



CONSULTATION ON THE DECISIONS OF THE 2008 AVIATION APPEAL PANEL

Commission Paper 1/2009

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Commission for Aviation Regulation

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1. Introduction

- 1.1 On foot of requests received from four interested parties (Aer Lingus, Dublin Airport Consultation Committee, the Dublin Airport Authority and Ryanair Limited) the Minister for Transport established an Appeal Panel (“the Panel”) on 29 September 2008 pursuant to section 40 of the Aviation Act 2001 (“the 2001 Act”).
- 1.2 The Panel was tasked with hearing the requested appeals against the Commission for Aviation’s Determination of 30 July 2007 (the “Determination”) on “Maximum levels of airport charges at Dublin Airport, Final Decision on interim review of 2005 Determination.” The Determination is published as CP6/2007 and is available, along with associated papers, on the Commission’s website at www.aviationreg.ie
- 1.3 On 23 December 2008, the Panel issued its decisions in relation to the appeals which were that - in light of certain matters raised in the Dublin Airport Authority (DAA) and Ryanair appeals - it had decided to refer the Determination back to the Commission for review. The Panel found that there was no basis for it to refer the Determination back in respect of matters raised on appeal by the Dublin Airport Consultation Committee (DACC) and Aer Lingus and in respect of those matters the Panel “confirmed” the Determination. In accordance with the statutory framework, the Commission must reach its decision on the referral by 23 February 2009 at the latest.
- 1.4 The purpose of this Paper is to set out without commentary and in summary fashion, the matters referred to the Commission for review and to seek the views of interested parties on the Panel’s findings on the appeals. The Paper also sets out the timeframe and the proposed scope of the review. It should be noted that if the Commission were to vary its Determination there would be no implications for the current price cap at Dublin airport.
- 1.5 The decisions of the Appeal Panel are summarised below.¹

Aer Lingus

- 1.6 Having considered the subject matter of the appeal by Aer Lingus the Appeal Panel confirmed the Determination.

Dublin Airport Consultation Committee

- 1.7 In relation to subject matter of the appeal by Dublin Airport Consultation Committee the Appeal Panel confirmed the Determination.

Dublin Airport Authority

- 1.8 Upon consideration of the DAA Appeal the Panel referred back to the Commission its decision as to:
 - the “correct” sizing of Terminal 2 at Dublin Airport;
 - the exclusion of the amount of €25m as a contingency;
 - the exclusion of the amount of €4m in respect of airfield projects.
- 1.9 The Panel did state that even if Terminal 2 is oversized, it agreed with the concept of a two-box approach for remunerating capital expenditure for that terminal.

¹ The decisions of the Appeal Panel in respect of each appellant are set out in each case in section 8 of the appeal decision documents published with this Paper.

Ryanair

1.10 As regards the appeal by Ryanair Limited the Panel has referred back to the Commission for its review:

- the assessment of capacity at Terminal 1 at Dublin Airport;
- the consequential assessment of the required capacity of Terminal 2 (also having regard to the Local Area Plan of Fingal County Council, the delay in the provision of a second runway, and the Ministerial Direction that there be a third terminal on the western campus);
- the expression of the result of those assessments;
- the consideration of the appropriate T2 associated projects capital expenditure which should be included in Box 1 or Box 2;
- the consequential appropriation of capital expenditure into Box 1 and Box 2, particularly the treatment of Pier E as either part of Box 1 or 2;
- The remuneration of Box 2.

1.11 The Panel accepted that it would not have been compatible with user interests and most particularly with the Ministerial Direction if the Commission had refused to permit the investment proposed for Terminal 2 at Dublin Airport to enter the regulated asset base of the airport. In addition, in circumstances where the Commission was of the view that the proposed second terminal was oversized it was appropriate for the Commission to devise a two-box treatment regarding to the addition of the investment of the second terminal to the regulated asset base. The Panel's view was that the risk of oversizing is one that should be borne by the DAA and not by current or prospective users.

1.12 The Panel expressed a clear view that no change should have been effected to the existing price cap in the interim review undertaken in 2007. In considering the Ryanair appeal the Panel referred back to the Commission the consequence for the next airport charges determination of the inclusion of excess expenditure in the regulated asset base at the time of the next determination.

2. Decisions of the Appeal Panel and review by the Commission of the Appeal Panel's referral of certain elements of the Commission's 2007 Determination

- 2.1 On 23 December 2008 the Panel decided to refer certain elements of the Determination back to the Commission to either affirm or vary its original determination.
- 2.2 The Panel, following its own procedures, for each appeal invited the relevant Appellant and the Commission to make written submissions and attend an oral hearing. The Panel did not circulate the appeals to other parties or invite their comments. The Appeal Panel took the view that it could only usefully proceed to hear the appeals if the Commission acted as the formal Respondent to the Appeals and so the Commission was requested to act in that capacity. On the previous two occasions on which appeal panels were established, the Commission had not been requested to become involved in the exercise prior to receiving the final decision of the relevant Panels.
- 2.3 The Commission upon a referral by the Panel shall within two months of receipt of referral either vary or affirm its original determination. Whilst the Appeal Panel has made observations and suggestions as to how the Commission might do so, it is a matter for the Commission to conduct its deliberations in accordance with the provisions of Aviation Regulation Act, 2001 and the time permitted.
- 2.4 The Commission remains of the view that in deciding whether or not to vary its Determination on foot of the referral by the Panel, it must continue to comply with the requirements of the Aviation Regulation Act, 2001 and in particular section 33. In addition, the Commission holds the view that it is necessary to consult with and receive the views of all interested parties. Accordingly, the Commission invites written submissions from interested parties and the public in relation to the matters identified by the Panel as constituting sufficient grounds for referring its decision in relation to certain aspects of the Determination back to the Commission.

3. Scope of the review

- 3.1 The review of the Determination is limited to those matters identified by the Appeal Panel as constituting sufficient grounds for referring its decision in relation to the Determination back to the Commission.
- 3.2 It is also worth noting that the analysis arising from this referral concerns the decision made by the Commission based on the information it had before it at the time of consultation with interested parties that resulted in the making of its decision in July 2007.
- 3.3 Those matters referred to the Commission by the Appeal Panel are as follows:
- (a) the assessment of capacity at Terminal 1 at Dublin airport;
 - (b) the consequential assessment of the required capacity for a second terminal;
 - (c) the “correct” sizing of the Terminal 2 that DAA proposed to build;
 - (d) the consideration of the appropriate T2 associated projects capital expenditure which should be included in Box 1 or Box 2;
 - (e) the decision to exclude €25 million in respect of contingency costs in reaching its determination;
 - (f) the decision to exclude certain airfield projects costs in the determination under appeal;
 - (g) the consequential appropriation of capital expenditure into Box 1 and Box 2, particularly the treatment of Pier E as either part of Box 1 or 2;
 - (h) the remuneration of Box 2.
- 3.4 The Commission requests interested parties to give their views as to whether it should affirm or vary its determination. The Commission encourages the receipt of representations setting out cogent arguments and supporting evidence in order to assist the Commission in properly considering those views.

4. Deadline for receipt of submissions and procedure leading to affirmation or variation of the determination

- 4.1 Submissions should be made for receipt by the Commission, no later than **5pm on the 21 January 2009**. Submissions should be addressed to:

John Spicer
Head of Economic Affairs
Commission for Aviation Regulation,
3rd Floor Alexandra House,
Earlsfort Terrace,
Dublin 2

Submissions are also welcome by email at info@aviationreg.ie or by fax to 00-353-1-6611269.

- 4.2 Commission Paper CP2/2005 sets out the meaning of deadlines imposed by the Commission in respect to the deadline for receipt of submissions by post, courier, hand delivery, fax, email or otherwise.
- 4.3 All submissions received by the Commission will be posted to the Commission's website.
- 4.4 Upon making a decision in this review within the timeframe indicated above the Commission will notify the parties who requested the Minister to establish the Appeal Panel of its decision and the reasons for its decision. The decision and the reasons for its decision will also be published on the Commission's website. In addition the Commission will publish a notice of its decision in a daily newspaper published and circulating in the State in accordance with Section 40(9) of the Aviation Regulation Act, 2001.
- 4.5 **Indemnity:** Any party submitting information to the Commission in response to a document inviting submissions acknowledges that the Commission intends to publish that information on the website of the Commission, in reports of the Commission and elsewhere as required or appropriate. Parties submitting such information to the Commission consent to such publication. Any party submitting information to the Commission shall have sole responsibility for the contents of such information and shall indemnify the Commission in relation to any loss or damage of whatsoever nature and howsoever arising suffered by the Commission as a result of publication or dissemination of such information either on its website, in its reports or elsewhere.