



**DECISION OF THE COMMISSION**

**in respect of an**

**Appeal by Menzies World Cargo under the European Communities (Access to Groundhandling Market at Community Airport) Regulations 1998.**

**5<sup>th</sup> October 2001**

The Commission for Aviation Regulation (the "Commission") was established pursuant to the Aviation Regulation Act, 2001 (the "Act"). By virtue of section 9(2) of the Act the functions vested in the Minister for Public Enterprise by or under the European Communities (Access to the Groundhandling Market at Community Airports) Regulations, 1998 (S.I. No. 505 of 1998) (the "1998 Regulations") were transferred to the Commission.

### **Notice of Appeal**

On the 25<sup>th</sup> of July 2001, the Commission received notice of an Appeal pursuant to Regulation 16 of the 1998 Regulations. This notice was received from William Fry Solicitors acting on behalf of Menzies World Cargo (the "Appellant"). This is an Appeal to the Commission against a decision taken by Aer Rianta to allocate a cargo warehouse facility (the "Premises") at Dublin Airport to a third party, with the result that the Appellant was not granted a lease of the Premises.

Set out below is a summary of the facts of this Appeal together with the submissions made by each party to the Commission. The Notice of Appeal and the written submissions are set out in full in Annex I to this Decision. In deciding this Appeal the Commission has had regard to the submissions of the Appellant, the submissions of Aer Rianta and documentation furnished to the Commission by both parties in response to a request by the Commission under Regulation 16(5) of the 1998 Regulations. The Commission has also had regard to the provisions of the 1998 Regulations and Council Directive 96/67/EC of the 15<sup>th</sup> of October 1996 on access to the groundhandling market at Community Airports (the "Directive").

### **Facts**

The Appellant is an approved groundhandler under the 1998 Regulations. To date the Appellant has not entered the groundhandling market at Dublin airport. In anticipation of entering the groundhandling market at Dublin airport, the Appellant wrote to Aer Rianta on the 26<sup>th</sup> of September 2000 notifying Aer Rianta that they had made a formal application to the Department of Public Enterprise for approval to provide groundhandling services. That letter also set out the plans and requirements of the Appellant as they related to the provision of groundhandling services. In October 2000 the Appellant met with Aer Rianta personnel and indicated its desire for a premises to facilitate their cargo operations. Subsequently in March and April 2001 the Appellant had further meetings with Aer Rianta and explained to Aer Rianta its property requirements. In particular the Appellant expressed

interest in the Premises which they understood might be available in the near future as they had heard it was going to be vacated by Nippon Express. At those meetings Aer Rianta informed the Appellant that they were aware of their approval to provide groundhandling services and their intentions to operate at the airport. Aer Rianta also stated that they were not aware that Nippon Express were proposing to vacate the Premises. The Appellant requested that they be kept informed in this regard.

On the 15<sup>th</sup> June 2001 it was confirmed to the Appellant by personnel of Reed Aviation Ltd that Aer Rianta had confirmed to Reed Aviation Ltd that they were to be granted a lease of the Premises. On the 19<sup>th</sup> June 2001, the Appellant sought confirmation of this from Aer Rianta by telephone and was advised that this was in fact the case and that the decision was made at a meeting held internally. On the same day it was confirmed to the Appellant that Aer Rianta was aware of the interest of the Appellant in the Premises and that it had been decided to lease the Premises to Reed Aviation Ltd as they had expressed an earlier interest and they were an existing operator at the airport.

It is clear from information furnished to the Commission in response to a request under Regulation 16(5) that a decision was made by Aer Rianta to grant a lease of the premises to Reed Aviation Ltd on the 8<sup>th</sup> of June 2001 (the "Decision"). It is not clear when the Decision was notified to Reed Aviation Ltd. The Decision does not appear to have been communicated to the Appellant by Aer Rianta and it was only confirmed to the Appellant after specific enquiries were made by the Appellant on the 19<sup>th</sup> of June, 2001. The Decision is reflected in 3 internal e-mails of Aer Rianta dated the 7<sup>th</sup> and 8<sup>th</sup> of June 2001 and a copy of the Decision is set out at Annex II to this Decision. It is this decision of Aer Rianta, which is the subject matter of this Appeal.

### **Submissions and Information furnished to the Commission**

In accordance with the provisions of Regulation 16 of the 1998 Regulations the Commission received written submissions from the Appellant and from Aer Rianta in respect of this Appeal. These submissions are set out in full at Annex I to this Decision and a summary of the main points of the submissions is set out below.

By way of a Notice of Appeal dated the 25<sup>th</sup> of July 2001, the Appellant submitted that the manner in which Aer Rianta arrived at the Decision was in breach of the provisions of the 1998 Regulations. The Appellant submitted that in failing to give the Appellant an opportunity to submit a bid for the premises, Aer

Rianta failed to observe and comply with their duties under the 1998 Regulations. The Appellant sought to rely upon Regulations 7(2), 14(1) and 14(2) of the 1998 Regulations.

Aer Rianta, by way of response dated the 7<sup>th</sup> of August 2001 submitted that the decision was not a decision governed by the 1998 Regulations. They submitted that a cargo warehouse facility is not an 'Airport Installation' under Regulation 14 of the 1998 Regulations. Aer Rianta also submitted that it is possible for a cargo handling company to operate from a site remote to the airport.

In response to this submission the Appellant, on the 20<sup>th</sup> of August 2001, made a further submission which repeated its initial submission and in particular its reliance upon Regulations 14(1) and 14(2) of the 1998 Regulations. The Appellant submitted that the term 'Airport Installation' is not defined in the Directive and that no relevant European Commission Decisions held that cargo handling premises do not constitute airport installations. The Appellant further submitted that nowhere does the Directive or the 1998 Regulations state that a cargo handling facility does not fall within the category of "space available for groundhandling". The Appellant also made submissions in respect of Aer Rianta's submission that a cargo handling company can operate from a site remote to the airport and in this regard the Appellant sought to rely upon a Commission Decision of the 5<sup>th</sup> of January 2000 in respect of the application of Article 9 of the Directive to Düsseldorf Airport.

The Commission requested the Appellant and Aer Rianta to furnish the Commission with copies of documentation in their possession relating to the Decision. This request was made in accordance with the provisions of Regulation 16(5) of the 1998 Regulations. Pursuant to this request the Commission was furnished with correspondence between the Appellant and Aer Rianta together with internal communications and memoranda from both parties.

The Commission also requested both parties to confirm whether or not the Premises contained specific equipment for cargo handling purposes or whether this facility was a warehouse/storage facility with no additional equipment. Based on the responses received by the Commission it is common case between the parties that the Premises is an unfitted warehouse facility with no additional equipment.

## **Decision of the Commission**

As a preliminary issue the Commission had to consider whether or not this Appeal was submitted to the Commission within the time frame set down by the Regulations.

Regulation 16(1) states as follows;

*"An Appeal against decisions and individual measures taken by the managing body of an airport pursuant to these Regulations may be made in writing to the Minister. The notice of appeal shall be served promptly and in any event within one month from the date on which grounds for such appeal first arose"*

It is clear from the information submitted to the Commission by each party that the Decision was made on the 8<sup>th</sup> of June 2001, that the Appellant first became aware of the Decision on the 15<sup>th</sup> of June from a third party and that the Decision was confirmed to the Appellant by Aer Rianta on the 19<sup>th</sup> of June 2001. The Appellant sought further information from Aer Rianta and the Appellant was informed by Aer Rianta on the 19<sup>th</sup> of June 2001 that they would furnish a more detailed response to the Appellant within 1 to 2 weeks of that date. There were several communications between the Appellant and Aer Rianta subsequent to this and in particular the Appellant alleges that they were informed by Aer Rianta on the 2<sup>nd</sup> of July 2001 not to do anything until such time as Aer Rianta reverted to them. Aer Rianta reverted to the Appellant by way of e-mail dated the 18<sup>th</sup> of July 2001 confirming the Decision and not providing any further information.

Although the Decision was confirmed to the Appellant on the 19<sup>th</sup> of June 2001, there was communication between the Appellant and Aer Rianta subsequent to that date as a result of which the Appellant was led to believe that the matter would be investigated and that further information would be supplied to them by Aer Rianta. In the circumstances the Commission considers it reasonable to find that the grounds of the appeal first arose on the 18<sup>th</sup> of July 2001 when Aer Rianta reverted to the Appellant, after their investigations, with confirmation of the Decision. The Commission is of the view that the actions of the airport manager cannot and should not operate so as to frustrate an appeal under the Regulations. Accordingly the Commission is satisfied that this appeal was served within the time frame stipulated by the Regulations.

The Commission must now decide that substantive issues raised in this Appeal.

The most relevant regulations of the 1998 Regulations are set out below. These are;

Regulation 14(1) which states

*"Subject to the provisions of Regulations 7,8,9,10 and 12, suppliers and self-handlers shall have access to airport installations to the extent necessary for them to carry out their activities. If the managing body of an airport places conditions upon such access, those conditions shall be relevant, objective, transparent and non-discriminatory. The Minister shall be informed in writing of these conditions prior to their imposition"*

Regulation 14(2) which states

*"The space available for groundhandling at an airport shall be allocated by the managing body of the airport among the various suppliers and self-handlers, including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of relevant, objective, transparent and non-discriminatory criteria."*

The first issue which the Commission must decide under this Appeal is whether or not the Premises is an airport installation. The Commission notes that the term 'airport installation' is not defined in the Directive or in the 1998 Regulations. While the Commission is of the view that the term 'airport installation' must be interpreted in the widest sense of the phrase, the Commission does not consider that a warehouse facility without any additional equipment or any equipment specific to groundhandling services constitutes an airport installation. Accordingly the Commission does not consider that Regulation 14(1) is applicable to the Decision of Aer Rianta.

The next issue which the Commission must decide is whether Regulation 14(2) is relevant to the issues under consideration. As the Premises consists merely of a warehouse facility and this warehouse facility has been used in the past and is currently being used by approved suppliers in connection with the provision of groundhandling services as defined in the Regulations, the Commission is of the view that the Premises does constitute "space

available for groundhandling at an airport". Accordingly Regulation 14(2) of the 1998 Regulations applies to the allocation of such space by Aer Rianta. The Commission must now consider whether or not the provisions of this Regulation have been complied with by Aer Rianta in making its decision to allocate this space to Reed Aviation Ltd.

Regulation 14(2) places an obligation on Aer Rianta to allocate space available for groundhandling at the airport among the various suppliers and self handlers, including a new entrant in the field to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis on relevant, objective, transparent and non-discriminatory rules and criteria.

It is clear from the information furnished by Aer Rianta in relation to the decision making process regarding the allocation of the Premises that Regulation 14(2) was not complied with by Aer Rianta. In so far as it is possible to ascertain from the documentation which has been furnished to the Commission, Aer Rianta's decision was made on the basis of one or more of the following criteria;

1. Reed Aviation had expressed an earlier interest in the premises;
2. Reed Aviation were an existing operator at the Airport;
3. Reed Aviation appeared to be more established than the Appellant,
4. The Appellant had not had a conversation of any substance with Aer Rianta.

The Commission does not consider that these criteria are relevant, objective, transparent and non-discriminatory. The Commission finds therefore that Aer Rianta have not complied with Regulation 14(2) of the 1998 Regulations. In particular, the process followed by Aer Rianta was lacking in transparency. The intention of Aer Rianta to allocate the space was not notified to all potential interested parties. The relevant criteria upon which the decision of Aer Rianta would be based were not known. Aer Rianta do not appear to have notified any party other than Reed Aviation of the outcome of their decision. In addition the Commission finds that one of the stated reasons of Aer Rianta for allocating the Premises to Reed Aviation Ltd disregards the reference to "including a new entrant in the field" in Regulation 14(2).

For the above reasons the Commission accepts the Appeal of the Appellant and the Commission directs that the decision of Aer Rianta to grant a lease of the Premises to Reed Aviation Ltd is invalid. The Commission further directs that Aer Rianta must take

steps to re-allocate the Premises as soon as possible and that such allocation must comply with the provisions of the 1998 Regulations and in particular Regulation 14(2) thereof.

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William Prasifka  
Commissioner

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Date