

Appeal to the Civil Aviation Authority under
Regulation 20 of the Airports (Groundhandling)
Regulations 1997 made by Ryanair Limited
against Gatwick Airport Limited:
The CAA's Directions to GAL

CAP 1046 (b)

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CHAPTER 1

The CAA Decision and draft Directions

Background

- 1.1 On 24 May 2013 the CAA published its Decision and draft Directions on the appeal made to the CAA by Ryanair under Regulation 20 of the Airports (Groundhandling) Regulations 1997 (the Regulations) in relation to the check-in and baggage charges levied by Gatwick Airport Ltd (GAL) from 1 April 2012¹. The CAA invited representations on the draft Directions by Friday 21 June 2013.
- 1.2 Representations were made by GAL, Ryanair and Virgin Atlantic. The CAA published the responses on its website². The following paragraphs summarise the responses.
- 1.3 GAL made a number of specific suggestions for changes to the draft Directions:
 - The addition of a materiality test to the principle that charges should reflect differences in the intensity of use of the facilities by airport users.
 - They should acknowledge that 12 months of data on “time-in-use” would not be available for the setting of charges from 1 April 2014. GAL should therefore be entitled to use data over an agreed period or, if not agreed, a period that GAL deemed to be fair and reasonable.
 - In relation to the treatment of rates, the Directions should state that it would be reasonable to allocate costs split equally between bags and departing passengers using check-in.
 - GAL’s obligation to provide information and consult annually on its charges should be at an appropriate level of detail of forecasts of costs and the use made of the facilities and the charges levied in the preceding year.

1 CAP 1046: Appeal to the Civil Aviation Authority under Regulation 20 of the Airports (Groundhandling) Regulations 1997 made by Ryanair Limited against Gatwick Airport Limited. The CAA’s Decision and draft Directions. This and related documents are on the CAA’s website at: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=69>

2 Available at: <http://www.caa.co.uk/default.aspx?catid=78&pagetype=90&pageid=69>

- There was no need to specify the timing of progress reports. GAL would update the CAA as required.
- 1.4 GAL agreed that the Directions should not have any retrospective effect and that neither the Regulations nor the Airports Act envisaged the award of costs.
- 1.5 Ryanair suggested modifications to the draft Directions that it saw as necessary to ensure GAL's compliance with the Regulations and to fulfil the CAA's role as an independent appeal body:
- The Directions should set out what constituted agreement or non-agreement on a revised charging structure. Agreement with airport users should require the specific agreement of Ryanair to avoid a charging structure to which it objected.
 - GAL should be required to bring its charging mechanism into compliance with the Regulations as soon as practicable and by no later than 1 November 2013.
 - In relation to rates, the draft Directions were insufficiently clear and prescriptive to ensure GAL's compliance. Intensity of use should be measured by reference to the number of check-in desks and/ or the length of time that they were open and take account of the proportion of passengers that were "straight to security".
 - The use of two particular illustrative examples of planned maintenance and rates should not narrow the scope of the CAA's findings or undermine their generality. The Directions should 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.
- 1.6 Ryanair noted that the CAA had not exercised its discretion so as to apply the remedy retrospectively to 1 April 2012. CAA's duty was to ensure that the charging structure that was the subject of the appeal (ie that in effect from 1 April 2012) was lawful and consistent with the objectives of the Directive and the Regulations. This was all the more important given that GAL's breach of the Regulations emanated from its failure to implement the CAA's earlier Directions of May 2011. The risk to GAL of a total under-recovery through being unable to 'surcharge' some airlines for past periods was a consequence that GAL had to bear as a result of its unlawful conduct. Ryanair would be severely prejudiced if it was charged unlawfully high charges from 1 April 2012 to the date on which a lawful structure came into force. Airlines that had not appealed had no entitlement to a remedy.

- 1.7 In Ryanair's view, the CAA should award costs against GAL. It had the statutory power to do so. Failure by the CAA to award costs would undermine the effectiveness of Ryanair's successful appeals and disincentivise it and other airlines from seeking in the future to ensure that European law was applied effectively by airport operators.
- 1.8 Virgin questioned any methodology for the allocation of baggage costs that was based on "time-in-use". The baggage system at Gatwick had to be made available for use by every airline for every flight regardless of the number of bags presented at check-in. While Ryanair had a relatively low check-in rate at Gatwick the baggage belt still needed to be "on-line" for the full duration of its check-in period for all flights. It was not discriminatory to treat this as a common cost. Virgin also questioned how a fair and transparent charging system could be implemented based on "time-in-use" without incurring large administrative costs. It was important that any change that could have a large charges shock for some airlines should be implemented over a number of years to minimise the impact on passengers. Virgin welcomed the proposed obligation on GAL to consult annually on check-in and baggage charges and to provide comprehensive information to airlines. It also welcomed that the CAA had chosen not to introduce a remedy retrospectively as this could result in extensive administration costs and result in unpredictable distortions between airlines.
- 1.9 Under paragraph 6 of Schedule 2 Part 1 of the Regulations, the CAA may ask any of the parties to the appeal to amplify or explain any point made by him or to answer any question, the answer to which appears to the CAA necessary to enable it to determine the appeal, and the CAA has to give the other parties to the appeal an opportunity of replying to such amplification, explanation or answer. The parties to the current appeal are Ryanair (as appellant) and GAL (as the airport operator whose decision was being appealed). Other parties could have joined the appeal but only if they had submitted an appeal in their own right. No airline other than Ryanair did so. Consistently with the Regulations therefore, the CAA invited the parties (Ryanair and GAL) to comment on the representations that had been made on the draft directions. Ryanair and GAL provided comments on others' representations.

CHAPTER 2**CAA Assessment**

2.1 The CAA has considered carefully the representations made on the draft Directions in CAP 1046 and the further comments from the parties on those representations. However, the CAA wishes to make it clear that the purpose of inviting representations and further comments was to enable it to issue final Directions that fully and reasonably implement the CAA's findings in section 2 of CAP 1046. It was not seeking to re-open those findings. There were a number of aspects of the representations and comments that went beyond the purpose of the consultation and related more to the CAA's findings and the reasons for them. Consequently, the CAA is not revisiting its findings in the following areas:

- the validity of the use of a "time-in use" metric for the attribution of the relevant costs, This was considered by the CAA in paragraphs 2.22 to 2.32 of CAP 1046.
- the mandatory extension of the "time-in-use" metric to other items of cost. The CAA considered this in paragraph 3.6 of CAP 1046 and made no adverse findings in relation to the methodology used by GAL to allocate costs other than planned maintenance (and rates). It noted, however, that GAL had accepted that some costs, specifically electricity and the baggage transfer unit could also be allocated on the basis of "time-in-use".
- its decision not to apply a remedy retrospectively. The CAA considered this in paragraph 3.8 of CAP 1046. It concluded that it would not seem an appropriate exercise of the CAA's discretion to issue a retrospective direction that would risk both creating unpredictable distortions between airlines and having an unintentional impact on GAL's overall revenue from check-in and baggage charges. The CAA has considered the further representations from Ryanair and GAL on this point and is not persuaded that it should change its view. While the CAA is not applying a remedy retrospectively either generally or in respect of Ryanair, it is aware of the ongoing litigation between the parties on the question of the appropriate level of charges to Ryanair for previous periods. The parties may therefore wish to draw on the CAA's findings in this appeal as appropriate in these separate proceedings.

- the award of costs against GAL. The CAA considered this in paragraph 3.9 of CAP 1046 and concluded that neither the Regulations nor the Airports Act 1986 were expressed in terms that conferred on the CAA the requisite powers to order one party to pay the costs of another and to enforce such payment. The CAA sees no reason to depart from this view.

2.2 In terms of the subject matter of the Directions themselves the CAA considers that the matters to be considered in the light of the responses are:

- The appropriate historic time period for the measurement of “time-in-use” for the development of a revised charging structure.
- What constitutes “agreement” to a new cost attribution methodology for the development of a revised charging structure.
- The latest date by which a charging structure based on the revised cost attribution methodology should be put into effect.
- The extent of GAL’s obligation to consult annually on check-in and baggage charges and to provide information to support the annual consultations. and
- Whether GAL should be required to provide periodic reports on its progress towards the full implementation of the Directions.

2.3 For the historic time period for the measurement of “time-in-use”, the CAA’s draft Directions provided that this should be as agreed between GAL and airport users with a default period of 12 months if agreement could not be reached. In its response, GAL argued that 12 months of data on time-in-use would not be available as a basis for setting charges from 1 April 2014. The airport therefore proposed that the period should be as agreed with airport users or, if not agreed, a period that GAL deemed to be fair and reasonable. While the CAA accepts that a full 12 months data might not be available it believes it should have a role in determining the period given the importance of the data for determining the future charges paid by individual airlines. The CAA therefore considers that GAL should notify it if the period is not agreed with airport users and GAL wishes to rely on a shorter period which should require the endorsement of the CAA.

- 2.4 In its draft Directions the CAA expected GAL to consult airport users on appropriate measures for the calculation of “time-in-use” with a view to agreement being reached on those measures. If agreement could not be reached the draft Directions mandated measures that the CAA considered would be in compliance with Regulation 16(d). Both GAL and Ryanair sought clarification of what would constitute agreement for this purpose. On further reflection the CAA considers it must be unlikely that full agreement would be reached on measures that would have the inevitable result that some airlines would pay relatively more than they do now while others would pay relatively less. An alternative would be some form of qualified majority voting but it would be difficult to construct arrangements that were fair to all interested parties. That being so, the CAA has concluded that the default arrangements in the draft Directions should, suitably modified, become the mandated position but with provision for subsequent modifications through consultation between GAL and airport users where any modifications are consistent with Regulation 16(d). Any such modifications would have to be approved by the CAA. The CAA would only withhold approval if it considered that the modification was inconsistent with Regulation 16(d).
- 2.5 The CAA’s draft Directions were not explicit as to the latest date by which a revised structure of check-in and baggage charges that took greater account of “time-in-use” should be implemented. The CAA believes that this date should be 1 April 2014. In setting this date the CAA acknowledges that GAL will have had in place for two years a structure of check-in and baggage charges that in certain respects breached both the criteria of Regulation 16(d) and the CAA’s earlier Directions of May 2011. The CAA has previously considered whether it should ‘backdate’ the final Directions and has concluded against doing so for the reasons given earlier in this chapter. The CAA also notes that Regulation 26 of the Regulations makes provision for action should an airport operator breach its duty to comply with a CAA Direction so there are avenues available in respect of check-in and baggage charges for periods before 1 April 2014.

- 2.6 On consultation and information provision, the draft Directions would have required GAL to provide users with a 'comprehensive explanation' of costs, usage of the relevant facilities and charges. In its response GAL asked for it to provide information to an "appropriate level of detail". In the CAA's view it is important that those who pay charges should have access to sufficient information that will allow them to make informed responses during an airport's consultation on its future charges. In this regard the CAA would draw attention to the information that airports subject to the Airport Charges Directive (ACD), including Gatwick, are required to supply to airport users³. While check-in and baggage charges are not within the scope of the ACD the same principles on transparency would seem to be equally relevant to those charges. The CAA has decided to modify the information provisions in the final Directions so the obligation on GAL will be to provide sufficient information to airport users. This would include responding positively to reasonable requests from airport users for further information or explanations of information that has been supplied.
- 2.7 The CAA's draft Directions would have required GAL to publish regular monthly reports on its progress towards full compliance with the Directions. GAL did not see a need to specify the timing of progress reports although it would provide the CAA with such updates as it required. On further consideration the CAA has some sympathy with GAL. Were the period over which GAL would be moving to full compliance to be a lengthy one, then progress reports might be more appropriate. However in this case GAL is expected to be in full compliance by 1 April 2014. Furthermore GAL has recently announced its timetable for consultation on its user charges generally from 1 April 2014. For check-in and baggage charges, which are treated as part of the Specified Activities, GAL will be issuing proposals for a meeting on 9 September 2013 with feedback from users due by the end of September. GAL expects to announce its final decision on 15 October 2013. This process, to which the CAA has access, should offer a number of opportunities to monitor GAL's progress towards full compliance. Consequently, the CAA sees no need for separate formal progress reports.
- 2.8 The CAA's final Directions to GAL which reflect its assessment above are in chapter 3.

3 Directive 2009/12/EC of 11 March 2009 on airport charges, Article 7.

CHAPTER 3**CAA Directions to GAL**

- 3.1 For the reasons set out in CAP 1046, the CAA has found that in establishing charges for check-in and baggage services at Gatwick from 1 April 2012 GAL did not comply fully with the provisions of Regulation 16(d) of the Airports (Groundhandling) Regulations 1997 (the Regulations). It follows therefore that GAL did not comply fully with the directions issued by the CAA in May 2011 following an earlier appeal brought by Ryanair under Regulation 20 of the Regulations.
- 3.2 In accordance with paragraph 7(2)(b) in Part 1 of Schedule 2 to the Regulations the CAA may give GAL such direction in relation to the decision or individual measure as it thinks fit.
- 3.3 The Directions below have the purpose of ensuring that the defects identified by the CAA are remedied and GAL brings itself back into full compliance with Regulation 16(d).
- 3.4 The CAA directs GAL to ensure that the following provisions are met:

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

GAL's charges attributable to planned maintenance costs, in relation to the departing baggage system and the arriving 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.

- b) The allocation of planned maintenance costs of the departing baggage system shall be as set out below in compliance with Regulation 16(d). This allocation of costs shall be used for the purpose of setting charges for check-in and baggage facilities for the year beginning 1 April 2014 and for subsequent years unless GAL and airport users agree a modification to the allocation of costs that is compliant with Regulation 16(d). Time-in-use shall be calculated by using Timeslice Data to estimate the period during which the baggage system is in use per AirTransport Movement (ATM). The costs of planned maintenance in relation to the 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.
- i) This allocation shall be done by calculating an Airport Average Timeslice per ATM and an Average Timeslice per ATM for individual airlines. This shall be used to produce a Departure Baggage Weighting Factor for each airline.
 - ii) The Airline Departing Baggage Weighting Factor shall 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 ATMs over the relevant period).
 - iii) The application of the Airline Departing Baggage Weighting factor as described above shall produce a Departing Baggage Charge per ATM for individual airlines.
 - iv) The relevant period shall be as agreed between GAL and airport users. In the absence of agreement, the relevant period shall be 12 months or such other reasonable period as notified to and approved by the CAA.
- c) For the arriving baggage system, time-in-use shall be calculated by reference to an objective, transparent, relevant and non-discriminatory measure.

- d) The cost of planned maintenance of the arriving baggage system shall be allocated as set out below in compliance with Regulation 16(d). This allocation of costs shall be used for the purpose of setting charges for check-in and baggage facilities for the year beginning 1 April 2014 and for subsequent years unless modified through consultation between GAL and airport users in a way that is compliant 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) This data shall be used to calculate an Airport Average Last Bag Time and an Airline Average Last Bag Time for each airline using Gatwick.
 - iii) A weighting factor for each airline shall be calculated by dividing the Airline Average Last Bag Time by the Airport Average Last Bag Time.
 - iv) The planned maintenance costs for the relevant period attributable to arrivals baggage overall shall correlate to the total time in use calculated by reference to the Last Bag data as described above. This shall then be divided by the total forecast number of arriving ATMs to produce an Airport Average Arriving Baggage Charge per ATM.
 - v) The weighting factor described above shall be applied to the Airport Arriving Baggage Charge per ATM to produce an Airline Arrival Baggage charge per ATM for individual airlines.
 - vi) The relevant period shall be as agreed between GAL and airport users. In the absence of agreement, the relevant period shall be 12 months or such other reasonable period as notified to and approved by the CAA.

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.

2. The allocation of costs attributable to rates shall be as set out below in compliance with Regulation 16(d). This allocation of costs shall be used for the purpose of setting charges for check-in and baggage facilities for the year beginning 1 April 2014 and for subsequent years unless modified through consultation between GAL and airport users in a way that is compliant 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, these shall be apportioned among individual airlines by reference to relevant, objective, transparent and non-discriminatory criteria which reflect 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.

C. Information and Consultation

GAL shall:

- a) consult users each year on its annual forecasts of costs, the anticipated use of check-in and baggage facilities and its proposed charges for the use of those facilities for the forthcoming year commencing on 1 April; and
- b) provide users each year with a timely and sufficient explanation of:
 - i) the cost forecasts for the forthcoming year commencing on 1 April regarding the anticipated use made of the check-in and baggage facilities and the proposed charges for the use of those facilities; and
 - ii) the actual costs of the check-in and baggage facilities and the use made of those facilities during the preceding year ended 31 March and the charges levied in relation to those facilities during the preceding year.
- c) make the information in (b) available to all users at the same time in a transparent manner, for example via its website.
- d) calculate charges that would have been payable by Ryanair for the use of check-in and baggage facilities for the period from 1 April 2012 until 31 March 2014 had these Directions been in force from 1 April 2012 and provide these calculations to Ryanair.

D. Reporting requirements

If so requested by the CAA, GAL shall publish reports on progress made towards compliance with the directions in A and B above. Any obligation to publish reports shall cease on the date that a charging structure that satisfies A and B comes into effect.

E. Entry into force

These Directions shall have effect from the date of issuing and shall remain in force unless and until they are modified or revoked by the CAA.

- 3.5 This document is a determination by the CAA for the purposes of paragraph 7(2)(b) of Part 1 to Schedule 2 of the Regulations. The determination was made by Mr Iain Osborne and Mr David Gray, members of the Civil Aviation Authority. The reasons for the determination are as set out in CAP 1046 as published on 23 May 2013 and in this document.

Paul Taylor
for the Civil Aviation Authority

27 August 2013