
9 January 2009



DAA Response to CN5/2008

Notice on PRM Charges at Dublin Airport

BACKGROUND

1. Dublin Airport Authority (“**DAA**”) refers to Notice 5/2008 (the “**Notice**”) issued by the Commission for Aviation Regulation (the “**Commission**”) on 8 December 2008 as National Enforcement Body for the purposes of Regulation (EC) No. 1107/2006 (Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air) (the “**Regulation**”).
2. The Notice sets out the Commission’s preliminary thinking on whether DAA has complied with Article 8 of the Regulation in providing assistance services (“**PRM Assistance Services**”) to disabled persons and persons with reduced mobility (“**PRMs**”).
3. This document sets out DAA’s representations on the preliminary views of the Commission as set out in the Notice and our proposals to end the current impasse.

THE OBLIGATIONS OF DAA UNDER THE REGULATION

4. DAA is obliged to ensure that PRM Assistance Services are provided.
5. DAA is obliged to set the quality standards for the PRM Assistance Services with the cooperation of airlines, handlers and organisations representing disabled passengers and passengers with reduced mobility. The PRM Assistance Services must:
 - 5.1 include the services set out in Annex I of the Regulation;¹
 - 5.2 take full account of internationally recognised policies and codes of conduct, including the European Civil Aviation Conference (ECAC) Document 30 – Section 5 and Annex J - Code of Good Conduct in Ground Handling for Persons with Reduced Mobility (“**ECAC Doc 30**”);²
 - 5.3 be of high quality as laid down in the Regulation.³

ISSUE

6. In order to meet its obligations under the Regulation, from October 2007 DAA engaged in an extensive process, in cooperation with airlines/handlers (through the Airport Operators’ Committee (“**AOC**”), the Dublin Airport Users Committee and representative organisations of persons with reduced mobility, to establish the service and service levels (“**Quality Standards**”) to be provided and to enable DAA to procure the services of a third party competent to provide PRM Assistance Services at its airports. This competitive tendering process, having regard to the outcome of the Quality Standards consultation, led to the appointment of One Complete Solution Ltd. (“**OCS**”) to provide PRM Assistance Services on behalf of DAA.

¹ Article 9.1 of the Regulation.

² Article 9.2 of the Regulation.

³ Recitals 5, 6 and 19 of the Regulation.

7. In the reasonable expectation that the Commission would ultimately be designated as the Irish National Enforcement Body (“**NEB**”) for the purposes of the Regulation, DAA adopted a policy of engagement with the Commission throughout its cooperation and procurement processes and indicated its openness to the Commission’s input from an early stage. DAA consistently briefed and kept the Department of Transport (who were responsible for drafting the statutory instrument appointing the and the Commission, informally and formally aware of the process it was adopting and the status of the implementation.
8. However, since September 1st 2008, certain airlines have failed to pay, or failed to pay in full, charges invoiced to them by DAA relating to PRM Assistance Services which services DAA has been providing, through OCS, since 26th July 2008. Some have failed to pay such charges as they have queried the basis for such charges being levied upon them.
9. The Commission has been requested to assess, as National Enforcement Body for the purposes of Regulation, whether the charges relating to the provision of the PRM Assistance Services comply with the Regulation.
10. The Commission has indicated in the Notice that its preliminary view is that the PRM charge of €0.33 per passenger currently levied at Dublin Airport does not fully satisfy certain parts of Article 8.4 of the Regulation.¹

CHARGES FOR THE PRM SERVICES

11. The Regulation allows DAA to recover the cost of the provision of PRM Assistance Services by levying a specific charge on airlines for the purposes of funding the PRM Assistance Services.
12. The Regulation provides that the charge payable by the airlines for the PRM Assistance Services shall be:
 - 12.1 reasonable;
 - 12.2 cost-related;
 - 12.3 transparent; and
 - 12.4 established by DAA in co-operation with airport users.
13. The Commission accepts in the Notice that there was cooperation between DAA and airport users in relation to the level of PRM Assistance Services that would be provided.

REASONABLE

14. The Commission has indicated in the Notice that for the charge to be reasonable it must be fair, balanced and commensurate with the PRM Assistance Services being provided.
15. Whilst the Commission's preliminary thought is that certain aspects of the reasonability criterion appear satisfied by the charge, the Commission then finds that the costs are unreasonable to the extent that they appear not to have been analysed in cooperation with the parties. This preliminary finding is rejected by DAA for the following reasons:
 - 15.1 the level of cooperation between DAA and airport users is irrelevant to the reasonableness of the costs. The Commission seeks to identify four distinct criteria and then finds that one of the criteria, "reasonable", is not met by virtue of DAA's alleged failure to meet another criteria, "cooperation" when the Commission provided in the Notice that:

"...to the extent that OCS costs appear not to have been analysed in cooperation with the parties, it is not possible to conclude that the charge is a reasonable one.";
 - 15.2 the level of cooperation between DAA and airport users is irrelevant according to the standard set out by the Commission itself in the Notice;⁴
 - 15.3 to ensure that the costs are commensurate with the PRM Assistance Services the Regulation requires DAA to separate its accounts in respect of the PRM Assistance Services;⁵
 - 15.4 the PRM Assistance Services provided were established in cooperation with airport users and representative organisations of persons with reduced mobility;
 - 15.5 the reasonableness of the cost of providing the PRM Assistance Services was established by what is considered the best way of ensuring a reasonable outcome based on the availability of services in the market, namely an open and competitive tender process designed to procure the provision of such services at the best attainable price based on the service required;⁶
 - 15.6 the Department of Finance Procurement Guidelines (2004) indicate that in general a competitive process carried out in an open, objective and transparent manner can achieve best value for money in public procurement;
16. The DAA PRM charge is reasonable and was set in a fair and reasonable way, as evidenced by the following:

⁴ See paragraph 2.2 of the Notice.

⁵ See Recital 9 and Article 8(5) of the Regulation.

⁶ Paragraph 3.6 of CAR Notice 5/2008 outlines the AOC position that the PRM "terminal" related charges be "absorbed by the DAA". This would be a completely arbitrary calculation as the legislation is relatively clear about the rights of managing bodies in terms of recouping all costs in connection with the Regulation.

- 16.1 as the Commission has noted, the charge represents a direct pass-through of the cost to DAA of providing the PRM Assistance Services and does not serve to finance other activities.
 - 16.2 objectively, at €0.33 per departing passenger, the PRM charge currently levied at Dublin Airport compares favourably to equivalent charges at other airports, as can be seen from the attached *Table 1*. Given that Ireland is a high cost location, it is notable that this charge is at the lower end of the scale of other European airports.
 - 16.3 the cost of providing the PRM Assistance Services was established in a fair and balanced manner by what is considered the best way of ensuring a reasonable outcome based on the availability of services in the market, namely an open and competitive tender process designed to procure the provision of such services at the best attainable price based on the service required;⁷
 - 16.4 the charge, which DAA submits covers only the minimum of PRM Assistance Services required in Annex 1 of the Regulation and benchmarks favourably against other European airports (see Table 1 attached hereto);
17. Even if it was accepted that the assessment of whether the charges are reasonable includes a test of cooperation:
- 17.1 the charge currently levied at Dublin Airport was established as the result of an extensive consultation process in which airport users were involved both directly and through the AOC;
 - 17.2 OCS costs were provided to DAA on a confidential basis as part of its tender bid. In line with best practice in this area and its legal obligations, DAA does not share such information submitted to it with non-contracting parties; and
 - 17.3 OCS has indicated both to DAA and to CAR serious concerns about DAA sharing elements of its cost information with airport users.

COST-RELATED

18. The Commission is satisfied that the charge is cost-related.

TRANSPARENT

19. The Commission has indicated in the Notice that for the charge to be transparent, the basis on which the charge is derived must be clear and evident to all, be capable of bearing scrutiny in all its elements and capable of being understood by payees and any other interested parties.
20. DAA disagrees with the Commission's test for whether the charges are transparent for the following reasons:

⁷ Paragraph 3.6 of CAR Notice 5/2008 outlines the AOC position that the PRM "terminal" related charges be "*absorbed by the DAA*". This would be a completely arbitrary calculation as the legislation is relatively clear about the rights of managing bodies in terms of recouping all costs in connection with the Regulation.

- 20.1 transparency requires confirmation that the charges relate only the PRM Assistance Services and do not serve to finance other activities of DAA. This is the test indicated by the Regulation itself;⁸
 - 20.2 the transparency test is satisfied by the requirement under the Regulation for DAA to prepare separate accounts in respect of the PRM Assistance Services;
 - 20.3 even if it was accepted that the assessment of whether the charges are transparent includes a test of a clear basis which is evident to all, the basis of the charges is clearly the Regulation, in particular Article 8(3) thereof which provides that DAA may levy a charge for the purpose of funding the PRM Assistance Services;
 - 20.4 if the interpretation of the requirement for transparency being proposed by the Commission is to require details of the costs of OCS in providing the PRM Assistance Services to be disclosed, such interpretation is without grounds. There is no law that requires a tendering party or indeed any commercial undertaking in this type of commercial context to “open its books” to “payees” (which in this context would include potential competitors, being the airport users) and to “any other interested parties” (the meaning of this term is unclear but would appear to include interest groups and otherwise, none of whom are entitled to such information).
21. In applying what DAA considers to be an invalid test for transparency, the Commission has indicated its belief that DAA’s alleged failure to cooperate by sharing cost information with airport users during the tender process means that the PRM charge currently levied at Dublin Airport does not satisfy the criterion of “transparency”. This preliminary finding is rejected by DAA for the following reasons:
- 21.1 the level of cooperation between DAA and airport users is irrelevant to the transparency of the costs. The Commission seeks to identify four distinct criteria and then finds that one of the criteria, “transparent”, is not met by virtue of DAA’s alleged failure to meet another criteria, “cooperation”;
 - 21.2 the charge levied at Dublin Airport is transparent as it directly reflects the costs of provision (as is acknowledged by the Commission), which costs were established by means of an open competitive tender, providing the level of service established in cooperation with the airport users and representative organisations of persons with reduced mobility;
 - 21.3 notwithstanding the above, DAA has consistently been willing to engage with the airport users and the Commission in order to respond to airport user’s request for information on how the PRM charge currently levied at Dublin Airport has been developed;
 - 21.4 it involves a misinterpretation of the nature of the procurement process which itself is intended to ensure that the *“most economically*

⁸ See Recital 9 of the Regulation.

advantageous” outcome will result. This contrasts with the “*lowest price*” mechanism which is inappropriate in a situation where the ability of the successful bidder to achieve a certain standard of service is crucial. In this case:

- (a) airport users and interest groups were involved in setting the level of service required;
- (b) quality levels were established in line with the Regulation and ECAC Doc 30 which formed the basis of the tender specifications;
- (c) bidders submitted tenders demonstrating (i) how they proposed to meet those requirements; and (ii) the pricing of their bids;
- (d) bidders who were best able to meet the tender requirements were identified based on the strict tender award criteria; and
- (e) a competitive process, including several rounds of price negotiation by DAA, sought to achieve the best possible price outcome;

21.5 DAA is subject to the public procurement rules under the Utilities Directive⁹ and DAA follows best practice public procurement procedures. DAA does not share sensitive commercial information which has been submitted as part of a tender bid with non-contracting parties, as the Commission appears to indicate it believes ought to have occurred. There are a number of considerations here:

- (a) it is not in line with best practice public procurement to involve non-contracting parties in this manner;
- (b) the non-contracting parties operate in the same industry (aviation services) as the bidders, and it would be improper and contrary to best practice to allow them access to information which was commercially sensitive to those bidders;
- (c) there is no basis in law that requires such information to be provided. There is no law that requires a tendering party or indeed any commercial undertaking in such a commercial context to disclose commercially sensitive information to third parties;
- (d) the successful bidder, OCS, has indicated serious concerns about sharing elements of its cost information with airport users on the grounds that key elements of its business model would be revealed to other interested parties in the aviation sector and that consequently it may be placed at a commercial disadvantage in seeking to provide services at other airports, or indeed at Dublin Airport;

⁸ Directive 2004/17/EC (Utilities Directive) as transposed into Irish Law by European Communities (Award of Contracts by Utility Undertakings) Regulations 2007 (Statutory Instrument No. 50 of 2007).

- (e) the disclosure of commercially sensitive information could distort future tender competitions;
- (f) a tender process which required that sensitive price information provided by bidders be shared with non-contracting parties operating in the same sector would disincentivise competitive pricing and competitive service provision by bidders, to the detriment of the end user (in this case, the passenger);
- (g) the disclosure of information in order to satisfy a cooperation test would undermine the relationship of trust between the contracting authority and participating economic operators on which the contract award procedures are founded and would be contrary to the duty imposed on contracting authorities not to disclose information that is designated as confidential. It is not reasonable to propose that a tendering party disclose confidential details of its internal workings; and
- (h) whilst it may have been possible to design a procedure which would have allowed for some disclosures no such proposal was put to DAA prior to commencement of the tender process by any party. DAA would have concerns that any such proposal would adversely affect the quality of the tenders submitted. The tender process had to be as robust as possible in order for DAA to comply with its obligations under the Regulation.

22. Without prejudice to the points above, in order to progress matters, DAA has been engaged in ongoing discussions with OCS to discuss the provision of certain limited information to airport users that would not be detrimental to the business of OCS. However, DAA does not consider the disclosure of information by OCS to be the proper manner in which to deal with concerns by airport users on the level of charges being levied.

ESTABLISHED IN COOPERATION WITH AIRPORT USERS

23. The Commission has indicated in the Notice that in order for the charge to be established in cooperation with airport users, airport users should be able to give feedback on the level of services to be provided, manpower, equipment and costs and to comment on tenders that dealt with such matters.

24. DAA agrees with the Commission that cooperation in the context of the PRM Assistance Services tender required discussions in relation to the level of services to be provided, subject to the minimum level of service being provided. Such cooperation took place. DAA rejects AOC's suggestion that a standard tender protocol can be established to deal with all situations. Tenders for different services have different terms and considerations. DAA also disagrees with the Commission's suggestion that the test for whether the establishment of the charges should include providing details of manpower, equipment costs and tenders for the following reasons:

24.1 the Commission is inappropriately setting out the basis upon which tenders are operated. A certain service (which in this case was established with cooperation with airport users and other interested parties) is sought by a contracting party. Tendering parties respond

by stating that they will provide such service for a certain cost. It is not expected, in the normal course of business, that tendering parties would be obliged to disclose detailed costings relating to their businesses as part of such tenders;

- 24.2 such a level of detail, if provided to airport users, would place the relevant tendering party (with whom the airport users could be competing for business) at a competitive disadvantage and could result in the distortion both of the applicable tender (by tender parties not being able to rely on business secrets disclosed remaining confidential) and on future tenders (if airport users who are potentially competing tendering parties had knowledge of the internal workings and costings of other tendering parties). There is no basis in law to suggest that such information must be provided to third parties.
25. In applying what DAA considers to be an invalid test for cooperation, the Commission has indicated its belief that DAA's failure to provide manpower, equipment, costs and tender information relating to the OCS tender to airport users during the tender process means that the charge levied does not satisfy the cooperation criterion. In particular, the Commission's preliminary view is that such consultation must take place in advance of airport users being simply informed of what the final charge would be for a now unnegotiable level of service. This preliminary finding is rejected by DAA for the following reasons:
- 25.1 the preliminary finding is factually incorrect. DAA has specifically provided in its contract with OCS that the level of service provided by OCS can be varied. The level of service is not unnegotiable.
- 25.2 DAA engaged in extensive consultation with the airport users with regard to the type and level of service to be introduced and the eventual costs, established via an open and competitive tender process, are a function of the service and Quality Standards/service levels agreed and established.¹⁰
- 25.3 the Commission is inconsistent in alleging that the airport users negotiated the levels of service to be provided without an understanding of the costs that were involved. Certain airport users are aware of the historical costs of providing PRM Assistance Services given that they had previously procured them directly, albeit at a significantly lower level of service. Many airport users are directly familiar with the cost of such services at other European airports under the new Regulation. It is inconsistent to suggest that the airlines and handlers had variable experience and knowledge which would have added to the procurement process but not to recognise that this same experience would be of value in reviewing the costs developed at Dublin.

¹⁰ DAA Email to all airlines/handlers on 5th February 2008 regarding the non pre booked arriving passenger service standards: "We would ask all interested parties to review this element of the proposal quite carefully, given that the **quality standards in terms of both resourcing and equipment will drive the overall costs associated with the tender** and these timings in their totality (as outlined in the attached document) will have a significant impact on the operation."

26. The Commission believes that a level of involvement from airport users would have been particularly relevant in the current situation where airlines had for some years previously procured services similar to the PRM service from another supplier at Dublin airport. With a view to obtaining the airport users' input with regard to costs, in a manner which was compatible with the tender process, DAA did request cost information from airport users in connection with the historical provision of assistance services. No substantive information was provided to DAA in this regard. This is an important observation, particularly in light of CAR's implicit criticism of DAA for not involving handlers airlines in such discussions.

SUMMARY

27. While some airlines have paid all outstanding charges in terms of the PRM Assistance Services, some airlines which have not paid all outstanding charges are paying equivalent charges at other airports where there was a tender process similar to that undertaken by DAA. One airline which had, prior to the publication of CN5/2008, agreed to pay in full under protest, has since stated that it will now make only partial payment.
28. The intention of some airlines and handlers is simply to avoid or reduce the charges which they must pay pursuant to the Regulation for the provision by DAA of the PRM Assistance Services. The DAA considers this to be an example of regulatory gaming by the airlines/handlers concerned. Indeed, the AOC has, without basis, formally proposed that the charges are somehow shared between DAA and the airport users rather than levied on the airport users as envisaged by the Regulation. This matter is causing DAA a financial loss which must be resolved.
29. DAA considers that the charges levied on the airport users comply with the Regulation and it is our view that the Commission should confirm that this is the case.
30. The charges are reasonable, cost related, transparent and were established with an appropriate level of cooperation. The Regulation does not require confidential and commercially sensitive information to be provided by parties tendering to provide PRM Assistance Services to third parties. The Regulation should not enable airport users who were involved in setting the service level specifications thereafter avoid paying for the services. Any such finding will adversely affect the provision of high quality PRM Assistance Services and is contrary to the intention of the Regulation and therefore the Regulation cannot be interpreted, as a matter of law, in such a manner.
31. DAA considers that the airlines/handlers have attempted to have the Commission interpret the Regulation in such a manner that goes against the practical commercial realities of how the tender was operated by DAA.
32. At no time did airlines/handlers suggest a different form of tender process where tender parties would need to provide confidential business information on the basis that third parties would have access to same.
33. The airlines/handlers have attempted to have the Commission require DAA to retrospectively amend the terms of the tender such that a detailed breakdown is provided by OCS. This is inappropriate, has no legal basis, is contrary to

the commercial interests of OCS and prejudices the ability of DAA to run robust tender processes in the future.

PROPOSED NEXT STEPS

34. Despite the DAA's fundamental disagreement with CAR's preliminary views expressed in CN5/2008, DAA is anxious to find a resolution to the issue. DAA considers the PRM consultation process with airport users and interest groups to be an ongoing process. DAA will continue to engage with airport users, representative organisations of people with reduced mobility and OCS to facilitate a resolution to the current situation.
35. It is DAA's intention to seek to use the existing mechanisms, specified during the Quality Standards consultation, to achieve this. Consultation has been ongoing since the introduction of the new service, including frequent meetings (originally weekly and now monthly) with OCS and the AOC to discuss any operational issues or concerns airport users have with regard to the PRM Assistance Services.
36. DAA disagrees with the Commission's implication, at paragraph 3.12 of CN5/2008 that certain elements of the Quality Standards adopted can be considered as discretionary. DAA reminds the Commission of the requirements outlined in ECAC Doc 30 and the legitimate nature of the requirements of stakeholders such as the representative groups of persons with reduced mobility. DAA believes that the Quality Standards which were established and agreed following full consultation with all relevant bodies and appropriate interested stakeholders, amount to a minimum position when read in conjunction with ECAC Doc 30 and Annex 1 of the PRM Regulation. DAA would further note that the assistance services currently being provided in its airports are in line with other European airports and is of the opinion that no aspect should be deemed excessive or unnecessary. DAA would find it helpful, in advance of the proposed consultation meeting, if the Commission, in the context of its role as NEB, could advise as to what elements of the Quality Standards/existing service levels, it deems can be considered as discretionary, how it has come to these conclusions and whether or not this has been the result of discussions with the representative groups of persons with reduced mobility.
37. With consultation ongoing, it will be important to ensure that the service levels are not reduced below the minimum required standards simply because of an unwillingness to pay on the part of certain airport users. The Quality Standards/service levels agreed and in place were based on consultation with all interested stakeholders including the airport users. DAA considers that the Quality Standards/service levels are no more than the minimum baseline interpretation of assistance services required under Annex 1 of the Regulation and ECAC Doc 30. In this regard, DAA envisages that if there are issues which remain unresolved between the various parties as to service level, these matters will be referred to the Commission for resolution in the context of its role as National Enforcement Body under the Regulation. Such a step would be to ensure that there is full compliance with the requirements of the Regulation with regard to Quality Standards/service levels.
38. Without prejudice to its position regarding the Commission's views expressed in the Notice, DAA is actively seeking a solution to the current deadlock by holding discussions with OCS to assess whether further information can be provided to airport users and under what circumstances this can be done in

the context of the current situation. OCS has emphasised that, from its perspective, the DAA has engaged in processes very similar to those adopted elsewhere, and has suggested that the current regulatory situation is unique in its experience. On 16 September 2008, at a meeting with the Commission, OCS explained in detail that there are certain aspects of its contract with DAA which are commercially sensitive, which if released or discussed with potential competitors could jeopardise its competitive position in any future tender process. The implementation of the Regulation has created an EU market for the services OCS provides and it hopes to expand its business in the future. A non-disclosure agreement may not adequately alleviate its concerns but OCS has indicated that it will assist DAA without divulging information which could compromise its competitive position.

39. DAA continues to seek to work constructively with all stakeholders to move this forward. DAA suggests holding a number of meetings in the coming weeks, giving an opportunity for the AOC to discuss the issue of service level and therefore costs of the service provided, with both DAA and OCS which DAA hopes will result in a positive conclusion for all parties involved (Table 2). DAA will seek weekly meetings over a four week period (or until such time as the issues can be deemed to have been dealt with) with a small AOC sub group and a representative from the Commission's office. It is the hope of the DAA that, subject to confidentiality concerns being sufficiently allayed, OCS would be in a position to disclose some level of costs to a group comprising 3 or 4 AOC members who have all signed Non Disclosure Agreements, to address the issues raised by the Commission. DAA will be in touch with the Commission and the AOC in this regard in the coming weeks.

Table 1: European Airports Summary of PRM Consultation Process Benchmarks

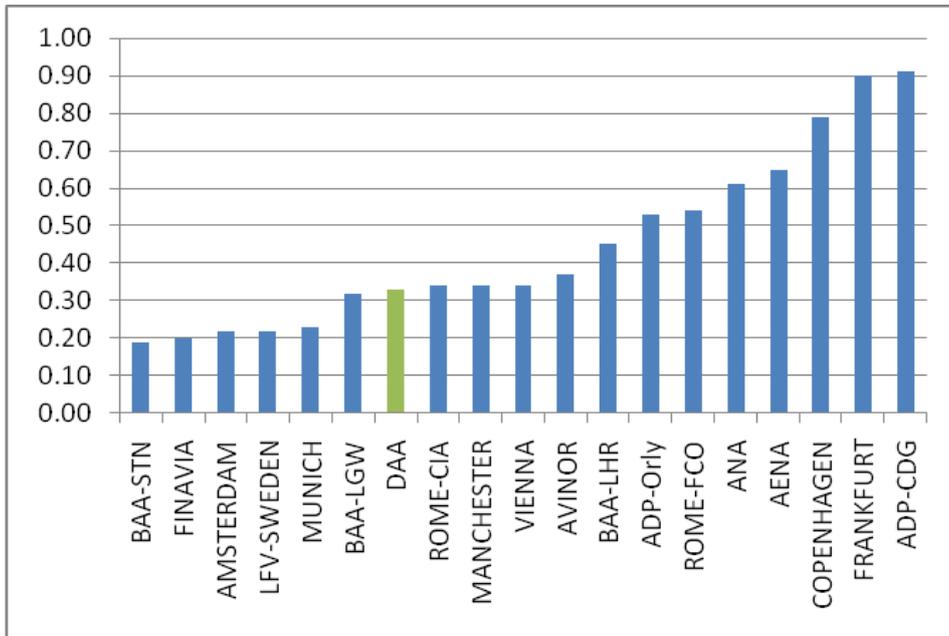


Table 2: Schedule of meetings proposed by DAA

Schedule	Attendees	Agenda
1st meeting - week commencing 26th January	AOC PRM Sub group, CAR	DAA proposal
2nd meeting - week commencing 2 nd February	AOC PRM Sub group, CAR and OCS	Further discussion
3rd meeting - week commencing 9th February	AOC PRM Sub group, CAR	Further discussion
4th meeting - week commencing 16th February	AOC PRM Sub group, CAR	Further discussion