

NON-CONFIDENTIAL VERSION

19 September 2022

Commission for Aviation Regulation
3rd Floor
6 Earlsfort Terrace
Dublin 2
Email: info@aviationreg.ie*By email***Re: Response to Draft S23 Declaration of Coordination Parameters**

Dear Sir / Madam,

We refer to the above consultation.

We agree with the Draft Decision on the Summer 2023 parameters as summarised in paragraph 1.2 of the Draft Decision.

The Draft Decision strikes a relatively conservative balance between facilitating growth by efficient, low cost airlines such as Ryanair at Dublin Airport and the sensible operational ramp up of the recently opened North Runway. In particular, we welcome the additional capacity in the highly congested 06:00 and 14:00 hours, which were particularly congested during the Summer 2022 season. This additional capacity will support Ryanair's planned growth at Dublin Airport (subject to competitive airport charges being maintained), as well as enhanced connectivity, economic growth and local jobs.

The capacity limits outlined in the Draft Decision are only modestly differently from the proposal put forward by the DAA (which was based on an in-depth review of operational capacity at the airport). The alternative proposal put forward by another airline, which suggested Dublin Airport's capacity should not increase at all, should be viewed for what it is – a naked attempt to suppress competition at the airport. Accordingly, CAR was correct to reject both these proposals in favour of the capacity outlined in the Draft Decision.

We note the Draft Decision has requested respondents to comment in a number of particular areas. Please see below Ryanair's comments in these areas.

Airfield Coordination Parameters

Sections 3.41 – 3.93 consider the implications on runway capacity in night hours of Conditions 3(d) and 5 of the planning permission for the North Runway (as set out prior to the 20 June 2022 Regulatory Decision (the Regulatory Decision) of the Aircraft Noise Competent Authority (ANCA), and subsequent grant of permission from Fingal CC on 8 August 2022 (the Permission)). We note CAR's proposed application of Condition 3(d).

We agree with CAR that the wording of Condition 5 as drafted means the implementation of the condition for Summer 2023 is rendered extremely challenging to the point of unenforceability. We also agree that the implementation of Condition 5 is an “Operating Restriction” under Directive 2002/30/EC and Regulation (EU) No 598/2014, with the necessary processes to be undertaken under S.I. No 645/2003 as per paragraph 3.86 of the Draft Decision.

Operational impacts of Condition 5

It is important that CAR is aware of the operational implications for Ryanair of an application of Condition 5 (in its form prior to the Regulatory Decision of ANCA, and subsequent Permission). The Dublin Airport Coordination Committee (DACC) previously considered the implementation of Condition 5 ahead of the Summer 2022 season. At that time (Spring 2021), the DACC was requested to consider a number of options for a reduction in slots at the airport to satisfy Condition 5. “Option 1” was a daily pro-rata % reduction applied across all airlines, calculated by day-of-week and rounded up to the nearest slot on each day. “Option 2” was a weekly pro-rata % reduction applied across all airlines, with calculation and rounding at weekly level. “Option 3” was a non-based carrier reduction, whereby all non-Dublin airport based airlines’ night flights are retimed/cancelled temporarily. Based carriers would make the remaining necessary retimes/cancellations.

The DACC recommended Option 3, however we understand that CAR’s interpretation of Condition 5 meant the implementation of the above options was not necessary for Summer 2022. We broadly agreed at the time that CAR’s interpretation of Condition 5 was reasonable.

As noted above, we agree with CAR on its interpretation in the Draft Decision of Condition 5 and consequent provisional view to make no adjustments to the R60 limits between 2200z and 0600z for Summer 2023. However, to the extent that Condition 5 comes into effect in Summer 2023, a significant reduction in night flying will be required at Dublin Airport, in which case we understand that CAR would be examining the above options again should it wish to apply Condition 5 in a manner which resulted in Operating Restrictions (as defined in the Draft Decision).

As part of the CAR assessment of how to take account of Condition 5 for Summer 2022, we engaged in some preliminary modelling of the operational impacts of Option 1 and Option 3. The results of our preliminary modelling should broadly apply for Summer 2023.

Option 1 would have the consequence that there would be a reduction in the number of Ryanair night movements in Dublin from 279 to 162 (based on a Summer 2021 peak week). This would result in Ryanair’s aircraft utilisation decreasing from [CONFIDENTIAL] sectors per day currently to [CONFIDENTIAL] sectors per day. In order to restore utilisation to its current level, under Option 1, we would need to reduce the number of aircraft based in Dublin by [CONFIDENTIAL], which in turn would reduce the number of passengers delivered to the airport by approximately [CONFIDENTIAL]. This would have the following knock-on implications:

- €[CONFIDENTIAL]m lost revenue to the Irish economy¹, and [CONFIDENTIAL] jobs lost.²
- €[CONFIDENTIAL] lost aeronautical revenue to the DAA (before considering the impact on ancillary revenue).
- Between [CONFIDENTIAL] routes cancelled by Ryanair which would be unlikely to be replaced by another carrier.

There would also be wider impacts, given the investment in infrastructure and other services at Dublin Airport by Ryanair, in light of its position as one of Ryanair's primary base airports. For example, maintenance takes place at Dublin Airport. Aircraft are swapped into routes which operate out of Dublin Airport, so that they are able to be maintained. A reduction in operations in Dublin would increase the need for 'ghost' flights to send aircraft to Dublin Airport for maintenance, rather than the more efficient approach of swapping the aircraft into a route which operates out of Dublin Airport. Similarly, with operations reducing there would be a reduced need for ground staff, leading to potential redundancies.

Under Option 2, Ryanair would have to reduce night movements to 169: a reduction of 110, which broadly would give rise to similar operational impacts as for Option 1.

Option 3 would entail a reduction in the number of Ryanair night movements in Dublin from 279 to 270 (assuming 85% of lost movements are retimed). This would result in aircraft utilisation reducing from [CONFIDENTIAL] sectors per day to [CONFIDENTIAL].

Legal impacts of Condition 5

Implementation of any of the above options would result in Ryanair losing the historic right to arriving and departure slots at Dublin Airport protected by Article 8(2) of Regulation (EEC) No 95/93 (as amended) (the Slot Regulation). Each of the above options would therefore constitute an interference with Ryanair's property rights as protected by the Irish Constitution, Article 17 of the EU Charter of Fundamental Rights, and under Article 1, Protocol 1 of the European Convention on Human Rights.

CAR must be cognisant that the general principles of EU law, including the principle of proportionality and equal treatment, apply in the context in which CAR is taking decisions under the scheme of the Slot Regulation. A decision to implement Condition 5 in a manner that results in Ryanair (and other Dublin airport users) losing historic slots, when there is an interpretation of Condition 5 available that results in users not losing historic slots (i.e., the interpretation set out in the Draft Decision at paragraphs 3.41 – 3.93), would be irrational, disproportionate, and a breach of CAR's statutory duty under Article 6(1) of the Slot Regulation and Section 8(1) of the Aviation Regulation Act, 2001.

Were CAR to make decisions which would have the effect of removing the entitlement to slots which Ryanair has under the Slot Regulation, based on the alleged requirements of Condition 5, this action would also be unlawful due to the fact that an unclear condition is not a proportionate or transparent basis upon which to remove Ryanair's rights. Regulatory conditions which are insufficiently precise are not enforceable.

¹ Assuming 50% of the [CONFIDENTIAL] lost arriving passengers are visitors -> [CONFIDENTIAL] visitors * €500 spend per pax = €[CONFIDENTIAL]m. (€500 spend confirmed by Tourism Ireland).

² As per ACI study: Every 1m pax = 750 jobs created/ saved ([CONFIDENTIAL]/1m * 750 = [CONFIDENTIAL]).

Ryanair also supports the analysis of certain operators, outlined in paragraphs 3.83 – 3.84, and the analysis of CAR at paragraph 3.88, that Condition 5 has not been properly notified under the requirements of EU law outlined in those provisions of the Draft Decision. This failure to notify is not simply a technical breach with no substantive consequences. In EU law a failure to notify renders the unnotified measure inapplicable, such that it does not have the effect of rendering unlawful any activity taken in conformity with the measure: see case C-226/97 *Criminal Proceedings against Johannes Martinus Lemmens* at §35. This procedural defect therefore operates as a fundamental bar to the operation of Condition 5. Condition 5 has not operative effect by reason of it: conduct allegedly contrary to Condition 5 will not be unlawful.

Accordingly, Ryanair calls on CAR not to apply Condition 5. As an unnotified measure, it has no effect and therefore there will be no breach or illegality in any alleged failure to comply with Condition 5. Moreover, were CAR to apply Condition 5 in such a manner as removed Ryanair’s entitlement to slots under the Slot Regulation, that would be unlawful under the Slot Regulation, general principles of EU law, and Ryanair’s property rights.

Should CAR take any decision which would result in Ryanair losing historic slots, we would be forced to seek a judicial review of the decision on the grounds of the breaches of domestic and EU law noted above.

Terminal Building Coordination Parameters

We agree with CAR’s proposed approach for Summer 2023 in this respect.

Yours sincerely,



Eoin Kealy
Head of Competition & Regulatory