

Ryanair's submissions in relation to the CAA's Decision and draft Directions in respect of Ryanair's appeal under Regulation 20 of The Airports (Groundhandling) Regulations 1997

A Introduction

- 1 These Submissions comprise Ryanair's representations in relation to the Civil Aviation Authority's (the "CAA") Decision and draft Directions (CAP 1046) in respect of Ryanair's appeal to the CAA under Regulation 20 and in accordance with Part 1 of Schedule 2 to The Airports (Groundhandling) Regulations 1997 (the "Regulations") in relation to the check-in and baggage charges introduced by Gatwick Airport Limited ("GAL") on 1 April 2012 (the "Present Regulation 20 Appeal").
- 2 There is one Annex to these Submissions which contains a marked-up version of the CAA's draft Directions.
- 3 Ryanair submits that the modifications to the draft Directions set out in Annex 1 are necessary to ensure GAL's compliance with the Regulations and to fulfil the CAA's role as independent appeal body under the Groundhandling Directive 96/67/EC (the "Directive"<sup>1</sup>).

B The CAA's draft Directions

Consultation and agreement

- 4 Paragraph 3.5 of the Decision and Sections A and B of the CAA's draft Directions provide for a period of consultation between GAL and airport users to explore whether agreement can be reached regarding objective, transparent, relevant and non-discriminatory measures to be adopted and implemented by GAL for the purposes of calculating certain charges for use of check-in and baggage facilities. If agreement cannot be reached, the CAA's mandated charging mechanisms ("the default arrangements") will apply.
- 5 It is not clear from the Decision and the draft Directions whether "agreement" with airline users means common agreement between all airline users on the proposals or bilateral agreement between GAL and a particular airline regarding that airline's individual time in use. To ensure equality of treatment, Ryanair has modified the draft Directions to specify that agreement with airport users shall include the agreement of Ryanair. This is to avoid a situation in which GAL seeks to implement charging mechanisms which have been agreed between GAL and certain airport user(s), but in relation to which Ryanair objects.

<sup>1</sup> Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports OJ 25.10.1996 L 272/36

### Implementation of the new charging mechanisms

- 6 Sections A and B of the CAA's draft Directions provide that the new charging mechanisms will come into force on 1 December 2013 if agreement cannot be reached between GAL and airport users by 30 September 2013.
- 7 Ryanair submits that GAL should be required to bring its charging mechanisms into compliance with the Regulations as soon as practicable, unless there is good reason for further delay. Ryanair has modified the longstop date of 1 December 2013 to 1 November 2013 as a period of 4 weeks should be sufficient for GAL to adjust its systems to deal with the CAA's default arrangements, particularly when those arrangements are "closely aligned" with GAL's own March 2013 submissions<sup>2</sup> and GAL will have been aware of the details of such arrangements for over 5 months.

### Rates

- 8 Ryanair agrees with the CAA's comments at paragraph 3.5 of the Decision that the CAA needs to prescribe in the Directions a default position on the allocation of the relevant costs. Ryanair respectfully submits that paragraph B.3 of the CAA's draft Directions is insufficiently clear and prescriptive to ensure GAL's compliance with the Regulations. In particular, it is unclear how intensity of use of the floor space is to be measured. This should be clearly prescribed to be calculated by reference to the number of check-in desks and/or the length of time that they are open and to take account of the proportion of the airline's customers that are "straight to security" ("STS") passengers. Ryanair submits that the lack of further clarification on these points will likely result in protracted disagreement, appeals to the CAA and/or satellite litigation.
- 9 Accordingly, Ryanair has added wording to the draft Directions at paragraphs 3 to 6 of section B of the draft Directions to address this concern. Ryanair submits that the allocation of rates set out in the draft Directions at Annex 1 to these Submissions is consistent with the CAA's findings in the Decision, and adheres to the user-pays principle and is objective, transparent, relevant and non-discriminatory.

### Other items of costs

- 10 The Decision makes a general finding that GAL did not fully comply with Regulation 16(d) when it set its structure of check-in and baggage charges from 1 April 2012<sup>3</sup>. It held that GAL had not used non-discriminatory criteria when it set its charges for check-in and baggage from 1 April 2012<sup>4</sup>. It stated that, "The way in which GAL allocated certain costs led to a situation where, by effect, similar terms were set for dissimilar transactions without a sufficient

<sup>2</sup> Decision, para 3.5.

<sup>3</sup> Decision, para 2.1

<sup>4</sup> Decision, para 2.2.

objective justification to overcome the fact that its actions meant that those airlines wishing to innovate in a way that made less use of these particular airport facilities could not realise a sufficient share of these gains and pass them onto passengers.”

- 11 At paragraph 2.4 of the CAA’s Decision, the CAA focussed on GAL’s allocation of two particular items of costs, namely planned maintenance costs and rates by way of illustration to demonstrate that GAL’s methodology had resulted in charges that had a discriminatory effect against Ryanair. The CAA concentrated on those two items of costs as they had the greatest materiality and accounted for almost half of the forecast costs recovered through the check-in and baggage charges.
- 12 Ryanair’s appeal raised a general concern that GAL had failed to apply non-discriminatory criteria in its check-in and baggage charging structure and had failed to apply the “user-pays” principle. The CAA agreed with Ryanair’s submissions that Regulation 16(d) had to be applied to “individual charges for each specified activity”<sup>5</sup>. In particular, as part of this appeal, Ryanair did not just challenge maintenance costs and rates, but also went further and disputed the allocation of Common Airport Costs (including police, corporate charge/overhead and terminal management) to STS passengers, which made up over 75% of Ryanair’s passengers<sup>6</sup> as well as other components of the departing and arriving baggage charges, including cleaning, refuse, electricity, heating and ventilation, portering, baggage flow controller costs and other charges<sup>7</sup>.
- 13 The use of the two particular illustrative examples (i.e. maintenance and rates) should not narrow the scope of the CAA’s finding or undermine the generality of its findings. The CAA correctly observed that GAL’s failures had undermined the objectives of the Directive, namely that “opening up access to the groundhandling market” should reduce the operating costs of airline companies and improve the quality of service provided to airport users<sup>8</sup>. That inconsistency applies with as much force to the other charges identified by Ryanair as to maintenance and rates.
- 14 Indeed, at paragraph 3.4 of the Decision, the CAA set out its general expectation to the effect that: “Given the nature of Ryanair’s operations at Gatwick, the CAA would expect it to benefit from a charging structure that is based to a significant extent on the relevant and objective cost-driver of time-in-use of the check-in desks and the departing and arriving baggage systems and on the intensity of use made by passengers of the check-in areas.”
- 15 At paragraph 3.6 of the CAA’s Decision, the CAA noted that “GAL has accepted that some costs, specifically electricity and the baggage transfer unit, could also be allocated on the basis

<sup>5</sup> CAA May 2011 appeal decision, para 3.5 and Decision, paras 2.10-2.11.

<sup>6</sup> Notice of Appeal, para 16.

<sup>7</sup> See, in particular, Notice of Appeal, paras 28-29, 33 and Agreed Statement of Facts, paras 72-82.

<sup>8</sup> Decision, para 2.2.

of time-in-use” and that its “illustrative proposal for an alternative charging structure allocates these costs in this way”.

- 16 Ryanair submits that, to ensure the effectiveness of the objectives of the Directives and GAL’s compliance therewith, the Direction should not be confined to maintenance and rates but should also include the CAA’s expectation that GAL should base its charging structure for all Common Costs and baggage handling costs on a time in use basis. It has inserted a new Part C to the draft Directions to this effect.
- 17 Ryanair submits that GAL should, in the absence of agreement with Ryanair of an alternative charging mechanism, be directed to charge for these other items of costs (in addition to the costs of planned maintenance and rates) on the basis of time in use required by individual airlines. These items of costs should be allocated as per GAL’s proposed charging structure dated 28 March 2013<sup>9</sup>, which indicates that GAL is willing and able to charge for these items of costs on the basis of time in use. Such a charging mechanism is compliant with the Regulations because it reflects the user-pays principle and is objective, transparent, relevant and non-discriminatory.

#### Application of the Directions from 1 April 2012

- 18 Ryanair is disappointed by the comments made by the CAA at paragraph 3.8 of the Decision regarding its refusal to exercise its discretion so as to apply the remedy retrospectively back to the start of the appeal from 1 April 2012. Ryanair respectfully submits that perceived difficulties, if any, in administering retrospectively from 1 April 2012 the charging structure provided for in the draft Directions are unfounded and in any event irrelevant to the duty on the CAA to ensure that the charging structures which were the subject of Ryanair’s Present Regulation 20 Appeal (namely those in place since 1 April 2012) are lawful and consistent with the objectives of the Directive and the Regulations.
- 19 First, it is possible for GAL to recalculate (or if not, to estimate) the amount that Ryanair should have been charged for its use of check-in and baggage facilities from 1 April 2012 had the charging structure provided for in the draft Directions been in effect. From this it will be possible for GAL to reconcile those sums against the amounts which Ryanair has actually been charged. A charging adjustment in Ryanair’s favour can then be made for the period from 1 April 2012 to the date on which the new lawful charging structure comes into force.
- 20 Second, and irrespective of any practical considerations, it is unacceptable for the CAA to determine that Ryanair has been unlawfully over-charged for its use of the check-in and baggage facilities from 1 April 2012, and to provide only a remedy in the form of a draft Direction which in substance takes effect no earlier than late 2013. That carries even greater force when GAL’s breach emanates from its failure to implement the CAA’s earlier Direction dated May 2011, which was granted following an initial appeal started by Ryanair in 2009.

<sup>9</sup> See Attachment I to GAL’s Comments in relation to Ryanair’s submissions to the CAA dated 4 March 2013

- 21 The fact that GAL might be faced with a total under-recovery because of difficulties in recovering the notional under-charge from other airlines is irrelevant. The risk of such a total under-recovery is a consequence which GAL must bear as a result of its unlawful conduct. The position in which GAL finds itself is entirely of its own making. It should have to bear the consequences of its failure to adhere to Regulation 16(d) and should not be allowed to retain the benefit from its own wrongdoing.
- 22 Third, as appellant in the Present Regulation 20 Appeal Ryanair should not be prejudiced by GAL's unlawful conduct nor by the comparative position of other airlines. As a result of its unique business model, Ryanair would be severely prejudiced if it is charged unlawfully high amounts for its use of check-in and baggage facilities from 1 April 2012 to the date on which the new lawful charging structure comes into force. The availability of an effective remedy to redress the wrongs that Ryanair has suffered should not be denied simply because of practical complications involving all airlines. The fact that other airlines may not benefit from a similar charging adjustment is immaterial: those airlines had the opportunity to appeal the charging structure to the CAA but did not do so. They therefore have no entitlement to a remedy in this particular case.
- 23 Fourth, the CAA has a discretion under paragraph 7(2)(b) in Part 1 of Schedule 2 to the Regulations to give GAL such direction as it thinks fit. That discretion is not unlimited but has to be exercised in line with its statutory duties, including its duty of sincere cooperation under EU law to ensure the effectiveness of the objectives of the Directive<sup>10</sup> and to ensure an effective appeal remedy to safeguard the rights derived from EU law<sup>11</sup>. If the new charging structure set out in the draft Directions does not apply to the charges levied by GAL on Ryanair from 1 April 2012 it would:
- (a) undermine the effectiveness of the objectives of the Directive. In essence, GAL will be permitted to have over-charged and discriminated against Ryanair since 1999, thereby preventing the opening up of access to groundhandling market from reducing Ryanair's operating costs and improving the quality of services to its customers. The draft Directions provide no deterrent to GAL or other airport operators from flagrantly breaching European law; and
  - (b) undermine the effectiveness of Ryanair's successful appeal, since Ryanair will have been charged an unlawfully high amount in respect of its use of the check-in and baggage facilities for the period from 1 April 2012 to the end of 2013 (when the new charging structure comes into force). The lack of any retrospective remedy in the draft

<sup>10</sup> The CAA, of course, is under a duty to ensure that the European law principle of effectiveness is fully upheld: see Art 4(3) TEU which obliges the CAA, as part of the public administration of the United Kingdom, to take such steps as are necessary to ensure the effectiveness of EU law and to avoid any steps that might jeopardise the attainment of those objectives.

<sup>11</sup> Article 21 of the Directive.

Directions makes it excessively difficult to exercise the rights conferred by EU law and undermines the right of appeal guaranteed by Article 21 of the Directive.

- 24 For the above reasons, Ryanair submits that the CAA should direct that the new charging structure set out in the draft Directions shall apply to the check-in and baggage charges levied by GAL from 1 April 2012. Accordingly, Ryanair has added proposed wording at section F of the draft Directions to accommodate this submission.

#### Ryanair's costs

- 25 At paragraphs 27 to 31 of Ryanair's Submissions on remedies dated 4 March 2013 and at paragraphs 14 to 21 of Ryanair's Reply Submissions on remedies dated 28 March 2013 (the "Reply Submissions"), Ryanair provided reasons why the CAA should award Ryanair its costs of its First Regulation 20 Appeal, its Present Regulation 20 Appeal and its first Transparency Complaint.
- 26 In particular, Ryanair repeats the point made at paragraph 20 of its Reply Submissions, namely: (1) the CAA has a statutory power to award costs, and on this occasion it should do so; and (2) failure to award costs in Ryanair's favour will both (i) undermine the effectiveness of Ryanair's successful appeals, since monies that it has succeeded in showing ought not to be paid to GAL will, instead, simply be used up in legal fees (instead of being used to the benefit of passengers) and (ii) disincentivise Ryanair and other airlines from seeking in the future to ensure that European law is applied effectively by airport operators.
- 27 The fact that Ryanair has now had to bring two appeals against GAL's charging structures to show that such charging structures are unlawful, and that both appeals have been successful provides a very compelling reason why GAL should be directed to pay Ryanair's costs; if GAL is not directed to pay Ryanair's costs, GAL will not be subject to a strong deterrent from imposing unlawful charging structures in the future and "gaming" the system. As explained above, the CAA is also under a duty to ensure that the European law principle of effectiveness is fully upheld and must not render it excessively difficult to exercise any rights derived from EU law. That principle extends to the objective of ensuring effective review or appeal proceedings conferred by EU legislation: see Case C-456/08 Commission of the European Communities v Ireland [2010] 2 C.M.L.R. 42 , at [61]&[62]
- 28 Ryanair therefore submits that the CAA can and should award Ryanair its costs of its first Regulation 20 Appeal, its present Regulation 20 Appeal and its first Transparency Complaint. Accordingly, we have added proposed wording at section G of the draft Directions to accommodate this submission.

C Conclusion

- 29 For the above reasons, Ryanair submits that the CAA should issue a Direction in the terms of the amended draft Directions at Annex 1 to these Submissions.

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21 June 2013

## ANNEX 1

The CAA directs GAL to ensure that the following provisions are met:

A. Charges relating to the planned maintenance cost~~cost~~ of providing ~~of~~ check in and baggage facilities shall reflect relevant differences in intensity of use by airport users and shall comply with Regulation 16(d). In particular:

1. GAL's charges attributable to planned maintenance costs, in relation to the departing baggage system and the arriving~~of the~~ baggage system shall be calculated so as to reflect the time in use required by individual airlines.

a) For the departing baggage system, time in use shall be calculated by reference to an objective, transparent, relevant and non-discriminatory measure to be agreed with airport users following an appropriate period of consultation to commence within [28 days] of the issuing of these Directions.

If agreement, including the agreement of Ryanair, cannot be reached by [30 September 2013], the allocation of planned maintenance costs of the departing baggage system shall from [1 ~~November~~December 2013] be as set out below in compliance with Regulation 16(d).

i) Time in use shall be calculated by using Timeslice Data to estimate the period during which the baggage system is in use per Air Transport Movement (ATM). The cost~~cost~~ of planned maintenance in relation to the~~of~~ departing baggage system shall be allocated to individual airlines as set out below based on the periods in use identified for their flights by reference to that Timeslice Data.

ii) This allocation would be done by calculating an Airport Average Timeslice per ATM and an Average Timeslice per ATM for individual airlines. This would be used to produce a Departure Baggage Weighting Factor for each airline.

iii) The Airline Departing Baggage Weighting Factor would be applied to the overall Airport Average Departing Baggage Charge per ATM (calculated by dividing the departing baggage share of Planned Maintenance Costs based on Timeslice Data by the overall number of forecast departure ~~departing~~-ATMs over the relevant period).

iv) The application of the Airline Departing Baggage Weighting factor as described above would produce a Departing Baggage Charge per ATM for individual airlines.

v) The relevant period shall be as agreed between GAL and airport users. In the absence of agreement, including the agreement of Ryanair, the relevant period shall be 12 months.

b) For the arriving~~arrival~~ baggage system, time in use shall be calculated by reference to an objective, transparent, relevant and non-discriminatory

measure to be agreed with airlines using Gatwick following an appropriate period of consultation to commence within [28 days] of the issuing of these Directions.

If agreement, including the agreement of Ryanair, cannot be reached by [30 September 2013], the cost of planned maintenance of the arriving arrivals baggage system shall from [1 ~~November~~December 2013] be allocated as set out below in compliance with Regulation 16(d).

- i) Time in use shall be determined by reference to Last Bag data on the time between the time of arrival of the aircraft on stand and the time the last bag on a flight is delivered to the carousel gathered over the relevant period.
- ii) The relevant period shall be as agreed between GAL and airport users. In the absence of agreement, including the agreement of Ryanair, the relevant period shall be 12 months.
- iii) This data would be used to calculate an Airport Average Last Bag Time and an Airline Average Last Bag Time for each airline using Gatwick.
- iv) A weighting factor for each airline would be calculated by dividing the Airline Average Last Bag Time by the Airport Average Last Bag Time.
- v) The planned maintenance costs for the relevant period attributable to arrivals baggage overall would correlate to the total time in use calculated by reference to the Last Bag data as described above. This would then be divided by the total forecast number of arriving ATMs to produce an Airport Average ArrivingArrivals Baggage Charge per ATM.
- vi) The weighting factor described above would be applied to the Airport ArrivingArrival Baggage Charge per ATM to produce an Airline Arrival Baggage charge per ATM for individual airlines.

#### B. Charges to airlines relating to Rates

1. Charges which reflect the cost of rates payable by GAL shall be calculated by reference to an objective, transparent, relevant and non-discriminatory measure to be agreed with airport users following an appropriate period of consultation to commence within [28 days] of the issuing of these Directions.
2. If agreement, including the agreement of Ryanair, cannot be reached by [30 September 2013], the allocation of costs attributable to rates shall from [1 ~~November~~December 2013] be as set out below in compliance with Regulation 16(d).
3. GAL shall continue to allocate costs attributable to rates based on floor space occupied by distinct activities. In relation to the allocation of costs attributable to rates for the check-in areas, the departing baggage areas and the arriving baggage

~~areas~~area, these will be apportioned among individual airlines by reference to criteria which as set out below reflect ~~to a reasonable degree any~~ material differences in the intensity of use by individual airlines' passengers of the check-in areas, the departing baggage areas and the arriving baggage areas~~area~~ ~~by their passengers~~.

4. In relation to the allocation of costs attributable to rates for the check-in areas (i.e. Rates (Desks)), GAL shall allocate and apportion these costs among individual airlines on the basis of the total hours of use of check-in desks by individual airlines. The allocation would be done by calculating an hourly charge per check-in desk, calculated by dividing the costs attributable to rates for the check-in areas by the total hours of use of check-in desks by all of the airlines. Each individual airline would then be charged by multiplying the hourly charge per check-in desk by the total hours of use of check-in desks by that individual airline.
5. In relation to the allocation of costs attributable to rates for the departure baggage areas (i.e. Rates (TBF)), GAL shall allocate and apportion these costs among individual airlines on the same basis as set out at paragraph A.1(a) above.
6. In relation to the allocation of costs attributable to rates for the arriving baggage areas (i.e. Rates (Baggage Hall), Rates – Arrivals Baggage System and Rates – Arrival Baggage Reclaim), GAL shall allocate and apportion these costs among individual airlines on the same basis as set out at paragraph A.1(b) above.

#### C. Other charges

1. CAA expects GAL to take account of its findings and apply the same principles from the Decision in relation to its charging structure for all other costs forming part of check-in and baggage charges, including but not limited to Common Airport Costs other than rates, (namely police, corporate charge/overhead and terminal management) and other departing baggage and arriving baggage costs (including cleaning, refuse, electricity, heating and ventilation, portering, baggage flow controller costs, and other charges).
2. Such charges shall be calculated by reference to objective, transparent, relevant and non-discriminatory criteria, in conformity with Regulation 16(d). In particular, the CAA expects GAL to adopt a charging structure that reflect the time-in-use required by individual airlines of the common airport areas, check-in desks and the departing and arriving baggage systems.
3. The charging criteria are to be agreed with airlines using Gatwick (including Ryanair) following an appropriate period of consultation to commence within [28 days] of the issuing of these Directions. If agreement, including the agreement of Ryanair, cannot be reached by [30 September 2013], the costs shall from [1 November 2013] be allocated and apportioned amongst individual airlines on the same basis as the default arrangements set out in Paragraph A.1(a) and A.1(b) and B.4 above.

#### C.D. Information and Consultation

1. GAL shall:

- a) consult users each year on its annual forecasts of costs of and the anticipated use of check-in and baggage facilities at Gatwick airport for the forthcoming year commencing on 1 April; and
- b) provide users by [28 February] each year with a comprehensive explanation of the cost forecasts ~~regarding~~, the use made of the check-in and baggage facilities and the charges levied in relation to those facilities. GAL shall make this information available to all users at once in a transparent manner, for example via its website.

#### ~~D.E.~~ Reporting requirements

1. GAL shall report [monthly] to the CAA, and send a copy of the report to Ryanair at the same time, on progress made towards compliance with the ~~directions~~direction in A, ~~and B and C~~ above. This obligation to report shall cease on the date that a charging structure that satisfies A, B and CB comes into effect.

#### F. Application of Sections A, B and C of these Directions from 1 April 2012

1. The charges imposed by GAL on Ryanair for its use of the check-in and baggage facilities at Gatwick Airport from 1 April 2012 shall be calculated in accordance with the terms set out in sections A, B and C of these Directions.

#### G. Ryanair's costs

1. GAL shall pay Ryanair's costs of the first Regulation 20 Appeal (£173,000), the section 48 Transparency Complaint (£42,000) and the present Regulation 20 Appeal (£220,000) with interest at 8% per annum within 14 days of the date of these Directions.
2. Interest on Ryanair's costs is as follows:
  - a) Interest on £173,000 from 31 May 2011 (the date of the first Regulation 20 Appeal decision) at 8% per annum to 28 March 2013 (667 days) = £25,292.64) and continues to accrue daily thereafter at a rate of £37.92 per day until the date of payment;
  - b) Interest on £42,000 from 14 June 2011 (the date of the Transparency Complaint decision) at 8% per annum to 28 March 2013 (653 days) = £6,014.13) and continues to accrue daily thereafter at a rate of £9.21 per day until the date of payment; and
  - c) Interest on £220,000 from the date 14 days after the date of these Directions at 8% per annum accruing daily at a rate of £48.22 per day until the date of payment.

#### E.H. Entry into force

1. ~~These Directions~~This direction shall have effect from the date of issuing and shall remain in force unless and until ~~they are~~it is revoked by the CAA.

4.4 ~~This decision was made by Mr Iain Osborne and Mr David Gray, members of the Civil Aviation Authority.~~