



## **Maximum Levels of Airport Charges**

# **ANNOUNCEMENT ON THE COMMENCEMENT OF A REVIEW IN RESPECT OF THE DETERMINATION ON THE MAXIMUM LEVELS OF AIRPORT CHARGES PUBLISHED ON 26 AUGUST 2001**

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## **1. BACKGROUND**

### **1.1 Legislation**

Section 32 of the Aviation Regulation Act, 2001 (the "Act") sets out the Commission's functions with respect to airport charges. Subsection (14)(a) states:

"The Commission may on or after the expiration of a period of 2 years after the making of a determination

- (i) at its own initiative, or
- (ii) at the request of an airport authority or user concerned in respect of the determination

if it considers that there are substantial grounds for so doing, review the determination and, if it sees fit, amend the determination."

The Act provides that if an amendment is made, it shall be in force for the remainder of the period of the original determination, in this instance, until September 2006. It further provides that the provisions in the Act relating to the making of a determination e.g. issue of a Notice to interested parties, the provision of a consultation period, the receipt of representations and the making and publication of a report, shall apply to any amendment in the same way as to the making of the original determination.

It is a function of the Commission to decide whether substantial grounds exist to review the Determination on the Maximum Level of Airport Charges made in August 2001(the "Determination").

## 1.2 Challenge to Determination

Arising from the Determination, Aer Rianta obtained leave to judicially review the Determination, and the hearing of this action commenced in the High Court in November 2002 (Record Number 2001/707JR)(the "Judicial Review") The Court gave its decision on 3 April 2003 in favour of the Commission. On 4 June 2003, Aer Rianta was given leave to appeal on one legal ground based on the criterion of " exceptional public importance". The Appeal has not yet been initiated by Aer Rianta. In response to an enquiry by the Court during the closing days of the action regarding the Commission's position on a possible mid-term review, the Commission indicated that it had at that stage identified a number of issues which it appeared might constitute substantial grounds for a review and that it would give an early indication of those potential grounds.

The Commission subsequently published a Notice on its website on 16 April 2003 stating that, although the final decision as to whether it would conduct a review of the determination could not be made earlier than the expiry of the two-year period, i.e. 26 August 2003, it had, already identified a number of issues which might constitute substantial grounds for a review. The issues, which were identified as possibly giving rise to a review, were set out as follows:

- (i) The commercial consequences for airport management and the airline business sector arising from the events of September 11<sup>th</sup>;
- (ii) The commercial consequences for airport management and the airline business sector arising as a result of the war in Iraq;
- (iii) The extensive range of information that has been exchanged between all the parties involved in the judicial review proceedings, and the Judgments delivered in that case;
- (iv) Current consideration being given to a second independent terminal at Dublin airport and the possibility of the segregation

of responsibility for the airports at Dublin, Shannon and Cork airports.

In the interests of transparency and in light of the practice of the Commission since its establishment, to provide a consultative forum for interested parties' views on the Commission's role and responsibilities in terms of economic regulation, a further Notice was published on 4<sup>th</sup> June 2003, through which a formal but non-statutory, consultation process commenced inviting submissions from interested parties as to:

- (i) whether there are substantial grounds for a review and,
- (ii) if so seeking comments as to what should constitute the specific grounds. A return date of 4 July 2003 was set for the receipt of responses.

## **2. RESPONSE TO CONSULTATION**

### **2.1. Submissions received**

Submissions were received from the following:

- Aer Arann,
- Aer Lingus,
- Aer Rianta,
- Air Contractors Ltd,
- Airbus SAS,
- BMI,
- Irish Association of International Express Carriers (IAIEC)
- Ryanair.

The full text of all views received were placed on the Commission's website following receipt.

### **3. STATUTORY REVIEW**

#### **3.1 Interpretation of 'substantial grounds'**

The Act does not define 'substantial grounds'. Thus, it falls to the Commission to come to a view on the meaning of the term. Following careful consideration of all the issues which are regarded as appropriate and relevant to the notion of a review from an economic regulation perspective, the Commission has taken the view that 'substantial grounds' should be interpreted in a manner consistent with the Commission's statutory objective in making the original Determination i.e. the development and operation of cost-effective airports that meet the requirements of users. This approach also serves to ensure that the regulated firm continues to be strongly incentivised to achieve the same goal.

The Commission considered, in particular how a review and its scope might affect the incentives for a regulated firm to operate and to invest efficiently.

Having analysed this question, the Commission developed a set of guiding general principles that it has followed in deciding whether to conduct a review, and what types of issue to admit into a review. The relevant principles are set out below.

#### **3.2 Principles of Undertaking an Interim review and commission's decision**

The Commission's conclusions on whether there should be a mid-term review, and if so what should be its scope, derive from its view of two high-level principles of incentive regulation:

- (i) One of the key indicators of the effectiveness of incentive regulation is the extent to which the financial consequences of

decisions by the regulated firm are borne by the firm rather than being passed on to the consumers. This requires sufficient time between determinations to reflect developments in actual conditions, some of which will be outside the management's control. This period of time should be sufficiently long as to provide strong incentives for efficient operations.

- (ii) In general, the scope of a review at an interim stage should be limited in the main, to matters of an exceptional nature, which are generally outside the control of the regulated firm.

Given that it is a very desirable characteristic of economic regulation that it offer maximum price certainty, it follows that there should be a presumption against holding a mid-term review unless events have occurred which significantly affect the objectives of the original decision. This is consistent with the approach of the Act, which is to provide intermittent quinquennial determinations, with interim reviews if there are substantial grounds for them, so as to ensure stability and predictability in the meantime. The Commission indicated in April 2003 that it was minded to hold a mid-term review for the reasons outlined at the time.

Based on the principles set out above and on the Notice published by the Commission on 16 April 2003, the Commission has decided to conduct a review of the Determination on the basis of the following substantial grounds:

- (i) Analysis of the commercial consequences (particularly as to changes in passenger traffic and security requirements) for airport management and the airline business sector arising from such exogenous events as September 11<sup>th</sup> and the war in Iraq.
- (ii) The correction of matters of computation, calculation and application arising out of information received by the Commission after the date of the Determination, including the

substantial volume of information exchanged between the parties in the course of the Judicial Review

As a decision is still awaited in relation to the proposed second terminal at Dublin airport and the legislation to implement recent Ministerial decisions regarding the segregation of responsibility at all three airports is in the preliminary stages, the Commission is not in a position at this time to have regard to these matters as part of the review.

In accordance with the provisions of the Act, it is the intention of the Commission to publish a statutory notice by 7<sup>th</sup> November, 2003 setting out the precise issues, which will come within the scope of the review. This notice will initiate the formal statutory consultation period of a minimum of 30 days. Following the Commission's consideration of all views received during the consultation period, it will as in the case of the original determination, publish a comprehensive report which will set out a reasoned response to all representations received.

The Commission would like to thank all those who participated in the exercise so far and looks forward to a meaningful and fruitful consultation on the remaining phases.

William Prasifka  
Commissioner