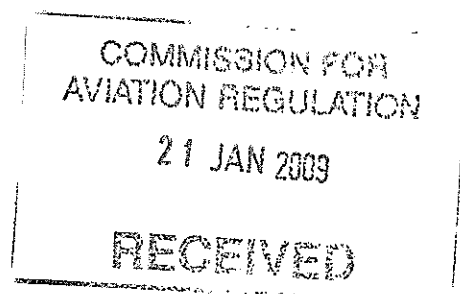


**Response on behalf of Ryanair Limited to the Consultation on the
Decisions of the 2008 Aviation Appeal Panel.**

Dated 21st January 2009

1. Ryanair welcomes the decisions of the Aviation Appeal Panel, Issued on 23rd December 2008, to refer a number of matters in the CAR's Determination CP8/2007 of July 2007, as clarified in May 2008, back to the CAR for reconsideration. Ryanair considers that its grounds of appeal were entirely vindicated and specifically that the following aspects of the 2007 Determination should be referred back to the CAR:
 - The decision to allow €1,107 million to enter the Regulatory Asset Base ("RAB") in future determinations and specifically that, in assessing the amount of capital expenditure to be allowed into the RAB:
 - The CAR failed to take proper account of available capacity in Terminal 1 ("T1") in considering the incremental capacity which was required through the development of Terminal 2 ("T2");
 - The CAR failed to take proper account of the fact that the capacity being provided in T2 cannot be used until the new runway is operational at the end of 2012 or later;
 - The CAR allowed excessive costs in to the RAB relating to T2 Phase 1, which is oversized by between 40% and 56% (as confirmed by the CAR's own consultants) and Box 1 and Box 2 are incorrectly specified, so providing capacity in breach of the limit set on the Eastern Campus at Dublin Airport of 30 million passengers per annum ("mppa") according to the Fingal Local Area Plan ("LAP") and/or the passenger throughput limit of 32 mppa imposed by An Bord Pleanála ("the Bord") on the T1 and T2 combined;
 - The CAR erred in allowing DAA to earn a return on capital on 100% of the costs of T2 Phase 1, including Box 2, as soon as such costs have been incurred, despite having found that T2 Phase 1 was substantially over sized, and despite the fact that the €101 placed in Box 2 by the CAR is only allowed to enter the RAB for the purpose of depreciation when passenger demand using T1 and T2 combined exceeds 33 mppa, a limit which cannot be achieved given the planning limits imposed on the Eastern Campus.



2. Ryanair welcomes the clear decision of the Panel that *"permitting what may be a greatly oversized Terminal 2 does not facilitate the efficient and economic development of Dublin Airport and might give rise to a risk to the financial viability of DAA, contrary to Section 33(1) (a) and (c) of the 2001 Act."*¹ This confirms Ryanair's long held view that, in allowing the scale of expenditure which it did to enter the RAB, the CAR was acting outside of its statutory objectives.
3. Ryanair agrees that the matters explicitly referred back are as set out in paragraph 3.3 of CP1/2009, save that it was clear that the Panel considered that these matters should be considered within the context of the limit on the passenger throughput in the Eastern Campus at Dublin Airport of 30 mppa as was known to the CAR at the time of the 2007 Determination:
 - (a) the assessment of capacity at Terminal 1 at Dublin Airport;
 - (b) the consequential assessment of the required capacity for a second terminal;
 - (c) the "correct" sizing of the Terminal 2 that DAA proposed to build;
 - (d) the consideration of the appropriate T2 associated projects capital expenditure which should be included in Box 1 or Box 2;
 - (e) the decision to exclude €25 million in respect of contingency costs in reaching its determination;
 - (f) the decision to exclude certain airfield projects costs in the determination under appeal;
 - (g) the consequential appropriation of capital expenditure into Box 1 and Box 2, particularly the treatment of Pler E as either part of Box 1 or 2;
 - (h) the remuneration of Box 2.
4. Ryanair also notes that the Panel, whilst not referring a number of other matters back to the CAR in the context of a review of the 2007 Determination, made clear that it also expected the CAR to reconsider other matters, where indications as to future policy were given in CP6/2007, within the review for the next regulatory period starting in 2010, namely:
 - (a) the precise treatment of the T2 depreciation costs within a unitised framework;
 - (b) the timing when T2 is deemed to be operational.

¹ Ryanair Appeal Decision, paragraph 8.18.

5. Ryanair further notes, with regret, that the Panel made clear that it did not necessarily expect any change to the level of charges within the 2007 Determination² as a result of this review and considered that matters relating to the opening RAB for 2010, including the write off of Pier C, fell to be considered at the next review for the 2010-2014 period.
6. Ryanair, in this response, confines itself to material known to the CAR or in the public domain at the time of the decision taken in July 2007. Ryanair refers the CAR to all submissions made by it to the Appeal Panel as containing material relevant to this review as well as to its submissions to the CAR prior to the 2007 Determination, including material submitted to An Bord Pleanála and copied to the CAR relating to the T2 development.

Process

7. At the outset, Ryanair welcomes the recognition by the Panel that the CAR's approach to regulating Dublin Airport, and the specific issues related to T2, has amounted to "*passive regulation*"³; an approach similar to that adopted by the UK CAA and which has been heavily criticised by the UK Competition Commission. Ryanair calls upon the CAR to change its approach to regulation and to use this review as the starting point for adopting a new approach of engaging fully with parties to properly regulate Dublin Airport in accordance with its statutory objectives.
8. The Panel was also critical of the CAR's approach to the hearings in not addressing substantive arguments "*the Commission, in effect, ignored the submissions of DAA and dealt only with the process of the Determination, not the substance of the same*".⁴ The same applies to the CAR's approach to the Ryanair Appeal Hearing whereby the CAR did not address the actual issues raised, merely the process it had adopted in reaching its previous Determination.

² Ibid, paragraph 8.23.

³ Ibid, paragraph 8.12.

⁴ DAA Appeal Decision, paragraph 8.4.

9. In the light of the Panel's clear view that many elements of the CAR's 2007 Determination were flawed, it is essential that the CAR engages during this review in the substance of the issues, not merely in reiterating the process by which it reached its previous decisions. To that end, Ryanair calls on the CAR to adopt the process advocated by the Appeal Panel, namely *"The Panel is of the view that the Commission might well be best advised to carry out that analysis by reference to the competing contentions of DAA (.....) and Ryanair, by way of a joint meeting/hearing with Ryanair's consultants, the DAA's consultants and the Commission's own consultants, rather than by way of passive regulation, as appears to have occurred to date"*.⁵
10. It is also clear from the Appeal Panel's decision in respect of the DAA Appeal that the CAR *"must state clearly and transparently what it regards as the appropriate size of T2."* In other words, the 2007 Determination failed to reach the necessary regulatory standards in terms of analysis and clear presentation of the CAR's reasoning. This is pertinent to the current review in so far as the CAR's refusal to engage with stakeholders during the process leaves a material risk that the ultimate decision will again fail the test of having been transparently arrived at and explained. The Panel made clear that it is not sufficient for the CAR to simply state that it takes a particular view, *"It must state why this is so."*⁶ It is clear this will require the CAR to have and demonstrate an in depth understanding of the issues and to set out fully the reasoning for and evidence supporting its decisions.
11. In the remainder of this submission, Ryanair deals with each of the matters referred back in turn.

Assessment of capacity at Terminal 1 at Dublin airport

12. The Panel made clear that it considered that the CAR had *"considered the size of T2 in isolation without properly considering the scale of the economic and efficient next increment of capacity at Dublin Airport to meet user needs within the limits set by (a) the Local Area Plan, including the provision therein for the further development of the airport on the western campus, and (b) runway constraint."*⁷ The concept of incremental capacity relies on the concept of establishing first the capacity offered by the existing infrastructure (T1 and the runway) then determining what would constitute a cost effective next increment to meet reasonable projections of demand to use the airport as a whole. The ceiling on capacity imposed by external constraints (the Local Plan) is also relevant to determining the scale of the next increment as are issues relating to economies of scale in terms of phasing.

⁵ Ryanair Appeal Decision, paragraph 8.12.

⁶ DAA Appeal Decision, paragraph 8.5.

⁷ Ryanair Appeal Decision, paragraph 8.3.

13. Ryanair pointed out the need to adopt such an incremental approach in its response to CP5/2007 as follows:

"The overarching aim should be to ensure provision of sufficient terminal, apron and runway capacity at Dublin Airport in an efficient manner to meet the needs of users and future demand as it arises. The next increment of development needs to be sized according to the scale of capacity which exists currently not according to the predetermined requirement for a new terminal. The logic which underpins the consideration of the size of Terminal 2 in isolation is negated by the fact that it will not be capable of independent operation and peak hour movements will in any event be split between the proposed Pier E and the existing Pier B on Terminal 1. The logic which says that Terminal 2 has to be large enough to accommodate all of Aer Lingus and partners' operations is hence flawed as operations will be split in any event....."

DAA is on record as stating that Terminal 1 will have a departing passenger capacity of 4,800 passengers per hour once the proposed extension to the existing terminal (T1X) has been constructed, taking into account the capacity added by Pier D and Area 14. Ryanair believes that even without T1X, which is almost exclusively dedicated to retail (and storage) space, is capable of at least 4,800 passenger movements per hour. Using busy hour ratios and analysis similar to that applied by RR&V in their Report No. 4, when considering the true capacity of Terminal 2, this would imply an effective capacity of Terminal 1 of at least 25 mppa and possibly more as, if Terminal 2 proceeds, its predominant user will be Ryanair and, as such, available capacity will be used even more efficiently than today.

There is no case therefore of considering the capacity to be provided by Terminal 2 against a "comfortable capacity" in Terminal 1 of 18.5 mppa as claimed by DAA....."

A further factor which should determine the scale of Terminal 2 is the ceiling imposed on the capacity of the existing eastern airport campus by the Fingal Local Area Plan (LAP) at 30 mppa. This limit was imposed because of surface access constraints implied by the 'Airport Box'."

14. Ryanair notes that DAA raised a new argument during its hearing with the Panel, namely that its approach was justified by economies of scale argument but this appears to be one brought forward by DAA in its Appeal rather than a consideration before the CAR at the time of the 2007 Determination. Ryanair is not aware of any evidence which would support this contention.

15. The Panel made clear that *"In order to properly assess the proper size of Terminal 2 (and accordingly the appropriate parameter for Box 2) the Commission must first establish and clearly identify the capacity of Terminal 1."*⁸ The Panel went on to state that *"Only having identified the capacity of Terminal 1 can a view be taken as to the appropriate size of Terminal 2 by reference to the needs of the airport and airport users."*⁹ The Panel made clear that consideration of the capacity of Terminal 1 had to have regard to the capacity added by T1X, Pier D and Area 14, all of which were known to the Commission in July 2007.
16. Although, in CP5/2007¹⁰, the CAR stated that T1 had a *"comfortable capacity"* of 18.5 mppa, this was not based on any evidence and was inconsistent with the CAR's previous decision in 2001 regarding the regulation of charges up to and including 2005 and 2006, where in it provided for capital expenditure and a level of charges necessary to enable DAA to handle 19.7 mppa in T1 by 2006. Therefore, as a result of paying charges relating to the 2001 determination, users have already funded developments to achieve a capacity of approximately 20 mppa in the previous regulatory period. This view is supported by the DAA's Annual Report of 1999, which records the capacity of T1 to be 20 mppa upon completion of Pier C and the earlier terminal extension, such capacity assessment being prior to construction of Area 14, Pier D and T1X, which again, as confirmed by the DAA have added some additional 6mppa to the capacity of T1.
17. It is not entirely clear what the CAR assumed the capacity of T1 as extended to be in CP6/2007 but it would appear, wrongly, to have been set at approximately 20 mppa. This appears to have been based on an assumption that the T2 Box 1 needed to provide a floor area necessary to handle 13.2 mppa to meet the needs of prospective T2 users, prior to the construction of a second phase, and that working back from an assumed threshold of Box 2 of 33 mppa, the capacity of T1 could only be a maximum of 20 mppa. As the Panel identified, this is simply the wrong approach and the capacity of T1 needs to be assessed as a first step in assessing the need for and scale of T2, not the other way round.

⁸ Ibid, paragraph 8.4.

⁹ Ibid, paragraph 8.5.

¹⁰ CP6/2007, page 107.

18. Ryanair believes that once the planned works are completed, the capacity of T1 will be of the order of 26 mppa. In assessing the capacity of T1 once extended, Ryanair relies on statements by DAA. According to Mr. Robert Hilliard on behalf of DAA, at a consultation meeting with airline users held on 2 March 2007 to which the CAR was referred in Ryanair's response to the CP5/2007 consultation, it was accepted that T1 would have a capacity of 4,800 departing passengers per hour (once the works to Area 14, Pier D and T1X were completed), which is equivalent to 26 mppa (capacity for departing passengers being the limiting factor in passenger handling capacity at Dublin Airport) as we explain below.
19. The hourly passenger capacity of a terminal can be converted to estimated annual capacity by taking into account the relationship of passenger demand in a busy hour to annual passenger volumes. In 2007, T1 at Dublin Airport handled 23.3 million passengers within a departure hourly capacity limit of 4,050 passengers. This gives a multiplier of annual demand to busy hour capacity of 5,570. (In 2006, on the basis of 21.2 mppa as the annual passenger throughput, the hourly constraint would give a multiplier of 5,382). Taking the 2007 multiplier would mean that the annual capacity of T1 at a busy hour departure throughput of 4,800 can be assessed as approximately 27.6 mppa and, at the 2006 multiplier, the annual passenger capacity would be 25.1 mppa.
20. DAA has contended that T1 is currently operating at unacceptable levels of congestion in peak periods, which it is seeking to alleviate through reducing demand using T1 once T2 opens. However, as an airport gets busier, demand tends to become more spread out over the day and over the year, i.e. less peaky. The ratio of busy hour demand to annual throughput (the converse of the multiplier referred to above) normally declines as airports become busier as evidenced by the graph overleaf, showing data from the BAA airports. Furthermore, it is evident that based on performance in 2006 and 2007 at 21-23 mppa, DAA is achieving no better than 174 to 191 busy hour departing passengers per mppa, which indicates a higher level of peak hour demand relative to the annual throughput than would be the norm at BAA airports as illustrated in the graph below. This suggests strongly that, over time, the ratio of peak hour demand to annual throughput at Dublin would be expected to decline further.

23. In the current review, if the CAR takes any different view than that the capacity of T1 prior to the recent expansion works was 20 mppa and why that the capacity of T1 as extended is 26 mppa, it will have to explain clearly its view, by reference to specific supporting evidence. Ryanair believes that the CAR will have to consult on its view, or at the very least hold the consultation meeting proposed by the Panel, prior to reaching its final decision on this review.

Consequential assessment of the required capacity for a second terminal

24. The Panel made clear that having assessed the capacity of T1, only then could the CAR consider what scale of development of T2 to meet the overall requirement for terminal capacity at Dublin Airport over time having regard to:
- (a) *"The delay in the provision of a second runway, and*
 - (b) *The Local Area Plan of Fingal County Council which suggested a limit to the airport campus at the eastern campus to 30 million passengers per annum."*¹⁶
25. It is clear that the Panel considered that not only was the cap on the throughput of the Eastern Campus relevant and that, as at July 2007, the CAR had no grounds for considering this to be other than 30 mppa, but that the impact of runway capacity constraints might give rise to considerations as to when the additional capacity to be provided by T2 might be required. The Panel made clear that *"The next step is to assess the size requirement of T2, having regard to the effective cap of 30 mppa on the eastern campus"*¹⁶. The Panel also made clear that the requirement is for the CAR to set out transparently what it considers to be the busy hour and annual capacity required having regard to the capacity of T1 and the cap on the Eastern Campus of 30 mppa. Ryanair contends that this amounts to a capacity increment of 4-5 mppa at Dublin Airport, with some increase in the hourly capacity required to allow for some loss of utilisation efficiency caused by demand being split across two terminals.
26. The Panel noted that Ryanair's consultants, York Aviation, used a similar methodology for assessing the hourly capacity of the required terminal, adopting both bottom up and benchmarking methodologies, to those used by RR&V for the CAR¹⁷. The Panel considered that, on the basis of evidence submitted by Ryanair to the Panel, *"T2 may well be oversized in amount significantly in excess of that allowed for by the Commission."*¹⁸

¹⁶ Ryanair Appeal Decision, paragraph 8.6.

¹⁸ *Ibid*, paragraph 8.14.

¹⁷ *Ibid*.

¹⁸ *Ibid*.

27. In assessing the size of T2 required, even to meet the annual demand of 11.4 mppa asserted by DAA as required to meet demand by T2 airlines in Phase 1¹⁹, which Ryanair disputes as set out above, it is important to assess whether the design hour passenger flow is efficient and matches what would be reasonably expected. This was the analysis which RR&V carried out for the CAR in 2007.
28. DAA has, however, designed T2 Phase 1 to handle a busy hour departing passenger volume of 4,200, which equates to a terminal with a capacity of the order of 22 to 24 mppa taking into account the ratio of busy hour demand to annual throughput at Dublin Airport outlined above. This is approximately double the size which DAA claims and sufficient to provide an overall terminal capacity in the Eastern Campus of around 40 mppa, taking into account some natural loss of efficiency from operations being split across two terminals. This assessment is broadly consistent with the assessment of RR&V for the CAR. RR&V confirmed that DAA's claim that T2 needed to be able to handle 4,200 busy hour departing passengers to meet this annual capacity requirement was not supported by evidence or by benchmarking against terminal developments elsewhere as the profile of demand through the day was unrealistically peaked.
29. RR&V assessed the area proposed for T2 Phase 1 of 75,000m², based on an hourly departure capacity of 4,200 passengers per hour, as being 40-56% too large for the annual passenger throughput of 11.4 million advanced by the DAA. This is broadly consistent with Ryanair's view if a terminal with that annual throughput was required, which Ryanair does not accept.
30. However, in CP6/2007, the CAR adopted a figure of approximately 3,000 departing passengers per hour as its allowable capacity for T2, equivalent (according to RR&V) to an annual capacity of 13.2 mppa²⁰, which DAA had indicated might be the maximum throughput which T2 Phase 1 might have to accommodate prior to the construction of a second phase. It is entirely unclear on what basis the CAR considered that this capacity was required to be provided within the overall limits of the Local Area Plan. Nonetheless, on this basis, the CAR concluded that this justified a mid-point design for T2 Phase 1 of approximately 54,000m², significantly greater than the area assessed by its own consultants as that required to accommodate predicted demand or to meet the target design capacity stated by DAA and for which planning approval was subsequently granted. The area allowed into the RAB by the CAR in the 2007 Determination, hence, represents approximately 73% of the total area of T2 Phase 1 as being constructed by DAA.

¹⁹ RR&V Report No. 4: Review of DAA Terminal Sizing, page 10.

²⁰ *Ibid*, page 6.

31. The effect of the Appeal Panel's decision that the size of T2 falls to be assessed by reference to the available capacity in T1 and the LAP cap of 30 mppa means that the analysis carried out by RR&V is no longer relevant to the current review. The RR&V study examined the capacity of T2 in isolation based on the expected profile of the planned user airlines and a target annual throughput of 11.4 mppa, without reference to the overall utilisation of capacity at Dublin Airport. This has been confirmed by the Panel as being the incorrect basis for assessment.
32. Using methodologies similar to those adopted by RR&V to benchmark the relationship between annual throughput and hourly capacity required, York Aviation for Ryanair has assessed that, with the passenger throughput in the Eastern Campus capped at 30 mppa and based on benchmarked data, the busy hour departing passenger capacity required across the two terminals would be no greater than 5,575 departing passengers per hour (using the multipliers set out above for the conversion of busy hour capacity to annual capacity and vice versa), even assuming that the ratio of busy hour passenger demand does not decline as the airport becomes busier as might otherwise be expected as set out above.
33. When demand is split over two terminals, Ryanair accepts that it will not be possible to match peaks of demand exactly in both terminals so the practice of allocating some airlines, such as Aer Lingus and the transatlantic carriers, to T2 will result in some natural loss of efficiency compared to single terminal operations. It would normally be expected that such loss of efficiency would amount to no more than 20% across two terminals. In other words, split across two terminals, effective capacity would be required for no greater 6,690 departing passengers per hour to match a total airport capacity of 30 mppa. Taking into account the available capacity in T1, the maximum required hourly capacity in T2 is no more than 1,890 departing passengers on the basis of an efficient increment of terminal capacity at Dublin Airport, consistent with the overall throughput limits of the LAP. This is similar to the lower bound of the estimate of the scale of the busy hour required in the RR&V analysis²¹.
34. This suggests that the amount of DAA's T2 costs allowed into the RAB should be no more than 45% of the costs being incurred, assuming that the floor area being provided is appropriately sized relative to hourly demand. Although Ryanair disputes this and considers that excessive space is being allocated to retail activities for which there can be no guarantee of a return, RR&V did not challenge the floor space being provided relative to throughput.

²¹ Ibid.

35. Even once the correct scale of T2 development has been determined, there remains a question of the timing of the development. Whilst the passenger capacity of T1 has been constrained prior to recent developments, including T1X, overall capacity at Dublin Airport is constrained by a busy period departure capacity of 31 departing aircraft movements in the peak hour. This constraint will remain in place until the new runway is open, which was scheduled for the end of 2012 but which DAA has recently announced will be delayed further.²²
36. As recognised in the RR&V report for the CAR²³, the T2 Phase 1 development was predicated on an increase in busy hour departure movements to 36 in 2009 and 38 in 2010, although the opening of T2 is now deferred to 2010. It is absolutely clear that these levels of departing aircraft movements cannot be accommodated within the capacity of the existing runways. In practical terms, this means that the additional capacity being provided by T2 Phase 1 cannot be taken up until such time as additional runway capacity is in place. This was clearly acknowledged by RR&V in their report:
- "As the runway capacity ultimately determines the capacity of the airport we are concerned that without delivery of additional runway capacity by 2009 the proposed terminal capacity at Dublin Airport will far exceed runway capacity resulting in the inefficient use of capital investment."²⁴*
37. Whilst airlines may relocate their operations to T2, this will leave the capacity in T1 underutilised and result in uneconomic operations at Dublin Airport in breach of the CAR's statutory objectives. This was also clearly recognised by RR&V in their second report which notes that:
- "Given the possibility of a delay to the delivery of a new parallel runway at DUB, the magnitude of additional terminal capacity being provided by the DAA could result in both T1 and T2 being substantially underutilised as a result of runway capacity constraints."²⁵*
38. Ryanair argues that the CAR should have taken this further factor into account in determining when any of the costs associated with T2 should enter the RAB for the purpose of either return on or return of capital. Ryanair contends that no element of T2 should be allowed to enter the RAB in advance of the opening of the new runway.

²² Press Statement of 18th December 2009.

²³ RR&V Report No 4: Review of DAA Terminal Sizing, page 23.

²⁴ *Ibid.*

²⁵ RR&V Phase II Report and Responses, July 2007, page 12.

39. Ryanair accepts that it is not possible to exactly synchronise the provision of additional runway and terminal capacity at an airport. However, it is easier to develop new terminal capacity in incremental steps to meet demand whereas the provision of a new runway can result in an effective doubling of the runway capacity of an airport. In this case, given that the binding constraint is runway capacity, Ryanair contends that the CAR was wrong to determine the inclusion of costs relating to incremental terminal development into the RAB when sufficient runway capacity does not exist to allow the terminal capacity to be used efficiently.
40. In its Response to the Panel, the CAR referred to the Cost Benefit Analysis prepared for it by CEPA in February 2007 by way of further justification for its stance that the need for the terminal could be considered independently of the timing when additional runway capacity is delivered. However, as Ryanair pointed out to the Panel, the benefits deriving from the development of the new runway and/or the second terminal were both wrongly assessed by CEPA on the basis of a passenger forecast which assumed that an additional runway capacity was in place concurrently with the provision of a new terminal and simply apportioned the benefits derived from additional passengers across the two developments. It is not possible to separate the benefits deriving from the provision of a second terminal in advance of the provision of the additional runway based on this analysis. Correcting for this error²⁸ shows that development of a second terminal ahead of the provision of additional runway capacity would not generate benefits greater than the costs until at least 2020, even assuming CEPA was correct that benefits derive from reduced congestion in the terminals reducing delays to aircraft.
41. Overall, this confirms Ryanair's view that the implication of the delay to the provision of additional runway capacity is that, whatever the size of T2 which is justifiable by reference to the existing capacity of T1 and the cap of 30 mppa within the Local Area Plan, there is no case for the costs associated with that development to enter the RAB until additional runway capacity is provided. Ryanair will raise this issue again within the context of the next review for the period beyond 2010 where the timing of the operational opening of T2 will fail to be considered.

²⁸ Annex 1 to Ryanair's Response to the CAR's Submission to the Appeal Panel.

Correct sizing of the Terminal 2 that DAA proposed to build

42. Ryanair has set out above that its assessment is based on evidence that the size of T2 required should only be 45% of that actually being constructed by DAA. This assessment has regard to the capacity of T1, the planning cap of 30 mppa and any loss of effective efficiency as a consequence of splitting demand across two terminals. Ryanair therefore calls on the CAR to conduct a new assessment, using experts in this field, following the criteria set out by the Panel.

Consideration of the appropriate T2 associated projects capital expenditure which should be included in Box 1 or Box 2

43. The Panel made clear that consequent upon a detailed assessment of the capacity required to be provided in T2, having regard to the capacity of T1 and the Local Plan capacity ceiling of 30 mppa, the CAR should then determine what proportion of DAA's expenditure on T2 should be included in Box 1 and what should be included in Box 2.²⁷
44. Based on Ryanair's assessment of the size of T2 which would constitute efficient development at Dublin Airport, in line with the decision of the Appeal Panel, only €171 million of the CAR's adjusted costs for the T2 terminal building should be allowed into Box 1. The remaining terminal building costs of €208 million should be placed in Box 2 to remain at DAA's risk. In setting out this apportionment of costs into the two boxes, Ryanair notes that, in practice, there is a further test which will have to be met before such costs enter the RAB for the purpose of depreciation, namely that they have been efficiently incurred. This will require the CAR to consider whether the DAA has procured the development efficiently over and above whether the development itself represents an efficient increment to capacity at Dublin Airport.
45. We deal below with the other T2 related elements, including Pier E and the apron works.

²⁷ Ryanair Appeal Decision, paragraph 8.15.

Decision to exclude €25 million in respect of contingency costs in reaching its determination

46. Ryanair notes that the Panel referred back the CAR's decision to substitute DAA's contingency costs relating to T2 with those of its own²⁸. Such a decision could be material to the level of charges within the current Determination period as it relates to the projected amounts of T2 expenditure upon which DAA is allowed to earn a return within the current regulatory period to the end of 2009. However, in the context that the Panel made clear that it did not expect the results of its referral back of certain matters to result in change as to the current level of the cap on airport charges²⁹, but merely to what capital expenditure would be allowed into the RAB and the conditions relating to Box 1 and Box 2, this is not material. By the time the opening RAB for 2010 is set, it will be clear the extent to which DAA has been required to use such contingency allowances in the course of constructing T2. To the extent that such contingency allowances have been spent, they fall eligible to enter the RAB, subject to the Box 1/Box 2 conditions. To the extent that the contingency allowances have not been required, they cannot enter the RAB at that point.
47. Notwithstanding this, before the actual costs of constructing T2 are allowed into the RAB, it is essential that the CAR satisfies itself that such costs have been efficiently incurred, specifically in relation to the procurement of the construction of T2 as well as to the size of T2 and its overall costs. It will be important to verify that such contingency costs have been legitimately spent. This will require an in depth analysis of the means by which DAA procured T2 within the next review.

Decision to exclude certain airfield projects costs in the determination under appeal:

48. In relation to whether the CAR was right of not to reduce the cost of some airfield projects by €4 million in its 2007 Determination, the same considerations apply as note above in relation to the €25 million contingency costs in respect of T2. By the time of the next review, the actual costs will be known and the RAB set on that basis, subject to the test of efficient procurement.

²⁸ DAA Appeal Decision, paragraph 8.8.

²⁹ The Panel stated that it did not consider that the cap on airport charges should have been either reduced or increased in the Interim Review – Ryanair Appeal Decision, paragraph 8.23.

Consequential appropriation of capital expenditure into Box 1 and Box 2, particularly the treatment of Pier E as either part of Box 1 or 2

49. The CAR relied on DAA's response to the consultation on CP5/2007 to justify the exclusion of the costs of Pier E and various T2 ancillary developments from the two box approach. However, these facilities are, like the terminal itself, sized to handle particular hourly flows of demand and not related to some overall annual passenger throughput. Therefore, to the extent that the main terminal block is oversized, the vast majority of these facilities will suffer from the same over-specification. Ryanair agreed with the CAR's proposed approach in its consultation document, CP5/2007, that these facilities should be included in its two box approach and considers it wrong in the Determination in allowing DAA to recover these excessive costs in their entirety within Box 1.
50. The Panel made clear that it agreed with Ryanair that the CAR erred in the 2007 Determination in effectively allowing all such costs into Box 1 on the basis that DAA's argument was "*persuasive*"³⁰. DAA merely noted that the size of these facilities is related to peak hour demands, of which the CAR was itself critical, and cited a gating analysis³¹ which was based on the same overly peaked aircraft schedule which had been used to generate the excessive terminal busy hour demand. Although DAA's justification deals with a potential shortage of stands prior to the opening of Pier E, it does not justify why Pier E should not be subject to the two box approach. It also merely asserts that other facilities cannot be reduced in scale if a lower design hour throughput was adopted.
51. RR&V considered the requirement for Pier E in its Phase II Report of July 2007. They noted that full consideration of the scale of pier requirement was outside the scope of their study but made a pertinent comment that:
- "Reducing the level of demand, in line with alternative busy hours could result in a reduction in the size of Pier E."*
52. The logical consequence of the adopting a significantly lower design hour passenger flow as the basis for sizing the terminal building for inclusion with Box 1 applies equally to the pier, apron and associated works, with any risks associated with DAA building too large a pier and any phasing implications being placed in Box 2.

³⁰ Ryanair Appeal Decision, paragraph 8.16.

³¹ DAA Response to CP5/2007, page 53.

53. The Panel expressed a clear view that the approach adopted by the CAR in CP5/2007 was the correct one and *"should be reinstated"*. Ryanair considers that once the CAR has determined the capacity of T1 and other existing infrastructure at Dublin Airport, an assessment will need to be made of the incremental pier and apron capacity required to handle 30 mppa, in accordance with the Local Plan cap. This approach should also be extended to all other T2 associated facilities contained within the sum of €203 million for T2 associated facilities allowed by the CAR into Box 1 in CP6/2007.
54. In the light of the Panel's decision, it is beholden on the CAR to examine these issues in detail and set out a clear justification as to what proportion of the costs of these T2 related facilities should be allowed into the RAB. Prima facie, Ryanair considers it should not be significantly in excess of the 45% assessed as the correct proportion of the terminal size as the other facilities should be sized relative to the busy hour demand for passengers or aircraft, or in proportion to the size of the terminal building in the case of facilities such as the Energy Centre.

Remuneration of Box 2

55. The Panel made clear that it is not appropriate to allow any remuneration of the costs eventually placed in Box 2 until the trigger of 33 mppa is reached⁸². This means that the CAR erred in the 2007 Determination in allowing DAA to earn its cost of capital (a return on the costs) on the full cost of T2 from when it has been incurred. To the extent that DAA has been doing so as a consequence of leaving the airport charges cap unaltered for the period to 2010, the excess income which DAA has received will need to be clawed back in the next Determination for the period 2010-2014. The Panel made clear the *"risk of oversizing is one which should be borne by the DAA, not by current or prospective users."*⁸³ The Panel made clear that allowing a return on such costs was clearly contrary to the 2001 Act.

⁸² Ryanair Appeal Decision, paragraph 8.19.

⁸³ *Ibid*, paragraph 8.20.

56. The Panel also made clear, that in assessing whether the trigger for the costs of Box 2 to enter the RAB, for the purpose of both earning a return of and a return on capital, would be when 33 mppa was permitted to be handled on the Eastern Campus, i.e. taking no account of any additional passengers permitted to be handled on a Western Campus by the construction of a third terminal³⁴. The Panel stated that to do otherwise would be contrary to Section 33(1) (b) of the 2001 Act as it would allow DAA to benefit from having built an oversized T2 at the expense of users. This is contrary to the express view of the CAR in its submissions to the Panel³⁵ where it is asserted that it was immaterial whether the trigger related to the Eastern Campus or the whole airport. This represents an important clarification as to whether the costs of Box 2 can ever be remunerated in practice, confirming the long held view of Ryanair that DAA has no entitlement to recover such costs unless and until there is a fundamental revision to the planning cap on the Eastern Campus.
57. Ryanair considers that as a consequence of the Panel's clear recommendation that the distinction between Box 1 and Box 2 should be by reference to the Local Area Plan cap of 30 mppa, this has consequences for how the Box 2 trigger is conceived. It would require a specific decision within the Local Plan that capacity above 30 mppa is acceptable in the Eastern Campus for any costs associated with providing this capacity to be allowed into the RAB for the purpose of earning either a return on or the return of capital.
58. The 2007 Determination has provided for DAA to earn a return on the full cost of its investment in T2, which the Panel has clearly stated to be in contravention of the 2001 Act. Furthermore, pursuant to its obligation to have regard to the financial viability of DAA, the CAR gave a commitment to accelerate depreciation in the event of any financial shortfall for DAA. As a consequence, given that DAA has already incurred the excessive costs of development, the effect of the CAR's decisions will be that users will effectively be required to pay for such facilities even though they cannot ever be used given the planning cap on the passenger throughput on the Eastern Campus. Essentially, therefore, the CAR wrongly indemnified DAA as against any exposure it may have due to its building an oversized T2 Phase 1 in the event that it does not or cannot reach the Box 2 trigger of 33 mppa. Such indemnity, if it arises, would be paid for by airport users by way of even higher airport charges. The Panel made clear that such risks associated with the oversizing of T2 should be borne in their entirety by DAA. Ryanair calls upon the CAR to reverse its decision in the treatment of such costs and to ensure that any excess revenues collected by DAA as a result of its 2007 Determination are returned to users in the next review.

³⁴ Ryanair Appeal Decision, paragraph 8.22.

³⁵ CAR Response to Ryanair Submission to the Appeal Panel, paragraph 21.

Matters Requiring Consideration at the Next Review

59. The Panel made clear in its decisions that there were a number of matters which did not require it to take a decision at this time, indicating that matters would be for future Determinations. This included issues relating to the implementation and form of unitised depreciation, noting that such an approach is *"unexceptional and that the Commission is entitled to adopt the same"* in response to a criticism by DAA³⁶. Ryanair considers this important in the context that a dramatic increase in the cost of using Dublin Airport, consequent upon the full costs of T2 entering the RAB, would be catastrophic in terms of the impact on traffic growth in the current economic climate. Ryanair accepts that this matter falls to be determined as part of the review of charges from 2010 and expects the CAR to transparently consider all issues associated with the precise treatment of the costs allowed into the RAB and how they are depreciated and allocated, as a consequence of matters referred back by the Appeal Panel, within that review.
60. In response to the Appeal by Aer Lingus, although not referring any matters back to the CAR for immediate consideration, the Panel made clear that the definition of when T2 becomes operational, and hence when depreciation costs fall to be recovered from users, *"will be considered in the 2010/2014 Determination and any matters to be considered can be considered within that consultative process."*³⁷ Given the constraint imposed by the capacity of the current runway system at Dublin Airport until at least 2013 or later, Ryanair considers that this will be a very significant matter for consideration at the next review in the context also of projected levels of growth in demand relative to current terminal capacity. Ryanair notes the view of the Panel that the ministerial direction meant that it was not inappropriate for the CAR to consider the timing of Box 1 costs entering the RAB by reference to the timing of operational use of T2 rather than by reference to the operational use of the runway.³⁸ Ryanair will address the issues relating to the timing of when T2 is deemed operational within the context of the next review.

³⁶ DAA Appeal Decision, paragraph 8.7.

³⁷ Aer Lingus Appeal Decision, paragraph 9.1.2.

³⁸ Ryanair Appeal Decision, paragraph 8.21.

61. The Panel, in its Decision, does not directly address the matter of Pier C and the effective demolition of the asset which was raised by Ryanair in its appeal. This also relates to what is allowed into the opening RAB at the time of the next determination. The construction of T2 has necessitated the substantial demolition of Pier C, to be incorporated into the new building structure. The depreciated cost of Pier C must be deducted from the RAB in order to avoid users paying for an asset which has been written off. Ryanair estimates the original cost of Pier C to have been approximately €150 million (based on total capex figures from DAA's Annual Accounts from the period in which Pier C was delivered). Ryanair has repeatedly requested details of the cost of the facility but DAA has refused to provide them. Ryanair submits that the written down cost of Pier C should be permanently excluded from the opening RAB for 2010 within the next review.