

**Appeal to the Civil Aviation Authority under
Regulation 20 of the Airports (Groundhandling)
Regulations 1997 made by Ryanair Limited
against Gatwick Airport Limited and BAA
Airports Limited.**

The CAA's Decision

May 2011

CONTENTS

	Page
1. CAA APPEAL HEARING	3
2. RELEVANT BACKGROUND	5
3. APPEAL FINDING	8
4. CAA DIRECTION	15

1. CAA APPEAL HEARING

- 1.1 On 18 August 2009 Ryanair appealed to the CAA under the Airports (Groundhandling) Regulations 1997 (“the Regulations”). The Regulations transposed into UK law the provisions of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (“the Directive”). Recognising that groundhandling services are essential to the proper functioning of air transport and make an essential contribution to the efficient use of air transport infrastructure, the broad aim of the Directive was to open up access to the groundhandling market.
- 1.2 Regulation 16(d) of the Regulations stipulates that the managing body of an airport or, where appropriate, the public authority or any other body which controls it, shall take the necessary measures to ensure that any fee charged for access to airport installations is determined according to relevant, objective, transparent and non-discriminatory criteria.
- 1.3 Under Regulation 20 (that implemented Article 20 of the Directive) any person who is aggrieved by a decision or individual measure taken pursuant to Regulation 16 by the managing body of the airport, or by another body controlling the airport, has the right of appeal to the CAA. The grounds for Ryanair’s appeal were that Gatwick Airport Limited (GAL) had not determined its charges for check-in desks and associated baggage facilities according to the criteria in Regulation 16(d).
- 1.4 The appeal process is governed by the procedures in Part 1 of Schedule 2 to the Regulations. At the conclusion of the appeal the CAA can either dismiss the appeal or give such direction in relation to the airport’s decision or individual measure concerned as it thinks fit.
- 1.5 The CAA convened a public Appeal Hearing under the Regulations that was held on 8 and 11 April 2011 to consider written and oral representations from the parties, Ryanair and GAL. Although BAA Airports Limited remained a party to the appeal it did not make any submissions to the CAA and did not appear at the Appeal Hearing.

1.6 Participants in the Appeal Hearing were as follows.

CAA Panel: Iain Osborne (chair)
David Gray

Adviser to CAA Panel: Richard Moriarty

Secretary to CAA Panel: Paul Taylor

Appellant: Ryanair Limited, represented by Daniel Jowell QC

Witnesses: Ian Clayton, General Manager UK Operations
Louise Congdon, Managing Partner, York Aviation

Respondent: Gatwick Airport Limited (GAL), represented by Mark Hoskins QC

Witnesses: Robert Eskine, Manager Passenger Services and Ground Handling
Stephen Priddle, Financial Business Partner

2. RELEVANT BACKGROUND

2.1 Alongside this document the CAA has also published the following material on its website that provides further background to the Appeal and the CAA's decision:

- a full transcript of the Appeal Hearing on 8 and 11 April 2011; and
- a copy of the "Case Brief" that the CAA issued to the parties in advance of the Appeal Hearing summarising the main arguments presented to date.

2.2 The issue before the CAA was whether during the period from 18 July 2009 to 18 August 2009 (the "Relevant Period") GAL determined its charges for check-in and baggage facilities in a manner that complied with the criteria of Regulation 16(d).

2.3 In coming to a decision the CAA must do so in accordance with any relevant decisions of the Court of Justice of the European Union (CJEU). It may also take into account other authorities such as opinions of the Advocates General to the CJEU and the decisions of national courts and of other regulators. Accordingly, the CAA has had regard to the following cases concerning ground handling:

- i. *Flughafen Hannover-Langenhagen GmbH v Deutsche Lufthansa AG* (Case C-363/ 01) of 16 October 2003 and the opinion of the Advocate General;
- ii. *Deutsche Lufthansa AG v ANA – Aeroportos de Portugal SA* (Case C-181/06) dated 5 July 2007 and the opinion of the Advocate General;
- iii. Judgment of the Court in Case C-460/02 of 9 December 2004 in relation to Italy;
- iv. Judgment of the Court in Case C-386/03 of 14 July 2005 in relation to Germany; and
- v. *Ryanair v The Commission for Aviation Regulation in Ireland* [2006] IEHC 291.

2.4 CAA has treated the following points, drawn from the above sources, as of particular relevance:

- a fee should only be charged in relation to access to airport installations;

- an airport should be able to recover its costs and to make a reasonable profit from the fees charged;
- the fee must constitute consideration for a service, which corresponds to the use of the airport installations;
- the primary definition of objectivity is ‘unbiased’ – as such the link between the costs to the airport in providing a service and the level of the fee for that service should be based on an unbiased approach and is the key to fulfilling the requirements of relevance and objectivity;
- to meet the transparency requirement a precise definition of the method of calculating the fee should be made available looking at the services, the cost of those services to the airport and the way in which the fee is calculated by reference to those costs; and
- in general terms, to comply with the principle of non-discrimination, comparable situations must not be treated differently and different situations should not be treated in the same way unless there is an objective justification for doing so.

Furthermore, discriminatory trading conditions can impede effective competition such that consumers fail to benefit from lower prices, increased quality, choice and innovation.¹

2.5 During the Relevant Period, the charges levied by GAL for check-in desks and baggage systems were as set out in Table 1. The same charges applied throughout 2009/2010.

¹ United Brands v Commission [1978] ECR 207, Alpha Flight Services v Aeroports de Paris [1998] OJ L 230/10.

Table 1: Check-in and baggage processing charges at Gatwick Airport July/August 2009

Service	Charge per passenger	Queuing standard
Gold	£2.30	10 minutes
Silver	£1.57	15 minutes
Bronze	£0.86	20 minutes
Common Use Self Service check-in	£0.73	
Airline bespoke check-in	£0.70	
Internet check-in	£0.61	
Day before check-in	£0.52	
Transfer passengers	£0.70	

3. APPEAL FINDING

Decision

3.1 Following the Panel's evaluation of evidence and representations leading up to and including the Appeal Hearing on 8 and 11 April 2011, the CAA has found that GAL did not fully comply with Regulation 16(d) of the Regulations.

3.2 The CAA upholds the appeal made by Ryanair in the following respects:

- GAL did not use objective criteria when it set the internet check-in charge. Over time, Ryanair increased its share of passengers carrying no hold baggage but GAL did not review its relative check-in charges. This had a discriminatory effect because similar terms were established for dissimilar transactions without a sufficient objective justification, in this case passengers carrying no hold baggage generating the same fee for check-in as passengers with hold baggage; and
- The criteria that GAL adopted were not transparent in that users were unable to gain an understanding of how precisely their charges had been calculated. For example, users would not have been aware that an important criterion that led GAL to the final calculation of the internet charge was that no airline should face a 'shock' to its price path.

3.3 While it has upheld Ryanair's appeal in certain respects, the CAA does not consider that the bundling check-in and baggage related charges is, of itself, evidence of discriminatory conduct. The failure of GAL relates to the specific issues discussed below.

Reasoning

3.4 As noted in paragraph 3.1, in reaching its decision the CAA has taken into account the written and oral evidence presented by the parties. In the reasoning below, where the CAA draws on specific pieces of evidence it references them as appropriate.

Non-discrimination

3.5 Both parties agreed at the Appeal Hearing that the provisions of Regulation 16(d) of the Regulations should apply to individual charges in addition to the totality of all

charges². It was also common ground between the parties that non-discrimination should be considered 'by intent' and/or 'by effect'³.

3.6 The CAA accepts the argument advanced by Ryanair that discrimination may arise if an airport sets equivalent terms for dissimilar transactions without an objective justification.⁴ This is a standard approach to assessing issues of discrimination based on the equivalent potential of both types of behaviour to have a detrimental effect on competition, innovation and consumers.

3.7 This approach suggests that where charges clearly relate to the costs that are associated with the relevant transactions this would provide an objective criterion for the determination of charges. This approach is supported by the relevant cases cited in Chapter 2.

3.8 However, charges that do not reflect differences in cost are not automatically discriminatory, for two reasons:

- airports have a margin of discretion to allocate costs that cannot be clearly attributed to particular services, for example to incentivise efficient use of assets to improve the passenger experience. In practice, the appropriate variation of charges will vary depending on a number of factors including the need to create suitable incentives for the most efficient use of airport facilities. However, this discretion to allocate costs is not unbounded and to ensure compliance with the Regulations, the airport must use objective, relevant, transparent and non-discriminatory criteria to justify the charges set; and
- airports could use other criteria to determine charges provided that, consistently with the Regulations, those criteria are also objective, relevant, transparent and non-discriminatory. The CAA notes that the more significant the relevant differences in assets or resources consumed by users paying the same fee, the more compelling the airport's justification for the fee may need to be in order to counter its apparently discriminatory effects.

3.9 In assessing whether equivalent terms were set for dissimilar transactions the CAA's judgement is that the balance of evidence presented by the parties suggests that airlines with a substantial majority of customers not requiring the airport's assets and

² Transcript pages 20 to 22.

³ Transcript pages 38 and 179.

⁴ Transcript page 38.

resources for baggage processing impose a lower cost over the long-run than those that do. GAL accepted that the main driver of check-in charges related to costs of the baggage system.⁵ Taking these costs in total, the CAA notes that approximately 65% of the cost associated with check-in charges for the South Terminal relates to the baggage system.⁶ Costs associated with the baggage system include fixed costs, maintenance costs and costs associated with incremental use of the assets. GAL accepted that passengers who checked in online with no hold luggage imposed relatively few incremental costs on the system compared to those that checked in bags.⁷ The parties did not agree on the scale of potential differences in total cost, for example in relation to costs associated with maintenance of the baggage system, but the CAA notes that both GAL and Ryanair agreed that the difference in total cost could be significant over the long-run.⁸ For example, costs could vary because different maintenance schedules might be adopted, or elements of the systems shut down as a result of predictably lower throughput over time.

- 3.10 GAL acknowledged that when setting the pricing differentials for different check-in methods – and hence the implicit contribution to common costs – it did so by balancing the impact on airlines and this was generally based on a judgment albeit in a way that would incentivise customer behaviour towards more efficient (that is, less costly) check-in methods.⁹ More significantly, after setting the initial relativities among individual charges in 2007 it appears that GAL opted to up-rate these across the board by reference to average price changes each year rather than revisiting them in light of market developments. The CAA accepts that there is no single “correct” way to allocate fixed and sunk costs but considers that GAL failed to ensure the variations in its charging structure were based on relevant, objective, transparent and non-discriminatory criteria.
- 3.11 This failure occurred, in particular, because GAL has recognised that there were significant changes in the market over this time. The risk of harm to the competitive process in either the ground handling or aviation services markets was likely to have increased over this period as some airlines such as Ryanair increasingly offered their customers a booking service aimed at encouraging them to make less use of the baggage system whilst checking in online. It appears that a key criterion GAL used

⁵ Transcript page 234.

⁶ GAL Pricing Transparency Statement 2009.

⁷ Transcript page 210.

⁸ Transcript pages 260 to 263.

⁹ Transcript pages 207 to 209.

to set charges was that no single airline should be faced with sharp price shocks. The CAA takes the view that the impact on individual airlines cannot be used as an objective justification for maintaining a structure of charges that has become increasingly discriminatory over time.

3.12 A number of further points during the Appeal Hearing were aimed at demonstrating that GAL had not failed to set non-discriminatory charges within the meaning of Regulation 16(d). However, for the reasons discussed below, the CAA does not find that these individually or taken together are sufficiently compelling in the circumstances to justify departing from a finding that GAL had clearly set equivalent terms for dissimilar transactions such that Regulation 16(d)'s requirements had not been met.

I) *GAL noted that there was no consensus amongst airlines for a different pricing approach.* The CAA supports an airport seeking a consensual commercial approach to setting check-in charges. However, where such a consensus cannot be reached, this cannot in itself justify the maintenance of an enduring pricing structure that does not meet the non-discrimination criterion. The CAA notes that GAL acknowledged one of the key reasons for it avoiding greater differentiation in charges was to mitigate sharp increases in charges levied on users that did make use of the baggage system.¹⁰ This is not an objective justification for maintaining a structure of charges that sets equivalent terms for dissimilar transactions.

II) *GAL argued it should not adopt a pricing structure for one airline.* Whilst the CAA can understand the impracticalities of setting a pricing structure for one or a small number of airlines' characteristics, this does not obviate the obligation on the airport to set charges that are non-discriminatory. The CAA accepts that the situation is complex and difficult because any change in charge to one airline or group of airlines will affect the level of charges faced by another airline or group of airlines. This, however, does not remove the requirement that charges are set in a non-discriminatory manner.

III) *GAL noted it was impractical to introduce an alternative system.* In particular, GAL argued that unbundling the check-in and baggage costs would present difficulties in terms of accurate forecasting and the robustness of information. There was also administrative convenience as most charges were on a per

¹⁰ Transcript pages 205 and 206.

passenger basis. While complexity and cost can be objective justifications for maintaining a charging structure, GAL acknowledged that these factors have become less of a constraint over time.¹¹ The CAA notes that the availability of data was not an insurmountable constraint if GAL had chosen an alternative pricing system that had a greater differentiation of use of the baggage system for the Relevant Period.

- 3.13 While the CAA recognises that the issues raised by GAL are legitimate concerns to consider, it notes that the airport does not appear to have balanced these factors against a consideration of whether that pricing system could indirectly cause discrimination by setting equivalent terms for dissimilar transactions without an objective justification. GAL understood that Ryanair was incentivising its customers to avoid checking in baggage. It would have been aware that its bundled internet check-in and baggage charge would, in effect, require Ryanair and airlines with similar characteristics to pay for a service many of their customers would not use. Compared to other airlines which did not operate in this way, this placed Ryanair and any other similar airline operations at a disadvantage and GAL has not provided an objective reason for justifying this type of discrimination.
- 3.14 A further point the CAA believes is relevant is that the potential benefits of competition, an aim of the Directive, should be realised for consumers. Competition promotes positive developments in the market such as innovation, choice and value – organisations may seek an advantage such as encouraging the development of innovative solutions. Internet check-in and systems to discourage the carriage of hold baggage are examples of the types of business model innovation the CAA would expect to see in a competitive market. One of the potential problems with GAL's approach is that an airline might not be able fully to realise the benefits of its chosen business model – in this case the cost benefits of reducing the proportion of passengers with hold luggage. To the extent this represented a process of innovation aimed at achieving cost reductions capable of being passed on to passengers, the structure of check-in charges adopted by GAL had the potential to impede its development to some degree.

¹¹ Transcript pages 223 and 263-264.

Transparency

- 3.15 Both parties accepted the test provided in previous case law that to meet the transparency requirement there should be a precise definition of the method of calculating the charges.¹²
- 3.16 The CAA recognises that it is difficult for all airlines to be assured the criterion has been met through the medium of one communication. It is important that the airport is open and responsive if airlines have any queries. The number of queries in response to such communication should not be considered a firm indication of the airport's failure to meet the criterion of transparency.
- 3.17 Regardless of the approach adopted the CAA would expect to see two clear outcomes from a transparent process;
- users have equality of access to information; and
 - users are in possession of sufficient information to build up for themselves the relationship between the charge(s) they face and the objective factors, such as cost, that have determined the charge(s).
- 3.18 In this case the CAA finds that the criterion of there being a precise definition of calculating the charges is undermined by the subjective nature of the setting of the differentials in the check-in mode charges. This meant that no user was able to know the method for how charges were determined – in this case users were not aware that a key factor used by GAL was that no airline should be faced with a rapid increase in costs, and this was an enduring principle that did not take into account changing circumstances. The CAA also notes that some of the information needed to understand the charges was only provided in the process of the Appeal Hearing, such as the provision of the charging model. For example, without this model, it was not possible for the CAA to understand how GAL derived the specific charges for the relevant period. It only became clear to the CAA how charges were set once GAL explained in its evidence that the internet check-in charge reflected a discount to incentivise internet check in and did not provide an explicit discount in relation to reduced use of the baggage system. GAL did not provide an explanation as to why this information could not have been made available to users.

¹² Transcript pages 45-54 and 377.

Other Matters

- 3.19 Ryanair's appeal was directed against both GAL and BAA Airports Ltd. While BAA Airports Ltd was a holding company of GAL during the Relevant Period, the CAA saw no evidence that would lead it to the view that it played any material role in the determination of GAL's charges.

4. CAA DIRECTION TO GAL

- 4.1 Having found for the reasons set out in section 3 that GAL did not comply fully with the provisions of Regulation 16(d), the CAA is required by paragraph 7(2)(b) in Part 1 of Schedule 2 to the Regulations to give a direction to GAL . That paragraph gives CAA the discretion to give such direction in relation to the decision or individual measure as it thinks fit.
- 4.2 The CAA confirmed at an early stage in the proceedings that consideration of the appealed decision/measure would involve looking not just at the invoices issued over the Relevant Period, but also at the pricing mechanism that had been applied to produce those charges. To the extent that the CAA's decision has found GAL's charging system to be incompatible with the requirements of Regulation 16(d), the direction below is aimed at ensuring that such defects are remedied. The CAA's concern is therefore to secure future compliance with the Regulations on the part of GAL guided by the CAA's findings in this decision.

The CAA directs GAL to ensure that the following provisions are met:	
A	It consults interested parties effectively in order to revise its pricing structure for check-in and baggage processing by no later than 1 April 2012 to meet the requirements of Regulation 16(d) so that individual charges are based on objective, relevant, transparent and non-discriminatory criteria.
B	In doing so it ensures that the charge for internet check-in does not in effect, set equivalent terms for dissimilar transactions without an objective justification with respect to those customers requiring the assets and resources of baggage system and those customers that do not require them.
C	In doing so, it exercises its margin of discretion in how it allocates the common costs of its baggage system to ensure cost recovery in such a way that any such allocation of these costs is based on objective and non-discriminatory

	criteria.
D	By no later than 1 April 2012, it reviews the information it provides to users and takes such steps as are necessary to ensure that users receive a precise and comprehensible description of the method of calculating the charges and there is a clear explanation of the link between the facilities used, the costs of the services and the charges set. In particular, it should make this information available in a transparent manner to all users at once, eg. via its website.
E	By no later than 1 May 2012, it provides the CAA with written evidence sufficient to demonstrate that GAL has complied with the direction in A to D above.

Paul Taylor
For the Civil Aviation Authority
27 May 2011