

# **COMMISSION NOTICE 2/2005**

## **NOTICE REGARDING THE POWERS OF THE COMMISSION UNDER THE GROUNDHANDLING REGULATIONS IN RESPECT OF RETROSPECTIVE APPROVAL FOR ACCESS FEES TO INSTALLATIONS**

The Commission received an application in April 2004 from Aer Rianta (hereafter the Dublin Airport Authority), which sought approval for the collection of a rental fee (both annual and hourly rates) in respect of check-in desks at Dublin Airport. The DAA were seeking approval for the fee rates as set by them back in January 2001.

The legislative basis for the request to the Commission is that set out in Statutory Instrument 505 of 1998 European Communities (Access to the Groundhandling Market at Community Airports) Regulations 1998 (the "Regulations"). Due to the very specific nature of the criteria governing the making of an application set out in those Regulations i.e. approval must be sought "in advance", it was the Commission's view that the DAA application should be treated as seeking approval on a prospective basis only and that the issue of any entitlement to retrospective sanction would require separate consideration from a legal standpoint.

In those circumstances the DAA submitted a revised application in respect of fees to be imposed prospectively only. This revised application – in relation to Dublin Airport - was received on 11 June 2004. On 9 July additional submissions were received seeking prospective approval in respect of check-in desks at Shannon and Cork and also in respect of the collection of a per passenger fee for use of the CUTE facility (Common User Terminal Equipment) at Shannon airport.

Following an examination of the various applications as presented by the DAA, the Commission initiated a non-statutory consultation process by way of Consultation Paper CP5/2004 which was published on 17<sup>th</sup> August 2004. This document set out the background to the application, the legal basis for the Commission's role and it sought the views of interested parties and the public in respect of the application. On page 3 of CP5/2004 it was noted that while the current application sought prospective sanction only, the DAA had informed the Commission that it also intended to seek retrospective approval of the check-in desk charges but that this aspect would be addressed separately. It was the DAA's intention to submit the case for retrospection based on legal advice.

The responses to CP5 were placed on the Commission's website on receipt and the Commission proceeded to conclude its analysis of the DAA application and consider the comments received during the consultation. A final Decision in relation to the request for prospective approval was published on 6<sup>th</sup> October 2004 in CP8/2004 and approval was given going forward for the rates as presented by the DAA.

In October 2004, the DAA provided the Commission with a submission, which set out the legal basis for the case for retrospective approval. The Commission, mindful of the background to this issue and relevant litigation in both the Irish Courts and the European Court of Justice, has carefully considered this submission and subsequent submissions made by the DAA and also sought Senior Counsel's advice on the matter. In summary, that advice advocated that it is not open to the Commission to reach a decision which could be viewed as an invalid interpretation of the fundamental criterion of advance approval as laid down in Regulation 14 (3) of the Regulations. That advice has been adopted as being the most prudent and appropriate course of action in all the circumstances. Consequently, if the DAA were to seek approval in respect of fees that have already been imposed, the Commission would not be in a position to consider such an application.

The DAA have been advised in writing of this decision.

William Prasifka  
Commissioner

8 April 2005