Commission consultation on the status of self service kiosks owned by groundhandlers under S.I. 505/1998

Commission Paper CP2/2008

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1. INTRODUCTION

1.1 On the 8th February 2008, the Dublin Airport Authority (DAA) wrote to the Commission for Aviation Regulation asking for the Commission's view as to whether or not a Self Service Kiosk (SSK) space rental charge at Dublin Airport required prior approval as a "access to installation fee". This paper sets out the Commission's preliminary view and seeks comments from interested parties.

1.2 Having had an opportunity to consider the matter, the Commission is of the preliminary view that the rental of floor space upon which the installation of SSK's belonging to an airline or groundhandler is permitted is not an access to installation fee requiring prior approval within the meaning or intent of the relevant EC Regulations. Set out in this paper is the background to and reasoning behind the Commission's current thinking on this issue.

1.3 Parties wishing to make submissions are invited to do so in writing by 7 April 2008. Submission should be addressed to

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2. PRIOR APPROVAL UNDER THE GROUNDHANDLING REGULATIONS

2.1 The European Communities (Access to the Groundhandling Market at Community airports) Regulations, 1998, S.I. 505/1998 transpose, Council Directive 96/67/EC of 15th October 1996 on "Access to the groundhandling Market at Community Airports" into Irish Law.

2.2 Regulation 14 of the Regulations states:

> *14. (1) 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.*
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> *(2) 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 rules and criteria.*
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> *(3) Where access to airport 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.*

2.3 Accordingly, when the managing body of Dublin Airport wishes to impose a fee for "access to installations" it must seek prior approval from the Commission for Aviation Regulation (the Regulations having been transferred to the Commission as part of its statutory remit).

3. THE ROLE OF THE DAA AND THE ROLE OF THE COMMISSION

3.1 It is clear that Regulation 14 foresees two distinct acts being done by the airport managing body:

- facilitating groundhandler access to installations to the extent necessary for them to carry out their activities, as per Regulation 14(1); and,
- allocation of space available for groundhandling among suppliers and self-handlers, including new entrants to the extent necessary for the exercise of their rights and to allow effective and fair competition, as per Regulation 14(2).

3.2 Where an airport managing body decides that access to airport installations under 14(1) gives rise to the collection of a fee, that fee requires prior approval by the Commission for Aviation Regulation, which must asses if the fee is relevant, objective, transparent and non-discriminatory in accordance with the criteria specified in Regulation 14(3).

3.3 The Regulations do not overtly specify requirements concerning fees in respect of the allocation of space but they do impose an obligation on the airport authority to allocate that space on the basis of the same four criteria which governs the approval of access fees.

4. THE DAA VIEW OF THE SSK SPACE RENTAL CHARGE

4.1 The DAA have sought clarification as to whether the proposed space rental charge to be imposed on airlines and handlers in relation to SSK's can be deemed to constitute an Access Fee to Airport Installations (ATI) such as to require prior approval by the Commission in accordance with Regulation 14 (3) above.

4.2 In brief, the DAA view that this charge is not an ATI fee and thus the charge does not require prior approval.

4.3 The DAA argument is summarised below:

- In order for a charge to be classified as an ATI, it must be levied in respect of the use of an airport facility by a groundhandler. In this regard DAA point out that the SSK unit and technology platform is provided by the airline or handler in question and is not the property of the managing body of the airport. Thus the SSK involved in this matter are not "airport installations",
- Any charge which involves DAA passing on utility type costs to groundhandlers (including where relevant, any margin added) should not constitute an ATI. In this regard a significant proportion of the cost base for the space rental charge per SSK relates to the passing on of utility type charges; and,
- The property rented must be essential for the groundhandler, to have adequate access to the airport to undertaking its groundhandling activities. Thus to be classified as an "access to installations" property it must either comprise or contain specialised equipment for groundhandling, or its location must be specifically required to be within the airside complex, as distinct from an office property which could be located anywhere throughout the airport complex or elsewhere.

4.4 DAA argues that SSK's are not located airside or necessarily in the traditional areas associated with the check-in process. No specialised equipment is provided to facilitate SSK's. SSK's are also not necessary for the processing of passengers, as not all airlines or handlers utilise SSK's. Indeed increasingly other technology solutions are becoming common.

5. THE PRELIMINARY VIEW OF THE COMMISSION

Allocation of space as opposed to access to airport installations

5.1 The question as to whether an SSK space rental charge requires approval or not turns on whether the proposed fee relates to "allocation of space" or "access to airport installations" at Dublin Airport.

5.2 An airport installation is not defined in the legislation. Neither is there any explanation or guidance offered in relation to the concept of space available for groundhandling. It has been said that an installation is something tangible, consisting of the airport infrastructure.[1] It is the Commission's view that "access to installation" means access to items of equipment installed for use at the airport by the airport managing body which groundhandlers need to use provide their services. One should recall that historically at Dublin Airport, most groundhandling activities and the equipment needed for them have been carried out and provided by companies other than DAA. Examples of airport installations provided by DAA include check-in desks and the baggage conveyance system. It is possible that a particular part of the terminal is so adapted for a particular use that as a piece of infrastructure it is an airport installation, for example, the baggage hall.

5.3 This view is consistent with that of the European Court of Justice,[2] which stated that reference to installations clearly relates to the infrastructure and the equipment made available by the airport. For some groundhandling activities, the supplier or self-handler needs to rent moveable or immoveable property belonging to the airport's managing body, while for others mere access to the installations used in common is sufficient. That interpretation is consistent with Article 2(a) of the Directive, which defines an airport as any area of land especially adapted for the landing, taking-off and manoeuvres of aircraft, including the ancillary installations which these operations may involve for the requirements of aircraft traffic and services, and the installations needed to assist commercial air services.

5.4 The fact that access to the airport installations is a necessary precondition for access to the groundhandling market explains why the Community legislature not only laid down provisions relating directly to access to that market but, in order to ensure genuine access to the market, was also entitled to specify the conditions for access to the airport installations themselves. These provisions have been transposed into Irish law with the additional feature of prior approval of access to installation fees by the Commission for Aviation Regulation.[3]

5.5 Having regard to a number of decisions of the European Commission it seems clear that offices, administrative and rest areas may be

[1] Opinion of Advocate General Mischo in Case C- 363/01 Flughafen Hanover-Lagenhagen GbmH v. Deutche Lufthansa AG, 28 January 2003.
[2] In the Hannover Airport case, see note 2 above.
[3] Case C- 363/01 Flughafen Hanover-Lagenhagen GbmH v. Deutche Lufthansa AG, 28 January 2003.

regarded as examples of "space" for the purposes of the Regulations.[4] Rest rooms are space and distinct to maintenance facilities.[5] Similarly renting hangars is regarded as coming within the meaning of renting storage space for equipment.[6]

The proposed SSK space rental charge

5.6 In relation to the DAA's point set out in paragraph 4.4 above, it occurs to the Commission that in order for a passenger to actually use an SSK it must not be located airside. If it were, the passenger would not be able to receive a boarding card allowing passage through security thereby making the transition for "landside" to "airside". The Commission believes the SSK machines are themselves specialist equipment for goundhandling on the landside representing an alternative to a check-in desk. Fees for check-in desks are "access to installation fees".[7] Fees for airport provided SSK's would also require approval but this does not arise in this matter. The question of location on the "airside" also does not arise in this application.

5.7 In the instant case the Commission is of the opinion that the rent by DAA of space to groundhandlers on which they can install their own self service kiosks (which is equipment) does not involve access to installations within the Regulations as interpreted or applied, as the airport does not own or the equipment. In this case it is the airlines/groundhandlers that are facilitated in installing their own equipment. Thus, in imposing a charge for SSK's it is not imposing an access to installation fee per se. Rather DAA is allocating a portion of its floor space for the purposes of a groundhandling activity. It is however under a statutory duty to ensure that the allocation of space is done by reference to relevant, objective, transparent and non-discriminatory criteria.

5.8 Whether SSK's are necessary for groundhandling depends on the other methods of check in available from the airline. Airlines/groundhandlers regularly rent check-in desk equipment from airport managing bodies to check-in passengers. That rent is regarded as an access to installation fee. Consequently, one can say that SSK's as a piece of check-in equipment installed at an airport, represent installations and thus if they were installed by and belonged to the airport they would be airport installations; and therefore any charge levied for their use by the airport would require prior approval from the Commission. This is not the factual position in the case before the Commission.

[4] COMMISSION DECISION of 27 April 1999 on the application of Article 9 of Council Directive 96/67/EC to Roissy-Charles de Gaulle airport.
[5] COMMISSION DECISION of 10 January 2000 on the application of Article 9 of Council Directive 96/67/EC to Funchal airport.
[6] COMMISSION DECISION of 14 January 1998 on the application of Article 9 of Council Directive 96/67/EC to Frankfurt Airport (Flughafen Frankfurt/Main AG)
[7] Judgment of the ECJ in Case C-363/01 between Flughafen Hanover- Langenhagen GmbH and Deutche Lufthansa AG, 16 October 2003.

6. CONCLUSION

6.1 Having regard to the DAA's argument that in order for a charge to be classified as an access to installation fee, it must be levied in respect of the use of some form of airport facility by a groundhandler, the Commission believes that an "access to installation charge" requiring prior approval by it must be a fee relating to the use of airport equipment or some specially adapted part of the terminal belonging to DAA which is required by the groundhandler to perform one of the listed groundhanding function. The SSK unit and technology platform in question is being provided by the airline/groundhandler and is not the property of the managing body of the airport, consequently the Commission is of the preliminary view that the charge foreseen in relation to rental of floor space is not an access to installation fee requiring prior approval by the Commission.

6.2 Interested parties are invited to submit comments by 7 April 2008. The Commission will consider all representations made to it in formation of its final view on this matter. Submissions should be made in writing and addressed to:

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