



CONSULTATION ON THE DECISION OF THE 2006 AVIATION APPEAL PANEL

Commission Paper CP3/2006

20 April, 2006

Commission for Aviation Regulation
3rd Floor
Alexandra House
Earlsfort Terrace
Dublin 2
Ireland

Tel + 353 1 6611700
Fax + 353 1 6611269
E-mail info@aviationreg.ie

TABLE OF CONTENTS

1. INTRODUCTION	3
2. DECISION OF APPEAL PANEL AND REVIEW BY THE COMMISSION OF THE APPEAL PANEL'S REFERRAL OF CERTAIN ELEMENTS OF THE COMMISSION'S 2005 DETERMINATION	5
3. SCOPE OF THE REVIEW	7
3.1 Reductions in allowed Capital Expenditure (Capex).....	7
3.2 Adjustments in the Regulatory Asset Base (RAB).	8
3.3 Commercial Revenues.....	9
4. DEADLINE FOR RECEIPT OF SUBMISSIONS AND PROCEDURE LEADING TO AFFIRMATION OR VARIATION OF THE DETERMINATION	11

1. INTRODUCTION

On 4 April 2006, an Appeal Panel established by the Minister for Transport pursuant to Section 40(2) of the Aviation Regulation Act, 2001 (“the 2001 Act”) issued its decision in relation to an appeal made by the Dublin Airport Authority (“DAA”) against certain aspects of the Commission for Aviation Regulation’s (“the Commission”) Determination of 29 September, 2005 on the maximum levels of airport charges at Dublin Airport (the “Determination”). The Determination and its accompanying reports are set out in the Commission Paper CP3/2005, which can be found at: http://www.aviationreg.ie/images/ContentBuilder/CP3_2005.pdf.

The Appeal Panel stated that the Minister had received two submissions from persons aggrieved by the Determination – Fáilte Ireland and the DAA. The Appeal Panel took the view (set out in Section 4.3 of the Decision) that Fáilte Ireland was not a body entitled to appeal within the meaning of Section 40 of the 2001 Act. The Appeal Panel contacted Fáilte Ireland, and informed them of this point. It was confirmed by Fáilte Ireland that it would not require an oral hearing but merely wished its observations to be considered by the Panel. Therefore, as Fáilte Ireland had in any event expressed its submission in terms of an observation by an interested party, rather than an Appeal, the Panel focused its decision on the appeal submitted by the DAA.

The Appeal submitted by the DAA contains 5 separate grounds of appeal. The Appeal Panel decided that, in 3 out of the 5, sufficient grounds had been established to refer those aspects of the Determination back to the Commission for review. In brief, if the Commission were to accept the reasoning set out in the Appeal Panel decision and vary its Determination accordingly, the (4-year average) price cap would increase by approximately €0.54 to €6.68. This is shown in Table 1, which is an extract from the Table on page 20 of CP3/2005 showing the differences in the building block components of the price cap between what the Commission allowed and what the DAA sought.

This Paper summarises the review that the Commission must now undertake and the timeframe and the scope of the review.

Table 1: - Potential impact on the prevailing price cap (€6.14) of matters referred back to the CAR by the Appeal Panel.

	cents	€/pax
Starting Price		€6.14
Commercial Revenues	28.1	
Capex Adjustments ¹	18.2	
RAB Adjustments	7.3	
Total		€0.54
Closing price		€6.68

¹ 18.2 cents is the per-passenger impact of the difference between the DAA's May 2005 Capital Investment Programme and the Commission's allowance for CAPEX. The Panel's Decision refers only to this difference in respect of Pier D and Terminal 2. Therefore, the CAPEX adjustment is likely to be less than 18.2 cents, thereby reducing the overall impact on the cap were the Commission to vary its Determination according to the Decision of the Panel.

2. DECISION OF APPEAL PANEL AND REVIEW BY THE COMMISSION OF THE APPEAL PANEL'S REFERRAL OF CERTAIN ELEMENTS OF THE COMMISSION'S 2005 DETERMINATION

On the 4 April 2006 the Appeal Panel decided to refer certain elements of the Determination back to the Commission to "either affirm or vary its original determination"².

The Appeal Panel, following its own procedures, invited the DAA as Appellant to make oral submissions to the Panel. The Panel considered it unnecessary to circulate any other persons for comment or to allow other persons to intervene because, in its view, the substance of the appeal was "the reasoning and general approach of the Commission only in so as they might affect the ability of the DAA to operate and develop Dublin Airport in a sustainable and financially viable manner."³

The Commission notes that its objective to enable the DAA to operate and develop Dublin Airport in a sustainable and financially viable manner is one of three objectives contained in Section 33 of the 2001 Act (as amended by the State Airports Act, 2004). The other two are:

- a. to facilitate of the efficient and economic development and operation of Dublin Airport which meets the requirements of current and prospective users, and
- b. to protect the reasonable interests of current and prospective users in relation to Dublin Airport.

The Commission remains of the view (as expressed on page 23 of CP3/2005) that all three statutory objectives must be read together and in light of each other. Therefore, in deciding whether or not to vary its Determination on foot of the referral by the Appeal Panel, the Commission is of the view that its statutory responsibilities do not permit it to restrict its focus, as the Panel appears to have done, to the single objective of sustainability and financial viability. Additionally and mindful of the expanded

² Section 40 (8) of the Aviation Regulation Act, 2001

³ Section 5.1 of the Aviation Appeal Panel's Decision, 4 April 2006.

meaning of, and significance given to, the concept of users in amendments made to the 2001 Act, the Commission holds the view, as it always has, in the interests of best practice regulation, that it is necessary to consult with and receive the views not only of the airport authority but also of airport users. It is the Commission's wish therefore, to give all interested parties an opportunity to express their views on the Decision of the Appeal Panel and to assist it in its Decision of whether to affirm or vary the Determination.

The Decision of the Appeal Panel is available on the Commission's website.⁴ A copy of the submission of the DAA to the Appeal Panel, edited to omit certain commercially sensitive information, which was furnished to the Commission on the 10 April 2006, is also available on the website – www.aviationreg.ie. The Commission has not received but has requested a copy of the transcript of the oral hearing conducted by the Appeal Panel which is referred to throughout its Decision.

In accordance with section 40 of the 2001 Act as recently amended by the Aviation Act, 2006, the Commission must ordinarily, within two months of the receipt of the referral from the Appeal Panel either affirm or vary its Determination. Due to the process leading to the appointment of a new Commissioner, this timeframe has been statutorily extended. A new Commissioner, Mr. Cathal Guiomard, has been selected and the two-month period will commence on the date of his formal appointment.

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 its Decision in relation to the determination back to the Commission for review.

A list of these grounds is set out in section 3 of this Paper.

⁴ The decision is in a redacted format as minor edits have been made at the request of the DAA to omit certain commercially sensitive information.

3. SCOPE OF THE REVIEW

The review of the 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.

The Commission notes that certain comments made in the Appeal Panel Decision echo arguments made in the course of litigation between the Commission for Aviation Regulation and Aer Rianta cpt. and disposed of in the course of a comprehensive 2003 High Court judgment in favour of the Commission's approach to airport charges regulation.

It is also important to point out that any analysis arising from this referral can only relate to information that the Commission had before it at the time of consultation with interested parties. In so far as this relates to capital expenditure (Capex), the main body of that information is the DAA May 2005 Capital Investment Programme⁵. It was clearly stated by the Commission in its Determination that separate consideration of the Capital Investment Programme presented to it by the DAA in the week before publication⁶ of the Determination would be necessary. Therefore, there is clear potential for a review of airport charges once a finalised CIP is submitted by the DAA. This is a separate process and the Commission is mindful of the need to clarify for interested parties the potential for overlap and confusion on this issue.

Those matters referred to Commission by the Appeal Panel are as follows:

3.1 Reductions in allowed Capital Expenditure (Capex).

The Appeal Panel has requested the Commission to:

⁵ Known as the "May CIP".

⁶ Known as the "September CIP".

- (i) review its decision to reduce allowed Capex in respect of Pier D. The amount in question is €15m⁷,
- (ii) review its decision to reduce allowed Capex in respect of Terminal 2. The amount in question is €74.4m⁸

The Appeal Panel request is in the context of an overall criticism of the benchmarking process used by the Commission's consultants.

The Appeal Panel has set out its reasoning on these topics in paragraphs 6.3.1 to 6.3.14 of its decision.

If the Commission were to reverse these adjustments on foot of the Appeal Panel's referral, the price cap would increase by approximately 18 cents, as shown in Table 1.

The Commission requests interested parties to give their views on whether the Commission should vary its determination on these elements of the capital expenditure programme. The Commission would welcome the receipt of representations setting out cogent arguments and, where possible, supporting evidence in order to assist the Commission in properly considering those views.

3.2 Adjustments in the Regulatory Asset Base (RAB).

The Appeal Panel has requested the Commission to:

- (i) review its decision to permanently exclude from the RAB a portion of the cost of Pier C. The amount in question is €13.4m (CP3/2005, page 19); and

⁷ the sum of the differences between the DAA figures and the WHA/IMR assessment of Pier D excluding pre-2005 spending on page 6 of IMR/WHA Review of Capital Programme, 28 September 2005.

⁸ the sum of the differences between the DAA figures and the WHA/IMR assessment of the T2 Core Buildings and T2 Other Enabling figures from page 6 of IMR/WHA Review of Capital Programme, 28 September 2005.

- (ii) review its decision to claw back allowances included in the first price cap in respect of the Pier D that was not built. The amount in question is €6.6m.

Table 1 shows that reversal of these RAB adjustments would increase the price cap by approximately 7 cents.

The Appeal Panel deals with this topic in paragraphs 6.4.1 to 6.4.14 of its decision.

The Commission requests interested parties to give their views as to whether it should vary its determination in respect of these adjustments to the Regulatory Asset Base. The Commission encourages the receipt of representations setting out cogent arguments and, where possible, supporting evidence in order to assist the Commission in properly considering those views.

3.3 Commercial Revenues

The Appeal Panel has requested the Commission to review its decision in relation to commercial revenues having regard to its consultant's use of benchmarking, the adopted relationships between passenger numbers and revenue growth and the complexity, scope and direction of their analysis.

In particular the Appeal Panel referred back to the Commission, for review, its stated assumptions regarding an increase in revenue from property, from car parking and from rents on the basis that they are erroneous.

In addition, it has requested the Commission to re-examine its decision on the ground that its forecast of Commercial Revenues is too simple, selective and ad-hoc.

For further information, discussion and detail on each topic please see the decision of the Appeal Panel as set out in paragraphs 6.6.1 to 6.6.7 of its Decision.

In its Determination, the Commission relied upon a forecast of commercial revenues made for it by consultants Alan Stratford and Associates. The Commission notes that the implication of the Appeal Panel's view is that the DAA's own forecast on commercial revenue as given to the CAR at the time should be accepted instead. If the

Commission were to make adjustments to commercial revenue based on that forecast airport charges would increase by approximately 28 cents.

The Commission requests the views of interested parties as to whether it should vary its determination on commercial revenues for the reasons stated above. The Commission encourages the receipt of representations setting out cogent arguments and, where possible, 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

Submissions should be made to the Commission for receipt by the Commission, no later than **5pm on the 18 May 2006**.

Submissions should be addressed to:

Anne Moloney
Deputy 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.

Commission Paper CP2/2005 sets out the meaning of deadlines imposed by the Commission in respect of the receipt of submissions by post, courier, hand delivery, fax, e-mail or otherwise.

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

Upon making a decision in this review within the timeframe indicated above, the Commission will notify the appellant of its decision and the reasons for its decision. The Decision and the reasons therefore will also be published on the Commission's website. In addition the Commission will publish a notice of the Decision in a daily newspaper published and circulating in the State in accordance with Section 40(9) of Act 2001

INDEMNITY

Any party submitting information to the Commission for Aviation or Regulation (“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.