

Ryanair Limited
Comments on Responses to
Consultation on the Decisions of the 2010 Aviation Appeal Panel
CP1/2010

30 June 2010

**Comments on behalf of Ryanair Limited to the Submissions by Other Parties to
Consultation CP1/2010 on the
Decisions of the 2010 Aviation Appeal Panel**

Introduction

1. Ryanair presents these comments on the Submissions of other parties in response to CP1/2010 in topic order. We do not comment on every point made in the Submissions of other parties. Lack of comment on any particular point should not be interpreted as signifying acceptance by Ryanair of the validity of any such point. The comments set out herein should be read in conjunction with Ryanair's Submissions in response to CP1/2010 dated 22 June 2010.
2. At the outset, Ryanair notes that the DAA's response implies that it is the only party whose business is materially affected by the matters referred back and should somehow receive special treatment. This is clearly not the case.
3. The fact that DAA seeks to argue that the Appeal Panel was misled in relation to matters brought before it is unfounded and incorrect. However, in circumstances where the CAR participated in the Appeal Panel Process, is indicative of the extent to which DAA controls and limits information in a manner which makes it impossible for the CAR to regulate effectively.
4. The DAA takes issue with the Appeal Panel on two fronts. Firstly, it claims that it was deprived of fair procedure due to the procedure adopted by the Appeal Panel. Secondly, it maintains that the Appeal Panel made recommendations, which it was not entitled to make. The purpose of these assertions is to undermine the Appeal Panel recommendations. These complaints have no merit. Moreover, however, even if there was merit to the complaints, they have no relevance to the decision to be made by the Commission herein. If the DAA is correct in its contentions against the Appeal Panel, this is a matter that should be the subject of a Judicial Review of the decision of the Appeal Panel. The DAA cannot be seen to accept the Appeal Decision on the one hand, whilst on the other hand claiming that it is so defective that it cannot be adopted by the Commission. It is clear that this strategy is adopted by the DAA to circumvent the appeal provisions as contained in the 2001 Act.
5. There are fundamental issues at stake which affect airline competition and the business of Ryanair and the other airlines. Whilst the DAA appears to consider that regulatory consistency applies only to itself and not to users¹, this is clearly not so and Ryanair demonstrated to the Appeal Panel that regulatory consistency also requires the CAR to address differential pricing.

¹ DAA Submission Page 6.

Differential Pricing

DAA

6. At the outset, Ryanair wishes to highlight that the regulatory commitment to remunerate DAA for its investment in T2 was granted in the context of expectations that the development of a second terminal would facilitate the introduction of differential pricing and in the context of previous regulatory commitments in relation to the 'user pays' principle. Entitlement to regulatory consistency applies not only to DAA's ability to recover the efficiently incurred costs associated with T2, but equally to the principle of differential pricing.
7. In its submission, the DAA seeks to hold the statutory requirement of the CAR to have regard to its financial sustainability as superseding or over-riding the CAR's other statutory objectives. It does not. It applies when the development of the airport is carried out efficiently and the investment and operations meet the specific needs of users.
8. In addressing the Appeal Panel's recommendation regarding the introduction of differential pricing, DAA claims that the basis of the Appeal Panel's recommendation is flawed and raises practical and legal issues. Ryanair deals with each of these in turn:

Asserted flaws in the basis for the Appeal Panel's Recommendation:

DAA is not in a monopoly position

9. DAA makes the extraordinary assertion that it is not a monopoly. It seeks to widen the market definition to include the whole of the European aviation market. This is clearly absurd as the relevant market in this case is that for the provision of airport infrastructure and services in the east of Ireland.
10. That Dublin Airport holds a monopoly over the provision of airport infrastructure and services in the Greater Dublin Area is clear. Other than George Best Airport, all airports in the island of Ireland lie over 160 km from Dublin. The UK Competition Commission's findings in its BAA inquiry, suggest that such airports cannot exert a competitive constraint because of the distance between airport locations. Dublin Airport is the only airport in the east of the island of Ireland, and is uniquely well placed to serve passengers flying into or out of the capital of the Republic, with the closest alternatives being Belfast in the north east of the island, the very small Waterford airport on the south coast, and Shannon on the west coast, also operated by DAA. For the population of Dublin, whose metropolitan area contains around 40% of the population of the Republic of Ireland, Dublin Airport is therefore likely to represent the preferred choice of airport by some significant margin. Similarly, passengers seeking to visit Dublin, the capital and largest city in the Republic, are unlikely to consider any other airport in the island of Ireland to be a viable alternative. Such passenger preferences severely limit the extent to which airlines can substitute other airports for Dublin Airport, access to which is exclusively supplied by the DAA. The evidence supports the contention that DAA holds a dominant position in the supply of aeronautical services to airlines in the east of Ireland.

11. Secondly, if countervailing buyer power exists, as claimed by DAA, then the reductions in capacity at Dublin by Ryanair and Aer Lingus would have resulted in a market response from DAA by way of reductions in charges. This has clearly not occurred, demonstrating that DAA is acting independently of its customers and raising prices leading to reduced output and loss of economic welfare. This is a clear indication of substantial market power.
12. Setting aside the inadequacy of the regulatory regime, the fact that Dublin Airport is subject to price regulation is a clear indication that the Government acknowledges that the Airport holds a monopoly.

DAA serves more than one airline business model

13. Both DAA and Aer Lingus assert that DAA serves more than one business model by offering airlines options to pay for additional facilities according to their requirements, such as for peak and off-peak operations, on-pier or remote stands and separate charges for check-in desks, airbridges and lounges. Whilst airport charges could be lower if a low fares airline was operationally able to park remotely and still maintain a 25 minute turnround (compared to full service carrier using an airbridge served stand for 1 hour), this fails to take into account the operational inefficiency of remote stands and the costs of bussing which the airline would incur. Even if it was feasible for Ryanair to avail of an approximately 21% reduction in charges to around €7.43 per passenger², this would still leave charges at Dublin at the top of the range of airport charges paid by Ryanair at comparable airports.
14. The current charges for add-on services amount to tinkering on the margin and do not address the different facilities required by low fares airlines or the effect of their different operational characteristics on costs and utilisation of facilities. These are issues that drive the requirement for appropriate differential charging.
15. For example, if Ryanair passengers do not, in the main, use check-in desks or the baggage infrastructure then the impact on charges arises not only from the requirement to pay for fewer check in desks, or for less baggage handling infrastructure, but from the impact on capacity and efficiency that freeing large areas of the terminal floor space brings about. This is an issue which needs to be addressed.
16. Furthermore, Ryanair specifically disputes DAA's assertion that Pier D was designed to meet the requirements of low fare airline users³. Ryanair consistently objected to the over-specification and excessive cost of the facility, including the bridge link to T1.
17. The effect of the Appeal Panel's decision is to make clear that, for reasons of airline competition, the DAA must address the facility and operational requirements of different types of airline user and that the CAR should incentivise it to do so through introducing differentiated price caps.

² Based on a B737-800 at 80% load factor.

³ DAA Submission, Page 14.

The level of service is common to T1 and T2

18. That DAA asserts that both terminals should operate to the same IATA level of service 'C', (a view that is supported by the 'anchor tenant' of T2, Aer Lingus), does not make it correct. Indeed, it demonstrates that DAA is seeking to impose a level of service/facilities on low fare airline users that they do not want or need.
19. IATA service levels define floor areas for different functions relative to the busy or design hour throughput. The fact, as discussed at length in the 2007 Interim Review in reports by RR&V for the CAR, that T2 has been designed to handle a busy hour throughput which is substantially above that which can reasonably be expected for its annual throughput means that there is substantial surplus space. This is consistent with the matter referred back on the Aer Lingus' Appeal relating to retail space. T2 is, hence, designed to a significantly higher space standard than has ever been applied in T1.
20. The fact that Ryanair expects DAA to operate efficiently, in not giving rise to excessive security queues or in providing efficient baggage handling services for those Ryanair passengers who have bags checked-in, has no relevance to the matter of whether there is equivalence between the two buildings in scale and cost relative to throughput.
21. T2 has been built to an excessive size to meet the requirements of a single airline user. When it became clear that DAA was intent on building a new terminal for use by high fares, full service, airlines, it was natural for Ryanair not to participate in the discussions about the detailed specification of T2. It expected DAA to then engage with it, as the largest airline user at Dublin Airport, to ensure that T1 met its requirements. This never took place.
22. It follows that T1 users should not be required to meet the costs of the excessive size and specification of T2, as it was clearly designed with a particular user in mind in disregard of objections from Ryanair and other users. In addition, there will be redundant capacity in T1 as a consequence of T2 opening. Both the excessive costs and the redundant costs fall to be borne by T2 users.

The cost basis for T1 and T2 charges

23. It is not credible or reasonable that DAA has never seriously considered the basis for differential prices between T1 and T2 given the CAR's clear indication in 2005 and 2007 that it would expect to see differential pricing at Dublin as a consequence of the new terminal being built.
24. DAA has provided facilities in T2 tailored to meet the needs of a single user, Aer Lingus, whilst failing to address the specific requirements of the largest airline user at Dublin Airport and, at the same time, seeking to upgrade T1 in order to enable it to justify the imposition of a single airport-wide charge supported by claims of common standards of service and facilities across the airport. This is clearly inconsistent with the expectations set out by the CAR in 2005 and 2007 and user entitlement to regulatory consistency requires the CAR to act now to impose a price differential.

25. DAA's high level analysis of a cost based differential is incomplete in two significant and material ways. Firstly the €8.3m capital cost of T2 that is allowed in the Determination is calculated on the basis of the excess of the total volume of airport users over 18 mppa. For 2011, this excess amounts to 1.89 mppa. However 7.98 mppa are expected to use T2 in 2011. Based on the Commission's unitised cost of €4.38 per passenger, the unitised revenue per passenger that should be earned from these passengers would amount to €34.96m in 2011 as opposed to the €8.3m figure used by the DAA in its high level analysis. To correct for this error, the DAA high level analysis needs to be adjusted by €26.67m as shown in Table 1.

Table 1

T2 Revenue Adjustment			
	Pax million	Per Pax (€,2009)	Total (€,2009)
T2 Allowed Revenue on incremental basis	1.89	4.38	8.28
T2 Revenue at expected Pax volumes	7.98	4.38	34.95
Adjustment required to T2 Capital Costs			26.67

26. A further significant error in the DAA's high level analysis arises from its failure to appropriately recognise the cost of redundant capacity in T1 that arises as a direct result of the development of additional capacity in T2, and the failure to reallocate the costs (Opex and Capital) of this redundancy as a T2 development cost.
27. When the DAA's high level analysis is corrected by making appropriate adjustments for these two DAA omissions/errors, it can be demonstrated, based on the adjusted DAA figures, that T2 cost per passenger would amount to 265% of T1 cost per passenger, a cost based differential of €10.09 per passenger as set out on Table 2 below.

Table 2

DAA High level analysis of cost based differential adjusted for (a) actual usage in T2 and (b) redundancy costs in T1						
€m's	Reference	%	T1	T2	Campus/HO	Total
Opex: Payroll & Non Payroll	per DAA		62.00	43.00	100.00	205.00
Capital Costs	per DAA		57.00	9.00	53.00	119.00
Adjustment for T2 Actual ppa	table 1			26.67		
T1 Redundancy Costs reallocation						
-Opex Payroll & Non Payroll	FR estimate	40.00%	-24.80	24.80		
-Capital Costs	FR estimate	40.00%	-22.80	22.80		
Total			71.40	126.27	153.00	324.00
Passengers			11.70	7.80		
Cost per Pax €			6.10	16.19		
T2 costs as percentage of T1 Costs				265%		
T2 / T1 Cost Differential € (per pax)				10.09		
Opex. Payroll & Non Payroll			38%			
Capital Costs			52%			

28. DAA argues that a computation of charges that would result in a lower level of charges for T2 than for T1 would be consistent with the economics of pricing for less utilised assets and that, as a consequence, economic theory would clearly point away from requiring lower charges for T1 than for T2 in order to encourage 'efficient' capacity utilisation. Given there will be substantial spare capacity in both terminals, efficient pricing would suggest lower charges in both terminals until each approaches its capacity. This point was made by Aer Lingus in its response to the Draft Determination CP3/2009.⁴
29. Once T2 opens, T1 will be used by some 11.7 million passengers out of an effective capacity, given its user mix, of 30 mppa⁵; a utilisation rate of 39%. T2 will be used by some 7.8 million passengers out of a Phase 1 design capacity of 11.4 mppa⁶; a utilisation rate of 68%. On this basis, it is clear that the level of spare (or redundant capacity) in T1 far outweighs that in T2. Far from lowering prices in T2 to incentivise more carriers to move, the DAA should be lowering prices in T1 to incentivise growth to fill spare capacity.
30. The DAA argues that T1 passengers will directly benefit from the opening of T2 because of a reduced level of congestion in T1, albeit Ryanair disputes that levels of congestion are excessive at the present time. Clearly this claimed benefit will equally apply to T2 users, where there will also be underutilised capacity.
31. In circumstances where clearly there will be ample spare capacity in each terminal, it is inappropriate to argue that T1 prices should be maintained at artificially high levels in order to encourage users to migrate to T2. The DAA reference to the need to relate prices to the demand for infrastructure rather than costs in order to secure efficiency in resource allocation, suggests that it anticipates low demand for T2.
32. In such circumstances, the DAA relies on the regulatory commitment to remunerate T2 rather than any argument that T2 represents an efficient investment. The DAA requirement for regulatory consistency with respect to remuneration for its inefficient investment in T2 does not carry any more weight than Ryanair and other users requirement for regulatory consistency in relation to the introduction of differential pricing and the application of the 'user pays' principle.
33. The DAA argues that the principles underlying unitisation and differential pricing are mutually exclusive. This is not so. There is no conflict between unitisation and differential pricing. As identified in our earlier submission, an issue does arise when comparing capital costs for T1, where they are computed on a time apportionment basis, with capital costs for T2 where they are unitised (computed on the basis of utilisation). This issue can be simply resolved.

⁴ Aer Lingus response to CP3/2009, Page 3.

⁵ Appendix A to Ryanair Response to CP3/2009.

⁶ RR&V Report for the CAR 2007.

34. When an asset is operating at capacity, time apportionment can serve well as an estimate of the erosion of economic value through usage. If usage of such an asset reduces to, say, 50% of capacity, it might be presumed that the useful life of that asset would be extended, which would give rise to the annual depreciation charge reducing pro-rata to the decrease in usage at the same time as the remaining useful life of the asset extends further into the future. Contemplating and calculating such adjustments to depreciation profiles enables a comparison to be made of costs of usage of various assets where varying methods of calculating capital costs are employed.
35. Furthermore, the DAA argument that Ryanair has benefited from the construction of T1 without having contributed to all of its construction costs is spurious. The RAB represents the assessed value/replacement cost of the operating assets at Dublin Airport. To the extent that T1 is included in the RAB, then Ryanair and its passengers have paid their share of the costs of usage of T1.
36. DAA requests the CAR to abandon the requirement for differential pricing because it alleges that there is a risk of 'stranding' the T2 asset if its proposed anchor tenant, Aer Lingus, refuses to move to T2 as a result of higher charges in T2 than in T1. If users are unwilling to pay the costs associated with the development of the facility, it is clearly not an efficient development designed to meet the needs of users, a circumstance which the CAR has a statutory duty to prevent DAA being remunerated for.
37. DAA's fears regarding the stranding of T2 on the introduction of differential pricing raises questions about the DAA's rationale for developing a terminal to meet the requirements of a specific user/anchor tenant without having received legally binding commitments from that user/tenant in advance of incurring the expenditure (in the face of clear opposition to the level and nature of the expenditure from the majority of the users of the airport.)
38. The Commission in CP4/2009 indicated, with respect to its financial viability obligations towards the DAA, that
- "The Commission's statutory objective relates to enabling the DAA to operate in a financially viable and sustainable manner: it is for the DAA actually to operate in such a manner"*
39. In light of the Commission's pronouncement, Ryanair submits that responsibility for any stranding of T2 that occurs as a result of Aer Lingus, the intended anchor tenant, refusing to occupy T2, must be attributed exclusively to fact that the DAA was remiss in failing to secure legally binding commitments from its proposed anchor tenant, prior to incurring its T2 expenditure. This amounts to a failure to operate efficiently rather than a failure to be enabled to operate efficiently. Users in general cannot be required to pay for the DAA's remiss in this regard. In these circumstances, it is entirely inappropriate that the DAA should seek to compromise user entitlements to regulatory consistency in relation to differential pricing and the user pays principles, on the grounds that this could induce the stranding of T2.

40. The way in which new capex can and should be effectively managed is to ensure agreement from the majority of users at the airport before expenditure is incurred and to obtain commitment from those users which seek additional facilities that they are willing to pay the cost of such facilities in advance. This is consistent with the CAR's proposed approach to the DAA's proposal to construct a new runway of length 3,660 metres, i.e. to charge the costs of a runway longer than 3,110 metres solely to those airlines which will benefit from it⁷.
41. Such an approach is consistent with the user pays principle and will ensure that DAA will receive clear pricing signals as to what it should build in future. This confirms that the CAR has accepted the principle that the DAA should differentially price new facilities according to the requirements of users. There can be no case for applying any different approach to T2.

Practical and Legal Issues:

42. The DAA objects to the introduction of a small nominal difference on the basis that this would be arbitrary, irrational and unjustifiable and would be contrary to the 2001 Act and European Law. The DAA is non-specific as to the manner in which such introduction would offend the 2001 Act or the principles of European Law. Again, however, if it is the case that the Appeal Panel's recommendation is unlawful and contrary to law, this is a matter that should be the subject of a Judicial Review of the Appeal Panel decision. On the one hand, therefore, DAA claims that the introduction of a calculated difference would be overly complex and require constant updating and on the other that the levy of a small difference would be arbitrary, irrational and unjustifiable. It is clear that the DAA are contending that whatever differential pricing is introduced would be unlawful.
43. It is worrying that the arguments relied upon by the DAA to prevent the introduction of differential pricing are permanent in nature. Is it the DAA's position that its owner, namely the Minister for Transport, can on each occasion over-ride the legislation so as to prevent the introduction of differential pricing on the basis of the sustainability and viability of the DAA? Likewise, complexities surrounding the calculation necessary for differential pricing, and the need for such figures to be updated, cannot be grounds to prevent differential pricing. DAA's reliance on the 2001 Act and Directive 2009/12/EC to contend that the Commission cannot introduce Differential Pricing makes it clear that it seeks to make the introduction of differential pricing conditional upon DAA itself agreeing. Having elected to build a T2 which was clearly over-sized, over-priced and over-specified, it will never agree to differential pricing. If the DAA were permitted to conduct itself in this way, it would result in the imposition of charges that were entirely discriminatory and disproportionate and which were unjustified and lacked transparency.
44. Ryanair now examines DAA's arguments under each heading further.

⁷ CP3/2009, Paragraph 9.61.

Statutory objectives and requirements

45. The DAA claims that the introduction of differential pricing would be contrary to the statutory objectives set out in Section 33(a) of the 2001 Act. This claim is unstateable and is advanced without any proper or adequate analysis. In fact, the only objective the introduction of differential pricing could be said to offend is the one where the Commission is to enable the DAA to operate and develop Dublin Airport in a sustainable and financially viable manner. However, if this is so, it is not because differential pricing would, in the normal course, be adverse to the sustainability and financial viability of the DAA but rather because the DAA chose to build an over-sized, over-priced and over-specified T2 that does not meet the needs of users, evident from the fact that its operation is dependent upon a universal price between T1 and T2. Any “*perverse effects*” arising out of the introduction of differential pricing, including the stranding of assets and/or the sub-optimal utilisation of the capacity available at Dublin Airport is not a symptom of differential pricing but is the consequence of the DAA’s decision to build a terminal that was not required or wanted by airport users.
46. The DAA argues that the effect of the 2007 Interim Determination to allow the expenditure on T2 means that to introduce differential pricing now would run the risk of adverse effects, by way of the risk of stranding of the T2 asset. As Ryanair has consistently reminded the CAR, the inclusion of the T2 capital costs was made within the context of a clear commitment to users that differential pricing would be introduced in consequence.⁸ Therefore, to deprive airport users of differential pricing as sought by the DAA would constitute a breach of legitimate expectation by the Commission.
47. The fact that the DAA and the ‘anchor tenant’ of T2 have chosen to proceed without taking cognisance of this regulatory commitment does not obviate the need for regulatory consistency to be applied equally in the interests of users as it has historically been applied in the interest of the regulated entity. Moreover, on the DAA’s logic, differential pricing can never be introduced in Dublin Airport so long as a single user objects.
48. The CAR has three statutory objectives of equal weight and which must be read in combination. In other words, the financial sustainability of DAA is not without regard to whether the development and operation of the Airport is efficient and economic, meets the requirements of users, and protects the reasonable interests of users. If the prospective users of T2 do not want to pay the costs of using that facility then there can be no clearer indication that the expenditure was not efficiently incurred and that the development did not meet the requirements of users. In these circumstances, the risk of the asset becoming stranded and its associated costs cannot simply be passed to other users.

⁸ See Paragraphs 9 to 13 of Ryanair’s Response to CPI/2010.

49. This highlights the perceived contradiction between the requirement for the CAR to meet its statutory objectives and the requirement for it to comply with a Ministerial Direction which places it in contravention of its statutory objectives. However, in this case, the relevant Ministerial Direction only referred to the opening of T2 "*as quickly as possible*". This is not sufficient to over-ride the statutory objective for the CAR to ensure that T2 is opened and operated in a manner which is economically efficient and meets the requirements of all users of Dublin Airport. The DAA's reliance on the Ministerial Direction is misconceived insofar as it is advanced by the DAA to over-ride the Commission's statutory power.
50. The introduction of differential pricing is simply a mechanism to apportion costs between users. The application of differential pricing principles simply allocates costs more appropriately and efficiently between users. It leaves DAA in the same net position as it would enjoy without differential pricing. Ryanair sees no impediment in the CAR's statutory objectives to it setting differential price caps for the two terminals which reflect the real costs of each to their respective users.

Assessment of Costs

51. Ryanair agrees that setting a differential price requires an assessment of the costs. In so far as it is able, based on information in past Determinations, Ryanair has made such an assessment in its earlier Submission in Response to CP1/2010.
52. The DAA's attempt to complicate the calculation necessary for differential pricing is contrived and could not, in any event, displace the Commission's statutory obligation to introduce differential pricing.
53. Furthermore, Ryanair does not accept that there is any case for applying a different cost of capital between the two terminals. As previously indicated, differential pricing will simply enable costs to be more appropriately apportioned between users. It is cost neutral from a DAA perspective, enabling the DAA to continue to earn a return on its efficiently incurred investments. Any increased risk of traffic downside volatility in one terminal would be counter balanced by upside potential in the other.

EU Law and Statute

54. DAA claims that the setting of differential prices would conflict with the provisions of the Airport Charges Directive, appearing to claim that this would not comply with the requirement for charges to be set "*according to the quality and scope of services and their costs or any other objective and transparent justification.*"⁹ As Ryanair has demonstrated in its earlier Submission to the CAR, there is an objective cost related basis for setting differential prices.

⁹ DAA Submission, Page 41.

55. The DAA has been entirely disingenuous in its submission in relation to the Directive wherein it states that differential pricing is not a matter for the Commission as the Directive provides that the airport operator shall remain free to set any such differentiated airport charges. The DAA continues to assert that if the Commission were to mandate differential pricing, it would be interfering with the system envisaged in the Directive. Of course, in making this submission, the DAA has failed to account for Article 5(1) of the Directive, which provides:

"This Directive shall be without prejudice to the right of each Member State to apply additional regulatory measures that are not incompatible with this Directive or other relevant provisions of Community Law with regard to any airport managing body located in its territory. This may include economic oversight measures, such as the approval of charging systems and/or the level of charges, including incentive based charging methods or price cap regulation."

56. The imposition of differential pricing by the Commission is not incompatible with the Directive, which provides that Member States take the necessary measures to allow the airport managing body to vary the quality and scope of particular airport services, terminals or part of terminals with the aim of providing tailored services or a dedicated terminal or part of a terminal. It is entirely consistent with the principle that the level of airport charges may be differentiated according the quality and scope of such services and their cost or any other objective and transparent justification. Equally, the imposition of differential pricing by way of a maximum charge does not infringe on the DAA's right to set any such differentiated airport charge.
57. As stated in earlier Submissions¹⁰, Ryanair believes that the Airport Charges Directive requires the Irish Government to ensure that users of airports covered by the Directive, which includes Dublin, are offered services and terminal infrastructure tailored to their needs. The Appeal Panel, in referring the matter of differential charging back to the Commission, made clear that it did not consider that the DAA regulated monopoly would unilaterally act to fulfil this requirement and that as a consequence the Regulator should seek to mandate differential pricing either through sub caps for each terminal or through incentive measures.
58. In respect of the Commission's Powers under the 2001 Act, the DAA's contention that the Commission is not entitled to introduce differential pricing is nonsense. The DAA relies on the definition of airport charges under the legislation to assert that:

¹⁰ Paragraph 19.

“While the Act thus provides the Commission with many options to choose from in terms of specifying the maximum levels of charges that can be levied in relation to Dublin Airport, the possibility of setting different limits for charges depending on the terminals used by the passengers at the airport is not amongst them. In particular, the possibility that limits be set for particular categories of airport charges does not, in view of the definition of airport charges include the possibility that different limits may be set for the two terminals. Indeed it is clear that the term “categories” refers to the set of services contained in the definition of airport charges, i.e., the services related to landing, parking or taking off of aircrafts, to the arrivals or departure of passengers and to the transportation of cargos, but not the terminal used by the passengers”

59. There is no substance to this submission by the DAA. If the definition of airport charges does not include terminals, then the DAA cannot charge for either T1 or T2. If airport charges include charges for the use of terminals by passengers, it must include limits to apply to that particular category of such charge, which includes differential pricing. Equally, the application of differential pricing would not necessitate the Commission to set the difference as it could include the setting of maximum charges relating to both terminals as is done in the absence of differential pricing.
60. Ryanair would highlight that the setting of differential price caps does not compel DAA to price up to the cap. The cap is a maximum level of charge not the mandatory charge. As a consequence, setting of differential price caps would not remove DAA’s freedom to vary its charges below those caps. Hence, there is no contradiction between differential pricing and the requirement for the CAR to set a limit on the maximum level of charges.

Aer Lingus

61. Aer Lingus’s argument in respect of differential prices relies on DAA’s assertion that both buildings have been constructed to meet the IATA level of service standard ‘C’. First of all, as previously highlighted by Ryanair, this is a meaningless concept as the IATA simply defines the floor areas to be provided for particular functions and does not take into account the extent to which those functions are required by low fares airline users. As Ryanair has repeatedly pointed out, IATA level of service ‘C’ is irrelevant in the context of a terminal processing low fare airline passengers which have different facility requirements. This is a clear example of DAA seeking to impose costs for facilities onto users who do not require such facilities (bundling).
62. Aer Lingus, in its response to CP1/2010 refers to the opening of T2 alleviating congestion in T1. At current levels of usage and based on the facilities required by low fare airlines, there is simply no congestion to be alleviated. Furthermore, this position is at odds with the position taken by Aer Lingus in its response to the Draft Determination CP3/2009, when it said that:

“As we have pointed out previously, the point of congestion at Dublin is the runway, not terminal capacity”

63. Aer Lingus effectively identifies the same issues to be considered in setting the differential price as does Ryanair as set out in its response to CP1/2010 and which we have addressed above in the context of the DAA response.
64. If Aer Lingus, or other airlines, will not move to T2 at a price which reflects its true cost, this only confirms that it is an inefficient development, which the CAR cannot, in accordance with its statutory objectives allow to be remunerated other than on the basis of a requirement for regulatory consistency. If regulatory consistency is to be applied in this instance in the interest of the DAA, then users are no less entitled to regulatory consistency regarding the introduction of differential pricing and the application of the user pays principle.
65. Ryanair is concerned, moreover, that the recent arrangement whereby DAA has taken back the lease for Aer Lingus's Head Office and paid the airline €10.55 million, plus other services totalling €11.6 million over 10 years appears without rationale. It would be normal for a tenant giving up a lease for space it no longer requires¹¹ to pay the landlord for the privilege of giving up the lease early. Coming on the same day as it was confirmed that Aer Lingus will operate from T2 from November 2010, Ryanair is concerned that these sums may effectively constitute a subsidy to Aer Lingus in return for it moving to T2. This has the effect of the main user of T2 effectively being subsidised by other airlines using Dublin Airport for moving to T2. This subsidy is potentially discriminatory and adds further to the case for properly structured differential prices to be put in place which reflect the actual costs of the infrastructure which users choose to use at Dublin Airport.

Other Users

66. It is significant that Ryanair's position in favour of differential pricing is also supported by CityJet, an airline which will also remain in T1, on the basis that users should pay only for the facilities which they require and that the CAR has already identified as part of its Determination a fair price for T1.
67. In contrast, the argument of IATA appears to be exactly that which would be expected of the high cost airlines which have chosen to move to T2 for the "*marketing and operational advantages*" which IATA cites. These airlines are, as Ryanair submitted previously, advocating a uniform pricing policy in which airlines that do not require such high cost/high specification facilities are disadvantaged by having to bear a substantial share of the associated costs and by having to cross-subsidise the operating costs of rival high fares airlines. This is anti-competitive.
68. In the context of T2 commercial facilities, IATA highlights that this represents pre-financing of capital costs before they are required. The same applies to the whole of T2 viewed from the point of view of airlines which will remain in T1. Those airlines will gain no benefit from the opening of T2 and therefore should pay no more than the 'fair' price for T1 established by the CAR.

¹¹ Quote Aer Lingus

69. The fact that some airlines are choosing to move to T2 indicates that they perceive clear commercial advantage in doing so. It follows that they must, in all fairness, pay a higher price in return for these commercial advantages.

Other Parties

70. Ryanair notes that four organisations purporting to represent business and tourism interest state opposition to differential pricing, with Chambers Ireland stating that there is “no business case for differential pricing”. These organisations contend that the two terminals should operate at the same standard of service. This flies in the face of the Appeal Panel’s rationale for differential pricing:

*“It is precisely because of Dublin Airport’s monopoly position that it should strive to cater for different ‘airline business models’. DAA’s failure thus far to do so has the possible effect that some business models are favoured over others. This in turn implies a potential restriction or distortion of competition in airline markets which the Panel feels should be addressed by the Commission.”*¹²

71. The Appeal Panel’s decision is based firmly on the principles that airlines with different business models must be offered facilities appropriate to their needs – the ‘user pays’ principle. As explained in our original submission, this is not anti-competitive, as claimed by ITIC and IBEC, but will remove a distortion to airline competition which undifferentiated prices between the two terminals will cause.
72. The reasoning of these parties is misplaced. As IBEC identify, it is increased air service connectivity which will stimulate trade, FDI and tourism, as these parties seek. This will not be encouraged if all airlines are required to pay for infrastructure they do not require nor does it follow that the introduction of differential pricing on the opening of T2 will in any way hinder or obstruct airlines (operating from either terminal) from improving the range and frequency of air services operated to Dublin. New infrastructure on its own will do nothing to contribute to the economic recovery of Ireland unless it creates the conditions whereby airlines are incentivised to operate additional air services, both within Europe and globally. This can best be achieved by ensuring that airport charges at Dublin Airport are set at a level, reflecting the services actually required by individual airlines, whereby airlines are incentivised to increase their services.

Conclusion

73. In conclusion, Ryanair considers that DAA’s submission serves to highlight the clear case for differential pricing on economic efficiency grounds. The only significant argument which DAA can muster is the risk of T2 becoming stranded if no airlines wish to use it at its true cost. There can be no clearer demonstration of the inefficiency of the investment.

¹² Appeal Panel Decision on Ryanair Appeal, paragraph 8.4.7.

TIX Incremental Revenues and Remuneration

74. Ryanair notes that DAA says that TIX is outperforming its expectations¹³ and that it is willing to share the information with the CAR. Ryanair would remind the CAR of the requirement for revenues per passenger to be incremental to those earned prior to the closure of Pier C. If DAA produces further information, it is essential this is made available to interested parties who should be afforded the opportunity to consult appropriately.

Over-specification of T2 Retail and the consequences for Opex

75. Ryanair has nothing to add to its previous submissions on this matter.

PRM Revenues

76. DAA has produced figures which it claims to be PRM revenues included by the CAR within 'Other Commercial Operations'. There is no explanation as to where these figures come from and they have not previously been made available to other parties. Ryanair does not understand these figures as they appear to amount to €0.06 per passenger, which is less than charged by DAA to users. Furthermore, the figures represent a declining income per passenger over the regulatory period. This is not consistent with DAA's stated intention to increase prices for PRM services.
77. In any event, the total sum claimed by DAA rises over the period, leaving a declining revenue stream from other sources, which, as Ryanair has pointed out, appears illogical.

Treatment of Inflation in the Reconciliation of CIP 2006-9

78. As set out in our previous Submission, Ryanair's analysis of the data available to it suggests that the outturn figures used by the CAR in the Draft Determination reconcile with the figures submitted by the DAA in response to the Draft Determination. Further, the methodology adopted by the Commission in CP4/2009, of applying the change in CPI (between Draft and Final Determination) to the results of the capex reconciliation that were set out in the Draft Determination, is an appropriate method of capturing the changes necessary to both the original CIP and to the outturn figures. As a consequence, based on the information available to it, Ryanair can see no merit in the DAA's argument.
79. To the extent that a new project by project reconciliation of the CIP 2006 – 2009 is required, it will be necessary to ensure that users are afforded the opportunity to consult appropriately.

¹³ DAA Submission, Page 44.

Disallowance of Pier D costs

80. DAA asserts in Appendix I to its submission that the additional costs associated with Pier D were largely incurred to meet the needs of or at the request of users. This is not the case and Ryanair maintains that the CAR was correct to disallow the additional costs in accordance with the principles which it set out regarding consultation and T1 capex in 2007 and consistent with prescribed regulatory practice regarding overspends.

Disallowance of Pier D Fit out and TFL costs

81. It is clear to Ryanair, from the information available to it, that the Commission has included the outturn for TFL project (CIP 7.020) in the amount of €6.49m within its overall figure for Pier D outturns in the amount of €124.63m as set out previously. It is also clear that the Commission has accounted for the allowance for that project of €7.07m within its overall allowance for Pier D of €93.4m, all figures being restated in CP3/2009 prices. Since both the allowance and the outturns are taken into account in the Commission's reconciliation under the overall Pier D heading, there is no requirement for any adjustment on foot of this project.

Regulated Entity Accounts

82. In response to DAA's assertion regarding the Appeal Panel's recommendations in respect of regulated entity accounts and the need for greater scrutiny by the CAR¹⁴, Ryanair submits that the Appeal Panel has simply addressed deficiencies in the manner in which financial and accounting information is requested, processed and made available for use, whether by the Commission in its work, or by users in the consultation process.
83. The DAA already has all of the financial and accounting information pertaining to the regulated entity at its disposal. The Commission does not and neither do users. The matters referenced by the Panel are relevant, pertinent matters that go to the core of the ability of the Commission to regulate effectively and of users to consult effectively. Ryanair looks forward to the provision and use of fuller, more enhanced and more appropriate financial information and analysis as recommended by the Appeal Panel.

¹⁴ DAA Response Page 5.

