than concentrating on the best interests of Aer Rianta only. (Adoption of the latter course would have resulted in Aer Rianta implementing a much higher charge to cover all costs involved).

- (3) **Transparent** – the criteria on which the charge is based are readily available and understood. The precepts underpinning Aer Rianta's charging policies have been clearly set out.

- (4) **Non-discriminatory** - identical or comparable situations must not be treated differently. In this case, the check-in desk fees are applied to all users equally. The charges are published and the relevant details are made available to all users.

5. MATTERS ON WHICH VIEWS ARE SOUGHT

The Commission wishes to receive views and comments on the following matters:

1. Whether Aer Rianta has complied with the specified criteria in setting the fees for which approval is sought?
2. What should constitute a proposed list of “airport installations” in the context of groundhandling activities and if, in particular, are there items of infrastructure or equipment which can/ought not reasonably be regarded as an installation?
3. The approach which might be adopted by the Commission in its statutory role of analysing a request for approval to impose access fees.
4. What is the appropriate role of an Airport Users Committee in the context of consultation on fee setting by the managing body of an airport?