Consultation on a Second Interim Review due to COVID-19 of the 2019 Determination of Airport Charges at Dublin Airport

Commission Paper 1/2021

31 March 2021

Commission for Aviation Regulation

3rd Floor

6 Earlsfort Terrace

Dublin 2

Ireland

Tel: +353 1 6611700

E-mail: info@aviationreg.ie

Table of Contents

1. Executive Summary

1.1 We published the 2019 Determination, on the maximum level of airport charges from 2020 to 2024, in October 2019. Following the initial large-scale impact of COVID-19 on the aviation industry, we concluded an Interim Review in December 2020 to implement a number of changes to the 2019 Determination in relation to the regulatory settlements for 2020 and 2021.

1.2 COVID-19 has continued to have an unprecedented effect on the aviation industry and the economy as a whole. While there has been progress with vaccinations, it remains unclear when passenger traffic will begin to recover. Therefore, the assumptions that underpinned the 2019 Determination remain far from the reality of the industry at present. As such, a review of the 2019 Determination for 2022 and beyond may be necessary. In this consultation paper we set out a number of possible responses in relation to 2022 and beyond. The starting point is the varied 2019 Determination[1] dated 3 July 2020, as amended in December 2020.

1.3 We have outlined several potential responses to the current circumstances in this paper. The options are:

- **No Review**: The first option is to make no further amendment to the varied 2019 Determination. This approach may lead to consequences which were unintended in 2019 in the case of certain mechanisms and incentives.

- **Limited Interim Review**: This option would be largely similar to the approach taken in the first interim review in December 2020. We would not conduct a full examination of the building blocks, instead focusing on which mechanisms and adjustments should be changed or removed from the price cap. Such a review could cover 2022 only or multiple years, potentially until the end of the regulatory period.

- **Full Review**: We could conduct a full review of the varied 2019 Determination. This approach presents many difficulties due to the current level of uncertainty. It would be challenging to produce reasonably accurate forecasts and fully assess the building blocks this year. Though we could potentially consider a range of scenarios and develop plans for each of these.

1.4 When considering the potential regulatory responses, parties must be prepared to commit the necessary resources to undertake the proposals they make (including the resource requirements of the Commission).

1.5 The purpose of this consultation paper is to communicate our current thoughts and to start discussions with stakeholders on how we may approach altering the varied 2019 Determination in light of the impact of COVID-19 for 2022 and beyond. The rest of the paper provides background on our approach to regulation, and a number of potential options for how we can respond to the current circumstances.

1.6 Dublin Airport has produced a paper titled 'Dublin Airport Regulatory Model Strategic Considerations', which outlines its views on possible alternative regulatory

[1] https://www.aviationreg.ie/_fileupload/20202024DeterminationVaried%20(1).pd

approaches, long term changes to the building blocks approach, and on regulatory oversight. We have included a summary and some discussion of the main points described. This paper also seeks comment on those proposals.

1.7 The timing of any draft or final decision is likely to be later in the year if an appeal panel is established to examine the 2020 Interim Review. If we conduct a 2021 Interim Review which is narrow in focus it will likely cover similar ground to the 2020 Interim Review, and the decisions of an appeal panel, if established, may have consequences for this review. Therefore, if we plan to conduct a narrow review we intend to publish the draft and final decisions after the decision of any appeal panel. Presently, we expect that this will result in the publication of the Draft Decision in September 2021. Following a consultation period, we would then publish the Final Determination before the end of 2021. If there is to be a wider review the timetable may differ. Either way we will update parties on the timeline later this year.

1.8 Responses are due by **5PM on Wednesday 5 May 2021**. See Section 9 for details on responding to this consultation.

Consultation Questions

1. Does the current situation resulting from COVID-19 represent substantial grounds to conduct a 2021 Interim Review of the varied 2019 Determination? See Section 4.

2. What time-period should an interim review of the varied 2019 Determination cover? (just 2022, or beyond this) See Section 4.

3. Is a limited interim review, as outlined in Section 6, most appropriate at this time?

    a. If so, what are the key elements we should consider in this review?

    b. If we conduct a narrow review and an appeal panel is established, should we wait until the potential appeal process is concluded to publish the draft and final decisions?

4. Is a more wide-ranging review required at this time, as discussed in Section 7? If so:

    a. How should we deal with uncertainty if we conduct a full review?

    b. What are the key areas that should be considered in such a review?

Dublin Airport's Proposal

5. What are the views of stakeholders on the proposals made by Dublin Airport?

    a. If there is interest in these proposals, could they work within the current regulatory framework, and if not, what changes would be necessary?

2. Background

2.1 The 2019 Determination was published in October 2019. The Determination set the maximum level of airport charges at Dublin Airport from 2020 to 2024. The Determination was amended in 2020 following the referrals from the Aviation Appeals Panel. It was further modified in 2020 following an Interim Review in response to COVID-19. These changes are detailed below.

Aviation Appeal Panel 2020

2.2 Ryanair and Dublin Airport requested the Minister for Transport to establish an appeal panel to review several aspects of the 2019 Determination. The panel, established in February 2020, decided to only take account of information that was available to the Commission during the consultation process, meaning that the effects of COVID-19 were not considered in their decision. For the most part, the appeal panel concluded that we did not err and that we gave proper consideration to material. The appeal panel referred two points to the Commission for further review, namely the mathematical application of the Operating Cost (Opex) passthrough mechanism and the length of the glidepath (achievability adjustment) allowed by the Commission in relation to Opex.

2.3 Following the appeal panel decision, and our subsequent consultation, in July 2020, the Varied 2019 Determination pursuant to Appeal Panel referrals was published. The price cap formula was altered so that the Opex passthrough mechanism would function as intended, and the Opex glidepath adjustments were removed from the 2022 and 2023 price caps. In summary, the appeal process resulted in a reduction in the base price cap by €0.13 in 2022 and €0.07 in 2023, and left it unchanged for other years.

2020 COVID-19 Interim Review

2.4 In June 2020, we consulted with industry on possible regulatory responses to the impact of COVID-19 on the 2019 regulatory settlement. Due to the impact of COVID-19 on the aviation industry, it was clear that the decisions reached in the varied 2019 Determination were not representative of industry circumstances in 2020. The main purpose of this consultation was to identify if an interim review was necessary, and if so, what form it should take. It laid out four potential options which were: no interim review, an interim review to address immediate issues, a full review, or a combination of an interim review to address immediate issues and a full review.

2.5 The Draft Decision on an Interim Review of the varied 2019 Determination in relation to 2020 and 2021 was published in October 2020. The Draft Decision outlined that the impact of COVID-19 on the aviation industry constituted substantial grounds for a review of the 2019 Determination for 2020 and 2021. It was decided that an Interim Review to address immediate issues was the most appropriate action at this time. The focus of this review would be to implement solutions to avoid or resolve any unintended consequences that may have arisen from the large reductions in traffic. The responses received to the consultation did not support a full review at this time and did not see the benefits of looking beyond 2021 while it was still unclear what the medium and long term effects of COVID-19 on the aviation industry would be.

2.6 An Interim Review of the 2019 Determination was completed in December 2020. It set out amendments to the Determination for 2020 and 2021. All triggers and adjustments to the price cap were removed for these years, including the Opex passthrough mechanism and price cap adjustments associated with the Capex reprofiling triggers. This was deemed necessary to avoid incentivising Dublin Airport to continue with capital investment projects that were no longer in line with immediate requirements. The continued implementation of triggers and adjustments would have led to unpredictable volatility in the price cap in the current circumstances.

2.7 The 2020 Interim Review replaced the per passenger price cap for 2020 with a set of individual caps that reflected Dublin Airport's menu of charges applicable during 2020. This decision was taken due to the unforeseen nature of COVID-19. It was decided that, having regard to each of our statutory objectives, it would be disproportionate to require Dublin Airport to rebate the 2020 overcollection in the particular circumstances of the pandemic. The 2021 price cap was set at €7.50. The review stated that there would be no clawback or adjustments related to 2020 and 2021 in future years.

2.8 As part of the review, we introduced a consultation process for substantial Capex projects in 2021. This process requires that Dublin Airport consults with airlines on projects over €4m that it wishes to progress in 2021. To move forward with such projects, it is necessary to obtain support from a minimum of 50% of passengers as represented by airlines, or else demonstrate that the project was required on grounds of safety or regulatory compliance. The process applies this year.

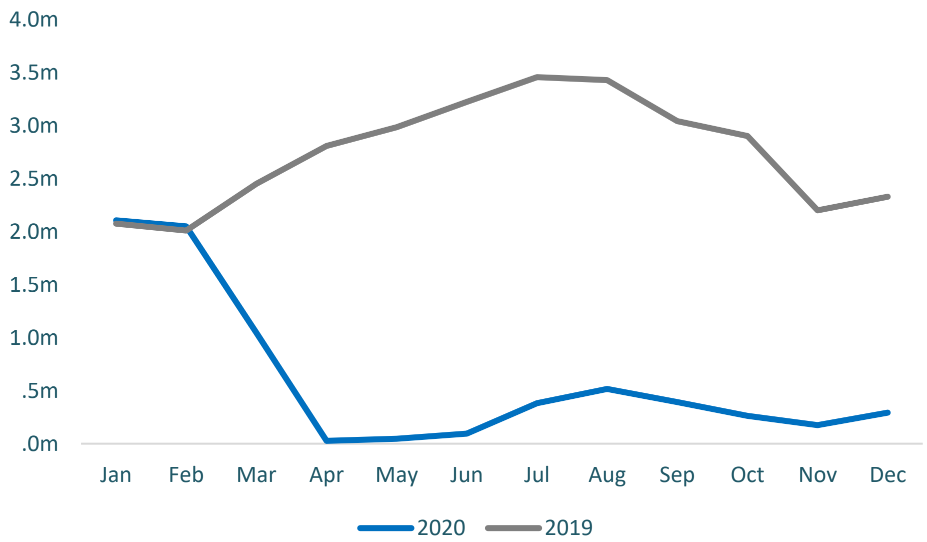
3. Impact of COVID-19 on the Industry

3.1 COVID-19 continues to have a devastating impact on the aviation industry, and there is still great uncertainty regarding how long this may last. Traffic in 2020 was down 78% at Dublin Airport, and at present with COVID-19 restrictions, there is no immediate term path to a large scale recovery.

3.2 While Eurocontrol's forecasts for Europe show that significant recovery may begin this year, it remains unclear what the impact will be on the aviation industry in Ireland in the coming years as the timelines around vaccinations, the easing of restrictions, and government support packages are still uncertain. Therefore, the range of potential outcomes to be considered in a pricing review are far greater than what would usually be the case.

3.3 When significant recovery does start, it is challenging to predict how long it will take the industry to return to 2019 traffic levels or the levels assumed in the varied 2019 Determination. Given these circumstances, it may be appropriate to again amend the varied 2019 Determination for 2022 and perhaps beyond. Chart 3.1 shows the decline in monthly passenger traffic at Dublin Airport throughout 2020. A similar pattern has continued so far this year.

Chart 3.1: Passenger Numbers at Dublin Airport in 2019 Compared to 2020



Source: Dublin Airport

4. Initial Considerations

4.1 Presently, it appears as though the varied 2019 Determination assumptions are unlikely to be representative of reality in 2022, and possibly also for the remainder of the regulatory period. As such, we need to consider whether there are grounds for an interim review and if so, the appropriate scope of the review and what time-period it should cover.

Grounds for a 2021 Interim Review

4.2 We need to consider whether the current circumstances represent substantial grounds for an interim review under Article 32 (14)(a) of the 2001 Aviation Regulation Act. This states that the Commission may carry out a review of a determination if there are substantial grounds to do so.

4.3 It is necessary that any decision on the grounds for a review is done in consideration of the objectives of the Commission in making a determination. They are defined in the 2004 State Airport Act as follows:

- To facilitate the efficient and economic development and operation of Dublin Airport which meet the requirements of current and prospective users of Dublin Airport.
- To protect the reasonable interests of current and prospective users of Dublin Airport in relation to Dublin Airport.
- To enable daa to operate and develop Dublin Airport in a sustainable and financially viable manner.

4.4 The following test has been used in the past by the Commission to establish whether there are substantial grounds for a review:

- Are the circumstances exceptional?
- Are the circumstances generally outside the control of the regulated company?
- Are the effects of those circumstances liable to be significant enough to compromise the objectives of the original decision without a review (taking into account the incentive and any other detriments that would in general also arise from a review)?

4.5 We can consider the grounds for review as previously, but views are also welcome on alternative approaches. We are open to opinions on what constitutes substantial grounds in this case, and whether a review should be deemed necessary.

Timeline for a 2021 Interim Review

4.6 The timing of any draft or final decision is likely to be later in the year if an appeal panel is established to examine the 2020 Interim Review. If we conduct an interim review which is narrow in focus, it will likely cover similar ground to the 2020 Interim Review. The decisions of the appeal panel, if established, may have consequences for this review also. Therefore, if we conclude that we should conduct a narrow review this year, we plan to publish the draft and final decisions after the decision of the appeal panel; provided that the appeal panel issues its decision in 2021 and we have sufficient time to implement any resulting recommendations. Presently, we expect that this would result in the publication of the Draft Decision in September 2021. Following a consultation period, we would then publish the Final Determination before the end of 2021. If there is to be a wider review, this timeline may differ. Either way, we will update parties on the timeline later this year.

Time Period Covered by a Review

4.7 The time period that the review will cover is an important consideration. The 2020 Interim Review covered 2020 and 2021. It is possible to conduct a review that looks solely at 2022, or to also include 2023 and possibly 2024. Conducting a longer-term review may give greater stability to stakeholders as it gives them the opportunity to plan further ahead.

4.8 Regardless of the time-period a review in 2021 covers, it is possible, and may be necessary, to perform further interim reviews in the coming years, which may also cover the same years. Therefore, a potential option could be to conduct a limited review that puts a set of adjustments in place for the remainder of the regulatory period. This gives more flexibility going forward, as if a more comprehensive review is not merited, there is the option to continue the amendments into 2023 and/or 2024 without conducting another review. Given the many challenges facing the aviation industry currently, this would save time and effort for all involved, as a review would not be necessary each year.

4.9 Another possible option to deal with this uncertainty could involve developing several potential scenarios for 2023 and possibly 2024 which depend on a variety of possible outcomes in the coming years. The appropriate scenario could then be triggered as events occur. In this case also, there is still the option to review the plans in later years.

4.10 There is also the option to shorten the current regulatory period to four years, or on the other hand to extend it. Once travel restrictions ease, there will be a clearer view of the traffic recovery path. In this case, there should be greater certainty by 2023, allowing the development of a new Determination for 2024 onwards. Combining this with potential narrow scope reviews would allow for the following further permutations:

- A narrow focus review for 2022 and 2023 combined with removing 2024, meaning that a new determination could be developed over 2022-2023 and take effect from 2024.
- A narrow focus review for 2022 only, which would allow for a further review in 2022 to either carry out a further narrow review, shorten the regulatory period, or extend it on the basis of a full reassessment over a further period of 4 or 5 years (for example, 2023 to 2027).

5. No 2021 Interim Review

5.1 This option would mean no changes to the price cap formula and regulatory measures, as set in the varied 2019 Determination for 2022 to 2024, at this time. Like 2020 and 2021, this approach may lead to consequences which were unintended in 2019 in the case of certain mechanisms and incentives. There are several items of consideration if this were to be the chosen approach which are detailed below.

5.2 The Opex passthrough mechanism that was removed for 2021, would now be implemented in 2022. As we are facing a similar level of uncertainty as when the last review was conducted, this presents the same issues as it did then. It will be challenging to appropriately calculate the inputs for the passthrough mechanism. This unpredictability also creates the potential for much greater volatility in the price cap than was intended when the mechanism was originally designed. This would place a larger than anticipated volume risk impact on airport users.

5.3 There is a commercial revenue rolling mechanism in place to incentivise consistent commercial behaviour from Dublin Airport. It is possible that there will be a high level of outperformance for some of the targets due to low passenger numbers, rather than improved commercial performance. This 'outperformance' could lead to significant rolling forward of adjustments and it is difficult to predetermine the size of this.

5.4 The appropriate timing for Capex has changed significantly in the past few years and the varied 2019 Determination plan for the rest of the regulatory period is no longer in line with reality. As a result, the level of Capex allowances does not fit with the current requirements at the airport. When the allowances were set, it was with respect to forecast passenger numbers, but currently numbers are significantly lower than expected due to COVID-19. Many of the Capex projects that were to be delivered in this regulatory period have been delayed due to COVID-19 and, it is likely that this will continue into 2022, and potentially beyond this, given the uncertainty around traffic recovery. Therefore, the level of allowances set in the varied 2019 Determination are out of line with traffic forecasts for 2022 and likely 2023 and 2024. In the 2020 Interim Review, a new consultation requirement was introduced for certain large Capex projects to ensure that a majority of airport users continued to support the progression of these projects. However, without a further review, this process will not be in place beyond 2021.

5.5 There are several reprofiling triggers linked to specific capital projects laid out in the varied 2019 Determination which combined can lead to a decrease in the price cap of €0.62 in 2022. These aimed to encourage Dublin Airport to work within a particular timeline on its capital programme. As the timing of the requirement for these elements of the capital plan has changed since 2019, these triggers are likely no longer appropriate, as they would incentivise spending on projects to a sub-optimal timeline.

5.6 The reimplementation of penalties for breaches in quality of service is likely not to be in line with the capabilities of Dublin Airport to accurately measure several aspects of quality of service due to social distancing guidelines. While price cap adjustments could potentially be waived on the basis of continued exceptional circumstances, there would be no opportunity to revise the targets and penalties outlined in the varied 2019 Determination if there is no 2021 interim review.

6. Limited 2021 Interim Review

6.1 Currently our preferred option is to conduct a limited 2021 interim review to address issues relating to incentives and regulatory mechanisms, similar to the approach taken in the 2020 interim review. The focus of such a review would be on elements of the varied 2019 Determination that could lead to unintended consequences in the current circumstances. There would not be a review of the building blocks in this case nor a reset of the base price cap. There is an outline of the possible considerations for such a review below.

6.2 In a limited review, we would not conduct an examination of the building blocks but we would consider the removal of the adjustments, regulatory mechanisms and triggers. In our decision, we will need to consider which, if any, of them should be maintained. Any decision to be more selective relative to the 2021 price cap approach would need to be considered in the context of the level of uncertainty, as well as the balanced approach in the 2020 Interim Review which resulted from removing all of these mechanisms regardless of whether they would be likely to increase or decrease the price cap.

6.3 Such a review would likely consider the following items: the Opex passthrough mechanism, the commercial revenue rolling scheme, the possibility of continuing with the current Capex consultation process for large projects, triggers and adjustments for capital investment projects, the treatment of unspent Capex and, quality of service targets and associated penalties.

6.4 As discussed in Section 5, the Opex passthrough mechanism was removed for 2021 in the 2020 Interim Review. Our view is that it may be appropriate to continue with this removal. We need to consider the implications of re-implementing this mechanism and whether there is an argument to be made for its retention during the effective term of a narrow scope review.

6.5 The varied 2019 Determination put a commercial revenue rolling scheme in place for 2022 and 2023. Our current thinking on this is that it likely makes sense to remove the rolling scheme for the period covered in the 2021 interim review. The table below demonstrates the yield per passenger from January to September 2020 compared to the commercial revenue targets for 2022. The high level of revenue yield in these categories in 2020 was largely driven by low passenger numbers combined with the relatively fixed nature of some elements of commercial revenue. Given the difficulty in forecasting passenger numbers at present, it is possible that if low passenger numbers continue into 2022 and beyond, the targets will be “outperformed” as in 2020.

Table 6.1: Yields per passenger - 2022 targets Vs 2020 partial outturns

Yield (€, nominal)	Retail	Car Parking	Lounges, Fast track, and Platinum services	Advertising
2022 targets as per 2019 determination	3.42	1.62	0.57	0.17
January-September 2020	3.63	1.80	0.63	0.30

Source: 2019 Determination, Dublin Airport data

6.6 The timing for capital investment has changed significantly due to COVID-19. Therefore, it is necessary to examine how decisions on when to progress capital projects should be made. In the 2020 Interim Review of the varied 2019 Determination in relation to 2020 and 2021, a requirement for consultation on the timing of certain Capex projects over €4m was implemented. Our view is that this process, or a similar process, should be continued into the period covered by this review to ensure that significant Capex projects are progressed in line with the requirements of current and future airport users.

6.7 There are several reprofiling triggers and adjustments in place for capital projects and currently, our view is that these should be removed from the price cap formula. Many of these projects have been delayed or postponed due to COVID-19. It is therefore unlikely that these targets will be met. These projects include the Terminal 1 Departures Lounge, Terminal 1 Check in, the West Apron Underpass, the North Runway, Pier 5, US Preclearance Expansion and Terminal 1 Security relocation. Similar triggers were removed for 2021 as they created incentives to deliver the projects to a timeline that no longer aligned with traffic forecasts. Most of these projects have been delayed, and as such it would provide a perverse incentive to maintain the triggers.

6.8 The 2020 Interim Review did not need to consider the North Runway triggers as it was clear the runway would not be fully operational during 2020. M2 (the main trigger) activates the year after runway is fully operational. The North Runway will similarly not be fully operational during 2021, which means that M2 will not activate during 2022. However, it is currently unclear whether the runway will be operational during 2022. If the review also covers 2023, we would need to decide whether to apply the 'no adjustments' approach in a symmetric way, i.e. remove both the reprofiling triggers (which would reduce the price) and the North Runway triggers M2 and M3 (which would increase it) for 2023. The M2 trigger incorporates a volume risk adjustment in that it is based on the number of passengers in the year that the runway becomes operational. For example, if the runway is completed in 2022 and there are 20m passengers in 2022, the M2 trigger would add €0.40*25m/20m = €0.50 to the per passenger price cap for 2023.

6.9 Similarly, we must consider the appropriate treatment of unspent Capex. In the last interim review, we decided that unspent capex in 2020 and 2021 would not be clawed back. Dublin Airport are not collecting the level of revenues expected due to reduced passenger numbers. The forecast capital costs to be recovered for 2022 as outlined in the varied 2019 Determination are €259.4m. It is unlikely that the amount collected will meet this.

6.10 The penalties for not achieving quality of service targets were suspended in March 2020. In an interim review, we will consider if this is still necessary, and whether it is beneficial to passengers for the suspension to remain in place for such a long period of time. Our current thinking is that we should explore options for reimplementing a quality of service price cap adjustment system. This may involve a reduction in the scope of the measures, the target levels and possibly also the penalties. The suspension was originally implemented to enable some flexibility due to social distancing measures but there are alternative options we can now consider. It is possible to reimplement incentive arrangements for the measures where it is possible for Dublin Airport to collect data. If the current targets are deemed to be unachievable with current measures, then they could also be revised. However, by 2022 Dublin airport may have adapted to working with the changes, if there remains a requirement for social distancing or similar measures at that time. Overall, there has not been a large number of breaches since the suspension, so taking the approach of reimplementing some of the measures may be in the best interests of passengers to encourage Dublin airport to continue to maintain high service standards.

6.11 There are also several measures where data is no longer being collected due to social distancing. It is likely that the difficulty in accurately measuring the subjective measures that are gathered by survey will continue due to social distancing rules Potentially, this provides an opportunity to look at some alternative ways of collecting information on passenger experiences. We welcome any suggestions on possible methods of collecting information on passenger experiences.

6.12 We invite views on whether or not a limited interim review is appropriate, and if so, which topics should be covered. Similarly, we are interested in any views on alternative methods to address these issues. Overall, a limited interim review could look at similar items as the previous review. This would potentially extend several of the measures implemented for 2021, to 2022 and possibly 2023. In consideration of the current level of uncertainty, this approach is currently our preferred option. It would provide solutions for the most pressing issues, while leaving a full review for a point in time when we have more certainty regarding passenger numbers.

7. Full 2021 Review

7.1 The final option for this year is that we conduct a full review of the varied 2019 Determination. This would be a much more involved and lengthy process than the alternatives. If a full review is conducted, we would re-evaluate each of the building blocks, examining all areas of the varied 2019 Determination. The current uncertainty makes this approach particularly challenging. In a full review we would look at how to proceed with the level of uncertainty, the building blocks, risk allocation, and other policy changes as suggested by stakeholders. There is further detail on these topics outlined below.

Uncertainty

7.2 In a full review, the biggest difficulty faced by the Commission and by stakeholders is the lack of certainty in the aviation industry at present. This makes traffic forecasts difficult and likely unreliable. The application of a building block approach would be challenging. Therefore, we would need to consider alternative approaches. One possible option would be to consider a set of potential future scenarios and develop alternative outcomes for each. However, developing any one regulatory settlement in the current circumstances would be a challenging task for both the Commission and stakeholders. Developing a range of regulatory settlements would multiply this challenge to the point of possibly being unworkable. We welcome suggestions on possible ways of dealing with this uncertainty.

Review of the Building Blocks

7.3 We would need to update the passenger forecasts in the varied 2019 Determination. The level of uncertainty will pose challenges for passenger forecasts. As mentioned previously, one option is to consider a variety of future scenarios and work on these separately.

7.4 The level of Opex would be considered in a full review. As in the 2020 interim review, it would need to consider the Opex passthrough mechanism and whether it should be implemented going forward, or if perhaps an overall review of this mechanism is warranted. An overall review of Opex and the passthrough mechanism would prove challenging due to the unreliable traffic forecasts at present. It is likely that if a full review is carried out, the CIP would also be adjusted in line with recent events and as such the Opex allowances associated with the 2019 CIP would be re-evaluated in line with this development. Given the continued uncertainty, it would be difficult to say what an appropriate investment plan looks like at this time.

7.5 In the process of carrying out a full review, it would be necessary to examine the Capex plans for the coming years. It will be challenging to accurately define a Capex timeline and allowances due to the current uncertainty on passenger numbers in 2022 and beyond. A key decision that will also need to be made in a full review will be whether it is appropriate to include any reprofiling triggers and adjustments related to the progress of Capex projects. We would also welcome views on Dublin Airport's suggestion to move to a Capex approach where we would set annual allowances for non-discretionary projects without consultation, and all other projects would be consulted on in a process similar to StageGate.

7.6 Another important consideration for the building blocks would be determining the appropriate return on capital.

Risk Allocation

7.7 In the case of a full review during COVID-19, consideration of risk allocation may be warranted. Given the high level of uncertainty at present, an alternative risk allocation could be considered. In the current regulatory model, Dublin Airport holds most of the within-period risk. This is due to the fact that it is deemed the party best able to manage and/or control it. A complete alternative to this is the option to have an overall revenue cap rather than a per passenger cap as this approach would allocate all risk to the airlines. To find a balance between these choices, the implementation of a volume risk sharing mechanism could be considered. The airport would be responsible for a prescribed level of deviations from forecasts, but the risk is shared with airport users for any deviations beyond this. However, there may be difficulty in defining what a significant deviation in traffic is in current circumstances due to the uncertainty surrounding traffic forecasts. If this is something there is interest in going forward, we would need to consider it carefully as it is a significant change from the current approach.

7.8 There are currently no ex post adjustments for outturn operating costs (except for the passthrough mechanism costs), commercial revenues or cost of capital. As a result, Dublin Airport holds most of the risk for these elements. However, in the current circumstances there is a high degree of uncertainty over how these building blocks might reasonably develop over the period, so there is a risk of a high level of forecasting error. As such, it may be appropriate to consider possible methods of sharing this risk in the current circumstances. These methods would need to be considered holistically in the context of the volume risk assignment; for example, if Dublin Airport was benefitting from higher than expected passenger traffic due to the volume risk assignment, this should not be compounded due to the application of an Opex risk sharing mechanism.

Quality of Service

7.9 The timeline for the implementation of new quality of service measures may need to be assessed due to some delays as a result of COVID-19. It would also be necessary to define when it would be appropriate to reimplement price cap adjustments for quality of service breaches. Another potential consideration would be the use of the passenger advisory group to assess the opinions and priorities of passengers at present, as well as going forward as traffic numbers begin to increase.

Timeline

7.10 Given the available time for a review in 2021, it may be difficult to carry out a full review before 2022 begins. A full review is usually a lengthy process. If a full review is the preferred option, we would need to engage further with stakeholders on what the timeline and scope should be.

Policy Changes: Dublin Airport's Proposal

7.11 Dublin Airport has provided a paper with recommendations on regulation at Dublin Airport. Below we outline some of the long-term modifications to the regulatory building blocks that are discussed in this paper.

7.12 Dublin Airport has suggested the inclusion of cargo traffic in passenger number targets. This would involve a decision on a passenger equivalent for a certain amount of cargo, such as 100kg of cargo is equivalent to one passenger. The alternative suggestion to this made by Dublin Airport is that we remove cargo from the regulatory till entirely. This is something that would need to be carefully considered.

7.13 Dublin Airport believes that the current approach of agreeing investment plans for several years into the future does not provide enough flexibility, considering the unpredictability of Capex costs and needs. It suggests that an annual allowance for core projects should be fixed without need for consultation, and consultation should then be focused instead on discretionary Capex projects in a format similar to StageGate. It believes that this would allow greater flexibility and reduce the time spent on consultations.

7.14 Looking at risk allocation in the current regulatory model, Dublin Airport suggests that, given the uncertainty caused by COVID-19, the implementation of a risk sharing mechanism similar to that discussed above may be appropriate. The paper details the volume risk sharing mechanism in place at Aeroporto di Roma. This mechanism assigns the risk for smaller deviations in traffic to the airport. When traffic deviates by more than 5%, the risk is shared with airport users. This is something that could be considered, following careful analysis of the implications for all stakeholders.

7.15 We can consider the possibility of a hybrid till as suggested by Dublin Airport if a full review is to take place. Dublin Airport's view is that this would allow it to use the additional profit for investment in infrastructure which would lead to lower Capex costs. It also states the belief that it would strengthen its financial viability. A hybrid till falls somewhere in between the current single till approach and a dual till. It usually works by considering only certain commercial activities in the regulatory till, or by setting a percentage of commercial revenue to be included in the till. Dublin Airport have suggested the latter. This would be a significant change in our regulatory approach and would require careful consideration by all stakeholders. If stakeholders are interested in this approach, we would need to carefully analyse any suggested benefits of this approach versus the current adjusted single till.

7.16 The final point raised by Dublin Airport states that the impact of COVID-19 has resulted in it being unable to earn revenue in line with the level of depreciation that continues to be deducted from the regulatory asset base. As such, it proposes that an adjustment is made to allow for recovery of this lost revenue. The first suggestion is that a proportion of the under recovered revenue is capitalised and recovered through additional depreciation and return in future periods. Alternatively, a "depreciation holiday" could be implemented where the unfunded depreciation from 2020 and 2021 is not deducted from the RAB. Finally, the paper highlights the system in Northern Ireland for the gas distribution network, which used profile adjustment to carry forward revenue to future years to ensure an even price path over time.

8. Dublin Airport Proposal: Alternative Regulatory Regimes

8.1 As previously mentioned, Dublin Airport has provided a paper 'Regulatory Model Strategic Considerations', which outlines its view on regulatory oversight, alternative forms of regulation, and long-term considerations for the building blocks. Dublin Airport's paper is published alongside this paper. Below we have summarised some of the main points raised regarding regulatory oversight and alternative forms of regulation.

Market Power at Dublin Airport

8.2 Dublin Airport state that a market power assessment (MPA) of the airport is required to determine the appropriate level of regulation. It considers that the Indecon MPA failed in several ways: competition from airports outside of the Republic of Ireland was not considered, the bargaining power of airlines was not accurately represented, and Indecon did not properly examine whether Dublin Airport was able to exercise its market power. It has also been five years since the MPA was completed and Dublin Airport claims that the industry has changed significantly. As such, the airport believes that a new MPA should be conducted. However, it understands the difficulty associated with carrying out a MPA at present and, suggests that the best approach for now would be to reconsider some of the elements of the Indecon report.

Time Period Covered in a Review

8.3 Regarding the time-period covered by a review, Dublin Airport has expressed a preference for a lengthened Determination period rather than shortening it, suggesting that the current regulatory period be extended to 2026 or 2027. If this is desired by stakeholders, it will require a full review of the building blocks to establish price caps and/or allowances for the years not included in the last determination.

Alternative Regulatory Approaches

8.4 Looking at the current price cap model, Dublin Airport claims that "the price cap model was originally designed to safeguard consumer interests in a utility setting and that as such this is not entirely appropriate for the airport sector where there is no direct relationship between airport charges and consumers." Dublin Airport makes two recommendations for alternative regulatory approaches: a shadow price cap with negotiated settlements, or price monitoring.

Shadow Price Cap with Negotiated Settlements

8.5 Dublin Airport has suggested that bilateral or multilateral contracts could be pursued within the existing regulatory framework. This approach would allow Dublin Airport to agree with airport users on price, service quality and investment outcomes through negotiations to establish multi-year contracts. There are two approaches to this outlined by Dublin Airport, which are described below.

8.6 The Commission could set a shadow price cap in advance of any negotiations. If there is no agreement reached, the shadow price cap is implemented. This system would be similar to that in place at Gatwick Airport.

8.7 The other option presented by Dublin Airport is that there is no initial shadow price cap. Airlines and Dublin Airport negotiate to reach an agreement and if this is not achieved, the regulator steps in to establish a price cap. Dublin Airport states that this system is similar to that which is in place at Copenhagen Airport.

8.8 Dublin Airport's view on the Commission's role in such a system is that we would "establish, guide and approve the process by which the outcomes are determined". It states we would also approve the final agreements, monitor compliance with the terms, and keep track of outcomes.

8.9 As an alternative approach, it is also suggested by Dublin Airport that the Commission could adopt a system similar to that used in the Northern Ireland Gas Transmission Market. According to Dublin Airport the regulator publishes what it considers to be an efficient level of Opex, and the regulated entities have a reputational incentive to comply with this 'shadow' allowance for Opex. This enables the regulator to ensure an efficient outcome without calculating a specific price cap.

Price Monitoring

8.10 Price monitoring, as outlined by Dublin Airport, would involve the Commission deciding on information requirements and pricing standards. Following this, the airport and airport users would reach an agreement independently in a manner similar to that described in the previous section on negotiated contracts. Dublin Airport would publish reports on price, quality of service, and financial information annually.

8.11 This approach is similar to that of negotiated contracts with the main difference being the role of the regulator. Dublin Airport states that the Commission could choose to have an active or reactive role in monitoring the agreements. In a reactive role, the Commission would only become involved when there is a complaint. This approach is not an option for the current review, as it would require a legislative amendment, but is something Dublin Airport would like to be considered going forward.

Interest from Airport Users in Bilateral Contracts

8.12 In consideration of Dublin Airport's paper and its stated preference for the implementation of bilateral contracts, we want to assess the level of interest of airport users in bilateral contracts. We also welcome views from airport users on how they think such contracts should work, and if/how they could fit within the current regulatory framework.

European Court of Justice Preliminary Ruling

8.13 In 2019 a preliminary ruling was issued by the European Court of Justice on the case of Deutsche Lufthansa Ag v Land Berlin[2]. This case was brought due to issues regarding bilateral contracts. The main conclusion of this ruling is that varied charges can be allowed under the Airport Charges Directive, but they must be transparent and non-discriminatory. The decision stated that "a modulation of the airport charges cannot be made within the confidential framework of contractual negotiations between the

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CJ0379

airport managing body and an individual airport user". It further states that "a modulation cannot be accepted unless it is confined to implementing criteria known to all airport users in so far as those criteria are part of the system of airport charges approved by the independent supervisory authority". This case was based on the German system and should be viewed in this context. In Germany, the ISA approves the actual charges. This differs from the approach that we currently take in setting a maximum price cap, and then Dublin Airport sets the charges. The opinion of the advocate general[3] did address our system, stating that negotiations could occur provided that "(i) the maximum laid down is observed; (ii) the negotiation is in any event collective; (iii) any air carrier is able to benefit from the same charge as has been granted to one or more other carriers at a level below the approved maximum; and (iv) the airport managing body's agreement with users is subject to subsequent review by the supervisory authority." This suggests a multilateral rather than bilateral approach to the setting of charges, a process that is similar to the annual consultation between Dublin Airport and airport users currently.

How Should Bilateral Contracts Work?

8.14 In 2018, we held workshops with Dublin Airport and airport users that looked at how bilateral contracts may work within the current or a revised regulatory system. This was prior to the 2019 European Court of Justice ruling and as such did not consider potential implications of that judgement. At this time, the question was not pursued further by stakeholders. In the context of this paper by Dublin Airport, we would like to pose the following questions:

i. Do airport users have an interest in pursuing bilateral contracts as outlined by Dublin Airport?

ii. Is there a role for CAR in relation to the possibility of bilateral contracts and if so, what would that role be?

iii. How might bilateral contracts fit within the current regulatory framework under both the 2001 Act and the ACD, having regard to the ECJ judgement and related material?

iv. What benefits, if any, would these contracts provide relative to the current situation?

8.15 Regarding the last point, it is important to note that collectively negotiated charges, where all airport users would be able to benefit from the same levels of charges, is what can happen currently through the ACD consultation process. The outcome of this consultation could include overall volume discounts equivalent to a privately negotiated contract, from which all users could benefit if they achieved the specified volume targets, if Dublin Airport were to include such discounts in its charging strategy.

[3] https://curia.europa.eu/juris/document/document.jsf?text=&docid=215566&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4285901

9. How to Respond to this Consultation

9.1 The deadline for responses to this Consultation Paper is 5PM, 5 May 2021.

9.2 Responses should be titled 'Response to Consultation on a Second Interim Review due to COVID-19 of the 2019 Determination of Airport Charges at Dublin Airport' and sent:

- By email to: info@aviationreg.ie (preferable); or

- By post to: 3rd Floor, Alexandra House, Earlsfort Terrace, Dublin 2, D02 W773

9.3 We may correspond with interested parties who make submissions, seeking clarification or explanation of their submissions.

9.4 Respondents should be aware that we are subject to the provisions of the Freedom of Information legislation. Ordinarily we place all submissions received on our website.[4] We may include the information contained in submissions in reports and elsewhere as required. If a submission contains confidential material, it should be clearly marked as confidential and a redacted version suitable for publication should also be provided.

9.5 We do not ordinarily edit submissions. Any party making a submission has sole responsibility for its contents and indemnifies us in relation to any loss or damage of whatever nature and howsoever arising suffered by us as a result of publishing or disseminating the information contained within the submission.

[4] While we endeavour to ensure that information on our website is up to date and accurate, we accept no responsibility in relation to the accuracy or completeness of our website and expressly exclude any warranty or representations as to its accuracy or completeness