DECISION OF THE AVIATION APPEALS PANEL 2012

Established by order of the Minister for Transport 28 April 2021

Appeal of Ryanair against Determination of the Commission for Aviation Regulation on an Interim Review of the 2019 Determination in relation to 2010 and 2021 (Commission Paper 12/2020)

Appeal of Aer Lingus against Determination of the Commission for Aviation Regulation on an Interim Review of the 2019 Determination in relation to 2010 and 2021 (Commission Paper 12/2020)

Appeal of dublin airport authority against Determination of the Commission for Aviation Regulation on na Interim Review of the 2019 Determination in relation to 2010 and 2021 (Commission Paper 12/2020)

Eoin McCullough SC

Hannah Nixon

Andrew Charlton

1. Summary

1.1 The Commission for Aviation Regulation ("**CAR**") published its Decision 12/2020 on an Interim Review of the 2019 Determination in relation to 2020 and 2021 ("**the Decision**") on 22 December 2020

1.2 As in its last decision, the Panel emphasises that the Decision under review was based on the facts as they stood at the time of that Decision. This is the approach that is mandated by the legislation. The impact of further events subsequent to the Decision is a matter exclusively for review under section 32(14) of the State Airports Act 2001 ("**the 2001 Act**"), if it is accepted that there is such a review.

1.3 The Panel faced difficult issues. The issues determined by CAR arose from the unprecedented circumstances caused by COVID-19. In accordance with the 2001 Act, it was necessary for it to balance the interests of various interests involved, which include those of facilitating the efficient and economic development and operation of Dublin Airport which meet the requirements of current and prospective users of the airport (which encompasses not just the airlines but also passengers); protecting the reasonable interests of current and prospective users of Dublin Airport; and enabling daa to operate and develop Dublin airport in a sustainable and financially viable manner. As appears from what is set out below, CAR must be given a margin of appreciation. Allowing for that margin of appreciation in these unprecedented circumstances, and exercising its own judgement, the Panel ultimately did not conclude that there was any error on the part of CAR.

1.4 Therefore, having considered carefully the issues raised in each of the three appeals, the Panel did not find that the grounds of appeal raised by any of the appellants gave rise to sufficient grounds to refer CAR's Decision back for review.

2. Legal issues

2.1 The participants raised various legal issues, which shall be discussed as they arise below. However, there was no dispute as to the proper scope of an appeal under section 40 of the 2001 Act.

2.2 All participants accepted that the Panel in discharging its function should adopt the same approach as that adopted by the Aviation Appeals Panel 2020, which consisted of the same members. In accordance with the decisions of that Panel, the approach that the Panel adopted is as follows:-

2.2.1 If the Panel is not satisfied that CAR had considered the matters referred to at section 33 of the 2001 Act it will refer the Determination back to CAR for further consideration.

2.2.2 If the Panel is satisfied that CAR had considered the matters referred to at section 33 of the 2001 Act, but it is satisfied that there were sufficient grounds to refer that consideration back to CAR, it will refer the Determination back to CAR for further consideration. In all other events, it will uphold the Determination.

2.2.3 In deciding whether there were such sufficient grounds, the Panel will reach its decision on the merits. It is therefore necessary to identify an error on the part of CAR. CAR must however be given a margin of appreciation. There are many issues on which judgement calls must be made, and where making the call one way or the other is not erroneous.

2.3 Furthermore, procedural concerns alone do not generally constitute sufficient grounds to refer a decision back to CAR unless such procedural concerns went beyond a procedural deficiency and constituted an error.

2.5 It is appropriate for the Panel to have regard only to material which was before CAR when it made the Determination, and not to subsequently procured materials or subsequent events.

3. The appeals

3.1 Ryanair' appeal is dated 25 January 2021. There are four grounds of appeal:-

(1) Ground 1: Removal from the Decision of the requirement to rebate airport users in respect of an overcollection of aeronautical revenues per passenger in 2020;

(2) Ground 2: Removal of the price cap for 2020;

(3) Ground 3: Removal from the Decision for the 2021 price cap formulae of triggers and adjustments relating to recovery of capex;

(4) Ground 4: Removal from the Decision of the requirement for unspent capital expenditure for 2020 and 2021 to be clawed back.

3.2 Aer Lingus' appeal is dated 26 January 2021. There are three grounds of appeal:-

(1) Ground 1: the Decision varies the 2019 Determination such that section 2.2 of the 2019 Determination does not apply and that accordingly no overall price cap has been set for 2020;

(2) Ground 2: the Decision varies the 2019 Determination such that section 2.2 of the 2019 Determination does not apply and accordingly daa are not being required to return in the order of €17 million over-recovery in the year 2020 to airline users; and

(3) Ground 3: the Decision varies the 2019 Determination such that section 9.94 of the 2019 Determination does not apply for capital allowances made for 2020 and 2021 and accordingly airline users may be required to remunerate daa for capital expenditures which have not in reality taken place.

3.3 daa's appeal is dated 9 March 2021. There are two grounds of appeal:-

(1) Ground 1: the decision of CAR to set a price cap of €7.50 per passenger for 2021;

(2) Ground 2: the decision of CAR to introduce an additional consultation process for substantial Capex projects, and the threshold of €4 million for that additional consultation.

4. One decision

4.1 On the last occasion that this Panel considered appeals under this legislation, it delivered separate decisions of each of the two appeals that it heard, although there was a degree of overlap between them, and they were progressed in tandem. On this occasion, there was even greater overlap between the grounds of appeal raised in each of the three appeals. All three appeals were progressed together. Each of Ryanair, Aer Lingus, and daa had the opportunity of commenting upon each of the other appeals. Likewise, CAR commented upon all three appeals in a single document. The oral hearing of all three appeals took place at the same time. In the circumstances, it seemed to the panel to be convenient and appropriate to deliver a single decision, addressing each of the three appeals.

5. Overall points made by the appellants

Ryanair

5.1 Ryanair pointed out that globally passenger numbers fell by 60% in 2020 compared to 2019. It said also that seat capacity fell by 50%, meaning that airlines were carrying fewer passengers on each flight, with implications for airline profitability. It pointed also to evidence suggesting that Ireland had been particularly badly affected, with passengers carried across the main Irish airports falling by just over 78% in 2020 compared to 2019 levels. Ryanair stated that its losses for its financial year ended 31 March 2021 were €815m, which it contrasted with what it said were the losses of daa of €185m in 2020.

5.2 Ryanair pointed out that daa has raised funds on the bond markets, with reports suggesting that the offering was three times oversubscribed. It submits that there was therefore no need for CAR to intervene by way of the Decision to protect daa's liquidity or financeability. It pointed out also that the Government is the 100% shareholder in daa, and that shareholders have a responsibility as equity providers to shoulder a substantial share of the burden of losses caused by the pandemic. It suggests that such support has been provided by other state shareholders of airports in Europe.

5.3 The fundamental complaint made by Ryanair was that airlines should not be asked to shoulder the burden, as it puts it "*of compensating DAA for any losses or reduction in revenues at Dublin Airport*." It suggested that the CAR's Decision was taken fundamentally to protect DAA's financeability. Ryanair suggested that the Decision involved a disproportionate transfer of the demand risk from DAA to the airlines. It laid emphasis in that regard on the importance of creating conditions whereby the airlines would have the financial strength to reinstate lost connectivity as soon as travel restrictions permit, and it suggested that the Decision will adversely impact on this.

5.4 Ryanair said that all determinations of CAR in relation to fixing maximum prices per passenger are required under section 5(4) of the Aviation Regulation Act 2001 to be objectively justified, non-discriminatory, proportionate and transparent. It suggested that, in coming to a decision as to the maximum price to be fixed, CAR must meet the statutory objectives set out in section 33(1), and have regard to the factors set out in section 33(2). Although CAR stated in section 8 of the Decision that it had addressed these matters, Ryanair submitted that in fact the approach adopted by CAR in the Decision is contrary to the statutory objectives. In particular, Ryanair complained that, contrary to what is stated at para. 8.6 of the Decision, the Decision was not balanced in expecting users to contribute to daa's losses caused by the pandemic. It suggested that the net effect of the Decision is to allow daa effectively to increase its charges to users, by denying users the rebate from over-recovery in 2020 to which they were legitimately entitled and had expected to receive under the 2019 Determination. It suggested that the Decision therefore prioritises the interests of daa over that of its users, contrary to CAR's statutory objectives, specifically the second objective that requires CAR "to protect the reasonable interests of current and prospective users of Dublin Airport".

Aer Lingus

5.5 Aer Lingus also pointed to the unprecedented impact of Covid-19 on the aviation sector, which has been particularly pronounced in Ireland. Its full year results show an operating of loss of €361M in 2020. Aer Lingus operated 8,741 million Available Seat Kilometres (ASKs) in 2020 which was down 71% on the ASKs flown in 2019.

5.6 The fundamental arguments made by Aer Lingus were similar to that made by Ryanair.

5.7 As to the legal context, Aer Lingus pointed to section 33(1) of the 2001 Act which sets out the statutory objectives applicable to CAR in making a determination namely:

- 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.

Aer Lingus pointed also to section 33(2) also sets out nine statutory factors to CAR must have due regard in making a determination.

daa

5.8 In common with the other participants, daa pointed out that the COVID -19 pandemic has had and continues to have a devastating impact on the aviation sector, which includes both airports and airlines. daa agreed that CAR should factor in the effects of the COVID-19 pandemic on the aviation industry, both on the airlines and on the airport, but said that it should do so in accordance with its statutory objectives. It pointed to the provision for an interim review at Section 32 (14) of the 2001 Act, which it said allows for a correction and readjustment of the regulatory regime due to unforeseen events.

5.9 daa also referred to section 33 of the 2001 Act, which sets out the regulatory objectives to be met by CAR in setting airport charges. It referred to the statutory objectives contained in section 33(1) of the 2001 Act, and to the factors to which CAR is to have regard to as set out in section 33(2) of the 2001 Act. It laid particular emphasis on the obligation imposed on CAR to balance the various interests involved.

CAR

5.10 As set out in the Decision, CAR said that the principles by which it considered the appropriate response for 2020 and 2021 were stability in the price cap; incentives which were fit for purpose; and a fair approach, avoiding charges which would disproportionately benefit one stakeholder or group of stakeholders at the expense of others. It said that it arrived at a methodology which would not lead to the listed airport charges rising in 2020 or 2021, and which would more than likely require a reduction in airport charges for 2021, but otherwise granting daa regulatory relief within that limitation, given the exceptional and unanticipated challenge it was facing. It pointed out that there is inevitably an element of judgement in arriving at a position on what is fair, and what constitutes a disproportionate transfer of financial damage with two sets of stakeholders who have both been severely impacted by the pandemic.

6. The 2020 Price Cap – Ryanair grounds of appeal 1 and 2 and Aer Lingus grounds of appeal 1 and 2

6.1 Both Ryanair and Aer Lingus raised grounds of appeal relating to the decision of the CAR to remove the price cap for 2020, and to remove the requirement to rebate airport users in respect of an overcollection of aeronautical revenues per passenger in 2020. These were the issues raised in grounds of appeal 1 and 2 of both Ryanair and Aer Lingus. It is appropriate to consider these matters together, both because Ryanair and Aer Lingus raised essentially the same two issues, and because these two issues are themselves intimately related. The non-return of the alleged over-collection follows from the decision to remove the price cap.

6.2 In the Decision, CAR said that the overcollection has resulted from an unexpected change in the profile of the aeronautical revenue stream, due to the pandemic, with lower load factors on passenger flights and relatively more cargo flights than expected. It pointed out daa had set its charges for 2020 at the end of 2019, in the absence of any knowledge of the events which would transpire in 2020, and that the total revenue collected was substantially less than forecast with passenger traffic down approximately 80%. It had therefore replaced the 2020 per-passenger cap with a series of individual caps reflecting daa's published menu of airport charges for 2020. It followed that daa was not under an obligation to rebate in respect of what would otherwise have been an over-collection.

Ryanair Submissions

6.3 Ryanair laid emphasis on the principle of regulatory certainty, particularly in relation to the level of charge per passenger. It said that this is the basis upon which airport charges are recovered through the ticket price, and that airlines cannot retrospectively adjust the fares they charge to a passenger. It referred to the response of Aer Lingus to the Draft Decision, in which it said that the Draft Decision set a dangerous precedent for the remainder of the current period and future periods, by permitting what were effectively retrospective and unpredictable changes to the price cap. It compared this with the position for airlines who are said to have no ability retrospectively to increase fares to passengers once flights are taken. Ryanair submitted that the Decision changes the position in relation to the price cap in respect of a period which has already passed.

6.4 Ryanair suggested that the rationale of CAR for rejecting the arguments made on that ground did not withstand scrutiny. It pointed to the fact that, in justification of its Decision, CAR cited three reasons. It said that (1) part of the over-recovery in 2020 related to charges in the period January to March 2020 having been set based on the 2019 price cap of €9.30; (2) most of the over-recovery occurred in April and May 2020; and (3) over-recovery was largely driven by landing and parking charges. In addition, CAR cited an increase in cargo flights.

6.5 As to the first of these reasons, Ryanair complained that, in March 2019, daa was aware that CAR had set a substantially lower price cap for 2020 than for 2019, but that daa nevertheless set charges that would over-recover, presumably in the hope that its 2020 appeal to the Panel

would succeed. It suggested that it is simply unfair for users to bear the burden of this over-recovery, as it relates to the period before most of the downturn in traffic had taken effect.

6.6 As to the other reasons, Ryanair said that CAR decided to remove the price cap for 2020 and effectively to adopt a 'tariff basket' form of regulation by individually freezing each of daa's airport charges. CAR said that this merely removed the unintended pricing consequences of the fall in passenger numbers at Dublin Airport that would otherwise have arisen. Ryanair pointed out however that, by freezing prices, daa has benefited from yield concentration and has earned more than expected from each passenger using the airport. It submitted that this is unfair to the airlines, who had to reduce fares to encourage people to fly and who can earn revenue only from passengers.

6.7 Ryanair submitted that CAR placed too much weight on the impact of the increase in the number of cargo flights (which it said was relatively small) in giving rise to the over-recovery. It did not pay enough attention to the impact of lower load factors on the effective cost to the airlines of each passenger carried. It said that most of the over-recovery arose from airlines operating with reduced load factors. As a consequence of these lower load factors, runway and aircraft parking fees at Dublin Airport, charged on a per aircraft basis, had to be spread over a much smaller number of passengers. It pointed out, that in the case of Ryanair, there was a greater than average fall in load factor at Dublin Airport, from 89% to 59%, meaning that the impact of the increase in airport charges per passenger for Ryanair was disproportionately large.

6.8 Ryanair suggested that the Revised Determination following the last Appeals Panel set a basic price cap of €7.50 for 2020 at 2019 prices, although it added that the actual price cap set for 2020 was €7.13 based on the additional costs of the development of T2 being excluded from the RAB as the throughput trigger was not reached in the year. It pointed out that, according to daa's Regulatory Accounts for 2020, the actual revenue earned was €9.94 per passenger. There was therefore an over-recovery of €2.36 per passenger, or €2.81 if an adjustment is made for T2. It suggested therefore that the total amount of over-recovery is either €17.5m or €20.8m, and that Ryanair's share of this over-recovery would amount to between €8.9m and €10.6m.

6.9 Ryanair submitted that the appropriate response of the CAR should have been, at the least, to ensure that the over-recovery was returned to the airlines and that the charges paid per passenger remained at the intended level.

6.10 Leaving aside regulatory certainty, Ryanair also submitted that CAR failed adequately to take into account the economic circumstances faced by the airline sector. It suggested that they were not in substance addressed by CAR in considering the effect of removing the price cap for 2020. It was submitted that this represented a failure to take an important consideration into account, vitiating the Decision.

6.11 Ryanair suggested also that CAR was wrong at para. 5.20 of the Decision in stating that rebating users for over-recovery in 2020 does not "*create any incentive for air carriers to drive a recovery in the level of traffic at the airport in 2021 or beyond*". It submitted that, on the contrary, this would assist airlines with their own financial challenges, improve the profitability of airline operations, and help to promote connectivity. It was suggested that this

was in the interest of future users of Dublin Airport and should have been a greater priority for CAR.

6.12 Ryanair suggested that the Decision failed to have proper regard to the reasonable interests of users, which is one of the statutory objectives, or to achieve an appropriate and fair balance between the interests of users and the financeability of the DAA, which it said was the stated objective of the interim review. Specifically, it complained that CAR recognised that the interests of users are not served by its approach and that it did not identify any longer-term user interest which is served by the approach adopted. It complained also that, while the stated motivation for the Decision is the development and operation of the airport in a sustainable and financially viable manner, CAR has not reached the view that it is necessary to enable viability in the short term. The "broader terms" that the CAR said to be conducive to this aim were, according to Ryanair, not discussed further by CAR elsewhere in the Decision or the consultation documents.

6.13 Ryanair complained also that CAR had rejected its arguments relating to the potential availability of shareholder funding, on the basis that this was not a matter for it to consider, being solely between daa and the Irish Government. Ryanair suggested that was irrational on the part of CAR, and that its position is inconsistent with the position taken by other regulators, such as the UK CAA that have sought to take balanced decisions as between user and airport interests regardless of whether this complies with the wishes of the airport and its shareholders. Ryanair suggested that CAR neglected this principle.

6.14 Ryanair also pointed out that CAR failed to demonstrate that the Decision was necessary to maintain daa's financeability and to protect the interests of future users. It pointed out that, in the Decision, CAR made clear that (at least in relation to its proposals concerning charges in 2020) "*we have not made this decision on the basis that we believe it is necessarily required to enable the ongoing viability of Dublin Airport in the short term. We have not seen evidence which would suggest that is the case. However, in broader terms, clearly it is conducive to enabling daa to operate and develop Dublin Airport in a sustainable and financially viable manner*." Ryanair submitted that the absence of evidence on impact on the financeability of daa rendered the Decision irrational, where the CAR had expressly stated its purpose of achieving a balanced approach.

Aer Lingus submissions

6.15 Aer Lingus acknowledged that in principle, section 32(6) of the 2001 Act permits CAR to impose an overall cap and/or sub-caps on airport charges. However, it suggested that CAR erred when it removed the 2020 price cap of €7.50 and implemented a series of individual caps which reflected daa's published menu of charges for 2020, with the result that the price cap for 2020 has in effect been replaced by a basket of tariffs. It complained that this fundamentally alters the regulatory regime applicable, which has always left the setting of specific charges to daa. It said that the idea that CAR can effectively set the actual tariffs with such granularity sets a dangerous precedent for the regulatory regime.

6.16 Aer Lingus also submitted that the effect of the removal of the possibility of an overcollection was to shift the allocation of volume risk from daa to the airlines. It said that

this is contrary to CAR's longstanding policy, and it reminded the Panel that daa has benefited from holding volume risk in previous regulatory periods when volumes exceeded projections.

6.17 Aer Lingus placed emphasis on the principle of regulatory certainty. It pointed out that, while CAR acknowledged in paragraph 5.11 the general benefit of not adjusting an ex-ante price cap after it has been set, it nevertheless concluded that this was warranted due to the exceptional circumstances of the pandemic. Aer Lingus complained that this aspect of the Decision undermined the established concept of regulatory certainty. It pointed out that the 2019 Determination envisaged only two circumstances with the potential to retrospectively alter the price cap, i.e. breaches of service quality levels by daa, and failure to complete certain capital projects to expected timelines.

6.18 Aer Lingus also submitted that the Decision was unfair because it had relied on the price cap in making pricing decisions. Airlines cannot retrospectively increase prices. Therefore, it is said, airlines will factor the risk of a retrospective adjustment to the price cap into their future pricing decisions. This will inevitably increase ticket prices, which will also reduce demand. It is said that such an approach is not in the interests of airlines or their passengers.

6.19 Aer Lingus said that, in setting prices, it estimates the level of airport charges to which it will be subject. It works on an annualised and aggregate basis and does not apply the exact proportion of charges incurred on each flight to each passenger on that flight. For flights to/from Dublin Airport, Aer Lingus assumes that these will be set in accordance with the price cap. It said that, entering 2020, a reasonable assumption was that if load factors fell below 75%, daa would over-collect on flight-based fees, and therefore on the overall yield per passenger, and would be required to rebate such overcollection to airlines. As load factors at Dublin Airport declined precipitously from mid-March 2020, Aer Lingus expected such an overcollection position to be realised. If it had known that CAR would subsequently remove the price cap, then it would have recalculated and increased its charges based on load factors actually experienced.

6.20 Aer Lingus complained of the fact that the Decision has resulted in daa not rebating circa €17 million of overcollection in 2020 to users, which under the terms of the 2019 Determination it was required to rebate within 90 days of the year end. Aer Lingus estimated, using passenger numbers in 2020 as a proxy for how an overpayment would have been shared among users, that the overcollection due to Aer Lingus would be in the order of €4.9 million.

6.21 Aer Lingus pointed out the daa charges for January to March 2020 were based on the 2019 price cap of €9.30. In normal circumstances, this would have been of little consequence as this would have been balanced out by a lower yield per passenger in the remaining nine months of the year. Aer Lingus submitted however that, once daa realised that lower passenger numbers would result in a higher yield than had been anticipated, it should have taken steps to minimise any potential overcollection. CAR, it was said, had rewarded daa for failing to do so.

6.22 Aer Lingus complained in summary that daa could have solved any overcollection issue through reducing its prices during 2020, and that if it had done so there would have been no requirement for CAR to act to avoid an overcollection being realised. As CAR's decision to

replace the price cap was not known to Aer Lingus before December 2020, there was no opportunity to react with regard to ticket pricing. It said that it had a legitimate expectation that the requirement to rebate any overcollection would be implemented by CAR.

6.23 In paragraph 5.21 of the Decision, CAR stated that: '*It is not clear to us how passengers, current or future, would benefit from enforcing compliance in these circumstances*.' Aer Lingus said that payment of a rebate would have no effect on passengers in the year concerned. But it suggested that CAR should have asked itself how passengers, current or future, would benefit from the absence of rebate. It suggested that uncertainty as to retrospective changes to the price cap may lead to higher prices for future passengers going forward. Thus, it was said that the Decision means that users, whether current or future, are not benefiting from the price cap as envisaged in the 2019 Determination.

6.24 Aer Lingus also submitted that removal of the price cap will increase ticket prices, which will in turn harm demand. It was suggested that this could result in the removal of further operations from Dublin Airport, and could ultimately serve to reduce consumer choice.

6.25 Aer Lingus referred to paragraph 5.21 of the Decision, where CAR said that the Decision might potentially better protect prospective users, for example in relation to future viability adjustment requirements or the risk profile at Dublin Airport. Aer Lingus however complained that this does not apply any weight to the impact of non-payment of the rebate on carriers. It was submitted that CAR had therefore erred in applying more weight to the potential impact on daa of requiring it to refund carriers while disregarding the devastating impact of the pandemic on airlines.

6.26 Aer Lingus in summary submitted that CAR has not paid any or adequate regard to the interests of airlines in reaching its decision and has not therefore complied with the statutory objectives.

6.27 Aer Lingus made three legal points (the first of which was also made by Ryanair). First, reliance was placed on section 32(14)(b) of the Aviation Regulation Act 2001, which provides:-

> "*An amendment made under paragraph (a) shall be in force for the remainder of the period of the Determination referred to in subsection (5)(a).*"

It was submitted that section 32(14)(b) envisages a forward-looking mid-term amendment and not a retrospective change. It was submitted that the Decision sought retrospectively to replace, with effect from 1 January 2020, the overall price cap imposed by the 2019 Determination with a series of price caps which replicate daa's published charging tariff. It was said that the Decision was a retrospective change, and therefore offended against section 32(14(b). Aer Lingus submitted that it is not sufficient that the Decision was reached in the same year, because it has retrospective effect from 1 January 2020.

6.28 Secondly, Aer Lingus made a point about the statutory objectives and criteria which went beyond the general contention that CAR had not complied with the statutory objectives. It contended that CAR was obliged to scrutinise each individual charges to ensure that it complied with the statutory objectives and the statutory criteria. It suggested that CAR had failed to do so.

6.29 Thirdly, Aer Lingus referred to the Airport Charges Directive (Directive 2009/12/EC) ("the Directive"), which has been implemented in the European Communities (Dublin Airport Charges) Regulations 2011. These provisions require daa to conduct a consultation process with airlines when setting charges, which must meet obligations in relation to transparency, objectivity and non-discrimination. Aer Lingus submitted that the consultation conducted by daa did not meet the requirements of the Directive. While the daa charges were set in consultation with the airlines, this consultation was in the context of there being an overall price cap which if exceeded would lead to a rebate. The tariffs were assessed by the airlines on this basis. It submitted that this renders it inappropriate for CAR to use tariffs set by daa as the basis of a price cap without confirming that it has scrutinised of each individual tariff and concluded that they have been set in compliance with the requirements of the Airport Charges Directive.

daa submissions

6.30 daa pointed out that, in setting airport charges for 2020, it intended to comply with the reduced 2020 price cap, and that it took action to cut charges for Summer 2020 and Winter 2020/21. daa refuted an allegation made by Ryanair that "*Dublin Airport knowingly set charges that would over-recover presumably in the hope that its appeal to the Panel in 2020 would be successful*." It said that, on the contrary, airport charges for 2020 were designed to ensure compliance with a price cap of €7.58.

6.31 Furthermore, daa submitted that the consultation on these charges was in accordance with the principles of the Airport Charges Directive 2009/12/EC. It said that the consultation period ran from September 2019 to December 2019, with the updated charges coming into effect at the start of the Summer 2020 season on 30th March 2020. daa said that the process was in compliance with the Directive and the principles of transparency, objectivity and non-discrimination.

6.32 daa submitted that CAR has a statutory objective to ensure the financial viability of daa, and that this must be one of its primary duties in carrying out an interim review of an existing determination. It submitted that it was therefore essential that CAR in its 2020 Interim Determination made decisions that where balanced for both the airlines and the airport.

6.33 daa agreed that regulatory certainty is an important requirement in the regulatory model. It pointed out that daa is currently regulated on the basis of the regulatory building block model. Under this model, CAR analyses forward projections for the regulatory period, makes allowances for the operating costs and depreciation that the airport is likely to incur plus the rate of return it is entitled to earn on its investment in the RAB, and assesses likely commercial revenues. This combines to generate the annual allowable required level of aeronautical revenues which daa as a regulated entity is entitled to earn on an annual basis.

6.34 daa suggested that the allowable annual required level of aeronautical revenues is the key component in the regulatory model, as opposed to the passenger price cap. According to daa, the price cap is simply derived from the required level of aeronautical revenues combined with a projection of annual passenger numbers. daa submitted that, in the 2019

Determination, a price cap was initially set at €7.50 based on the allowable required annual aeronautical revenues of €255.2m combined with the assumption that passenger numbers at Dublin Airport would reach 34m in 2020. Further annual price cap adjustments increased this price cap to €7.58. daa suggested that it had an expectation and entitlement to earn the required aeronautical revenues under the price cap model, and that the purpose of the average price cap is simply to allow daa to earn an appropriate and pre-determined level of aeronautical revenues.

6.35 As a result of the COVID-19 pandemic, passenger traffic fell to 7.4m in 2020. daa submitted that, as a result, the total revenue yield generated by daa in 2020 was substantially below that envisaged under CAR's price cap calculation. As a result, daa failed to generate its required aeronautical revenues allowed under the 2019 determination.

6.36 daa submitted that, from a theoretical perspective, the current regulatory model would dictate that there should be a recalculation of the 2020 price cap based on passenger volumes of 7.4m. Using appropriate assumptions regarding the regulatory building blocks, daa suggested that, based on 2020 passenger volumes, the price cap should have been increased to a figure above €30. While it accepted that such a figure would not be reasonable in the current market circumstances, it suggested that the calculation demonstrated that the price cap of €7.58 for 2020 was rendered wholly void by the substantial fall in passenger volumes.

6.37 daa further submitted that there is no basis for the argument that CAR had not taken account of the interests of the airlines, given that it decided not to adjust upwards either the 2020 or the 2021 price caps under the 2020 Interim Review.

6.38 daa further suggested that it would have been impossible to adjust the airport charges appropriately during the year, given the complete lack of certainty which arose as the COVID-19 crisis developed throughout 2020. It said that, while overall traffic at the airport declined sharply, a certain amount of cargo operations and aircraft movements continued to operate. Aircraft movements continued to be levied with the agreed airport charges. Since daa's price cap compliance is calculated based on the average revenue generated per passenger, the low passenger numbers for 2020 resulted in an unexpectedly higher yield per passenger.

6.39 daa said that a higher yield per passenger would ordinarily result in the generation of a higher amount of aeronautical revenue. In 2020, however, the increased yield was simply a volume effect where the sharp decline in passenger numbers divided into the revenue generated from non-passenger related airport charges such as aircraft movements and parking charges distorted upwards the average revenue per passenger yield.

6.40 daa said that CAR recognised this volume distortion and its implications for price cap compliance in 2020. As part of its 2020 Interim Review Decision, it introduced an alternative approach specifically for 2020, where it agreed to look at individual caps related to specific airport charges in assessing price cap compliance for 2020. daa submitted that, contrary to the case made by Ryanair and Aer Lingus, this did not amount to a substantial change in the regulatory model.

6.41 daa submitted that this was a pragmatic and practical approach on the part of CAR, and that it was a proportionate solution striking a balance between the interests of airport users and the financial viability of the airport.

6.42 daa therefore did not accept that airport charges increased during 2020, or that during the year the airlines were overcharged in respect of any individual airport charges.

6.43 daa also pointed out that, in its view, there has been a discrepancy in the pandemic between the total aeronautical revenues generated by the airlines and the actual revenues that correlate to the total number of flown passengers. It suggested that the airlines had generated revenues from passengers who have not flown, and that it is therefore disingenuous of them to focus on alleged overcollection by daa.

6.44 daa submitted that, if the CAR had implemented the suggestions of the airlines, it would be contrary to its statutory objective under section 33(1)(c) of the 2001 Act to "*enable daa to operate and develop Dublin Airport in a sustainable and financially viable manner*" It would also represent a disproportionate and discriminatory burden on daa contrary to 5(4) of the 2001 Act, which requires CAR to "ensure that all determinations, conditions attaching thereto, amendments thereof and requests shall be objectively justified and shall be non-discriminatory, proportionate and transparent". Furthermore section 33(2)(h), requires CAR to have 'due regard' "*to…. imposing the minimum restrictions on daa consistent with the functions of the Commission"*. This requires CAR to consider each restriction imposed and ensure it was the minimum restriction that was available, which is consistent with CAR's functions.

CAR submissions

6.45 CAR pointed out that, in late 2019, daa consulted on its charges to take effect from March 2020. The charges were based on the expected level of traffic and load factors for 2020, with the intention to comply with the 2020 maximum price cap of €7.58. However, COVID-19 resulted in much lower load factors, a higher proportion of cargo flights, and a larger proportion of revenue coming from aircraft parking. daa offered discounted aircraft parking charges and reductions in runway charges for cargo flights in 2020. Nonetheless, given the change in the profile of the revenue stream, it was clear that there would be overcollection at a per-passenger level, notwithstanding CAR's expectation that daa would recover only 29% of the forecast aeronautical revenue.

6.46 CAR therefore implemented for 2020 a series of caps that mirrored the airport's menu of charges. Accordingly, the listed airport charges at the times these flights operated would be the payable charges, but these charges did not align with the anticipated yield per passenger. The effect of this change meant that daa would not have to issue rebates to airport users equivalent to approximately a further quarter of that 29% of forecast revenues, which would have reduced that figure down to 22%.

6.47 CAR said that it had not suggested that it would have been impossible for daa to mitigate a per passenger overcollection in 2020. Rather it concluded that it would be disproportionate to require daa to pay out rebates of this revenue in 2021.

6.48 CAR pointed out that, by June 2020, it had already signalled that it was considering changing the compliance requirement for 2020.

6.49 CAR pointed out that it was very difficult in 2020 to predict when and if passenger numbers would recover. Early forecasts suggested a recovery to 80% of pre-pandemic levels by September of 2020, but by September 2020 that projection was abandoned. CAR said that it would therefore not have been reasonable to have expected daa, in the first six months of 2020, to have been able to foresee how the latter part of the year would develop and have been ready to adjust its prices accordingly. According to CAR, once the Consultation was issued in June, it was reasonable for daa to advocate for one of the options presented for 2020 and to avoid changing its prices in a way which would be inconsistent with that option.

6.50 CAR referred to Aer Lingus' submission, supported by Ryanair, that in setting airfares it estimates the level of airport charges to which it will be subject, and that it was entitled to rely on rebates during 2020. The point was made that, because the CAR decision to replace the price cap was not known to the airlines before December 2020, there was no opportunity to react with regard to ticket pricing. CAR pointed out that these issues had been considered in Section 5 of the Decision.

6.51 CAR added that, in the Consultation of June 2020, it identified the potential to accept the existing 2020 charges as price cap compliant as one of three possible options to take for 2020. It suggested that, from that point, all stakeholders were on notice that it was considering this approach. It suggested that airlines could therefore have factored this into airfares. Furthermore, this approach, and the specific mechanism for achieving it, was then set out in the Draft Decision in October as the proposed approach, before being confirmed in December.

6.52 CAR pointed out that, in accordance with normal practice, the listed airport charges at the times that flights operated would be the payable charges, but that exceptionally these charges did not align with the originally anticipated aeronautical revenue per passenger.

6.53 Furthermore, CAR pointed out that, in its response to the Consultation of August 2020, Aer Lingus considered that the question of whether the overcollection issue was addressed would have only a '*marginal impact, if any*' on the 2019 Determination. In its response to the Draft Decision in November 2020, Aer Lingus provided a '*necessarily, not fully informed*' estimate of the overcollection at just €7m. CAR suggested that this demonstrated the extent to which the normal profile of pricing, revenue, and passengers had been distorted relative to expectations. Furthermore, according to CAR, the airlines equally had no visibility over the mechanism for how the rebates of any overcollection would be apportioned among them. CAR submitted that these considerations are inconsistent with the contention that, until December 2020, the airlines were reasonably entitled to assume that they would receive rebates in relation to 2020 charges, or that they were able to factor this into airfares with any degree of accuracy.

6.54 Addressing the concerns about regulatory certainty, CAR submitted that the 2020 compliance approach was not changed ex-post facto, but rather was confirmed to be changed in December of the same year, with the potential approach having been flagged in June of

that year. CAR added that, as set out in the Decision, it does not believe that airlines will see the Decision as marking an ongoing change in the regulatory model or that it will spark an ongoing approach of within-year changes to the price caps. Rather, it believes that all parties will see the Decision as an exceptional reaction to an exceptional set of circumstances. Therefore, it would not expect that this decision creates uncertainty surrounding future price caps.

6.55 In response to the suggestion that the Decision represents an unjustified shift in risk allocation, going beyond the scope of the interim review, CAR referred to paragraphs 4.15 and 4.16 of the Decision. It pointed out that if it had truly shifted the allocation of volume risk to the airlines for 2020, the price cap would have increased to over €30. Given the exceptional downside risk which had materialised, CAR concluded that this warranted a degree of regulatory relief. It saw this as removing a requirement for a retrospective transfer of wealth from airport to airlines, and not as a decision on future airport charges which could impact capacity decisions and airfares. It therefore defended its decision to provide relief to daa without increasing the charges being paid by users, by adopting the menu of charges that was already in place for 2020 as the price caps for that year.

6.56 As to compliance with the statutory objectives, CAR suggested that the primary way which it could reasonably protect the interests of users was by avoiding increases in airport charges in 2020 or 2021. Within those bounds, it considered it reasonable to provide regulatory relief to daa, given the unprecedented extent of the downside volume risk.

6.57 CAR noted that Aer Lingus had not raised before it the alleged non-compliance with the Airport Charges Directive, based on CAR not having stated that it had scrutinised the menu of charges and their compliance with the Airport Charges Directive. But in any event CAR submitted that, as required by the Directive, the individual charges to take effect from March 2020 were consulted on and set as normal in late 2019. CAR oversaw this process. Ireland has opted to apply Article 6(5) of the Directive, which states that a Member State may decide not to apply paragraphs 3 and 4 of Article 6 where '*there is a mandatory procedure under national law whereby airport charges, or their maximum level, shall be determined or approved by the independent supervisory authority*.' In 2020, CAR set the maximum levels of airport charges via the mandatory procedure set out in the Aviation Regulation Act, 2001.

6.58 Furthermore, CAR submitted that Aer Lingus or other carriers could, in 2019, have either issued a complaint to CAR and/or a direct legal challenge against daa if it believed the charges were not set in accordance with S.I. No. 116 of 2011, which transposed the requirements of the Directive into Irish law. No such complaint or challenge was issued.

6.59 CAR pointed out that, taking account of the time required for consultation on and notification of new charges after publication by CAR of a provisional price cap statement, new charges take effect from the start of the summer season each year in March. CAR submitted that, as set out in paragraph 5.19 of the Decision, daa set these charges seeking to precisely hit the €7.58 price cap for the calendar year 2020, rather than building in any expectation that the 2020 Appeal Panel process would lead to a higher price cap for 2020. CAR said that it has verified this from the daa internal forecasting. CAR pointed out that charges were higher in the first quarter of 2020 as the new charges had not yet taken effect, but this was the same

pattern as every other year. CAR was satisfied that daa had built the requirement to offset this higher level of yield per passenger into their pricing for March to December 2020.

6.60 CAR submitted that there is no precedent regarding how an overcollection should be distributed across airport users. This has not previously occurred, and the 2001 Act does not provide guidance. The Decision contemplated two potential ways that this might be done. CAR submitted that the simple methodology proposed by the Ryanair and Aer Lingus would ignore the extent to which individual airlines contributed differently to the overcollection. It suggested that the alleged over-collection was spread across a wide range of carriers, with relatively higher amounts associated with many carriers with relatively small operations at Dublin.

6.61 CAR disagreed with the suggestion made by Aer Lingus that it had not considered how not enforcing the rebate would benefit current or future passengers. It said that it had done so, and it referred to paragraphs 5.21 and 5.22 of the Decision.

6.62 In response to Ryanair's contention that enforcing compliance would aid airlines facing their own financial challenges, which in turn would assist in ensuring vital connectivity, CAR said that Ryanair had not explained how a rebate in relation to past activity would generate future demand at Dublin Airport. It suggested that future charges, and not past charges, will impact the future restart. As stated in paragraph 5.20 of the Final Decision, CAR did not believe that enforcing the rebate would incentivise airlines to drive a recovery in traffic in 2021 and beyond.

6.63 As pointed out above, Ryanair had suggested that it was irrational of CAR to ignore the possibility that the additional costs could be covered by the State, and that daa's success in raising further debt on the bond markets demonstrated that there was no need for CAR to enable the financeability of daa. CAR repeated what it had said in the Decision, at paragraph 5.46 and paragraph 9.6, namely that it has no role in determining whether the state provides assistance to daa. CAR did not see evidence to suggest that enforcing compliance with the ex-ante price cap for 2020 would threaten the viability of daa in the short term. It submitted however that not enforcing it would be better aligned with financial viability and enabling daa to operate and develop the airport

Decision of the Panel

6.64 The Panel carefully considered the submissions that had been made to it.

6.65 Ultimately, the Panel concluded that CAR's Decision was a balanced and reasonable response to the unprecedented emergency caused by the collapse in passenger traffic arising from the COVID-19 pandemic. In reaching that decision, the Panel was influenced by the approach taken by CAR to 2021, where all other things being equal, it decided to remove all triggers and adjustments contained in the price cap formula for 2021, meaning that the price cap will be €7.50 per passenger. As discussed below in more detail when considering the daa appeal against that aspect of the Decision, the likely effect of leaving the price cap at €7.50 per passenger for 2021 will be that daa will have to reduce airport charges for 2021. In the view of the Panel, these two aspects of the Decision when taken together represent a fair

balance between the reasonable interests of current and prospective airport users, with facilitating the efficient and economic development and enabling the financial viability of daa.

6.66 The price caps had been derived from the required level of aeronautical revenues and a projection of annual passenger numbers. The 2019 Determination set a price cap of €7.50, based on the allowable required annual aeronautical revenues of €255.2m combined with the assumption that passenger numbers at Dublin Airport would reach 34m in 2020. Further annual price cap adjustments increased this price cap to €7.58. As a result of the COVID-19 pandemic, passenger traffic fell to 7.4m in 2020. As a result, the total revenue yield generated by daa in 2020 fell greatly below that envisaged under CAR's price cap calculation. daa therefore failed to generate the anticipated and required aeronautical revenues allowed under the 2019 determination.

6.67 In late 2019, daa consulted on its charges to take effect from March 2020. The charges were based on the expected level of traffic and load factors for 2020, with the intention of complying with the 2020 maximum price cap of €7.58. Although it was submitted to the Panel that the charges in the first quarter of 2020 been set deliberately high in the hope that the earlier appeal to this Panel would lead to a higher price cap for 2020, CAR said that it had verified from daa internal forecasting that the charges proposed by daa were set to hit the €7.58 price cap for the calendar year 2020, rather than building in any such expectation. The Panel has no reason to doubt that. Although charges were higher in the first quarter of 2020, precisely because the new charges had not yet taken effect, the Panel accepted that daa had built the requirement to offset this higher level of yield per passenger into their pricing for March to December 2020. The Panel also accepted that there is nothing unusual about the fact that the new charges took effect from the start of the summer season in March. It appears that this followed almost inevitably from the time required for consultation and then of notification of new charges after publication by CAR of a provisional price cap statement.

6.68 As it turned out, although overall traffic declined sharply, daa's yield per passenger increased. COVID-19 resulted in lower load factors, a higher proportion of cargo flights, and a larger proportion of revenue coming from aircraft parking. Thus, in due course, notwithstanding that daa's forecast aeronautical revenue declined dramatically, it also became clear that there would be overcollection at the yield per passenger level. As pointed out in submissions, the net effect was that daa, according to its accounts, earned approximately €9.92 per passenger.

6.69 The limited measure applied by CAR was to determine that the listed airport charges at the times these flights operated would be the payable charges. The Panel considers that this was proportionate because of the utterly unanticipated and exceptional consequences of COVID-19; because there had been detailed consultation on those charges; because they were bona fide proposed with a view to staying within the original 2020 price cap; and because (subject to what is discussed below) the airlines did not really expect to achieve a rebate when they paid those charges. One consequence of this change was that daa did not have to issue rebates to airport users. If it had had to do so, that would have reduced the 29% of forecast revenues down to 22%.

6.70 The Panel does not accept the submissions of daa that it had an expectation and entitlement to earn the required aeronautical revenues under the price cap model, or that

the purpose of the average price cap is simply to allow daa to earn an appropriate and pre-determined level of aeronautical revenues. Volume risk in general remains with daa, and it has profited from increased volume in the past. However, this was an entirely exceptional circumstance. It was not unreasonable to allow a limited measure of regulatory relief.

6.71 In the same context, the Panel agrees that regulatory certainty is an important value. However, the 2001 Act permits of interim reviews. It follows that the principle of regulatory certainty is not offended by the fact of such a change. As discussed in more detail below, the Panel agrees that in this case, the 2019 compliance approach was not, properly understood, changed ex-post facto.

6.72 The airlines complained, with some justification, that once daa realised that lower passenger numbers would result in a higher yield than had been anticipated, it could have taken steps to minimise any potential overcollection. Likewise, the Panel accepts when setting airfares, airlines estimate the level of airport charges to which they will be subject. Aer Lingus in particular said that it was conscious of low load factors, and it assumed that it would obtain rebates during 2020. While the Panel can see that theoretically this could be so, it is conscious that in reality it was very difficult in 2020 to predict when and if passenger numbers would recover. Therefore, the airlines cannot have been confident that they would obtain a rebate, and they certainly cannot have been confident about the extent of any rebate that might be achieved.

6.73 Furthermore, for the same reasons, it was reasonable of CAR to conclude therefore that, in the first six months of 2020, daa could not easily have predicted how the latter part of the year would develop. It would therefore have been difficult for daa to adjust its prices in a manner that could predictably have enabled it to remain with the original cap.

6.74 Furthermore, the CAR Consultation was issued in June, wherein CAR identified the potential to accept the existing 2020 charges as one of three possible options to take for 2020. The Panel agrees that it was reasonable thereafter for daa to advocate for one of the options presented for 2020 and to avoid changing its prices in a way which would be inconsistent with that option. Furthermore, this approach, and the specific mechanism for achieving it, was then set out in the Draft Decision in October as the proposed approach, before being confirmed in December. While of course no one could have been sure what decision would ultimately be reached, it does follow that, from June 2020, all stakeholders were on notice that CAR was considering this approach, and that it was apparent from October that it may well be the approach that would ultimately be adopted. These considerations help to mitigate the concerns that might otherwise arise about the unpredictable effect of the Decision on the actions of the airlines in setting prices.

6.75 As appears from what is set out above, there is a dispute as to whether and the extent to which there was compliance with the statutory objectives. In particular, Ryanair complained that the Decision was not balanced in expecting users to contribute to daa's losses as a consequence of the pandemic, so that it prioritises the interests of daa over that of its users. It said that this was contrary to CAR's statutory objectives, specifically the second objective that requires CAR "*to protect the reasonable interests of current and prospective*

users of Dublin Airport". It pointed also to the absence of evidence that the Decision was necessary to maintain daa's financeability and to protect the interests of future users, and submitted that this rendered the Decision irrational, given that CAR had expressly stated that its purpose was to achieve a balanced approach. Aer Lingus likewise submitted that CAR has not paid any or adequate regard to the interests of airlines in reaching its decision and has not therefore complied with the statutory objectives.

6.76 In the Decision, at Part 8, CAR pointed out that the scope of the review did not encompass a full review of the building blocks but was rather designed to address immediate unintended consequences in a balanced way. CAR said that this involved balancing the reasonable interests of current and prospective airport users, with facilitating the efficient and economic development and enabling the financial viability of daa. Those are the central objectives for which section 33(1) provides. The Panel notes that CAR expressly had regard to the statutory objectives, but it also agrees with its conclusions in that regard. As pointed out above, the Panel views the Decision as a fair balance between the reasonable interests of current and prospective airport users, with facilitating the efficient and economic development and enabling the financial viability of daa. As far as the Panel is concerned, it is therefore evident that CAR did have regard to the statutory objectives.

6.77 The Panel does not agree that CAR did not consider how not enforcing the rebate would benefit current or future passengers. That is addressed at paragraphs 5.21 of the Decision.

6.78 There was discussion in the submissions to the Panel about whether enforcing compliance would aid airlines facing their own financial challenges, which in turn would assist in ensuring vital connectivity. As stated in paragraph 5.2 of the Final Decision, CAR does not believe that enforcing the rebate would incentivise airlines to drive a recovery in traffic in 2021 and beyond. Ryanair disagreed, and said that the past financial performance of an airport drives future planning at that airport. It said that payment of a rebate would impact future strategic decisions regarding its operations at the airport. This is not an issue that the Panel can or needs to resolve, save to say that the view taken by CAR was not inherently illogical and that it lies within the margin that must be accorded to it. In any event, even if the Decision has some impact along the lines suggested by Ryanair, that would not alter the views of the Panel as to the fair and balanced nature of the Decision as a whole.

6.79 While the Panel understands Ryanair's frustration as to the limited role that the State has decided to adopt as a shareholder in daa, it agrees that CAR has no role in determining whether the State provides assistance to the airport. Nor does the Panel.

6.80 As pointed out above, Aer Lingus contended that CAR was obliged to scrutinise each individual charge to ensure that it complied with the statutory objectives or the statutory criteria, and that CAR had failed to do so. The Panel does not agree that this is the proper Interpretation of section 33. In making a determination, CAR is obliged to have regard to the statutory objectives in section 33(1) and the factors set out in section 33(2). But it does not follow that each separate component must be justified by reference to those objectives and criteria. Rather, the statutory requirements apply to the determination as a whole.

6.81 CAR submitted that in any event the consultation process carried out for the purpose of the 2019 Determination analysed in detail the costs that went to make up the price cap. According to CAR, it followed that the charges had been analysed in detail by reference to the statutory objectives and the statutory criteria, so that CAR when making the Decision and fixing the listed airport charges as the payable charges did in fact have regard to the statutory objectives in relation to those charges. The Panel accepts that rationale. It is unrealistic to contend that these charges had not been analysed by reference to the statutory objectives and criteria: the costs that justified them were the same costs that had been analysed in detail by CAR in its consultation leading to the 2019 Determination.

6.82 On a related point, as described above, Aer Lingus suggested that the consultation conducted by daa in relation to the airport charges did not meet the requirements of Directive 2009/12/EC, because it occurred in the context of there being an overall price cap which if exceeded would lead to a rebate. But that seemed to the Panel to miss the point, for two reasons. First, the daa consultation does not lie at the heart of this appeal, because it was CAR who set in 2020 the maximum levels of Airport Charges via the mandatory procedure set out in the Aviation Regulation Act 2001. Secondly, and in any event, daa could set the level of charges only within the terms of section 39(1) of the Air Navigation and Transport (Amendment) Act 1998, which provides for daa to determine the rate of charge subject to section 32 of the 2001 Act and the 2011 Regulations. The Directive requires a transparent consultation process, with daa obliged to provide information on the components serving as the basis for determining the system or the level of all charges levied. The consultation therefore could take place only in the context of the 2019 Determination, and daa had to provide information on the components serving as the basis for determining the charges that were being set in the context of the 2019 Determination. The consultation was necessarily based on a determination which provided for the possibility of a rebate. The very feature that Aer Lingus suggests made the consultation invalid was a central and required component of a proper consultation.

6.83 As pointed out above, in addition to the issues that were raised about regulatory certainty, there is a more specific legal issue, namely the contention that section 32(14)(b) of the 2001 Act forbids retrospective amendments, and that the Decision offends against this principle. daa submitted that the airlines were not entitled to raise this point, because it went properly to judicial review which is addressed in section 38 of the 2001 Act, and not to an appeal under section 40 of the 2001 Act. CAR accepted that section 32(14)(b) did not permit of retrospective amendments, but it argued but the Decision was not such as to create a retrospective amendment. It accepted however that, if the Panel determined that the Decision did create a retrospective amendment, that this was a matter that might constitute a sufficient ground for referring the Decision back to CAR.

6.84 The Panel accepts that section 32(14)(b) envisages that any amendment introduced pursuant to its terms must be prospective in nature only, and therefore cannot be of a retrospective nature. It also accepts that, if it were to conclude that an amendment purported to operate retrospectively, that might in principle constitute a sufficient ground for referring the Decision back to CAR for reconsideration. However, the Panel does not agree that the Decision does in fact introduce a retrospective amendment. That is so for three connected reasons. First, the listed airport charges are based on the same costs that had been analysed for the purpose of the 2019 Determination, and which underlay the price cap imposed by that

Determination. Instead of expressing that price as a per passenger unit, the 2020 Decision switched that price for a suite of airport charges deriving from the same costs. That is not a retrospective change, but rather a continuation of what went before in a different format. Secondly, the price cap in the 2019 Determination was to be calculated on an annual basis. The alteration was introduced by a Decision dated 22 December 2020, shortly before the end of the regulatory period to which it related, which ran from 1 January 2020 to 31 December 2020. This therefore was not a case of retrospectively altering a price cap that had become operative in a previous year. Thirdly, the refund, if it was going to occur at all, would have taken place in 2021, which of course post-dated the Decision.

6.85 Accordingly, on these aspects of the Ryanair and the Aer Lingus appeal, the Panel has decided that sufficient grounds have not been established to refer CAR's Decision back for review. The Panel did not think that this these grounds of appeal gave rise to any reason to believe that CAR had not properly considered the matters referred to in section 33.

7. The 2021 Price Cap – daa grounds of appeal 1

7.1 The Decision provided that, for 2021, the price cap reverts back to the price cap derived for 2021 in the 2019 Determination with the exception of the removal of the capital expenditure reprofiling triggers and the operating cost pass through mechanism. CAR also stipulated that price cap compliance for 2021 would be based on an assessment of the average revenue yield per passenger compared to the average revenue price cap.

daa submissions

7.2 daa expressed two main complaints about the 2021 price cap. First, it is said that the price cap of €7.50 set by CAR for 2021 is artificially low and was based on a set of regulatory building block assumptions which were rendered invalid by COVID-19. Secondly, it is said that the methodology which had been stipulated to calculate price cap compliance for 2021 was inappropriate as it fails to take account of the potential impact of the COVID-19 pandemic.

7.3 daa expanded on the first issue by pointing out that the 2021 price cap set out in the 2019 Determination is predicated on daa generating 35.1m passengers and earning €272m in allowable revenues for 2021. It is now clear that there will be a large shortfall in both passenger volumes and aeronautical revenues for 2021 when compared with CAR's 2019 projections. daa submitted that a price cap of €7.50 coupled with traffic volume of between 7.9 and 12 million passengers will result in it incurring losses and not earning its cost of capital. It reworked the 2021 price cap based on its latest business forecasts for 2021 and said that this would suggest a far higher price cap for 2021, although it redacted both the forecasts and the ultimate result in the submissions that were circulated. It submitted that, at an average revenue yield per passenger of €7.50, the average revenue generated might fail to cover the average cost of providing aeronautical services. It suggested that these reduced aeronautical revenues would add to financial crisis facing daa without any guarantee that this level of charging would have any potential for stimulating additional demand.

7.4 daa accordingly submitted that, in this respect, the Decision ran contrary to the statutory objective of safeguarding the financial viability of daa, and that the best interests of the travelling public were not protected by artificially suppressing airport charges, causing "malaise" in the airport's development and infrastructure plans.

7.5 daa therefore suggested that CAR should consider a regulatory mechanism which would allow for the future recovery of the exceptional losses incurred. It submitted that a mechanism could be introduced into the regulatory model which would treat these deviations in a manner similar to the introduction of a new asset to the RAB, allowing for the recovery of these losses over a period of perhaps 15 years for example. It pointed to what is said was regulatory precedent in the UK for the inclusion of such a recovery mechanism, namely the approach of the CAA at Heathrow Airport.

7.6 As pointed out above, daa's second broad complaint under this heading was in respect of the approach adopted by CAR of assessing price cap compliance for 2021 on the basis of the average revenue yield per passenger. daa submitted that this approach failed to take account of how the impact of the COVID-19 pandemic was expected to continue into 2021 with passenger numbers at Dublin Airport forecasted to be substantially lower than the projection used by CAR in the 2019 Determination.

7.7 daa referred to the difficulties in forecasting traffic volumes for 2021 with any degree of accuracy. At the start of 2021, it forecast passenger traffic in the region of 8m, and set airport charges at a level that would ensure compliance with the €7.50 price cap. It said however that subsequent events have rendered this forecast volatile for 2021. If 2021 demonstrates a similar pattern to 2020, that will cause the average yield per passenger to move upwards. This, according to daa, would be an inadvertent function of the ratio between higher aircraft movements and lower passenger volumes.

7.8 daa pointed out that the Decision makes no allowance for this effect where it has stipulated that price cap compliance for 2021 should be assessed on the basis of average revenue per passenger. daa submitted that this may penalise it further if it is required either to refund over-collected revenue or to introduce a further reduction in airport charges in the later part of this year.

7.9 On the basis of these submissions, daa suggested that there were sufficient grounds for referring the Decision in relation to the 2021 price cap back to CAR for further review. It submitted that CAR should firstly use a "top-down" assessment to derive an appropriate price cap for 2021, and secondly that it should adopt the same methodology as that used in 2020 to assess price cap compliance for 2021 given the impact of COVID-19 this year.

Ryanair submissions

7.10 Ryanair suggested that this appeal ground is primarily predicated on outturn traffic and revenue data for 2021 that was not before CAR at the time of the Decision. It submitted that, in accordance with the legal principles identified above, it would not be appropriate for the Panel do to regard to that data.

7.11 Ryanair further suggested that daa's submission on this appeal that CAR should have reset the price cap to allow daa to recover its cost was not an argument made by daa in response to the Draft Decision, in which it said that its preferred option was for a tariff basket approach equivalent to the 2021 price cap, as subsequently adopted by CAR for 2020. Ryanair submitted that if daa's suggestion in its submission was adopted, each year's price cap would need to be recalculated based on 'valid' building blocks at the time, which it said would cut across the whole principle of regulatory certainty. It would also follow that the price cap would need to be restated every time there was over-performance by daa to ensure that users were not being overcharged.

7.12 Ryanair said that, in responding to the Draft Decision, daa had supported CAR in its approach of undertaking only a narrow interim review in relation to 2020 and 2021. it suggested that the approach of daa in its submissions to the Panel was contrary to what had earlier said. It would involve a clear departure from the stated objective of CAR to pursue a "narrow-focused review to address immediate unintended pricing consequences, arising from the pandemic, in 2020 and/or 2021 in a balanced way" (paragraph 4.7 of the Decision) and which did not envisage changes to the building blocks (paragraph 4.8 of the Decision).

7.13 Ryanair suggested that it was not appropriate that charges should be set on the basis of addressing short term financial viability concerns asserted by daa. It repeated submissions that it made in the context of its own appeal that there is no evidence that daa has had difficulties in raising debt.

7.14 Ryanair criticised the suggestion of daa, which is described as "*yet a third regulatory mechanism to address its concerns regarding the shortfall in its finances*", namely that there should be something akin to a RAB adjustment. It said that the precedent relied on by daa, namely the actions of the CAA in relation to Heathrow, was not in fact comparable. It claimed that the CAA allowed only £300 million out of the £2.6 billion RAB adjustment requested by Heathrow Airport, and that the allowance was specific to projects that the CAA identified as being in the consumer interest and which Heathrow would not be incentivised to undertake without such an allowance. Ryanair suggested that the circumstances at Dublin were different, because there was no requirement for such an intervention at Dublin Airport. According to Ryanair, CAR has already allowed daa to retain the benefit of capex allowances for projects, whether commenced or not in 2020 and 2021, which remain in the RAB despite these projects having not commenced. It said that users would be further penalised if a RAB adjustment was made without a clear demonstration as to the need for such expenditure.

7.15 Ryanair submitted that daa's suggestion that CAR should not enforce compliance even with a recalculated cap would be damaging to the interests of airlines and passengers, and to the realisation of broader aviation policy objectives for Ireland as it would further slow recovery.

Aer Lingus submissions

7.16 Aer Lingus also made the point that daa had relied on information that came into existence after the Decision and asked that the same should be disregarded by the Panel for the purposes of this appeal.

7.17 Aer Lingus suggested that the two contentions of daa under this ground of appeal were internally inconsistent. It said that if compliance was assessed based on the 2021 price list not being exceeded then a review of the 2021 price cap was redundant. If the price cap for 2021 was increased then there would be no justification for daa being allowed to exceed what it would therefore consider an appropriate price cap.

7.18 In response to the argument made by daa that it may be unable to finance the proposed investment programme due to CAR's decision not to revise the 2021 price cap, and that if the new and improved aeronautical facilities envisaged in the investment programme are not delivered this would have a negative impact on airport connectivity, Aer Lingus pointed out that daa had provided no evidence of being unable to finance the proposed investment programme.

7.19 By way of contrast, Aer Lingus submitted that, if the price cap for 2021 were to be increased now mid-way through the year, this would have an immediate impact on airlines' ability to finance their own operations, and to continue to provide essential connectivity. It suggested that a second year of operating with a retrospectively increased price cap would be unduly damaging to the financial position of the airlines.

7.20 Aer Lingus pointed out that the daa business forecasts for 2021 which underline its redacted alternative price cap for 2021 were redacted, and that they had not been subjected to any scrutiny by airport users. It suggested that the history of the 2019 Determination process demonstrated a tendency on the part of daa to adopt an unrealistic position in relation to the price cap without any coherent economic rationale. Aer Lingus submitted that daa's proposal in relation to an alternative price cap should therefore be disregarded by the Panel.

7.21 In respect of daa's suggestion of the introduction of a RAB adjustment into the regulatory model to compensate for "revenue losses", Aer Lingus submitted that, in price cap regulation, there is no concept of "lost revenues" if outcomes differ from those forecasted, just as there is no concept of "unearned revenues" if total aeronautical revenues exceed those forecasted, provided that the maximum yield per passenger is not breached.

7.22 Aer Lingus, in common with Ryanair, submitted that daa's reliance on the actions of the CAA in making a RAB adjustment of £300 million at Heathrow Airport were inapposite to the case made by daa. It said that the £300m RAB adjustment under consideration to facilitate Heathrow being able to raise debt at an efficient cost throughout its next regulatory period to the benefit of airport users, and specifically not as a compensation for "lost revenues" in 2020 and 2021.

7.23 As to price cap compliance in 2021, Aer Lingus agreed with daa's statement that 2021 was proving to be an exceptionally difficult year to forecast traffic volumes with any degree of accuracy. It pointed out that it is also faced with rapid and repeated reforecasts of passenger volumes in 2021 arising from the effects of varying levels of national lockdowns, uncertainty over the timing of removal of international travel bans and mandatory hotel quarantine for travel from certain countries.

7.24 Aer Lingus did not agree however that the most appropriate response to this difficulty is to change the procedure for assessing price cap compliance in 2021. It suggested that, because daa expects the average per passenger yield to trend upwards but has taken no remedial action, it should be taken as deliberately planning for an average per passenger aeronautical revenue above the price cap. Aer Lingus described this as "*regulatory gaming*". It suggested that daa either expects this appeal process and any subsequent decision by CAR to remove this impediment or, even if it does not, intends to overcharge its customers over the remainder of 2021 knowing that it will not have to make good until 2022.

7.25 In summary, Aer Lingus suggested that the difficulty in forecasting traffic volumes for 2021 was known by all parties when the 2021 price cap was set. It submitted that, if daa was permitted to escape the difficulties which this uncertainty causes for all parties in the aviation industry through non-enforcement of the 2021 price cap, that would neither be a fair nor proportionate response to the current situation.

CAR submissions

7.26 Dealing with the suggestion that the 2021 price cap of €7.50 has no valid basis as a result of COVID-19 and that there should have been a 'top down' reassessment to derive a new base price cap for 2021, CAR submitted that this suggestion conflicts directly with the responses which daa provided to the Consultation and Draft Decision. In the former it supported a €7.50 global cap, and in the latter it proposed a continuation of the 2020 compliance approach. In fact, according to CAR, there was no appetite from stakeholders for a review of the building blocks during the review process. CAR submitted that, in any event, it would not be possible to carry out such a review, even at a high level, within the two-month timeframe for which the 2001 Act provides to vary a determination on foot of an appeal panel referral.

7.27 In response to the suggestion that the 2021 price cap is contrary to the statutory objective to enable financial viability of daa, CAR referred to paragraph 5.42 of the Decision, in which it said that daa had not provided evidence to demonstrate that a price cap of €7.50 would not enable the financial viability of daa, or that maintaining the 2020 approach or otherwise increasing charges for 2021 would be required to enable it.

7.28 Addressing the complaint that a per passenger approach to price cap compliance does not appropriately take into account the impact of COVID-19 on the ability of daa to forecast, and the complaint that the approach does not take into account that the per passenger revenue is a function of relatively higher aircraft movements compared to passenger numbers, CAR referred to paragraph 5.43 of the Decision. CAR said that, while forecasting is challenging and while this would make it difficult to set charges to hit the price cap precisely at the beginning of 2021, that did not in itself provide strong justification to move away from the per passenger cap in 2021.

7.29 CAR submitted that a key difference for 2021, relative to 2020, was that all parties were aware from the outset that traffic would remain at a fraction of the usual level for at least the first six months of the year. Furthermore, all parties were aware that the Decision to

enforce compliance with the global cap of €7.50 was made in awareness of this reduction, so that the approach in 2020 did not require to be repeated. In addition, CAR submitted that (unlike 2020) the prospective charges for 2021 had the potential to affect traffic levels and airfares in 2021, while daa had time to publish an updated menu of charges in the knowledge that a global cap of €7.50 for the year would be enforced.

7.30 CAR said that it had pointed out in the Decision that daa would likely need to reduce its menu of charges to comply with the €7.50 price cap for 2021. That has proven to be the case. daa has in fact already reduced its runway charges, relative to the 2020 levels, to move towards compliance with the 2021 price cap.

7.31 CAR pointed out that the contention made in daa's written submissions that there should be a mechanism to allow it to recover the losses incurred as a result of COVID-19 had not been expressly raised in the appeals letter. It said that it was not clear on whether this was put forward as a point for the Panel to consider. It added that it presumed that daa was raising the point ahead of future reviews or determinations, because in its response to the Consultation, it had supported the scope of this review being limited to 2020 and 2021. CAR said that this meant that issues such as the potential future recovery of losses in later years would fall to be considered as part of future reviews or determinations.

Decision of the Panel

7.32 The Panel carefully considered the submissions that had been made to it.

7.33 As pointed out above when considering the grounds of appeal in respect of the 2020 price cap, the Panel concluded that CAR's Decision was a balanced and reasonable response to the unprecedented emergency caused by the collapse in passenger traffic arising from COVID-19. In the same way as it was influenced in its decision on the 2020 price cap by the approach taken by CAR to 2021, so also it was influenced in its decision on the 2021 price cap by the approach taken by CAR to 2020. In the view of the Panel, these two aspects of the Decision when taken together represent a fair balance between the reasonable interests of current and prospective airport users, with facilitating the efficient and economic development and enabling the financial viability of daa.

7.34 The Panel noted that the suggestion there should have been a 'top-down' reassessment to derive a new base price cap for 2021 conflicts with the responses which daa provided to the Consultation and Draft Decision. This was not the point of the interim review, and there was no suggestion during the consultation process by any participant that it was the approach that should be adopted. The stated objective of CAR to pursue a "narrow-focused review to address immediate unintended pricing consequences, arising from the pandemic, in 2020 and/or 2021 in a balanced way" (paragraph 4.7 of the Decision) and which did not envisage changes to the building blocks (paragraph 4.8 of the Decision). The Panel does not think that CAR can be criticised for failing to adopt an approach that would have been inconsistent with the stated objective and that was not urged upon it by daa.

7.35 Likewise, daa did not raise with CAR the suggestion that there should be a mechanism to allow it to recover the losses resulting from COVID-19. Indeed, as already pointed out, daa had supported the scope of the review being limited to 2020 and 2021. This means that, if

they arise at all, issues such as the potential future recovery of losses in later years will fall to be considered as part of future reviews or determinations. The Panel therefore did not think that it could be appropriate to refer the Decision back to CAR on the basis that it should have treated the losses allegedly incurred by daa in a manner similar to the introduction of a new asset to the RAB along the lines suggested by daa.

7.36 It nevertheless remains to address the point that lies at the heart of the ground of appeal raised by daa, namely that the 2021 price cap of €7.50 has no valid basis as a result of COVID-19. It is of course the case that the key assumptions underlying the 2019 Determination have not been borne out by events. That merited the degree of regulatory relief for which CAR provided in respect of the 2020 price cap. But, as pointed out by CAR, there are crucial differences between 2020 and 2021. In particular, in 2021, all parties would be aware from the outset of the year that traffic would probably remain below the usual level for at least the first six months of the year. That means that when daa was setting charges in 2021, it could do so in the knowledge that those charges might have to be varied or reduced to stay within a pre-existing price cap. In Accordingly, the approach in 2020 did not require to be repeated in 2021.

7.37 The Panel accepts that, at the best of times, forecasting is challenging. It would necessarily have been difficult to set charges to hit the price cap precisely at the beginning of 2021. But the Panel agrees that this does not in itself provide justification to move away from the per passenger cap in 2021. CAR pointed out in the Decision that daa would likely need to reduce its menu of charges to comply with the €7.50 price cap for 2021. This therefore was something that daa knew from the beginning.

7.38 daa did not provide evidence to demonstrate to either CAR or to the Panel that a price cap of €7.50 would threaten its financial viability, or that applying the 2020 approach or otherwise increasing charges for 2021 would be required to maintain its financial viability. The Panel therefore cannot agree with the submission that the 2021 price cap is contrary to the statutory objective to enable financial viability of daa.

7.39 Accordingly, on this aspect of the daa appeal, the Panel has decided that sufficient grounds have not been established to refer CAR's Decision back for review. The Panel did not think that this this ground of appeal gave rise to any reason to believe that CAR had not properly considered the matters referred to in section 33.

8. Removal for the 2021 price cap formula of triggers and adjustments relating to recovery of CapEx

8.1 Ground 3 of the Ryanair appeal complained of the removal from the 2019 Determination of triggers and adjustments relating to recovery of capex for the 2021 price cap formula. In the Decision, CAR decided to remove the T2 Box 2 triggers from the price cap formula in the 2019 Determination, meaning that Box 2 would be remunerated from 2020 onwards and that no downward adjustments will be made to the base price caps on the basis of T2 Box 2.

Furthermore, CAR decided that a number of specific reprofiling triggers should be removed from the 2021 price cap formula.

Ryanair submissions

8.2 Ryanair complained that the Decision has left daa benefitting from the revenues associated with various triggered capex projects that have not commenced and are unlikely to be commenced within the foreseeable future. It submits that users will therefore continue to pay for projects that have not commenced and are no longer required and may never commence. Its case is that such pre-funding of unknown future capex projects is unacceptable.

8.3 Ryanair submitted that there are various reasons for suggesting that extensive pre-funding of airport capex is unacceptable. It submitted that pre-funding through user charges is more expensive for airlines because of the higher cost of capital for airlines compared to airports which have a lower risk and, therefore, lower financing options; that pre-funding is unreasonable as there is no guarantee that the airlines paying for future facilities today will be using the service when the facilities become operational; that providing an upfront pool of money does not encourage investments to be delivered in a cost effective and timely manner; and that pre-funding through user charges is unnecessary and is not applied in other transport sectors. Ryanair submitted that it was for precisely these reasons that CAR introduced the triggers within the 2019 Determination.

8.4 Ryanair submitted that, in retaining the price cap of €7.50 for 2021, CAR has gone beyond allowing pre-funding of capital projects and has effectively allowed daa to retain the benefit of a contribution to projects to which it was not entitled. First, it referred to the fact that the T2 Box 2 trigger has been allowed although the criteria of 33 million passengers per annum (mppa) being exceeded within a year was not met. It said that this increases the price cap by €0.31. Ryanair argued that CAR was unjustified in allowing daa to start to recover the costs of Box 2 of T2 from 2020 when the trigger threshold was not reached in 2019. Secondly, Ryanair said that CAR has effectively allowed daa to retain the benefit of a contribution to projects that are highly unlikely to commence by Q1 2022. It claimed that these triggers have the effect of increasing the price cap by €0.15 in 2021.

8.5 Ryanair acknowledged that CAR's stated rationale for retaining these triggers was to avoid any perverse incentive for daa to commence work on projects that may not be required. But it submitted that this arises from an unfounded threat by daa not to proceed with a rational re-prioritisation of the capital programme in the face of the downturn in traffic. Ryanair characterised this aspect of the Decision as CAR being primarily motivated by daa's financial health rather than considering where the balance between daa's interests and those of users properly lay.

8.6 Ryanair suggested that the way to address any perverse incentive on daa to commence projects prematurely, so as to activate the triggers within the price cap, would have been to systematically remove (at least for 2021) the trigger amounts for those projects for which it is clear that there was no longer any immediate need. It submitted that this would have removed the revenue from the price cap, thereby removing any incentive to embark prematurely or unnecessarily on those projects. It complained that instead, CAR had simply allowed daa to retain the benefit of those triggered projects in terms of the price cap.

8.7 Ryanair did not accept that the removal of these triggered projects would necessarily have required a full review of the building blocks, contrary to what CAR suggests at paragraph 6.23 of the Decision. If they were removed, they would have been isolated from the remainder of the capital programme and other building blocks. According to Ryanair, that would have been a self-contained decision, consistent with removing the unintended consequence of users paying prematurely for projects that had not commenced.

8.8 Ryanair submitted that it is little comfort to users in 2021 that CAR may, in future, remove these allowances from the price cap if the projects are not ultimately commenced. It said that these projects will by then have received substantial pre-funding, so that users in 2021 will have paid the price without any prospect of reimbursement.

8.9 Ryanair suggested that, with legitimate adjustments, the price cap would be some €0.46 lower in 2021. It suggested that retaining the price cap at €7.50 will do nothing to protect our air connectivity during this crisis and ensure its recovery and restoration over time, as it is the airlines that provide this connectivity. According to Ryanair, removal of the allowances for projects that have not commenced and are not needed in the short term would therefore better support the objective of recovery.

daa submissions

8.10 daa submitted that the price cap formulae in issue were derived based on passenger volumes of 35.1mppa in 2021, and that it would be perverse to continue to apply them in the 2021 price cap where daa's aeronautical revenues for 2021 will be substantially below the allowed revenues set by DAR in the 2019 Determination.

8.11 As far as T2 Box 2 is concerned, daa pointed out that CAR anticipated in the 2019 Determination that passenger numbers at Dublin Airport would reach 33 mppa over the period 2020-2024. On that basis, an allowance for the Box 2 investment in T2 was included in the 2020- 2024 price caps, subject to a proviso that it would be removed if passenger volumes fell below 33 mppa in any given year. daa submits that pre-COVID-19, the 33m threshold was approaching achievement on a rolling 12-month basis. daa suggested that, for practical purposes, the specific trigger has now been achieved and that there should be no requirement to alter the current level of charging by removing the T2 Box 2 allowance going forward.

8.12 daa submitted also that airport users have used the facilities at Terminal Two for the past ten years. It said that some €200 million in capital investment was not added to the RAB until 2020, with the consequence that customers have enjoyed this usage without paying the full cost related charges. It suggested that CAR was correct in removing this trigger for 2021 as it recognised that the application of this T2 Box 2 price cap trigger would result in an additional reduction in potential aeronautical revenues for daa in the immediate future adding to the growing financial crisis facing the company

8.13 As far as removal of the capital expenditure reprofiling triggers in the 2021 price cap is concerned, daa said that the contention that it is benefitting from pre-funding in respect of capital expenditure is misplaced, because it was predicated on daa earning what it describes

as its “required” aeronautical revenues in 2021. According to daa, the fact that aeronautical revenues for 2021 will be substantially below that level deprived the contention of any force.

CAR submissions

8.14 As regards reprofiling triggers, CAR pointed out that their inclusion in the 2019 Determination was designed to ensure that the timing of remuneration and timing of the project would be approximately aligned, and to incentivise daa to progress the projects in line with the timing in the Capital Investment Plan (CIP). CAR considered that the postponement of this allowed capex would be a valid response to the collapse in demand. It did not want to disincentive the reassessment of the CIP, and therefore in the Decision it removed the reprofiling triggers for 2020 and 2021.

8.15 In answer to Ryanair’s contention that this was not in the interest of users, CAR submitted that its approach was in the long-term interest of airport users, who would be paying for these capital costs in future determinations if daa were to progress the projects regardless of the changed circumstances. It is submitted that if it had removed the reprofiling triggers while deducting the associated revenues as suggested by Ryanair, that would be akin to disallowing the projects as part of the review. For consistency, it would then also have to have reconsidered the other building blocks.

8.16 In answer to Ryanair's contention that the approach was equivalent to allowing pre-funding of projects that may never happen, CAR pointed out that it had stated in the Decision that if these projects were to be ultimately cancelled in the future, it would ensure that this was reflected appropriately in subsequent regulatory reviews.

8.17 Finally, CAR pointed out that while theoretically daa is collecting a per passenger revenue for these projects, the allocation of traffic risk means that in practice its total revenue collected from the price cap is not sufficient to remunerate these projects.

8.18 Turning to the renumeration of Terminal 2 Box 2, CAR said that the initial intent of the T2 Box 2 mechanism was to ensure that the materialisation of a level of demand so as to justify the proposed scale of T2 (33 million passengers per year) would align with remuneration for daa. CAR pointed out that in 2019, it had forecasted that the 33m trigger threshold would be comfortably exceeded in 2020, with a forecast of 34m passengers. In 2019, actual traffic exceeded its forecast to reach 32.91m, to bring Dublin Airport within less than 0.3% of the passenger volume threshold of 33m. Due to the COVID-19 pandemic, this threshold will not be met in 2020, and according to CAR it is unlikely to be met for several years. CAR submitted that the traffic trend showed that the threshold of 33m passengers would likely have been reached in 2020 were it not for the impact of the pandemic.

Decision of the Panel

8.19 The decision of the Panel can be relatively shortly stated. As regards the reprofiling triggers, the Panel agrees that it was desirable to remove perverse incentives for daa to engage in capital development that has become unnecessary in the short term. To achieve that end, it was a sensible and proportionate decision to remove the reprofiling triggers. The Panel does not agree that this was equivalent to allowing pre-funding of projects that may

never happen, precisely because, as stated in the Decision, if these projects are ultimately cancelled CAR will be in a position to ensure that this is reflected appropriately in subsequent regulatory reviews. While it may be true to say that daa is in theory collecting a per passenger revenue for these projects, the reality is that the total revenue collected from the price cap is not sufficient to remunerate these projects. The decision of CAR in respect to the reprofiling triggers is therefore not one that is open to valid criticism.

8.20 The Panel came to an equally clear view about the remuneration of T2 Box 2. It is of course correct that the target of 33 million passengers was not precisely met. But there is a negligible difference only between the target and actual traffic. The target would have been met in short order were it not for COVID-19. The circumstances demonstrate that daa's decision to build T2 to the scale it did had been justified by 2019. It would therefore be the triumph of form over substance to withdraw the remuneration of T2 box 2. The Panel concluded that it would be disproportionate and inconsistent with the goal of the T2 Box approach to withdraw the remuneration of T2 Box 2 in the current circumstances.

8.21 Accordingly, on this aspect of the Ryanair appeal, the Panel has decided that sufficient grounds have not been established to refer CAR's Decision back for review. The Panel did not think that this this ground of appeal gave rise to any reason to believe that CAR had not properly considered the matters referred to in section 33.

9. Clawback of remuneration of unspent capital expenditure allowances in 2020 and 2021

9.1 Ground 4 of the Ryanair appeal and Ground 3 of the Aer Lingus appeal can be taken together, because they related to the same issue. That issue was the removal from the 2019 Determination of the requirement for unspent capital expenditure for 2020 and 2021 to be clawed back.

Ryanair submissions

9.2 Ryanair submitted that the Decision leaves daa benefiting from allowances relating to capital projects that have not commenced and may never commence, to the detriment of users. It suggested that CAR had in effect pre-determined that the capex programme will be unaltered by the effects of the pandemic and the consequent slowing of demand growth.

9.3 Ryanair submitted that the only motivation for this decision appears to have been to maintain as far as possible revenues to daa regardless of whether this was justified or not. Ryanair pointed to the fact that, at paragraph 5.5 of the Draft Decision, it appears to be suggested that daa could use these allowances for opex or capex as it saw fit. Ryanair said that constitutes a de facto resetting of the building blocks in a way that CAR said that it did not intend to do.

9.4 Ryanair submitted to the Panel that CAR was wrong to suggest that the Decision was necessary to avoid "*a perverse incentive to spend in a non-efficient manner*" in circumstances where a tighter capex consultation process has been put in place. It suggested that, properly enforced,

such enhanced consultation would minimise the risk of projects commencing injudiciously and reinforce the logic of removing unspent capex allowances from the RAB. Ryanair submitted that the net effect of this approach is to allow daa to retain the financial benefit where no expenditure has been made.

9.5 Ryanair criticised CAR's assertion that there will be a revenue shortfall against the allowances to which daa would be entitled based on capex projects that it has commenced, saying that this was not transparently demonstrated. It suggested that CAR had based its position on daa spending 50% of its originally allowed capex in 2021, whereas according to Ryanair this is a substantial overstatement of the true position based on the projects for which consultation with users has taken place.

9.6 Ryanair submitted that, although CAR has indicated that it will reconsider the treatment of unspent capex in any future reviews covering 2022 and beyond, users will already have paid these allowances in 2020 and 2021 based on the price caps set. According to Ryanair, it was not clear how CAR intends to deal with this in future determinations. Ryanair suggested that the best way of ensuring that users do not pay a second time in respect of these projects when they do commence in future years would be to remove the allowances for capex that has not commenced at this stage and to reimburse users by adjusting the price cap.

9.7 At the level of principle, Ryanair suggested that this aspect of the Decision represents a failure to properly assess and balance the interests of users against those of the airport, contrary to CAR's objectives and its self-stated purpose in the regulatory exercise which was to achieve a balance.

Aer Lingus submissions

9.8 Aer Lingus pointed out that RAB roll forward principles were established in 2009 following comprehensive consultation with both the airport and the airlines and are contained within Annex 3 of the 2009 Determination. The 2019 Determination set a base price cap of €7.50 for 2020. Aer Lingus pointed out that this €7.50 was made up, in part, of depreciation on capital expenditure expected to take place within that year and a return on that capital expenditure at the WACC of 4.22%. If the expected capital expenditure in 2020 were not to take place, then an adjustment to the opening RAB for the next regulatory period in line with Scenario 3 from the RAB roll-forward principles would be expected to apply.

9.9 While CAR stated that leaving the issue of unspent capital allowances unaddressed would provide daa with a perverse incentive to continue spending on projects to avoid clawback, Aer Lingus contended that because the Decision was issued only in December 2020, it was unlikely to have had any material impact on the investment decisions undertaken by daa in 2020. Aer Lingus suggested therefore that applying the RAB roll forward principles in the 2019 Determination would not realistically provide any perverse incentive to daa to overspend on capex in 2020.

9.10 Aer Lingus submitted that, in fact, the effect of this aspect of the Decision is to introduce a perverse incentive for daa to underspend on capex in 2021. it suggested that that will arise from daa knowing in advance of 2021 that there will be no clawback of the allowed depreciation and return on capital on any unspent capital allowances made for 2021, and for

which return on capital will continue to be included in the price caps to the end of 2024. Aer Lingus said that it is only at that point that CAR will adjust the opening RAB for the following regulatory period downward to reflect the unspent capital allowances allowed to that point, and that no further downward adjustment will be made to take account of the return on capital for the unspent portions in 2020 and 2021 allowed in the price caps for 2021-2024. Aer Lingus suggested that this perverse incentive was not in the interests of current users of Dublin Airport who will pay higher charges than would otherwise be the case. Nor according to Aer Lingus was it in the interests of future users as necessary maintenance and other investment at Dublin Airport may be postponed under this perverse incentive.

9.11 Aer Lingus referred to CAR's suggestion that daa will not collect the full capital remuneration allowed under the price cap in 2020 in any case and is unlikely also to do so in 2021, and that it was therefore appropriate to maintain return of and return on unspent capital allowances in the price caps for these years. It suggested that CAR had failed to take account of the continuation of return of and return on unspent capital allowances for 2020 and 2021 into the price caps for 2022, 2023 and 2024.

9.12 In the design of the 2019 Determination, volume risk remained with daa, which carries with it the risk that it would not be renumerated for capital expenditure. Aer Lingus submitted that by failing to apply the RAB roll-forward principles and clawback return of and return on unspent capital allowances, CAR had in effect transferred volume risk to airport users. It suggested that, by failing to apply the RAB roll forward principles, the opening RAB for the next regulatory period will be higher than would otherwise be the case, without a commensurate reduction in the WACC.

daa submissions

9.13 daa said that, despite the immediate reduction in passenger demand, it still forecast a capacity requirement for 40 million passengers by the year 2030. It believed that the current composition of the approved projects is still appropriate. Due to COVID-19, some projects had been delayed, whereas other were on site and were subject to contractor claims relating to COVID-19. daa acknowledged that the urgency has abated on the delivery timelines for several investment projects, especially for those related to capacity enhancing infrastructure. It said that it may be necessary to reprogramme the delivery timelines for a number of projects, so that the full completion of the capital investment programme for 2020-2024 will likely be pushed out for a number of years

9.14 daa rejected the Ryanair assertion that by retaining an allowance in the 2021 price cap for the following projects, CAR had effectively allowed daa to benefit from the financing costs and share of depreciation associated with the T1 International Departure Lounge and T1 Check or the Western Underpass. It said that work is proceeding on all those projects, albeit that the delivery date for the latter has been extended out beyond the original completion date.

9.15 daa said that it supported and accepted CAR's roll forward principles relating to the RAB, and it adhered to the principle that the RAB will need to be adjusted to remove any unspent capital allowances going forward. It suggested, however, that any such adjustment would have to take place as part of a broader regulatory review where all the regulatory

building blocks would be adjusted to reflect current market conditions. Its central point was that, in the absence of a broad material change to the 2020 and 2021 price caps, there was no justification to support such an adjustment at this juncture. It suggested that it would be inappropriate for CAR to be required to reopen one of the individual building blocks (i.e. re-adjusting capex) while leaving the other building blocks unchanged

9.16 daa repeated the submission made elsewhere that its total revenue yield for 2020 was substantially below that envisaged under CAR's price cap calculation, resulting in a substantial loss in aeronautical revenues. It said that it anticipated that a similar position will arise in 2021. It suggested that this was likely to result in it incurring losses and not earning a full return on its capital investment. It submitted that the consequence was that it was not earning a return on the unspent capital allowance as alleged by Aer Lingus.

9.17 daa therefore submitted that the airlines had not provided sufficient evidence to support their ground of appeal in relation to the claw back of capital expenditure allowances for 2020. It suggested that the implementation of the airlines' suggestions would be contrary to the DAR's statutory objective under section 33(1)(a) "*to facilitate the efficient and economic development and operation of Dublin Airport which meet the requirements of current and prospective users of Dublin Airport*", which is intended to ensure that Dublin Airport is developed and operated in a profitable manner allowing it to re-invest in infrastructure and services for the benefit of its users.

CAR submissions

9.18 CAR pointed out that the clawback mechanism is intended to incentivise daa to carry out capital investment in line with the agreed plan, ensuring that if this does not occur, it does not retain the remuneration of the allowances. In addition, the allowances do not enter the RAB for future remuneration. It said that COVID-19 resulted in a dramatic fall in passengers meaning that (a) the scale of allowed level of capital investment may not be in the interests of stakeholders at present, so that is necessary to avoid disincentivising its reassessment and (b) while the capital projects are being remunerated in theory, in fact little of it has been or will be collected. CAR pointed out that the future clawback of theoretically remunerated unspent Capex, none of which is likely to have been collected in reality, is not an outcome that was envisaged at the time of the 2019 Determination.

9.19 According to CAR, the approach that it adopted recognised that daa will collect a far lower level of aeronautical revenue than was forecast and allows it to use this revenue either for Opex or Capex as it may require, without any regulatory penalty for either approach. CAR suggested that this aligns with an approach of avoiding increases in listed airport charges for 2020 and 2021, while yet providing regulatory relief for daa within that limit. Furthermore, CAR believed that if traffic did not recover quickly there was a risk that the Capex clawback mechanism would create a perverse incentive for daa to continue spending capital in 2020 and 2021 to avoid future clawback. It decided that all adjustments to the price cap would be removed to avoid such perverse incentives.

9.20 CAR next addressed Ryanair's contention that airport users should not pay twice for capital investments, and that its decision had allowed daa to retain the financial benefit where no expenditure has been made. CAR said that it had demonstrated in the Decision that actual

capital remuneration for 2020 would be zero, so that there would be a shortfall of 100%. Given the uncertainty about 2021, it had used an example with a 50% reduction relative to total planned Capex, to demonstrate that the likelihood that a decision to remove the clawback mechanism would lead to actual recovery of capital costs associated with unspent capex was low. CAR added that it is now clear that no actual remuneration of unspent Capex will occur across 2020/2021, and that daa will still under-collect relative to its actual expenditure on new Capex, notwithstanding the lack of clawbacks. It said that there was therefore no overall potential for actual double-remuneration stemming from this decision.

9.21 CAR addressed Aer Lingus' contention that it had overlooked the continuation of return on capital and depreciation into 2022-2024, so that it was not in fact evident that daa will fail in fact to earn any of the permitted revenues. CAR pointed out that, in the Decision, it had determined that the no clawbacks approach '*applies to the remuneration (depreciation and return on capital) of the allowances for new Capex in 2020 and 2021'*, and that it had made no decision in relation to the allowed depreciation and return on capital for 2022-2024, including in relation to the continuation of allowances associated with new Capex for 2020 and 2021. It said that the change has had no impact on the clawback mechanism for 2022-2024, and that daa will not in reality earn any of the remuneration which is the subject matter of this change.

9.22 CAR then addressed the arguments made as to incentives. As pointed out above, Aer Lingus had submitted that (because of its timing) the decision was largely irrelevant from the perspective of this perverse incentive in the case of 2020. It had also submitted that in addressing the perverse incentive to overspend on Capex, CAR had created a similarly perverse incentive to underspend on Capex in 2021. Ryanair had submitted that CAR has pre-determined that the capex programme will be unaltered by the effects of the pandemic, and that the enhanced consultation process should be sufficient to ensure that unnecessary Capex was not progressed.

9.23 CAR agreed that the point was of more relevance for 2021 as opposed to 2020, given in particular that for 2021 it was combined with the additional consultation requirement discussed below. It disagreed however with Aer Lingus' argument about incentives to underspend, distinguishing between removing an incentive to spend as against creating a disincentive to do so. It contended that the Decision did not have the latter effect. Its point was that to leave this incentive unaddressed might have led to increased expenditure which would have led to inefficiently high charges for future users.

9.24 CAR agreed with Ryanair that the Capex consultation process would have partly mitigated this incentive, but it said that it is not always easy to distinguish between projects which are safety or compliance critical and those which are not. It disagreed with Ryanair that the Decision pre-determines that the Capex programme will be unaltered, pointing out that the programme has in fact been scaled downwards for 2020 and 2021. It drew the attention of the Panel to the comment at paragraph 7.14 of the Decision, where CAR said that it had removed '*an impediment to the optimal re-prioritisation or adjustment of the capital programme in light of the pandemic. The consultation process set out below then is intended to ensure that airport users are involved in this re-prioritisation.*'

9.25 Dealing finally with the contention that the removal of the clawback mechanism effectively shifts the volume risk to the airlines, contrary to the approach that underlies the 2019 Determination, CAR said that the allocation of this risk to daa was a feature of the regulatory model but that it is designed to function where there is a reasonable level of variation from the forecasts. The present position is not such a variation. In any event, it drew the attention of the Panel to the reasoning in paragraphs 7.11-7.13 of the Decision, where CAR concluded that daa would likely not collect any capital costs from the price cap and that it is unreasonable to enforce the clawback of allowances that were never collected. It did not agree that there had been an entire shift in volume risk to the airlines, and it contended that the element of reallocation of the volume risk implicit in this aspect of the Decision was warranted in light of the exceptional nature of the materialisation of downside risk for 2020 and 2021.

Decision of the Panel

9.26 Again, the decision of the Panel on this issue can be relatively shortly stated.

9.27 The clawback mechanism was originally intended to incentivise daa to carry out capital investment in line with the agreed plan, ensuring that if this does not occur, it does not retain the remuneration of the allowances. Given the effect of COVID-19 on passenger numbers, the contemplated scale of development may not be desirable. Furthermore, while the capital projects are being renumerated in theory, in fact little of it is likely to be collected. It is desirable to avoid perversely disincentivising the reassessment of the programme, and this can be achieved by the measure adopted by CAR. While it is certainly the case that the point is of more relevance for 2021 as opposed to 2020, that does not alter the merit of the point. While it might be said that the measure creates an incentive to underspend in 2021, that seems relatively unlikely, and it is better than leaving a disincentive to review overspending. The Panel also agrees that the Capex consultation process would have partly mitigated this incentive, but it finds it hard to disagree with CAR's statement that it is not always easy to distinguish between projects which are safety or compliance critical and those which are not.

9.28 Importantly, if the measure is not taken, there may be a future clawback of theoretically remunerated unspent Capex, none of which is likely to have been collected in reality. That does not seem a fair or reasonable outcome.

9.29 It is clearly not the case that the Decision pre-determines that the Capex programme will be unaltered. On the evidence, the programme has in fact been scaled downwards for 2020 and 2021.

9.30 The Panel also agrees that it was reasonable and proportionate to recognise that daa will collect a far lower level of aeronautical revenue than was forecast, and that it should therefore be granted a limited measure of regulatory relief in being permitted to use this revenue either for Opex or Capex as it may require.

9.31 The Panel accepted that there is little practical potential for actual double-remuneration stemming from this decision, given the level of actual capital remuneration

collected and likely to be collected in 2020 and 2021. It notes that the Decision makes it clear that the no clawbacks approach applies only to the remuneration for 2020 and 2021,and that no decision had been made in relation to allowed depreciation and return on capital for 2022 – 2024. It accepts that there is therefore little or no impact on the claw back mechanism for those years

9.32 Finally, the Panel of course agrees that there is an element of re-assignment of volume risk from daa to the airlines in this aspect of the Decision. But it also agrees that the original assignment of volume risk to daa was designed to function where there is a reasonable level of variation from the forecasts. The present position is not such a variation.

9.33 Accordingly, on this aspect of the appeals of Ryanair and Aer Lingus, the Panel has decided that sufficient grounds have not been established to refer CAR's Decision back for review. The Panel did not think that this ground of appeal gave rise to any reason to believe that CAR had not properly considered the matters referred to in section 33.

10. Consultation requirements for capital expenditure 2021

10.1 daa ground of appeal 3 complained of the introduction in the Decision of a new additional consultation process for substantial CapEx projects over €4 million which is required if daa wishes to progress these projects in 2021. There are two aspects of this ground of appeal. First, daa complains about the requirement for additional consultation. Secondly, it says that if this consultation is to take place, the threshold must be increased to a higher level.

10.2 The requirements for this consultation are (a) details on why the project needs to be progressed in 2021 on the basis of safety or regulatory compliance; (b) why it would be beneficial to progress this project in 2021 and seek support of airport users representing 50% of passengers. CAR stipulated that the 50% threshold is to encompass only airport users who engage with the consultation by submitting a response specifying support or not.

daa submissions

10.3 As to the requirement for additional consultation, daa pointed out that the projects contained in CIP 2020+ already went through a very detailed consultation process with airport stakeholders in 2018 and 2019. It added that, in the 2019 Determination, CAR highlighted the robustness of the consultation process, where it stated that there had been a significant amount of consultation and information exchange between it, daa and airport stakeholders in arriving at the regulatory decision.

10.4 daa pointed out that, in addition, the 2019 Determination introduced a new StageGate process for large scale infrastructural projects. It noted that the majority of the StageGate projects are over €30m, with the lowest capital cost being €16m, and that the introduction of an additional €4m consultation process is duplication of an existing process.

10.5 According to daa, the majority of projects outside of the StageGate process are asset care and IT in nature. It contended that the airlines are not best placed to determine if these projects should proceed. It submitted also that the majority of these projects are safety critical. According to daa, it is essential that it is afforded the ability to manage its requirements without the need for unnecessary protracted consultation, particularly on safety critical and often time sensitive projects.

10.6 As pointed out, daa also submitted that, if this additional consultation is required, the threshold should be increased to a reasonable level. It argues that 'substantial' projects in the context of a €2,000m capital programme cannot reasonably be considered as €4m, representing less than 0.2% of the overall capital investment programme. It submitted that this is a disproportionally low threshold of materiality, and that the threshold should be increased to at least 1% of total capital investment programme. This would represent a project value of €20m.

10.7 daa said that the total capital investment by daa in 2020 was less than €60m. It listed projects that had proceeded, and it said that its own internal governance process ensures that only the most important, safety critical and regulatory compliance project are progressing in the current pandemic. It submitted that the introduction of another layer to the consultation process at this time is an inefficient use of resources at a time when daa has substantially cut resource numbers.

Ryanair submissions

10.8 Ryanair observed that the additional consultation process was put in place specifically to protect users from daa embarking on projects that are not required due to changing demands as a consequence of the pandemic. Ryanair pointed out that daa had been able to justify a project as required on safety and security grounds in relation to IT upgrades that were claimed to be safety/security critical. It noted that essential maintenance work required on safety grounds would also be exempt from the additional consultation requirements.

10.9 Ryanair submitted that, in relation to development of new infrastructure or other more general maintenance work, it is only proper that users representing the majority of passengers using the airport should be able to determine whether such expenditure is needed at this critical time. It expressed the view that it is vital that unnecessary expenditure is not embarked upon.

10.10 Ryanair observed that, while the StageGate process has been set up to examine the larger projects identified in the 2019 Determination, it does not address the need for the project but only the scope of works proposed and the costs. It suggested that it is vital that there is a second check as to whether a project is still required at all.

10.11 In summary, Ryanair submitted that the additional consultation requirements put in place by CAR in the Decision are proportionate to the current critical situation as the market recovers from the effects of the pandemic.

Aer Lingus submissions

10.12 Aer Lingus acknowledged that, in its response to the Draft Decision, it had agreed there had been extensive and sufficient consultation on the current capital programme. It said that, while that was correct at the time, the continuation of the Covid-19 crisis has caused it to conclude that it is prudent to have additional consultation to assess whether the timing of capital investment as set out in the 2019 Determination remains appropriate for material capex.

CAR submissions

10.13 CAR said that purpose of the capex consultation requirement was to ensure that any new significant capex progressing in 2021 would be supported by airlines, or alternatively the airport would be required to demonstrate that the project is safety critical or required for regulatory compliance. It said that this was an interim measure in advance of a likely requirement for a full reassessment of capacity requirements over the coming years, once there is more stability in the industry.

10.14 CAR pointed out that a consultation was in fact already held in 2021, as required, for a single project which was classified as safety critical by daa. No stakeholder disagreed with this categorisation or sought to challenge the progression of the project. It noted that daa has not to date proposed to progress any other project, including any of the large-scale capacity projects which were originally included in the 2019 Determination.

10.15 In response to daa's suggestions that the new process is merely a duplication of StageGate, and that the majority of projects covered by the consultation are of a nature which airlines are not best placed to assess, CAR observes that daa in its response to the Draft Decision stated that it did not disagree with the proposal to implement a consultation process. CAR in any event suggests that StageGate differs from this process. The purpose of StageGate is to consider project scope and costs, while this consultation requirement for 2021 is focused on timing, and on whether the originally allowed investment should continue to be progressed in the current circumstances.

10.16 In response to daa's complaint about the threshold, CAR pointed out that the €4m was calculated to include all significant Capex. It excluded Capex on small projects which are likely to be broadly immaterial in relation to future airport charges, so that including them in the process would have created a disproportionate administrative burden. It said that, while a €10m threshold was suggested by daa in its response to the Draft Decision, a convincing rationale was not provided for this increase. CAR therefore maintained the original proposal of €4m.

Decision of the Panel

10.17 The Panel accepts that it is important to exercise scrutiny of whether originally allowed investment should continue to be progressed in the present circumstances. The new consultation process achieves that end. The consultation prior to the 2019 Determination took place in an entirely different context. The new process is different from the StageGate process, which considers project scope and costs, and not the question of whether it is necessary or appropriate to continue. Furthermore, this is an interim measure in advance of a likely requirement for a full reassessment of capacity requirements over the coming years.

The Panel concluded that the imposition of a new consultation process is not a disproportionate response to the new circumstances.

10.18 As to the threshold, the Panel takes the point that it is relatively low when one considers the size of the capital programme as a whole. However, the circumstances are very unusual. It is a matter for judgement as to where the threshold is fixed. The Panel did not feel that it was better placed to make that judgement than CAR. This therefore was a decision that the Panel felt lay within the margin of discretion that must be accorded to a regulator.

10.19 Accordingly, on this aspect of the appeals of daa, the Panel has decided that sufficient grounds have not been established to refer CAR's Decision back for review. The Panel did not think that this this ground of appeal gave rise to any reason to believe that CAR had not properly considered the matters referred to in section 33.

11. Conclusion

11.1 For the reasons set out above, having considered carefully the issues raised in each of the three appeals, the Panel did not find that the grounds of appeal raised by any of the appellants gave rise to sufficient grounds to refer CAR's Decision back for review.

Eoin McCullough SC

Hannah Nixon

Andrew Charlton

28 July 2021