



**Notice of the Commission relating to the Decision of
the Appeal Panel**

Commission Paper CP1/2002

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1. Introduction

On the 10th of January 2002, an Appeal Panel established by the Minister for Public Enterprise pursuant to Section 40(2) of the Aviation Regulation Act, 2001 (the "Act") issued its decision in relation to appeals lodged by five parties (the "Appeals") against certain aspects of the Commission's Determination of the 26th of August 2001 on the maximum levels of airport charges (the "Determination"). The Determination and its accompanying reports are set out in Commission papers CP7/2001, CP8/2001 and CP9/2001.

Set out below is some further detail in relation to the review which the Commission must now undertake together with the scope of this review.

2. Decision of Appeal Panel and Review by the Commission

The Appeal Panel considered that, in respect of some of the issues the subject matter of the Appeals, sufficient grounds existed to warrant referral of the decision in relation to the Determination back to the Commission for review. The decision of the Appeal Panel is available on the Commission's website.

In accordance with Section 40(8) of the Act, the Commission, where they have received a referral from an Appeal Panel, must, within one month of receipt of the referral either affirm or vary its original Determination. Prior to discharging its obligations in this regard, the Commission invites written submissions from interested parties and the public in relation to the matters identified by the Appeal Panel as constituting sufficient grounds for referring the decision in relation to the Determination back to the Commission.

The review which the Commission is currently undertaking, and in relation to which the Commission now invites submissions, relates only to those matters identified by the Appeal Panel as constituting sufficient grounds for referring the Determination back to the Commission. A list of these issues is set out in Section 3 of this paper.

3. Scope of Review

The review of its original Determination is limited to those matters identified by the Appeal Panel as constituting sufficient grounds for referring the decision in relation to the Determination back to the Commission.

Those matters are as follows;

1. Off-peak 'Landing and Take off' charges and aircraft classification.
2. Efficiency.
3. OPEX (Operating Expenditure)
4. Depreciation
5. Transfer and Transit passengers
6. Cargo Charges.
7. Security Surcharges
8. Passenger number/forecasts.
9. Interest Payments.
10. Communication from Commission.

The above list is a summary taken from the headings used by the Appeal Panel of the issues in relation to which the Appeal Panel considers sufficient grounds exist to refer the Determination back to the Commission for review. For further information and detail on the reasoning of the Appeal Panel, please see the decision of the Appeal Panel published on the Commission's website.

Item number 10 relates to a letter from the Commission's Solicitors to the Appeal Panel dated the 20th of December 2001 (the "Letter"). The text of that Letter is set out in Annex I to this paper. That Letter deals with technical matters in the Determination and/or reports accompanying the Determination which have been identified by the Commission.

The matters identified by the Commission in that Letter fall under the headings of

- (a) Passenger numbers
- (b) Typographical errors
- (c) Schedule of users
- (d) RAB and CAPEX

The decision of the Appeal Panel states at page 53:

"In order to avoid the statutory objective being frustrated the Panel concludes that sufficient grounds have been established in respect of all issues averted to in the said communication from the Commission"

Accordingly, the Appeal Panel has found that sufficient grounds exist in relation to the matters identified in the Letter, for these matters to be referred back to the Commission for review. Of the four items set out above, the Appeal Panel has dealt with the first three of these items under headings other than the heading of "Communication from the Commission for Aviation Regulation".

In relation to the fourth item, in order to assist interested parties and the public in making submissions to the Commission in the context of this review, Annex II to this paper sets out a list of those computational matters identified by the Commission together with the proposed figures, which the Commission is considering using in any variation of its original Determination.

In relation to the figures set out in Annex II, the effect of implementing any such changes will be determined according to the methodology used in the original Determination, namely, an increase in the Regulatory Asset Base (RAB) will result in an increase in the maximum allowable yield per passenger, a decrease in the RAB will result in a corresponding decrease in the maximum allowable yield per passenger. Prior to implementing any such changes pursuant to this review of its original Determination, the Commission will consider any submissions it receives from interested parties on this or any other of the grounds on which the Determination was referred back to it. Furthermore, the majority of the other grounds of appeal, if they were to be taken into account by the Commission in the event of a decision to vary its original Determination, would each cause a further variation in the maximum allowable yield per passenger.

The Commission would like to emphasise that the figures, set out in Annex II are those which the Commission may use in the event of a decision to vary its Determination. The Commission would welcome submissions in relation to these figures together with submissions in relation to each of the other 9 grounds on which the Appeal Panel referred the Determination back to the Commission for review.

4. Deadline for Receipt of Submissions and Procedure Leading to Affirmation and Variation of the Determination

Submissions should be made to the Commission for receipt by the Commission, no later than 5pm on Friday the 25th of January 2002 and should be addressed to Cathal Guiomard, Head of Economic Affairs, Commission for Aviation Regulation, 36 Upper Mount Street, Dublin 2. Submissions are also welcome by e-mail at info@avaiationreg.ie or by fax to 00 353 1 6611 269.

The rules set out in Annex II to CP6/2001, which is available to view on the Commission's website in respect of the deadline for receipt of representations are applicable to the furnishing of written submissions in respect of this review.

Submissions received by the Commission will be posted to the Commission's website.

In accordance with Section 40(8) of the Act, the Commission must either affirm or vary its original Determination on or before the 9th of February 2001. Upon making a decision in this regard the Commission will then 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 Act.

ANNEX I

Appeal Panel established pursuant to
Section 40(2) of the Aviation Regulation Act, 2001.
C/o Mr. Rory Brady S.C.
Chairman of the Appeal Panel
P.O. Box 4460
158/9 Church Street,
Dublin 7.

BY HAND

20th December 2001

Our Ref CLP/RCB/AC

Commission for Aviation Regulation

**Re: Appeals Pursuant to Section 40 of the Aviation Regulation Act,
2001.**

Dear Sirs

We act on behalf of the Commission for Aviation Regulation and are writing to you in respect of your consideration, pursuant to section 40(5) of the Aviation Regulation Act, 2001 (the "Act"), of the Commission's Determination on the maximum levels of airport charges dated the 26th August 2001 (the "Determination").

The Commission has been sent copies of the appeals made which you are in the process of considering. It has also been made aware of hearings which you have held. As you have not been in contact with the Commission and having regard to the time limit for your consideration, we have assumed that you do not propose seeking the views of the Commission on the issues raised by the appeals.

The Commission has commenced a consideration of the issues raised by the appeals made to you. It now appears to the Commission that in relation to certain of the issues raised in the appeals before you, there are what might be considered as errors or miscalculations in the Determination and/or

Report of the Commission and which the Commission would like to bring to your attention before you exercise your statutory function under section

40(5). The Commission does not want to leave you in the position of confirming a Determination which the Commission now considers to contain errors or omissions.

Passenger Numbers:

Aer Lingus raise the issue of the passenger numbers used by the Commission in its Determination. The Commission intended as is stated in CP8, Appendix 1 at page 7 to use the traffic forecasts as per the Aer Rianta centre line forecast which is set out in Table 2, Page 8, Appendix 1 CP8. Notwithstanding this stated intention, it is accepted now by the Commission that the actual figure used for passengers in the calculation for the year 2001/02 was not in accordance with this decision but rather the figure of 18,557,881 as set out in Table 1, Page 4, Appendix 1 CP8. This was a figure which had been used in the process leading to the Determination and due to an oversight, was not corrected when the decision was made by the Commission to use Aer Rianta's own centre line passenger forecasts in the Determination.

The actual figure intended to be used by the Commission for the year 2001/02 is the figure for the twelve month period commencing the 24th September 2001 to be derived from the calendar year figures supplied by Aer Rianta for the years 2001 and 2002 as set out in Table 2.

The use of Aer Rianta's centre line forecasts in the relevant computations as intended by the Commission will have an impact on the amount of the maximum charges in the Determination for the year 2001/02 and a consequential effect on the subsequent years.

Typographical Errors:

Aer Lingus, in its appeal, identifies typographical errors in the regulatory formula. The Commission accepts that the matters identified under this heading in the Aer Lingus appeal are typographical errors.

Schedule of Users:

The Association of Flying Groups at Dublin Airport raise, in their appeal, the incompleteness of the aircraft categories specified in Schedule 1 to the Determination. The Commission prepared this Schedule from information supplied to it by Aer Rianta and which now appears to have been incomplete and in particular, not to have included categories of single engine light aircraft.

RAB and Capex:

The Ryanair appeal raises issues in relation to the RAB and recoverable Capex used in the computation of the RAB. The Commission in the context of the appeals made to you and the judicial review proceedings brought by Aer Rianta (which, *inter alia*, identify alleged errors in relation to the quantification of the RAB used for the purposes of the Determination) has commenced a review of the computations made for the purposes of the Determination. The Commission wishes to inform you that it has identified certain computational errors in the quantification of the RAB used and which, contrary to the contention made by Ryanair in its submission to you, would have the effect of increasing the quantum of the RAB to be used for the purposes of calculating the maximum airport charges in the Determination. If you would like details of these matters, we can furnish you with a note relating to same.

It would be the intention of the Commission in any review which it is required to undertake pursuant to section 40(8) to take into account the issues which have now been identified and which also impact on the amount of the maximum airport charges in the Determination.

The Commission obviously regrets the fact that its Determination contains errors or miscalculations, some of which stem from information supplied to the Commission. We are sure you and your colleagues will appreciate that this Determination involved a very complex assessment which had to be done under considerable time pressure.

Yours faithfully,

ANNEX II

In the instances detailed below, the Commission's computations in the Financial Model, used by it in its determination of maximum airport charges ("the Financial Model"), did not fully correspond to its intentions as set out in the report accompanying the Determination. Accordingly, the Commission proposes to review the following matters and invites the comments of interested parties.

- 1. The size of the write-downs of Pier C, of the aircraft Parking Stands at Dublin Airport, and of the new Terminal building at Shannon Airport. Draft figures, rather than the final figures decided upon by the Commission, were used in the Financial Model. In addition, some of the write-downs were erroneously subtracted twice from the RAB.**
- 2. The commercial CAPEX in the Commission's Recoverable CAPEX Programme was not incorporated into the calculation of the maximum yields.**
- 3. Part of the (non-commercial) CAPEX for the first nine months of 2001 was not included in the yield calculation due to confusion between the calendar and regulatory years.**
- 4. Although the Commission decided to index the RAB between December 2000 and September 2001 by 4.5%, an increase of 6% was applied.**
- 5. The Commission intended to calculate the rate of return it would allow to Aer Rianta on the basis of the 'opening' RAB (i.e. September 01) for the first regulatory year. The calculation was actually made with reference to the 'closing' RAB (i.e. September 02).**

The Commission has not calculated revised estimates of maximum airport yields consequent to the above matters. This is because the Commission must first consider any submissions it receives from interested parties regarding the grounds of appeal which were referred to it by the Appeal Panel. Furthermore, the majority of the other 9 grounds of appeal (for instance, the questions of efficiency, OPEX, depreciation, passenger definitions and numbers, and security surcharges), would, were the Commission to accept them, each cause a further variation in the maximum per-passenger yield from airport charges.

However, any variation in the determination arising for any of the above reasons to the extent that it produced a higher value of the RAB would

increase maximum airport charges, whereas any variation that produced a lower value of the RAB would reduce maximum airport charges

To clarify this, in the first column of the accompanying Table, the figures referred to above that were used in the Financial Model are presented. The second column contains a general indication of possible revised values. The proposed revised values may be subject to further refinement, in light of the Commission's review of the matters referred to it by the Appeal Panel, and subsequent submissions received. Also, these figures represent initial values used in the Financial Model. There would be similar and consequential effects in subsequent regulatory years.

FIGURES USED IN THE FINANCIAL MODEL AND POSSIBLE REVISED VALUES ¹ (Negative values in brackets)		
	Original Values	Proposed Revised Values
The date of the RAB	September 02	September 01
RAB indexation first 3Q of 2001	6%	4.5%
Effect on the RAB of:	£m	£m
Pier C write-down	(48)	(11)
Shannon Terminal write-down	(17)	(6)
Dublin parking stands write-down	-	(5)
Commercial CAPEX first 3Q of 01	-	15
Non-Commercial CAPEX first 3Q of 01	11	19

¹ These may be subject to further refinement, in light of the Commission's review of the matters referred to it by the Appeal Panel, and subsequent submissions received.