DECISION OF THE AVIATION APPEALS PANEL 2020

Established by order of the Minister for Transport, 4th February 2020

Appeal of dublin airport authority against Determination of the Commission for Aviation Regulation CP8/2019

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THE DETERMINATION

1. The Commission for Aviation Regulation ("**the Commission**") published its final Determination ("**the Determination")** on airport charges at Dublin Airport for the period 2020/2024 on the 24th October 2019.

2. The table below shows the maximum revenue per passenger that Dublin Airport Authority ("**daa**") can collect at Dublin Airport per the Commission's final Determination CP8/2019.

	2020	2021	2022	2023	2024	Average
Price cap per Passenger	€7.50	€7.50	€7.88	€8.12	€8.32	€7.87

Within the period of the Determination, these price caps can change for various reasons, details of which are set out in the Determination.

LEGAL ISSUES

3. Section 33 of the Aviation Regulation Act ("**the 2001 Act**") (as substituted by section 22 of the State Airports Act, 2004) provides:-

"(1) In making a determination the objectives of the Commission are as follows: -

(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,

(b) to protect the reasonable interests of current and prospective users of Dublin Airport in relation to Dublin Airport, and

(c) to enable Dublin Airport Authority to operate and develop Dublin Airport in a sustainable and financially viable manner.

(2) In making a determination the Commission shall have due regard to –

(a) the restructuring including the modified functions of Dublin Airport Authority.

(b) the level of investment in airport facilities at Dublin Airport, in line with safety requirements and commercial operations in order to meet the needs of current and prospective users of Dublin Airport,

(c) the level of operational income of Dublin Airport Authority from Dublin Airport, and the level of income of Dublin Airport Authority from any arrangements entered into by it for the purposes of the restructuring under the State Airports Act 2004,

(d) costs or liabilities for which Dublin Airport Authority is responsible,

(e) the level and quality of services offered at Dublin Airport by Dublin Airport Authority and the reasonable interests of the current and prospective users of these services,

(f) policy statements, published by or on behalf of the Government or a Minister of the Government and notified to the Commission by the Minister, in relation to the economic and social development of the State,

(g) the cost competitiveness of airport services at Dublin Airport,

(h) imposing the minimum restrictions at Dublin Airport Authority consistent with the functions of the Commission, and

(i) such national and international obligations as are relevant to the functions of the Commission and Dublin Airport Authority."

4. Section 40 of the 2001 Act provides:-

"(2) The Minister shall, upon a request in writing from a person to whom this Section applies who is aggrieved by a determination under Section 32(2) or 35(2), establish a panel ("appeal panel") to consider an appeal by that person against the determination.

………

(4) An appeal panel shall determine its own procedure.

(5) An appeal panel shall consider the determination and, not later than three months from the date of its establishment, may confirm the determination or, if it considers that in relation to the provisions of Section 33 or 36 there are sufficient grounds for doing so, refer the decision in relation to the determination back to the Commission for review.

(6) An appeal panel shall notify the person who made the request under subsection (2) of its Decision under subsection (5)."

5. The Minister for Transport received requests from two parties aggrieved by the Determination, one being Ryanair and the other being daa. On the 4th February 2020 the Minister for Transport established an Appeal Panel ("**the Panel**") to

consider those appeals. The members of the Panel are Mr. Eoin McCullough S.C. (Chairman), Ms. Hannah Nixon and Mr. Andrew Charlton.

6. As pointed out above, Section 40(4) of the 2001 Act provides that an appeal panel shall determine its own procedure. The Panel determined that the following procedures were appropriate:-

(i) There is considerable overlap between each of the two appeals. The Panel therefore decided that it was appropriate to hear each of the two appeals together, but at the conclusion of the process to produce a separate determination in respect of each of the two appeals.

(ii) Each of Ryanair and the daa was invited to produce detailed written submissions.

(iii) Each of Ryanair, the daa and the CAR was invited to produce such written submissions as they wished to make in response to the initial written submissions by Ryanair and the daa.

(iv) Aer Lingus applied to the Panel to be permitted to participate. Having consulted with the other participants, the Panel granted Aer Lingus the right to participate. Aer Lingus was therefore also invited to make a written submission in response to the initial written submissions by Ryanair and the daa. Ryanair, the daa and the CAR and Aer Lingus are hereafter referred to collectively as "**the Participants**".

(v) The Panel, having considered the written submissions, determined that it would hold an oral hearing. Because of the restrictions following from the public health emergency caused by Covid-19, it was not possible to convene an oral hearing in the usual way. Accordingly, the oral hearing was convened by way of videoconference, which took place on 6 and 7 April 2020. Each of the daa, Ryanair, CAR and Aer Lingus participated in the oral hearing. A stenographer kept a record of the hearing.

7. It follows from section 40(5) of the 2001 Act that the Panel may not substitute its own view for the view of the Commission. It does not have the power to reject the Determination or amend it in any respect. It may only refer the decision in relation to the Determination back to the Commission for review when it considers that there are sufficient grounds for doing so by reference to the provisions of section 33.

8. The Panel asked each of the participants to address the nature and standard of the appeal to the Panel.

9. daa submitted that the appeal was on the merits. The Panel is obliged to look at the merits of the grounds of appeal brought before it. Where it is satisfied that there is merit in the arguments being presented, then the duty of the Panel is to refer the relevant matter to the Commission for its review. It submitted that each flaw could be considered individually, with errors also to be considered cumulatively where applicable.

10. Ryanair submitted that the appropriate approach is that set out in the decision of the Appeal Panel in 2009. The 2009 Appeal Panel determined that: -

    (a) If the Panel was not satisfied that the Commission had properly considered the matters referred to at section 33, it would refer the Determination back to the Commission for further consideration.

    (b) If the Panel was satisfied that the Commission had considered the matters referred to at section 33 but was satisfied that there were sufficient grounds to do so, it would refer the Determination back to the Commission for further consideration.

    Ryanair referred to the decision of O'Sullivan J. in *Aer Rianta v. The Commissioner for Aviation Regulation* (unreported, O'Sullivan J., 16th January 2003). It was submitted that O'Sullivan J. determined first that the jurisdiction of the Panel was one for the correction of errors, and secondly that the Panel could make recommendations which must be considered by the Commission. It was submitted that the Panel was not obliged to show any deference to the views of the Commission. The question is not whether the Commission acted irrationally or unreasonably, but rather whether the Panel as an expert group

takes a different view from that taken by the Commission. If the view of the Panel on the merits is different from that taken by the Commission, then it should exercise its power to refer the decision back to the Commission.

11. Aer Lingus submitted that, if the Panel was not satisfied that the Commission had properly considered the matters referred to at section 33, then it should refer the Determination back to the Commission for further consideration. That was in accordance with the first part of the decision of the Appeal Panel in 2010. The second part of the decision of the Appeal Panel in 2010 stated simply that if the Panel was satisfied that the Commission had considered the matters referred to at section 33, but was satisfied that "there were sufficient grounds to do so", it would refer the Determination back to the Commission for further consideration. Aer Lingus submitted that "sufficient grounds" should be more than a mere difference of opinion with the conclusion reached by the Commission, and that as a minimum the Panel should be able to point to some objective standard which the Commission had failed to follow. The standard however was not one of manifest error, or any other standard akin to that applied in judicial review.

12. The Commission submitted that the correct test is that of whether, taking the adjudicative process as a whole, on the balance of probabilities the Panel believes that there is merit in the claim of an appellant that the Commission's decision on the point in question should be revisited by the Commission with a view to varying the decision in the manner claimed. Some examples of what might constitute a sufficient ground within the meaning of section 40 were proposed:-

(a) Where there is a clear error such as a mathematical error or a misstatement of a sum of expenditure or cost, or an error in relation to the application of a financial modelling methodology.

(b) Where the reasoning of the Commission on a point is logically incoherent.

(c) Where there has been an omission on the part of the Commission to take into consideration a fact that was before it.

(d) Where the Commission has clearly misunderstood a representation made by one of the appellants.

(e) Where the Panel believes that there is merit in the argument that the weight accorded by the Commission to a representation made by an appellant was incorrect having regard to the evidence. It was submitted that the Panel is a panel of experts and is entitled to draw on its own expertise and knowledge to look afresh at the decisions of the Commission.

A distinction was drawn between the nature of judicial review and the nature of an appeal to the Panel. The test on this appeal is not one of manifest error or serious error, but simply a test of error. Issues of process, such as an alleged lack of consultation, fell to be considered exclusively as part of a judicial review, and therefore were not appropriate to be considered as part of an appeal to the Panel.

13. In response, Ryanair said that it did not ask the Panel to interfere with the decision of the Commission on the grounds of procedural error, such as lack of consultation. Ryanair's challenge was substantive and not procedural in nature, although it maintained that absence of sufficient consultation could constitute an error. Ryanair agreed with the Commission that simple error was enough, and that there was no requirement to afford deference to the assessment of the Commission. Ryanair submitted that its points of appeal fell easily within some of the categories to which the Commission had pointed as being examples of circumstances in which the Panel could uphold an appeal.

14. The Panel determined that:-

(a) If the Panel was not satisfied that the Commission had considered the matters referred to at section 33 it would refer the Determination back to the Commission for further consideration.

(b) If the Panel was satisfied that the Commission had considered the matters referred to at section 33 but it was satisfied that there were sufficient grounds to refer that consideration back to the Commission, it would refer

the Determination back to the Commission for further consideration. In all other events, it would uphold the Determination.

(c) In deciding whether there were such sufficient grounds, the Panel would reach its decision on the merits. It would therefore be necessary to identify an error on the part of the Commission. The Commission 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.

15. Because this is an appeal on the merits, procedural concerns would not generally constitute sufficient grounds to refer a consideration back to the Commission. The Panel did not dismiss the possibility that lack of consultation might constitute an error for its purposes, but it bore in mind that issues of lack of consultation go more to process than to the merits and that the appeal to the Panel is not a judicial review. To some degree, the process before the Panel itself could assist in remedying any perceived difficulties in the consultation process.

16. The statutory requirement under section 32(17) of the 2001 Act is that the Commission should give notice of its intention to make a determination, and that it should specify the period within which representations with respect to the proposed determination may be made by members of the public. These obligations were clearly fulfilled and exceeded by the Commission. In its submission of the 16th March 2020, the Commission set out the consultation process that it followed. In April 2018 it published an Issues Paper on which it sought representations. It received and published those representations in July 2018. It then embarked on an extensive consultation process with users and stakeholders, including Ryanair, and with its Passenger Advisory Group. It published a Draft Determination in May 2019, informed with five draft reports from external consultants. It consulted again with the Passenger Advisory Group. It received and published responses from 38 stakeholders in July 2019. It offered each person who had made a submission the opportunity to meet, and a number of such meetings took place in July and August 2019. It held workshops with Dublin Airport in July to October 2019. Finally, it published the Determination on 24th October 2019. There is no requirement, whether under

the Act or otherwise, to give notice of every single detailed adjustment from the Draft Determination that the Commission might have in mind to make.

17. The Panel also asked the participants for submissions on what approach it should take to evidence that was not before the Commission, and to events occurring after the date of the Determination. That was a particularly acute issue for the Panel because the onset of the Covid-19 pandemic post-dated the Determination. The consequences of that pandemic are likely to have been particularly severe for airlines and airports. Section 32(14) of the 2001 Act provides for the Commission, under certain circumstances, to review and amend a determination.

18. The Commission submitted that the Panel should consider only events and evidence which were before the Commission when making its Determination. It pointed out that Covid-19 is having a significant impact on the aviation industry and is changing many of the underlying assumptions of the Determination, and that the impact of this would be best dealt with in a future review under section 32(14) if such a review is deemed necessary.

19. daa submitted that it was appropriate for the Panel to focus on events that occurred before the date of the Determination but suggested that reference could be made to later events when they clearly and distinctly implied that previous judgments and conclusions capable of having significant effects could no longer be reasonably sustained. While daa submitted that it would not be appropriate for the Panel to rely on evidence that was not before the Commission as the basis for its decision, it suggested that the Panel can and should have the ability to take into account evidence of material significance which demonstrates that judgements made can no longer be reasonably sustainable. It suggested that the Panel for that purpose could look at outturns and other findings that further support existing evidence previously presented to the Commission.

20. Ryanair submitted that events occurring after the Determination should be considered (if at all) in a review under section 32(14), and not by the Panel. It suggested that in particular, events related to Covid-19 would be matters for the Commission to consider in the first instance. Ryanair agreed that the Panel

should consider only evidence which was before the Commission when making the Determination.

21. Aer Lingus submitted that it was appropriate for the Panel to make its decision on the basis of the facts as they stood at the time of the Determination. In particular, it suggested that the scale of the impact of Covid-19 is such that an interim review will inevitably be required, and that that was the appropriate forum for the detailed review of the impact of events which have occurred since the Determination.

22. In the circumstances, the Panel concluded that it would be appropriate for it to have regard only to material which was before the Commission when it made the Determination, and not to subsequently procured materials or subsequent events. That was of particular importance for the purpose of these appeals, given the likely impact of Covid-19 on many of the assumptions underlying the Determination. The impact of events subsequent to the Determination was therefore deemed by the Panel to be a matter exclusively for review under section 32(14) of the 2001 Act, if there is such a review.

23. The Panel likewise determined that it would have regard only to material which was before the Commission when it made the Determination, and not to subsequently procured materials. The structure of the Act requires all issues to be considered in the first instance by the Commission. It would be inconsistent with that structure if the Panel could consider evidence that had not been before the Commission.

DAA'S GROUNDS OF APPEAL

24. daa set out its grounds of appeal in a letter to the Minister of the 18th December 2019. It then provided written submissions dated the 2nd March 2020. Initially, it provided a redacted version of those submissions to the other participants, and an unredacted version to the Panel. The other participants executed an appropriate non-disclosure agreement, and each received a copy of the unredacted submissions. The Commission provided a written submission dated the 16th March 2020, and Ryanair and Aer Lingus provided written submissions both dated the 19th March 2020. daa provided further written submissions dated 19th March 2020 which, although primarily responding to Ryanair's grounds of

appeal, did provide some material in relation to its own grounds of appeal. daa, Ryanair, the Commission and Aer Lingus all made further oral submissions in the course of the hearing that took place on the 6th and 7th April 2020.

25. daa's appeal to the Panel can be broken down as follows:-

Ground 1: Passenger Forecasts
Ground 2: Cost Pass Through mechanism.
Ground 3: Cost of Equity.
Ground 4: Cost of Debt.
Ground 5: Capital Expenditure Disallowance 2015 to 2019.
Ground 6: Capital Expenditure Disallowance 2020 to 2024
Ground 7: Reprofiling Triggers.
Ground 8: Service Quality Measures.

This was the numbering used in daa's submissions of the 2nd March 2020. The Panel noted that it used different numbering during its oral presentation, but the original numbering has been retained in this determination.

APPEAL GROUND 1: PASSENGER FORECAST

26. In the Draft Determination, the Commission forecast traffic of 33.6m passengers for 2020. In the Final Determination, it forecast traffic of 34m passengers for 2020. It then forecast that passenger numbers would grow from 34m in 2020 to 38.1m in 2024, representing an average annual growth rate of 3%. That in turn was based largely upon an assumption that passenger numbers would grow in line with GDP to reach the 2020 forecast of 34 million. Accordingly, the target passenger growth rate for each year 2020 to 2024 was estimated by multiplying an elasticity of 1.01 by the Irish GDP forecast growth rate from the IMF. Similarly, the 2020 figure was based upon a 2019 passenger estimate of 32.85 million, which was then increased in accordance with the formula described above.

27. In its appeal, daa raised three main issues in respect of this traffic forecast, namely:-

(a) It suggested that the Commission had ignored the facts that daa presented with regards to the 2020 traffic, or to undertake a risk assessment.

(b) It suggested that the Commission had used an inappropriately simplistic forecast model, rather than using a more advanced model such as that proposed by daa in its regulatory submission or by Mott MacDonald in daa's response to the Draft Determination.

(c) It suggested that the Commission had ignored the infrastructure constraints at the airport that had been pointed out to it by daa for the period 2020-2024.

The daa submissions

2020 Forecast

28. daa had suggested in submissions to the Commission in both August and October 2019 that there was a wide range of downside risks in terms of passenger numbers facing the airport. daa submitted that, while Dublin Airport has seen large growth in passenger numbers since 2015, growth at both Dublin and other airports has slowed significantly since 2018. daa said that it pointed out to the Commission on the 8th July 2019 that there was a wide range of downside risks facing the airport. In its discussions with the Commission on the 2nd October 2019, it made further observations, from which it predicted that capacity looked flat for the summer of 2020. The uncertainty was generally negative rather than positive. daa suggested that, under these circumstances, the Commission erred in failing to undertake a methodical risk assessment to evaluate and substantiate the risks associated with the passenger forecast.

29. daa, in its submission to the Panel, pointed to events that have occurred since the Final Determination which it said supported the prediction that it had made prior to the Final Determination that the overall potential for traffic growth was low.

30. daa pointed out that there are three ways to increase passenger traffic in Dublin Airport, namely extra capacity, higher load factors and decreased seasonality. The only plausible upside for summer 2020 was in load factor, but daa suggested that there was a very limited ability for this to increase further. It pointed out that load factor has stayed flat at 83% for the last three years, and that Dublin Airport has a high load factor in comparison with other airports around the world. daa suggested that, with no capacity growth, little change to seasonality and little potential for load factor change, passenger traffic is likely to be close to static in 2020 at circa 33m passengers. Overall, it suggested that the Commission's passenger forecast should be reasonable, and not excessively positive.

31. daa also suggested that the Commission had failed to undertake a methodical risk assessment to evaluate and substantiate the risk associated with the passenger forecast as part of the Final Determination. It suggested that such a risk assessment would have established the over-estimation impacts to both volume and the denominator and the knock-on implications to commercial revenue. It suggested that this would have allowed for a quantification of the known and unknown risks, as well as any associated impacts.

The forecast model

32. In its written submissions, daa submitted that the Commission's modelling approach was weak because it ignored available information in respect of what was likely to happen in 2020; because it did not use dummy variables; because it forecast at a total annual level ignoring how differently specific markets are performing from each other; because its log-log model may not be best utilised for traffic at Dublin Airport; and because it ignored increasing constraints at the airport. Modelling issues were not discussed in any detail in the initial oral presentation by daa. In replying submissions, daa made it clear that it did not oppose the principle of GDP based modelling, but that it did not think that passenger forecast could be based simply on GDP. In particular, while GDP might legitimately be used to forecast demand, it was not correct for the Commission to ignore other issues that were specific to Dublin Airport.

Infrastructure constraints

33. The third issue, which of course also forms part of the first and second issues, is the suggestion that the Commission ignored the infrastructure constraints in Dublin Airport for the period 2020-2024. As pointed out above, daa submitted that Dublin Airport is unlikely to be able substantially to grow via increased slots, increased slot utilisation or increased load factors.

34. In advance of the Final Determination, Mott MacDonald had been commissioned by Dublin Airport to review the Commission's traffic forecast. They had argued that the growth in passenger numbers has been so significant over the past five years that the facilities are no longer available to accommodate 3% growth per annum. In particular, daa pointed to the fact that services flying to Dublin Airport already have a very high load factor, which cannot easily be grown further. While there is scope to grow load factor in the winter months, there has been no positive change in seasonality in recent years at Dublin Airport. daa pointed out that there are no lined up daily slots available in Dublin from the hours of 06.00 to 17.59 in the summer 2020 peak week. Growth in off-peak hours is also difficult, in particular because of the time difference between Dublin and most of the rest of Europe. Equally, daa submitted that there was little room to overcome the difficulties caused by an absence of stand availability by adopting new management techniques. Dublin Airport is effectively full for parking overnight. While Dublin Airport will deliver new stands in accordance with its programme, delivering significant stand infrastructure prior to 2024 will be challenging.

35. While the Mott MacDonald report assumed that Dublin Airport could improve its slot utilisation when it examined constraints in Dublin, daa submitted that the Commission has gone further and has determined that the factors identified by it will completely overcome all constraint issues. daa submitted that this was an error on the part of the Commission.

The Commission's submissions

The 2020 forecast

36. The Commission pointed out that in August 2019 daa had predicted 32.65m passengers for 2019, and in October 2019 had predicted 32.75m passengers. The actual outcome was 32.91m. The Commission commented that notwithstanding the constraints on capacity, passenger numbers grew.

37. For the 2020-24 price control period, the Commission used the same method that it used previously for estimating passenger numbers. That was to multiply the previous year's passenger numbers by demand elasticity and by the GDP growth forecast of the IMF for the following year. It did this for each year of the control period, without making any adjustment for specific factors. In response to the daa's submission to the Panel that there were issues specific to Dublin Airport that might downgrade the forecast for 2020, the Commission said was that it was not trying to forecast exactly for any particular year. Rather it was trying to estimate a trend for passenger numbers for the five-year regulatory period.

38. In response to the suggestion that it had erred in not carrying out a risk assessment of the traffic forecast, the Commission said that it disagreed for three reasons. It said that first, it assessed and consulted on the volume risk allocation, and that daa supported holding the volume risk. Secondly, it suggested that the main effect of passenger numbers reducing the price cap levels in 2020-2024 results from the significant increase in passenger outturns in 2015-2019 rather than the forecast in 2020-2024. Thirdly, it said that it had in fact assessed the interaction between the building blocks and the financial viability of the price cap settlement. It explained those three reasons in some detail in its submissions to the Panel.

The forecast model

39. The Commission acknowledged that it had used a single variable GDP model, using Irish GDP. It acknowledged that it could have used other methods, including a blended GDP model, i.e. using data from several relevant countries. It reviewed the various other models that could have

been used, including the daa forecast and various Mott MacDonald models, and the results of that review are set out in the Final Determination.

40. The Commission said that it had rejected the daa methodology because it was difficult to replicate and check for robustness; the wide range of inputs may be open to many interpretations that would lead to different forecasts; the fact that the methodology had proved not to be accurate even for short periods ahead; and the fact that airline users supported the Commission's model. The Commission said that it chose to continue using its own model because it followed its regulatory precedent since 2009. The Commission believes that it had been shown to work well, but that the model depends on the accuracy of the GDP forecast. It submitted that the model used is simple and transparent, and that it is therefore easy to replicate and check for robustness by any stakeholder.

41. In response to the specific issues about the model raised by daa in its written submissions, the Commission suggested that these had all been addressed satisfactorily in the Final Determination, and pointed the Panel to the parts of that document in which the relevant material could be found. Ultimately, the Commission decided to continue to use the methodology and data sources set out in the Draft Determination, and to estimate an Irish GDP elasticity of passenger volume based on historical data, and then to use this elasticity and GDP forecast to estimate passenger numbers.

Infrastructure constraints

42. As pointed out above, this is relevant to the issue of the 2020 forecast and the appropriateness of the model used.

43. The Commission acknowledged that it used a demand driven forecast, the assumption being that if the demand is there, airlines will provide aircraft to transport the passengers. The Commission said that is aware of the existence of capacity constraints at Dublin Airport, but expressed the view that there is room to grow through various methods including the potential to increase the number of slots; higher slot utilisation; the use of larger aircraft; and the ability of airlines to grow within their existing fleets through higher load factors. All of this is analysed in some detail at 5.63 to 5.80 in the Final Determination.

Other submissions

44. Aer Lingus supported the approach of the Commission on the forecast of passenger numbers. It suggested that there are tools that are available to airlines to meet market-led demand, and that these tools enable the achievability of passenger growth forecasts in situations where capacity constraints exist. Examples are better utilisation of existing slot capacity through the expansion of the peak operating period on a seasonal basis; utilisation of existing slot capacity that remains available at off-peak times; the capacity of individual airlines to up-gauge aircraft to increase capacity; and increasing load factors.

45. Ryanair did not accept that capacity issues could necessarily be relied upon as a rationale for lower demand forecasts. It suggested that, properly assessed, there was in fact more capacity than claimed by daa.

The Panel's consideration

46. Leaving aside some of the more technical issues about the model that was used, the Panel concluded that a central issue was the suitability of the model used by the Commission, and in particular the question of whether it was suitable to use this model without (a) taking account of infrastructure constraints, and (b) taking account of information suggesting other downside risks facing the airport. If it was suitable to use the model notwithstanding these issues, then that largely addressed the issue of the suitability of the 2020 forecast.

47. The Panel did not think that the Commission had erred in adopting a GDP based approach to forecasting passenger numbers. That is the model that it used since 2009, albeit with some adjustments. It is of course the case that its accuracy depends on the accuracy of the GDP forecast. But the accuracy of all forecast models must depend on the accuracy of the inputs. It is a virtue that the model used is simple and transparent, and that it is therefore easy to replicate and check for robustness. Indeed, subject to some points discussed below, daa did not really criticise the principle of GDP-based modelling, at least in predicting demand.

48. The Panel equally did not think that the Commission had erred in rejecting the daa's forecast model. As the Commission pointed out, that methodology is difficult to replicate and check for robustness, and the wide range of inputs may be open to many interpretations that would lead to different forecasts. It noted also that it had not been accurate even for a few months ahead.

49. The Panel had some concerns about the use of this methodology for 2020, without taking account of the downsides and difficulties (including infrastructure constraints, although they are addressed separately below) that daa had brought to the attention of the Commission in July and October 2019. However, it ultimately concluded that the Commission had not erred in its approach. As the Commission pointed out in oral submissions, the use of its GDP model should in principle be as valid for the first year of the determination as it is for any other year of the determination. The Commission is not trying to forecast passenger numbers exactly for any one particular year, but rather is trying to get a trend for the five years. Even if the GDP forecast is correct for 2020, but the forecast number is not reached for other reasons, that does not necessarily demonstrate that the model is inappropriate over a five-year regulatory period. Overall, notwithstanding its concerns, the Panel concluded that it was not an error to fail to take these factors into account. If it is appropriate on an overall level to use the GDP model employed by the Commission, then it can appropriately be employed for the first year notwithstanding the fact that daa may be able to point to particular issues that may arise for the first year of the regulatory period.

50. The question of whether the Commission paid insufficient attention to infrastructure constraints when assessing passenger forecasts is not really a separate issue, but rather forms part of the assessment of whether an error was made in the 2020-2024 forecast or the model generally. The Panel had some concerns about the view that the Commission took on constraints at Dublin Airport. It is obvious that there are significant constraints at Dublin Airport.

51. One of the Mott MacDonald forecasts was based on runway and stand constraints. The use of that model gave lower passenger forecasts for each of the five years of the regulatory period, but in particular for the first four years. However, as pointed out by the Commission at 5.22 in the Final

Determination, historic data shows that passenger growth above the assumptions of the Mott MacDonald model has been achieved due to different combinations of increased slot utilisation, load factors and slot capacity.

52. The legitimacy of the unconstrained approach to passenger forecasts is examined in more detail at 5.63 to 5.80 of the Final Determination. The Commission analysed the various points that had been made, but concluded that there was room to grow via a menu of airport charges and incentive schemes or similar agreements with airlines; increased load factors in off-peak months; expansion of existing routes in off-peak months; use of departure slots in the evening off-peak hours; use of larger aircraft; and use of higher stand utilisation ratios. Overall, the Commission concluded that it did not consider the points made by Dublin Airport to be persuasive to the extent that its demand driven forecast was not valid.

53. Although the Panel was concerned about these constraint issues, and the legitimacy of not using them as part of the model, it was ultimately persuaded that the Commission had not erred in the circumstances that presented themselves in October 2019. In particular, the Panel accepted that there is room for growth at Dublin Airport through the various mechanisms identified by the Commission. It noted that in the 2018 Annual Report Dublin Airport stated that it "is facing some capacity constraints but can continue to expand in smart ways, by increasing transfers, attracting new airlines, and growing into the existing infrastructure through filling off-peak periods, increasing load factor and up-gauging those aircraft. This will position us for the future when constraints are addressed." The airport is in the best position to ensure that demand is met. Although the Panel acknowledges that forecasts of passenger numbers must be treated with some circumspection, whether given by Dublin Airport on the one hand or airlines on the other hand, it notes also that the airlines tended to agree with the passenger forecasts upon which the Commission has relied. The Panel also bore in mind that daa had been anxious to take passenger risk onto itself. This infers that it should have not just the benefit of passenger risk, but also the reasonable detriment. Accordingly, the Panel concluded that the Commission had not made an error in failing to factor constraints, including runway and stand constraints, into its forecast model.

54. Thus, the Panel concluded that the Commission had not erred in fixing upon the model that it used both to reach the 2020 forecast and the forecast for the remaining years of the regulatory period, without taking account of infrastructure constraints or information suggesting other downside risks facing the airport.

55. There were however other issues raised under this heading. The Panel did not think it correct to suggest that the Commission had failed to carry out a risk assessment of the traffic forecast. The risk assessment analysis that the Commission carried out is set out at 2.11 to 2.18 of its submissions to the Panel. The Panel notes in particular that daa supported holding the volume risk. The Panel thinks it correct to say that the Commission could not build risk into a forecast, while simultaneously allowing Dublin Airport the full benefit of exceeding the forecast. It noted also that the main effect of passenger numbers reducing the price cap levels in 2020-2024 results from the significant increase in passenger outturns in 2015-2019 rather than the forecast from 2020-2024. The Commission did consider the interaction between all the building blocks in arriving at the 2019 Final Determination, as stated in the Determination itself. The Panel therefore did not regard the Commission as having erred in this regard.

56. Leaving aside the issues of information suggesting weakness in 2020 and infrastructure constraints, both of which are discussed above, the major complaints raised in the daa written submissions are

(a) The treatment of outlier years
(b) The alleged failure to consider whether it was correct to use a log-log model at all
(c) The treatment of alternative base years

57. These can be addressed relatively briefly. As the Commission points out, the use of dummy variables to correct for the variance seen in 2006 to 2009 only improves the fit for historic data, but not for the forecast years, because one cannot predict if and when there will be similar outlier years in 2020-2024. The Commission concluded that the regression analysis should take all available years, from 1997 onwards, because the use of an elasticity that

averages all scenarios is consistent with the use of a long-term GDP forecast, which can also be interpreted as an average of short-term economic cycles. The Panel did not think that this approach was erroneous.

58. The Commission estimated Irish GDP elasticity by using a log-log regression. At paragraph 5.84 of the Final Determination, it explained why this is an appropriate methodology for estimating total passenger growth. The Panel thinks that explanation to be reasonable, and certainly as not demonstrating any error on the Commission's part. daa suggests that some of the material in the Determination demonstrates that the log-log model struggles with markets that have seen strong growth at some period. It suggests that this shows that the log-log model is inappropriate at a disaggregated level, and therefore that it is not an approach that should be used at an aggregated level. But the alternative is to use level regressions. At 5.18 to 5.19 in the Final Determination the Commission recorded the results of an exercise that it carried out on the Mott MacDonald unconstrained forecast by key markets. The Panel noted that if the Mott MacDonald forecast had used the transfer passenger forecast that was estimated by daa, then the unconstrained forecast would be 38.5m by 2024, which was higher than the Commission's estimate. The Panel also notes the statement made by the ICAO, recorded at 5.84 in the Final Determination, to the effect that "for estimation of traffic demand at an aggregate level such as global, regional or major traffic flows, the multiplicative (log-log) model is generally considered the most appropriate to use." Accordingly, the Panel does not regard this argument as establishing that the use by the Commission of this method was erroneous.

59. The final passenger forecast issue raised specifically by daa in its written submissions relates to the use of alternative base years. In essence, daa makes the point that, given the model is built using data starting from 1997, it would be expected that if the model was applied to a year starting close to 1997, then the results would be close to the actual numbers in 2018. While this is the case for a base year of 2000, it is not the case for a base year of 1997, or indeed 2008 or 2014. daa says that the Commission has tried to overcome this difficulty by overwriting the start date with the most up-to-date forecast, in this case the 2018 outturn. But daa submits that the model is still unable to accurately forecast five years out. As an example, daa states that,

starting from 2014, even if one had accurate GDP data, the model would predict 34.1 million in 2019. That is nearly 1.2 million above the actual outturn. It is suggested that this flaw reiterates that the forecast model is not robust enough accurately to forecast traffic from 2020 to 2024 on its own.

60. These issues are addressed at 5.48 to 5.51 in the Final Determination. As daa acknowledges, if one starts with the first outturn year (2000) and then forecasts passenger numbers using the outturn GDP growth multiplied by the estimated elasticity, the result is a relatively close fit. The model underestimates the growth between 2006 and 2009 but is a close fit for the rest of the years. This is well illustrated by Chart 5.9 in the Final Determination.

61. It certainly appears to be the case that, if one uses some other baseline years, then the results are not necessarily as consistent with the outturns. However, at 5.50 in the Final Determination, the Commission says that, once it estimates elasticity, it chooses a base year considering the most updated passenger outturn and expectations. While the Panel appreciates the point made by daa, it does not seem unreasonable to adopt this approach. If one uses the approach of updating the base year to use the latest available outturn data, then it seems that the model works reasonably well. Accordingly, the Panel did not conclude that the material brought to its attention by daa under this heading demonstrated that the Commission had committed an error of principle in deciding to use this model.

62. In the circumstances, despite some reservations, the Panel did not conclude that the Commission had erred in the passenger forecasts that it set, or in the model that it used to set them. The Panel emphasises that it is not necessarily concluding that the Commission's model is suitable to use in all circumstances. There may well be circumstances where is would not be reasonable to conclude that a simple GDP-based model could reasonably forecast passenger numbers, including perhaps those that now arise in the Covid-19 emergency.

63. In its written submission, daa requested that the Panel should, on these grounds, refer the decision in relation to passenger forecasts to the Commission for further review. It suggested that the Panel should

recommend that the Commission use the original traffic forecast requested by daa, or at a minimum modify its forecast to consider the real constraints at Dublin Airport and modify the initial years of the forecast to take account that 34m is unfeasible in 2020. The Panel has concluded that sufficient grounds have not been established to refer the Commission's decision back for review on these grounds. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

APPEAL GROUND 2: COST PASS THROUGH

64. The Determination provides for a cost pass through mechanism in respect of certain costs that are unanticipated or under anticipated and outside the control of daa. The criteria that will define the category of costs to fall within this mechanism are set out at paragraph 6.47 and 6.49 of the Final Determination. Costs falling within this formula are remunerated through the application of two formulae, the W factor and the K factor. The W factor operates with a one-year lag on remuneration, while the K factor operates with a two-year lag.

The daa submissions

65. daa raised four issues. It submitted:-

(a) That the Commission had taken an unduly formalistic approach in defining the requirements and formula for the cost pass through mechanism, leaving insufficient scope to broaden the categories of costs covered by the mechanism as may be required for different legislatively mandated costs.

(b) That while the formula intends to delay remuneration for materially unanticipated or under-anticipated costs for a minimum of one year and a maximum of two years, in fact potentially two or three years of costs may not be remunerated via the cost pass through mechanism in the regulatory period.

(c) That the Commission has not specified how the costs incurred over the period 2020-2024 that are unremunerated via the W and K factor will be potentially allowed as part of a future determination.

(d) That the Commission's K factor formula includes an error, as it is not working as intended, which is to ensure that any throughput adjustment between final costs incurred and those estimated by the Commission in the W factor are adjusted for two years later.

66. In its oral submissions daa emphasised also the significant difference between what it had claimed on Opex on the one hand, and the figures allowed in respect of Opex in the Final Determination on the other hand. The gap between daa's submission and the figure in the Draft Determination was some €215 million. By the time of the Final Determination, that gap had narrowed to something in the order of €100 million. daa emphasised that the Final Determination remained very challenging for Dublin Airport, and that Dublin Airport was very competitive relative to peer airports.

67. The issue at (a) above was not supported by a great deal of detail in daa's written submissions, or indeed in is oral submissions.

68. As to the issue at (b), daa suggested that the Commission had erred in not ensuring that costs applicable would be remunerated in a timely basis. It suggested that the W and K factor should be amended as appropriate to ensure that costs applicable through this mechanism are remunerated on a timely basis. In particular, it suggested that there should be no one-year delay for the W factor, or that there should be a catch up over the regulatory period to ensure that costs are remunerated in full within the period.

69. The issue at (c) speaks for itself. The point was made that it was not clear how costs incurred in (say) 2024 could be recovered in 2025, if at all. It was said that this put greater uncertainty into the Opex remuneration process from the point of view of daa.

70. No further details of the issue at (d) were given in the written submissions, or in the course of the oral submissions.

The Commission's submissions

71. In response, the Commission pointed out that the holistic assessment of risk is a key feature of the 2019 Determination, and that Opex risk is generally assigned to the airport. The pass through mechanism for costs beyond the control of daa was a specific exception to the general rule, and its scope was deliberately set out in a narrow and exhaustive way.

72. As to the issue at (b), the Commission made the point that it will on occasion be necessary and proportionate to have a degree of timing inconsistency between expenditure and remuneration, where certain factors are unknown at the time that the Determination is made. In particular, the Commission queried how remuneration falling within the cost pass through mechanism could sensibly be applied without having a time lag, given that Dublin Airport sets its charges ahead of the year in question. It clarified that the revenue stream adjustment is solely a timing question: the financial impact of (say) €16m permitted for the year 2020 would be added to the price cap in 2021, provided that it fulfils the conditions for inclusion.

73. As to the issue at (c), the Commission said that this is relevant for the next determination. It was not properly one to be addressed at this stage. It accepted however that, if the Commission was to apply a consistent approach in the next determination, and assuming the same regulatory structure, it should allow for any equivalent unremunerated costs incurred in 2023/2024.

74. As to the issue at (d), the Commission said that it had not investigated this given the time available. It said however that it agreed with daa that for 2022 at least, the revised element of the K factor is redundant in the price formula. While the timing of cost inclusions in the W factor may allow the mechanism to work as intended, the Commission said that it would be happy to reconsider whether the mathematical application of the mechanism in the price cap formula could be improved. It indicated that it would therefore welcome a referral from the Panel on the mathematical application of the mechanism. In its oral submissions, the Commission clarified that while it could not necessarily see a problem in the manner in which the K factor operated, it was happy to have the matter referred back to it so that it could run further tests in order to see whether it is working as intended.

Other submissions

75. Ryanair submitted that the Commission had addressed this issue correctly, and said that any alternative approach would mean that users would be at a substantial risk of paying more than is necessary, a factor that is especially important where there is no automatic pass through of cost savings.

The Panel's consideration

76. As to the issue at (a), the Panel did not believe that the Commission had made an error in defining the terms on which costs can be claimed pursuant to this mechanism. Those terms are set out at 6.47 and 6.49 of the Final Determination. Because the cost pass through mechanism is an exception to the rule whereby Opex risk is in general assigned to daa, any exception must be tightly defined.

77. As to the issue at (b), in oral submissions daa accepted that there must necessarily be some lag in revenue stream adjustment. A delay of one year in respect of the considerable majority of any such remuneration, with a potential delay of two years in respect of a smaller proportion thereof, does not seem unreasonable. While the Panel accepted that, depending upon the circumstances, the delay may on occasion be longer, the lag in revenue stream adjustment is largely a timing issue. It should not alter the overall outcome for daa. Furthermore, the mechanism is symmetric, so that if there are allowances to be repaid, then the same potential lag will apply. The Panel therefore did not conclude that the Commission had made an error here.

78. That leads to the issue at (c), namely how costs which may be unremunerated over the 2020-24 period will be remunerated in future determinations. In reality, the main concern of daa seemed to be to avoid this difficulty, by ensuring that all Opex is fully remunerated by the end of a regulatory period. But, as the Commission pointed out, this is necessarily something that will have to be addressed at the time of next determination. It did not seem to the Panel that there was any mechanism that the Commission could reasonably have set up that would have ensured that expenditure falling within the cost pass through mechanism, but occurring

late in the regulatory period, would be guaranteed of remuneration prior to the end of the period. The Panel therefore concluded that the Commission had not made an error in this regard either.

79. As to the issue at (d), the Panel agreed, in accordance with the suggestion of both daa and the Commission, that it should refer back to the Commission the question of whether the K factor formula is working as it was intended, namely to ensure that any throughput adjustment between final costs incurred and those estimated by the Commission in the W factor is adjusted for two years later.

80. In the circumstances, the Panel agreed to refer back to the Commission the question of whether the K factor formula is working as it was intended, namely to ensure that any throughput adjustment between final costs incurred and those estimated by the Commission in the W factor is adjusted for two years later. Otherwise, the Panel concluded that this ground of appeal does not give rise to sufficient grounds to refer the Commission's decision back for review. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

APPEAL GROUND 3: COST OF CAPITAL

81. The Commission fixed on a weighted average cost of capital (WACC) of 4.22%, based on the work of Swiss Economics. Overall, daa submitted that the Commission erred in assessing the WACC. The WACC set by the Commission was significantly lower than the WACC range of 4.8% to 6% for the next regulatory period estimated on behalf of daa by NERA Economic Consulting, whose report was submitted to the Commission in January 2019. NERA had proposed a WACC of 6%, which was at the top of its recommended range.

The daa submissions

82. daa submitted that one of the key concerns during the next regulatory period is the need for a determination which will allow for adequate funding of the proposed development at Dublin Airport over the period 2020-2024. The daa

submissions suggest that its debt ratio position is likely to weaken substantially over the course of the next regulatory period. It suggested that, in the circumstances, its proposed investment plan and/or its required expenditure on maintenance, service quality, safety and security, will not be financeable, and therefore will not be delivered, with significant knock on consequences for the traveling public. It suggested also that the outcome of the determination may lead it to take on too much risk, with potentially significant adverse financial consequences in the event of an economic downturn or shock. This would impact passengers, and the financial performance and pre-existing and future financial obligations of Dublin Airport.

83. Dealing more specifically with the cost of equity, daa suggested that a real post tax cost of equity of 6%, which was ultimately allowed by the Commission, represents an inadequate rate of return on equity for the airport over the period 2020 to 2024. It pointed out that the allowance is substantially lower than the 7.1% recommended by its consultants, NERA. daa pointed to a number of errors which it said had been made by the Commission in its calculation of the cost of equity. It identified three in particular, namely:-

(a) The calculation of the Asset Beta.
(b) The derivation of the Risk-Free Rate (“**RFR”**).
(c) The calculation of the Total Market Return (“**TMR”**).

84. Of these, by far the most important was the Asset Beta. Mr. Grayburn of NERA, who presented on this issue on behalf of daa, explained that of the 110 basis points difference between the Commission’s and daa’s position on the cost of equity, the TMR accounted for about 20 basis points difference, the RFR was minimal, so that the Asset Beta was the substantive element of the difference.

Asset Beta

85. Asset Beta measures a stock’s comparative riskiness to the market. Higher riskiness infers a higher Asset Beta. A higher Asset Beta, all else being equal, leads to a higher cost of equity.

86. The Commission's estimate was of an Asset Beta of 0.5%. daa said that the proper estimate was one of at least 0.6%. daa submitted that there were a number of flaws in the methodology used by Swiss Economics in calculating the Asset Beta. They can be broken down as follows:-

(i) Swiss Economics placed undue weight on poor comparators, leading to an underestimation of the Asset Beta. Swiss Economics had given no theoretical basis for the selection of the comparators, and there was an inadequate weighting structure of the various risk factors.

(ii) A flawed approach was used to de-lever and re-lever the Asset Beta.

(iii) The Commission's reduction in the Asset Beta from the previous price control period for Dublin Airport was not supported by regulatory precedent,

(iv) The Commission's reduction in the Asset Beta for Dublin Airport was not supported by relevant empirical evidence

87. Of the various alleged flaws, that at (i) above seems to be the most important, namely the suggestion that the methodology placed undue weight on poor comparators. The Swiss Economics estimate had been based on an international benchmarking exercise, where it looked at the observed estimates of nine listed airport companies, and the regulatory estimate of the Beta for an additional three unlisted airports. It then applied a weighting scheme. That scheme assigns scores to each comparator based on their comparability to Dublin Airport in three risk categories (regulatory environment, demand structure and business structure).

88. daa suggested that the proper approach would be to focus on airports that operate under a similar five-year incentive based regulatory framework to that used by the Commission for Dublin Airport. Using that approach, NERA identified AdP, AENA and Auckland as operating under an incentive-based framework. Auckland was excluded because of the size of the market. It pointed out that the UK's CMA had recently taken a similar approach in a

determination relating to NATS (the UK's air traffic control service provider). NERA suggested that an error in the approach of Swiss Economics was to place undue weight on airports operating under low risk cost of service regulatory regimes, such as Frankfurt. Those airports are unlike Dublin Airport in terms of their risk characteristics. Of the three comparators used by Swiss Economics, it was suggested that regulatory framework is the principle Beta risk. It is irrelevant to consider demand structure if an airport does not face demand risk in the first place. Thus, on an overall basis, daa considered that undue weight was given by Swiss Economics to comparators that are not in fact really comparable to Dublin Airport.

89. As to the issue at (ii), NERA said that it disagreed with Swiss Economics' use of the Hamada formula. It favoured instead the Miller formula.

90. As to the issue at (iii), daa submitted that the Commission's proposed Asset Beta was in contrast to the Beta determinations by other Irish regulators. Those Determinations were submitted to have generally increased over the recent period. daa pointed out, given what it described as the lower risk passenger profiles of AdP and AENA, both of which have Asset Betas of around 0.6% based on NERA's estimates, it followed that daa's Beta should be at least as great as the empirical Beta estimates for these two entities.

91. As to the issue at (iv) above, daa submitted that the Commission was wrong to assume that there has been a substantial reduction in Dublin Airport systematic risk since the 2014 Determination. The investment programme will require high levels of investment that will increase the cost equity and operating leverage, resulting in greater systematic risk relative to 2014. Swiss Economics had suggested that many comparators with strong Beta Assets have comparable Capex/RAB ratios. The NERA presentation to the Panel suggested that this was not true for AENA, one of the main comparators. It was suggested also that sector-wide empirical Betas have increased since the 2014 determination, and that determinations by other Irish regulators are broadly similar to 2014 determination. It is suggested that the Commission did not provide any evidence to support the expected reduction in Beta risk.

Risk free rate

92. daa made a number of points under this heading. First, it said that the Commission should have taken a longer view. In deriving the RFR for Dublin Airport, Swiss Economics was said to have placed an over-reliance on short run market evidence and to have failed to take into account long-run evidence. In this regard, daa submitted the Commission had not followed the approach taken by other Irish regulators. Secondly, in estimating the RFR, Swiss Economics used German bond yields, but failed to include a country risk premium in those yields, to reflect the additional risk of investing in Ireland. Thirdly, Swiss Economics calculated its forward rate uplift based on all Euro area government bonds and AAA-rated Euro area government bonds, but it did not consider the Irish government bonds' forward rates. It was submitted that this was an error: a forward rate adjustment based on Irish government bonds should have been used in order to be consistent with the use of a national RFR.

93. It was submitted that overall, the inclusion of a country risk premium in the RFR, and the use of forward rates consistent with Irish government bonds, would increase the RFR to a mid-point estimate of -0.25%. This was higher than the point estimate of -0.61% adopted by the Commission on the advice of Swiss Economics.

Total market return

94. daa suggested that the TMR range of between 6% and 6.8% estimated by Swiss Economics, giving rise to an estimate of 6.4% adopted by the Commission, was flawed and unreliable. It made a number of points under this heading. First, it pointed out that Swiss Economics had assumed a ten-year holding period of long-run historical returns. This was said to be inconsistent with surveys of equity market participants and UK regulatory precedent. Instead, one to five-year holding periods should have been used. Secondly, daa suggested that the Commission should properly have considered not just a European TMR, but also a world TMR. The latter was said to be a more reliable investment parameter, with lower volatility and more available information. Thirdly, it was said that Swiss Economics relied

only on a simple one-stage dividend discount model (DDM) as the basis for its forward-looking evidence. It was suggested that this approach is overly simplistic for high growth countries such as Ireland. It was said that, instead, a multi-stage model should have been used, as this would have proved more realistic. daa submitted that there is no evidence that short-run GDP growth is a good proxy for investors' expectation of dividend growth.

95. The daa submission was supported by a report from NERA dated the 28th February 2020. However, as acknowledged by the Commission, there was in fact nothing particularly new in that NERA report. The issues raised in it, and again discussed by Mr. Grayburn of NERA in his oral presentation, had largely been considered by Swiss Economics and the Commission prior to the production of the Final Determination. Thus, although the Panel has determined that it will not consider material that was not before the Commission when it made the Determination, it was not an offence against that principle to consider the points made by NERA and Mr. Grayburn on behalf of daa.

The Commission's submissions

Asset Beta

96. The first point under the heading of Asset Beta is the suggestion that the Commission placed undue weight on poor comparators. The Commission submitted that Swiss Economics implemented a transparent methodology and tested different weighting scenarios. Section 5.2 of the Swiss Economics final report of the 30th September 2019 sets out the reasons for choosing the approach that it did. It explains why differences in regulatory environment, demand structure and business structure are all of significance. Paragraph 5.2.4 and Table 22 represent an overview of awarded points, and the resulting weights for all airports across all criteria. As explained in the Swiss Economics final report, regulatory characteristics have a higher weighting than demand and business structure characteristics, which is in line with the notion that the regulatory environment is a principal risk factor. The Commission also pointed out that Appendix A.5 and Table 47 presents a sensitivity analysis of the impact on the Asset Beta of five weighting schemes. The Table suggests that the effect

of the choice of schemes on the Asset Beta is relatively small. Swiss Economics explained at page 82 that their choice of comparability measures was based on a qualified assessment of the real-world parameters that determine an airport's level of undiversifiable risk. The use of a large sample in order to reduce the risk of outliers distorting the estimate is important given the strong volatility across airports' Asset Betas.

97. The second issue is the use of the Miller as opposed to the Hamada formula. The Commission points out that the former assumes a constant leverage ratio, while the latter assumes constant debt. Swiss Economics had said that the assumptions underlying both formulas are unlikely to be met in practice. Swiss Economics had continued to use the Hamada formula, because the impact on Asset Beta estimates was minor. The Thessaloniki Forum of Airport Charges Regulators had recommended its use.

98. The third and fourth issues are the suggestion that the reduction in Asset Beta from 2014 is not supported by regulatory precedent, and that the value is lower than justified by empirical evidence. The Commission pointed out that there was a change in the general approach between the 2014 and 2019 Determinations. In the 2014 Determination, point estimates towards the upper end of the range for each of the cost of capital components were chosen. This implicitly aimed up the total allowed cost of capital. However, in 2019, the Commission chose the mid-estimate within each range, and then added an explicit aiming up allowance to the total allowed rate. The Commission submitted that the market evidence in 2014 supported the same Beta estimate as the evidence in 2019, but that the difference is explained by the treatment of the aiming up allowance. The Commission pointed out that Swiss Economics had reported that, out of ten comparator airports, only the ranges for AdP and Fraport support values as high as 0.6% in 2019.

99. As pointed out above, daa points out that CIP 2020 will increase its cost of equity and operating leverage. It submits that the Commission failed to supply evidence of decreased Beta risk under these circumstances. The Commission points to the conclusions of Swiss Economics to the effect that there was no compelling reason to adjust the Asset Beta of Dublin Airport because of the CIP 2020. Its rationale was that the aiming up component is

already preventing the negative consequences that an under-estimation of the cost of capital would have on investment incentives.

The risk-free rate

100. The Commission clarified that Swiss Economics relied upon evidence over various time periods, ranging from one to five years. The Commission submitted that daa was wrong to suggest that the risk-free rate should be as high as 2%. That is against financial theory, for three reasons. First, financial theory expects that the cost of debt is a sum of the risk-free rate and a positive debt premium. Swiss Economics estimates a cost of debt of 0.7% for Dublin Airport and it follows that the risk-free rate cannot be above 0.7%. Secondly, Swiss Economics had suggested that using long-term evidence for the risk-free rate is contrary to the theoretical and empirical evidence on the TMR approach. Thirdly, the Swiss Economics final report showed evidence that bond yields would remain below 0% during the next regulatory period.

101. The Commission disagreed with the proposition that it would have been correct to add a country risk premium to the German bond yields to reflect the additional risk of investing in Ireland. The Commission suggested that the proper interpretation of the Thessaloniki Forum Guidelines is that Irish bonds should be used only if they are considered risk free. The use of German government bond yields is therefore correct, as they have been consistently considered risk free, unlike Irish government bonds.

102. The Commission disagreed that there was any failure to follow regulatory precedent. On the contrary, the Commission submitted that it was following the Thessaloniki Forum recommendations, and indeed applying the same methodology that it had applied in 2014.

103. In response to the criticism that Swiss Economics had not considered Irish government bonds forward yields, the Commission referred to page 24 of the Swiss Economics Final Report. There, it is explained that forward rates of all-rated and AAA-rated Euro area government bonds were used because European bond data is readily available from the ECB, whereas German or Irish data is not available for the wide range of maturities required for this analysis.

Total market return

104. The Commission pointed out that the Swiss Economics Final Report at page 77 gave reasons for using the ten-year holding period that had been criticised by daa as inconsistent with surveys of equity market participants and UK regulatory precedent. In summary, a ten-year holding period is consistent with the tenor used in estimating the cost of debt and the RFR. In both cases, the bond maturity is ten years. Furthermore, the UK Regulators' Network recommends using a long investment horizon, such as ten years.

105. In answer to the criticism that it would have been more appropriate to use world total market returns, the Commission pointed to pages 77 and 78 of the Swiss Economics Final Report. The use of European returns is justified because a European equity portfolio is likely to represent an Irish investor's investment universe better than a world equity portfolio.

106. On the dividend discount model, the Commission disagreed that it would have been better to use a multistage model. Swiss Economics had pointed out that the benefits from more stages in a DDM can be negated by additional errors in the inputs. Swiss Economics explained that a growth model which assumes a constant dividend growth rate performs nearly as well at explaining prices as more complex DDM models. Furthermore, Swiss Economics justified the use of real average GDP forecast as measures for dividend growth, because it is more in line with the approach used by the UK's Civil Aviation Authority's consultants, PwC, in 2017 for their ongoing H7 price control review for Heathrow Airport. Swiss Economics had questioned the reliability of analysts' forecasts because they are prone to large swings, such as at turning points in the economic cycle.

Other submissions

107. Aer Lingus was supportive of the WACC assumed in the Final Determination, and it noted that the WACC included an aiming up contingency to the higher end of the Swiss Economics analysis.

108. Ryanair submitted that the selection by NERA of AdP, AENA and Auckland as the only comparators provided an insufficient sample size. It said that the

aim of the exercise should be to produce a yardstick for a typical airport Beta in its country, and then to consider other factors such as local and national regulatory precedent, systematic risk factors, and best practice recommendations, to estimate a Beta specific to Dublin Airport. It submitted that the selected Betas should then be considered in relation to the relevant local index. It suggested the Commission had failed to do this, leading to an overstatement of the Beta. It suggested that to adopt the approach recommended by daa would compound this alleged error.

109. Ryanair supported the use by the Commission of the Hamada formula for de- and re-leveraging, stating inter alia that its use was recommended by the Thessaloniki Forum Guidelines.

110. Ryanair disagreed with the proposition that regulatory precedent suggested that there should be an increase in Asset Beta. It said that the four comparators to which the Commission had drawn the Panel's attention had an Asset Beta lower than that of Dublin Airport in their respective previous determinations, as did three out of four in their most recent determination.

111. Ryanair submitted that the Commission was correct to have made a downward adjustment in Asset Beta from the 2014 determination. It said that the Commission correctly identified a reduction of risks facing Dublin Airport, not least because there is now a substantial improvement in the Irish economy. Ryanair suggested that the Asset Beta determined by the Commission was unjustifiably high, so that any further uplift would be wholly unwarranted.

112. Ryanair suggested that if the proposed capital expenditure was properly scaled to user requirements and the demand forecast, then the risks inherent in a higher Capex/RAB ratio simply would not arise.

113. Ryanair supported the selected risk-free rate. However, it said that the total market return should be adjusted to be on a consistent timeframe.

114. Ryanair said that there was no need to add a country risk premium to the risk-free rate, because the equity returns and risk premiums are done at a level where German government bonds are seen as "risk-free" in comparison to Irish government bonds. Ryanair submitted that countries

such as Italy, Portugal and Spain are not comparable in terms of risk to Ireland. Ryanair disagreed with the use of Irish government bonds as a basis for making a forward rate adjustment to the RFR.

115. On total market returns, Ryanair supported the holding period of 10 years for investments suggested by Swiss Economics, as described above. This was appropriate because airports, as infrastructure investments, are lower risk than the market as a whole, and such investments tend to have longer holding periods. According to Ryanair, it follows that daa's contention that it was appropriate to reduce the holding period was flawed.

116. While Ryanair agreed that the definition of total market return strictly applies to the nation in which the market is being considered, it supported the use of a European TMR as recommended by Swiss Economics. This was appropriate given the nature of the risk-free rate used in the estimate, and in order to maintain consistency. It suggested that, with the use of a global TMR, the cost of equity would be inaccurate and overestimated.

117. Finally, Ryanair submitted that no forward adjustment to the total market return is needed, because the DDM assumes that all companies in the market are issuing dividends with an assumed growth rate.

The Panel's consideration

118. The case made by daa is that the cost of equity is too low by 110 basis points, on account of the various flaws in the Commission's methodology suggested by daa. The Panel bore in mind the general approach taken by the Commission to the cost of capital. It effectively estimated a "steady state" cost of capital for Dublin Airport, but then applied a 50 basis points uplift to take account of the CIP 2020 programme. Furthermore, it applied a financeability adjustment in order to achieve financial ratios. The latter does not add long-term value, but simply reprofiles cash flow. The Commission explained in oral evidence that it had taken this approach to avoid locking in a higher than warranted steady state cost of capital: it permits it for instance to remove the 50bp aiming up allowance if the capital expenditure programme is ultimately deemed unnecessary. In order to reach this steady state cost of capital, the Commission estimated ranges for each of the

individual components, and then took numbers around the middle of each range. As pointed out by the Commission, this approach is to some extent a variation from that that lay behind the 2014 Determination, when points in the higher range of estimates were chosen.

119. The challenge by the daa focusses on the approach of the Commission to a number of the individual components. It relies to a considerable degree on the importance of being able to fund its very large capital investment programme. In assessing that argument, the Panel had to bear in mind that the significance of the programme for the WACC has been taken account of not just in the individual component parts, but also in the aiming up allowance. Furthermore, if any individual error was determined, and if that led to an increase in the cost of equity, that might have the effect of requiring a corresponding reduction in the 50 bp uplift that had been permitted as an aiming up allowance.

Asset Beta

120. The Asset Beta was the most important issue raised by daa under this heading. In turn, it appeared to the Panel that the most important part of the Asset Beta argument was the contention that undue weight had been placed on poor comparators. The Panel carefully considered the submissions of daa on this issue, but ultimately, acknowledging that there is room for judgement in such decisions, the Panel did not agree that the approach of Swiss Economics and therefore the Commission was in error.

121. It is undoubtedly the case that the regulatory environment is a principal risk factor. That is acknowledged by Swiss Economics. It is not however the only risk factor. The other factors identified by Swiss Economics, namely differences in demand structure and differences in business structure, are also of some importance. Swiss Economics allocated five maximally obtainable points for regulatory environment characteristics, whereas the maximum points for each of the other two comparability characteristics was two. This weighting did not seem to the Panel to be incorrect. Furthermore, the Panel agreed that it makes sense to aim for a somewhat larger sample, in order to reduce the risk of outliers distorting the estimate. This does not lead to the inclusion of irrelevant comparators. Where comparators are

relevant, but less relevant than others, the proper approach is to devise a weighting scheme. Accordingly, the Panel did not consider it an error in an overall sense that the Asset Beta for daa should be calculated to be lesser than the Asset Beta for AENA and AdP.

122. Equally, the Panel did not consider it an error to make use of the Hamada formula rather than the Miller formula. The Panel agrees that the impact is likely to be relatively small, and notes in any event that the Thessaloniki Forum recommended the use of the Miller formula.

123. Nor did the Panel conclude that there was an absence of evidence for the reduction in Beta values between 2014 and 2019. As pointed out above, in 2014, the Commission took point estimates for the upper end of the range for each of the components of the cost of capital, which implicitly aimed at the total allowed cost of capital. In 2019, it took the mid-estimate, and added an explicit aiming up allowance to the total allowed rate.

124. Finally, and in similar vein, the Panel did not accept that Swiss Economics and therefore the Commission had failed to take proper account of the effect on the Asset Beta of the fact that daa proposes a very large capital investment programme. Swiss Economics concluded that there was no compelling reason to adjust the Asset Beta because of CIP 2020: the aiming up component already prevents the negative consequences that an under-estimated cost of capital could have on the investment incentives of Dublin Airport. Swiss Economics pointed out that comparator airports with relatively strong weights have a Capex/RAB ratio that is comparable to Dublin Airport over the next regulatory period. That does not seem to be in dispute. It provides further material to support the suggestion that the Capex/RAB ratio at Dublin Airport does not infer a higher Asset Beta.

125. Overall, therefore the Panel did not conclude that the Commission had made an error in respect of the assessment of the Asset Beta for Dublin Airport.

Risk Free Rate

126. These are quite technical issues, on which a fair margin of appreciation must be allowed to the Commission. The Panel did not agree that the Commission was guilty of an error in relying solely on short-run evidence, or that it was

wrong to do so in a period of very low bond yields. As set out above, Swiss Economics relied on evidence over various time periods, ranging from one to five years. Equally, there was certainly a reasonable body of evidence to support the conclusion of Swiss Economics that daa was wrong to suggest an RFR as high as 2%, and to support the conclusion that that bond yields will remain below 0% in the next regulatory period. There is room for judgement on these issues. Allowing for that, the Panel did not think that the conclusions of Swiss Economics or the Commission were erroneous.

127. The same applies to the issues raised by daa in respect of country risk premium, regulatory precedent and forward rates. In respect of county risk premium, the Panel accepts that the Commission relied upon a reasonable interpretation of the Thessaloniki Forum Guidelines. The same applies to regulatory precedent, where indeed the Commission was following its own precedent. In respect of forward rates, the Swiss Economics report points out the reasons for not using the German or Irish data, namely that they are simply not available for the wide range of maturities that are required. Again, the Panel could not conclude that these were errors.

Total market return

128. Again, various technical issues are raised in respect of the estimate of total market return reached by Swiss Economics, and therefore by the Commission. The Panel has reached the same conclusion, namely that some of the conclusions are matters of judgement, but that none of them are wrong.

129. Thus, it was not an error for Swiss Economics to use a ten-year holding period. It would appear that Swiss Economics attempted where appropriate to use consistent time periods for estimating the components of the cost of capital. Likewise, the Panel could not disagree with the conclusion that the use of European rates was justified because the world portfolio contains returns from many countries that are not relevant for Irish investors. Finally, Swiss Economics cannot be said to have been wrong to use a single stage DDM. As it has pointed out, the benefits from more stages in a DDM can be nullified by additional errors in the inputs. The use of GDP forecasts can be justified by reference to the shortcomings in the alternatives.

130. Accordingly, the Panel did not conclude that any of the issues raised by daa in respect of the cost of equity demonstrated an error on the part of Swiss Economics or the Commission. The Panel therefore concluded that this ground of appeal did not give rise to sufficient grounds to refer the Commission's decision back for review. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

APPEAL GROUND 4: COST OF DEBT

131. The Commission, on the advice of Swiss Economics, assessed the cost of debt as being in the range of 0.3% to 0.9%, and fixed upon a point estimate of 0.6%. NERA, daa's consultants, had recommended a range of 0.81% to 3.3%.

The daa submissions

132. daa suggested that the Commission's cost of debt range was underestimated, due to inaccuracies or errors in the methodology used to derive:-

(a) The cost of Embedded Debt.
(b) The Cost of New Debt.
(c) The Forward Rate Adjustment.

As pointed out before, the central point raised by daa on the calculation of the WACC was the Asset Beta, which forms part of the calculation of the cost of equity. The alleged errors in the calculation of the cost of debt are relatively speaking not as important and contribute less to the alleged overall error in the calculation of the WACC. Nevertheless, each alleged error requires to be examined separately.

133. Swiss Economics and the Commission estimated the cost of debt based on a weighted average of the cost of embedded debt and new debt at a notional investment grade credit rating. This is a change from past regulatory

reviews, where a debt premium approach has been the predominant method used. daa however did not challenge the overall approach used by the Commission in estimating the cost of debt. Rather, it challenged detailed aspects of the methodology that was used.

134. First, on the cost of embedded debt, it was submitted that the Commission erred in failing to include debt transaction costs in addition to bank margin when calculating the cost of embedded debt. It was said that this underestimated the cost of embedded debt by 20bp, as based on UK regulatory precedent. In oral submissions, it was said that the Commission had made an error because they had interpreted bank margins as covering transaction costs, but that transaction costs in fact relate to arrangement fees, legal fees or rating agency fees and are not bank margin fees. These transaction costs ordinarily relate to the cost of providing operational cash flow. They are not included within other elements of the WACC calculation. It was said that the Commission should therefore make allowances for additional transaction costs, and that Swiss Economics had simply omitted to do this in relation to embedded debt.

135. In respect of the calculation of the cost of new debt, daa submitted that the Commission should have used an iBoxx benchmark index with a tenor of ten plus years, rather than the average of seven to ten years and ten plus used by the Commission in arriving at its estimate. It suggested that this was primarily due to the fact that the tenor at issuance of daa's recently issued bond closely matches the tenor of the ten plus years index.

136. On the approach to the calculation of the forward rate adjustment, it is suggested that the Commission erred in failing to consider the Irish government bonds' forward rates, in addition to all Euro area government bonds and AAA-rated Euro area government bonds. It is suggested that Swiss Economics should have considered the relevant evidence based on Irish government bonds, in order to be consistent with their use of the national RFR.

137. Overall, it is suggested that, instead of the point estimate of 0.63% used by the Commission, these errors if corrected and combined together should have led to a point estimate of 0.81%.

The Commission's submissions

138. On the cost of embedded debt, the Commission said that the estimated cost of embedded debt does not include debt transaction costs. It clarified that transaction costs are already included in the interest rate of embedded debt. In oral submissions, the Commission stated that arrangement fees and other ongoing fees associated with maintaining debt such as maintaining a credit rating, paying for debt advisors, and legal fees are accounted for in the Opex allowance for Dublin Airport.

139. On the cost of new debt, the Commission pointed out that Swiss Economics had said that it is not clear what the appropriate tenor for new debt at Dublin Airport should be, because the tenor of new loans from the undrawn facility that is available may be anywhere between four and 20 years, according to the underlying facility agreement. In the absence of evidence on the tenor of future debt, Swiss Economics had concluded that there is no compelling reason to deviate from the investment horizon of ten years, which is consistent with a ten-year holding period that is used in estimating TMR and RFR.

140. On the forward rate adjustment, Swiss Economics had used readily available data from the ECB, because Irish bond data is not available in all the maturities required for the relevant analysis.

Other submissions

141. Ryanair submitted that the drop in the estimated cost of debt from the 2014 Determination reflects the reduction in central bank rates over a longer period. Furthermore, the Commission continues to provide headroom in the WACC through the 0.5% uplift, which in the submission of Ryanair obviates the need to make any further correction to the cost of debt.

142. Ryanair supported the approach of Swiss Economics to transaction costs on embedded debt. It said that it would be inappropriate to use a 10+ Year index, because this would include bonds issued with tenors of 20, 30 or even 50 years with greater risk, and therefore higher prices. It suggested that this would be inappropriate as daa has issued only one bond of 12 years. On the

use of forward rates on Irish government bonds, Ryanair noted the position of Swiss Economics, where it said that Irish government bonds at the time were not perceived as “risk-free” in comparison to German government bonds. It suggested that the approach of the Commission was therefore in line with the Thessaloniki Forum Guidelines, and that the contention that forward yields on Irish government bonds should be used was wrong.

The Panel’s consideration

143. The Panel considered these various issues. Overall, acknowledging that there is room for judgement in such decisions, it did not consider that Swiss Economics, and therefore the Commission, had made an error.

144. On the cost of embedded debt, it noted the clarification from the Commission in oral submissions to the effect that transaction and arrangement fees were accounted for in Opex. On the material before the Panel, their omission from the calculation of the WACC is therefore justifiable. On the cost of new debt, the Panel noted and accepted the explanation recorded in the Commission’s submission, namely that there is no evidence on the tenor of future debt, so that there is no compelling reason to deviate from the investment horizon of ten years, which is consistent with the holding period that it used in estimating TMR and RFR. On the issue of the forward rate adjustment, the Panel does not agree that Swiss Economics made an error in using data that it obtained from the ECB. It accepts the explanation given, namely that Irish bond data is not available in all of the maturities required for the relevant analysis.

145. In the circumstances, the Panel concluded that there was not sufficient reason on these grounds to refer the decision back to the Commission for further consideration. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

APPEAL GROUND 5: CAPITAL EXPENDITURE 2015 TO 2019

The daa submissions

146. daa suggested that the Commission had disallowed some €60 million of capital expenditure, being the spend that was incurred in capital projects undertaken between 2015 and 2019 above that originally allowed under the 2014 Determination. daa submitted that the Commission made this decision on the basis that adequate stakeholder consultation had not taken place. daa said that this was an error, because it had provided strong supporting evidence and justification for the additional investment; because the additional capital expenditure was linked to circumstances which occurred that were beyond daa's control; because some of these issues were safety related and therefore urgent; and because the Commission failed to provide adequate detail and reasoning in the 2019 Determination regarding such "stranded investment costs".

147. In the 2014 Determination, the Commission had set up two requirements to be met before additional capital investment allowances could be obtained. First, if daa envisaged going over allowance in a particular group, it should consult with users. Secondly, for a consultation to result in an increased allowance, it should have the unanimous support of users.

148. daa said that, in response to the 2019 Draft Determination, it had set out how these consultation requirements were not feasible in the case of this additional Capex. It had explained how the urgent and safety critical nature of the projects did not allow for a full formal consultation to take place in advance of the capital expenditure involved. The consultation that it was able to run regarding this additional investment was therefore during the process for CIP 2020 from October to December 2018. It said that a full breakdown of these projects was provided to airport stakeholders in October 2018, and that to date it had received no objections to this additional investment from stakeholders following this process.

149. daa submitted that the possibility of seeking a decision from the Commission through the supplementary Capex process was not available to it in relation to this expenditure. It said that this mechanism was reserved exclusively for

projects which had not been previously approved, rather than requests for additional capital expenditure in relation to projects that had already been approved. The additional capital expenditure in this case fell within the latter group.

150. daa referred to the decision of the 2010 Aviation Appeal Panel, which said at paragraph 8.5.12 of its decision:-

> "The Panel is concerned that capital markets might react negatively if the approach to regulation here is seen to disallow large tranches of past investment, as such retrospective adjustment almost invariably gives rise to regulatory uncertainty. The Panel considers that the circumstances under which RAB disallowances might be legitimately justified are in circumstances where (i) the investment is obviously imprudent or (ii) there is some manifest deficiency in the performance of the regulated entity. In considering the latter requirement, merely operating at less than maximum efficiency is not sufficient (most companies fall short of this standard in some areas). Rather, ex post disallowance should only be contemplated where the performance of the regulated company can be considered to fall outside normal commercial parameters."

daa submitted that this criterion had not been met here.

The Commission's submissions

151. In its submissions, the Commission pointed out that in the 2014 Determination, Capex allowances were grouped across six categories, within which daa had some flexibility, provided that it did not exceed the overall allowance for each grouping. These groupings and allowances are set out in Table 9.3 of the Final Determination. As also set out in that Table, daa exceeded the grouped allowances. The 2014 Determination required consultation with users as a basic requirement if daa considered that it was necessary to exceed a grouped allowance. Where allowances are grouped for reconciliation, overspend can only occur at a group level. The Commission submitted that it was therefore misleading for daa to suggest that the disallowed overspend related to specific projects. Rather, it related to daa having exceeded its budget in a number of groupings.

152. In response to the suggestion that the consultation requirement was not feasible in relation to urgent and safety critical projects, the Commission submitted that daa could have held a meaningful consultation on increasing

the group allowance in advance of actually exceeding it, to obtain views from users, particularly in relation to the discretionary scope changes, the timing of expenditure, and the decision to continue to progress both the projects to which daa referred in its submission to the Panel and also other projects in the groupings.

153. The Commission submitted that daa did not consult in 2018 on why the grouped allowance was insufficient, and thus provide an opportunity for meaningful feedback on exceeding the grouped allowance. Rather, as part of its consultation on the CIP 2020 programme in October 2019, it highlighted a number of individual projects in relation to which it had spent more than it had requested and advised airport users that it would be submitting that expenditure to the Commission.

154. The Commission submitted that its supplementary Capex option was in fact open to daa in order to seek an increase in Capex allowances within these groupings. It suggested that, following an interim consultation, if Dublin Airport had not obtained full certainty over the remuneration of additional expenditure on one or more of these groupings through unanimous user support, it would have been open to it to seek a decision from the Commission through the supplementary Capex process.

155. The Commission referred to the decision of the 2010 Appeals Panel relied upon by daa. It submitted that the difference is that this is not a case of retrospective adjustment or an ex post allowance. Rather, it submitted that allowances were set in the 2014 Determination on an ex ante basis, and that daa now seeks a retrospective adjustment to these allowances. It agrees with daa that regulatory uncertainty should be avoided where possible, but it submitted that retrospectively changing the RAB principles would give rise to significant uncertainty regarding the reliability of the Commission's approach in following through on previous commitments to airport users.

156. Finally, the Commission submitted that if the reference projects were to be considered on an individual basis, the Commission would have needed to apply this broadly. In particular, an analysis of each project on an individual basis would also mean that ongoing remuneration for a number of non-delivered or undelivered projects might not be able simultaneously to occur.

It suggested that, in advance of carrying out such an assessment, it is not clear whether it would have led to a higher or lower opening RAB for 2020.

Other submissions

157. Ryanair supported the position of the Commission in disallowing this expenditure on the basis of an absence of effective consultation.

The Panel's consideration

158. The Panel did not think that there was any error by the Commission here. It was convinced by the reasoning of the Commission. In particular, it was clear that it was appropriate to consider expenditure at the grouped level rather than on an individual project level. It would therefore not be appropriate to look at the case for individual projects without examining expenditure in the relevant group(s) as a whole. In addition, while daa submitted that the projects that resulted in the overspend were "safety critical", that clearly did not apply to them all. For instance, the runway 1028 overlay project was safety critical, but the same could not apply to the US preclearance lounge. daa accepted that it had not followed the consultation process for which the 2014 Determination provided. It was for daa to ensure that spending was maintained within the grouped allowances, and to demonstrate why spending within those allowances had to be exceeded. Crucially, daa did not convince the Panel that consultation could not have been carried out in advance of exceeding the relevant group allowances. Nor did daa explain why such consultation would have delayed the specific projects to which it refers. On the specific example of runway 1028, it is clear that there would have been time for a consultation appropriate to the circumstances. The consultation in October 2018 on the CIP 2020 programme did not constitute such consultation, and in reality was not claimed to so constitute.

159. It seemed to the Panel that if consultation had taken place but if approval had not been obtained, then it would have been open to daa to make use of the supplementary Capex process. But that conclusion is not central to the Panel's reasoning, because the availability or non-availability of this process

does not alter the clear requirement under the 2014 Determination that consultation should take place as a requirement of additional expenditure within a grouped allowance.

160. In oral submissions, daa suggested that the fact that capital expenditure was allocated by way of grouped allowances was not particularly relevant, because most of the other expenditure within the relevant groups had already either taken place or had been the subject matter of commitments. daa submitted that it that followed that there was insufficient flexibility within the grouping to deal with this necessary new expenditure. However, that does not of course address the consultation issue. Nor did it address the other issue raised by the Commission as arising from the concept of grouped allowances, namely that if the Commission was in error in failing to examine individual projects in the previous regulatory period in order to assess whether they should be allowed to enter the new RAB, then it would also have had to examine whether ongoing remuneration for non-delivered or undelivered projects should be removed.

161. Accordingly, while not doubting the wisdom of this expenditure or even the fact that much of it was necessary to be spent for safety reasons, the Panel was not convinced that the Commission made an error in its treatment of it. It did not think that the issue fell within the principle expressed by the 2010 Appeal Panel. As the Commission submitted, this is not a case of an ex post disallowance or a retrospective adjustment, which is what the 2010 Appeal Panel had in mind. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

APPEAL GROUND 6: CAPITAL EXPENDITURE 2020 – 2024

The daa submissions

162. The Commission decided to disallow approximately €98.3 million of Dublin Airport's planned investment for the period 2020-2024. daa submitted that some €44 million of this disallowance related directly to incorrect

assumptions that were made by the Commission. Specifically, daa submitted that the disallowances were based on incorrect assumptions used by the Commission's consultants, Steer. Those disallowances were based largely on the cost of demolition and relocations on the one hand, and on the cost of fit out and finishes on the other hand. daa submitted that these assumptions were erroneous because they were based on comparisons with the UK.

163. Furthermore, daa submitted that, as part of the capital expenditure reductions proposed by Steer in their Cost Efficiency Assessment, Steer had outlined several cost saving recommendations. These included procuring framework suppliers, and a proposal that priority should be given to NEC types of contract. It was also recommended that daa should give consideration to looking further afield for suppliers to deliver works. daa submitted that, while these are valid recommendations, little consideration was given by Steer to other initiatives that Dublin Airport had already taken in these areas. In relation to contract type and packaging of works, daa submitted that it had already deployed the NEC type contract for the majority of works at Dublin Airport, and was already finalising two new airside civil construction framework panels. It suggested that these strategies had already been factored into the CIP 2020 estimates.

The Commission's submissions

164. In response, the Commission pointed out that Steer had examined all the Dublin Airport projects in CIP 2020. Of the Dublin Airport estimate of just over €1.8 billion, Steer had concluded that an appropriate target to deliver CIP 2020 was just over €1.7 billion. Those allowances had been substantially increased from €1.6 billion in the Steer draft report to more than €1.7 billion in its final report.

165. The Commission said that two areas where Steer concluded that rates were generally inefficiently high were in relation to fit out and demolitions. The advice was that certain proposed fit out and demolition costs were excessive, relative to what is achieved by other comparable airports. The representations made by daa on the Irish construction market were specifically considered in the Steer final report. At Table 9.1 of the

Commission's submissions, it sets out the various projects in question, and gives references to where in its final report Steer has considered specific rates and inclusions or exclusions.

166. The Commission said (and daa accepted) that the total amount at issue in this aspect of the appeal should have been €42 million rather than €44 million, because variance in relation to the T1 baggage reclaim is in fact €3.2 million rather than €5.2 million.

167. In reference to the points made by daa about NEC contracts, the Commission submitted that Steer did not apply reductions to rates on the basis that Dublin Airport had not built in changes arising from the use of NEC contracts. Rather, Steer applied them on a more granular benchmarking exercise, drawing on experience at other airports. The Commission accordingly concluded at paragraphs 9.27 and 9.28 of the Final Determination that Steer had set out reasonable efficiency targets, and that the Commission had used these costings to inform its Capex allowances for 2020-2024.

168. The Commission however added that previous experience shows the difficulties in preparing fixed cost estimates for projects which may be at a basic level of design and may not start on site for a number of years. It suggested that the new StageGate process sets out a framework to ensure that ongoing consultation on cost and scope will occur throughout the regulatory period for certain key projects. StageGate projects are to be reconciled at an individual level rather than at group level. The Steer costing in relation to StageGate's projects has been used as an initial input, and thus should be considered as an initial target rather than a finalised ex ante allowance. Of the nine projects that are the subject matter of this ground of appeal, seven are included in StageGate.

Other submissions

169. Ryanair believed that excessive Capex had already been permitted to enter the RAB, and therefore did not support the contention that it ought to be further increased.

The Panel's Consideration

170. The Panel is not in a position precisely to determine the cost of demolition or fit out in Ireland as opposed to England. The Commission has employed reputable consultants to assess this issue. Those consultants considered the representations made by daa and adjusted its recommendations to take account of those representations. The Commission must be allowed a certain margin of tolerance on issues such as this. The Panel accepts that the consultants approached their task on a granular basis, and did not misunderstand what daa had said to it. There is no mistake of principle in the approach of the consultants or the Commission, and the Panel cannot conclude that an error has been made. It notes also that of the nine projects under consideration, seven are included in StageGate. The use of the StageGate process means that adjustments can if necessary be made, as the projects proceed. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

APPEAL GROUND 7: REPROFILING TRIGGERS

171. Reprofiling triggers were introduced for the first time in the Final Determination. They were designed to allow for a reduction in allowed Capex revenues where specific capital investment projects were significantly delayed or not delivered. There are eight specific capital investment projects subject to reprofiling triggers.

The daa submissions

172. daa submitted that the possible introduction of the triggers was not mentioned in the Draft Determination of the 9th May 2019. Their possible introduction was first mentioned during a meeting with the Commission on the 14th October 2019. daa made formal submissions outlining its concerns by way of letters dated the 18th and 21st October 2019 but did not receive a response. daa accordingly submitted that the Commission had failed properly to consult on the possible introduction of these triggers. It also said

that the Commission had failed to provide adequate reasons for their inclusion.

173. daa suggested that the reprofiling triggers do not take account of underlying factors as to why a specific project may not be progressed as intended in the time allocated. It submitted that they effectively prohibit Dublin Airport from implementing innovation through outputs: the sole emphasis will now relate to adhering to the timing of delivering the infrastructure projects associated with the triggers, rather than allowing scope for driving sustainable and financially robust operations for passengers and airport users.

The Commission's submissions

174. The Commission said that, while there was always a risk that Dublin Airport might not be able to deliver the full programme, the Draft Determination provided for the projects to enter into the core regulatory settlement in line with daa's own project timelines, and also included a further adjustment for financial viability. However, subsequently daa publicly stated that it had stood down works pending a more favourable overall regulatory settlement in the Final Determination, and that the programme would need to be reassessed as to what projects would proceed. In the view of the Commission, this increased the risk that users would pay substantial capital costs for infrastructure which may not be delivered or even progressed within the period. Respondents expressed concern that the Draft Determination lacked any incentive mechanism for Dublin Airport to deliver all the required Capex. The Commission said that this led it in the Final Determination to seek to address these concerns.

175. The Commission pointed out that the triggers are derived from the capital costs associated with each project in each given year only. They do not amend the accelerated depreciation profile included for the purpose of financial viability. Nor do they alter the Opex increases that are driven by the specific projects. Furthermore, while they are based on the project timeline set out by daa, they allow for at least one year's slippage relative to that timeline before triggering. The Commission submitted that this was a proportionate response.

176. The Commission submitted that it did not fail to provide adequate reasons for their inclusion of the reprofiling triggers. It pointed in that regard to paragraphs 9.70, 9.75 and 9.76 of the Final Determination.

177. On consultation, the Commission referred to section 32(7) of the 2001 Act, and the limited requirements for consultation that are set out therein. The Commission pointed out however that its intention to include reprofiling triggers was discussed at a meeting with daa on the 10th October 2019. Subsequently, an advance copy of the Centrus Report was shared by the Commission with a number of key stakeholders, including daa. That report included a recommendation that the Commission consider what Centrus termed "a form of reverse trigger". daa sent letters dated the 18th and 21st October 2019. These were not formal consultation submissions, but the material contained therein was of a similar nature to the arguments now made in submissions to the Panel. The points made by the daa were addressed by the Commission in its Final Determination.

178. The Commission pointed out that the reprofiling triggers do not affect the overall level of remuneration for the various projects. Rather, they simply delay remuneration. All else being equal, if a reprofiling trigger event occurs, this is offset by increased remuneration in a future period in line with the life of the project. Furthermore, if a reprofiling trigger activates, the project will have been delayed by at least a year. The debt requirement will therefore also have been reprofiled. The higher price cap set out in the base case scenario will not be required, as Dublin Airport will not have been required to raise debt to the extent envisaged in the core regulatory settlement.

Other submissions

179. Aer Lingus said that it was particularly concerned about public statements made by daa indicating that critical infrastructure expenditure may be at risk on the basis of the pricing outcome in the Determination. It suggested that any scale back of capital projects should not impact critical hub infrastructure projects, and that this possibility was appropriately and coherently addressed through the measured application of reprofiling triggers.

180. Ryanair expressed the view that, rather than adopting reprofiling triggers to exclude Capex that has not been incurred because projects are delayed or no longer required, the Commission should have introduced a practice of triggering the allowance of Capex into the RAB. It did not accept that the reprofiling triggers would stand in the way of daa achieving innovation through outputs.

The Panel's consideration

181. The Panel did not agree that there had been a failure of adequate consultation by the Commission. Section 32(7) of the 2001 Act provides for relatively limited consultation obligations, but these were exceeded in the present case. The intention to introduce reprofiling triggers was raised relatively late in the process. Nevertheless, that arose because of the reaction of daa to the Draft Determination, when it said that the programme would need to be reassessed as to what projects would proceed. Even though it was relatively late in the day, daa was given time to comment. It made comments, and its comments were considered by the Commission. The comments that it made are not substantially different from the submissions that it makes now. Accordingly, whether or not the limit of required consultation is set out in section 32(7), the Panel cannot conclude that there was any want of proper consultation here.

182. Nor does the Panel agree that no reasons for including the triggers were given. As the Commission has suggested, reasons are set out at 9.70, 9.75 and 9.76 of the Final Determination. There, it is stated that a reason for the introduction of the reprofiling triggers is to ensure that users do not continue to pay for the full CIP programme if it is not being delivered, thereby avoiding the timing of remuneration becoming entirely misaligned with the programme. A further reason is said to be the better protection of the future financial sustainability of the airport in the event that it does not proceed with a substantial part of the programme.

183. Finally, the Panel does not conclude that there was any mistake or error in the substance of the reprofiling triggers. The purpose of the mechanism is simply to avoid remuneration becoming misaligned with the project delivery

timeline. That seems to the Panel to be entirely reasonable. It would not be appropriate for daa to be remunerated in respect of large capital expenditure that it is not undertaking, particularly where it had stated in advance that it might not undertake it. Furthermore, the Panel noted that reprofiling triggers allow for at least one year's slippage before triggering. Even if they are triggered, they do not amend the financial viability adjustment, or the Opex increases allowed for that are driven by the specific projects. Thus, the rationale is reasonable, and the response is proportionate, and the Panel did not think that an error had been made.

184. Accordingly, the Panel did not conclude that the Commission had made any error in respect of this ground of appeal. Equally, the Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

APPEAL GROUND 8: SERVICE QUALITY MEASURES

185. In its Final Determination, the Commission introduced a new range of service quality measures (SQMs).

The daa submissions

186. The daa submits that three SQMs are not proportionate, namely:-

(a) Passenger Walking Distance.
(b) Ground Transport Information on Arrival.
(c) Wait Times for Passengers requiring Additional Assistance.

187. As regards Passenger Walking Distance, Dublin Airport acknowledges that walking distances are challenging, particularly for some passengers. However, Dublin Airport cannot take specific measures in the short term to alter them. While passengers may be unhappy with the length of the walk, other parts of their experience are more important to overall airport service quality. daa therefore submits that passenger walking distance as a metric in isolation is inappropriate.

188. As to ground transport information on arrival, daa submits that it had no opportunity to challenge the inclusion of this metric. While it was apparent that Dublin Airport would be required to monitor this metric, there was no indication that it would become a financially incentivised metric in the Final Determination. Unlike all other metrics, there is no historical performance data on this metric to inform or guide the level at which such a target should be set. It is therefore difficult to understand how a target of eight was set in the 2019 Final Determination.

189. As to wait times for passengers requiring additional assistance, the daa says that it understands that the Commission based its service quality measure in this area on the service level agreement (SLA) that existed between Dublin Airport and OCS (the provider of services for passengers with reduced mobility), at the time of publication of the Final Determination. At that stage, the specific targets were set in line with the targets agreed in the OCS SLA.

190. However, it had become apparent that those target service levels were unrealistically high. OCS had difficulty in achieving them in 2019. Some of the targets require 100% performance. It was felt that this is not an appropriate measure, given that there are technical issues that will impact in achieving the set target. After the Final Determination, discussions took place with the Airline Operators Committee and OCS. Following that, the SLA was changed to set targets that were achievable for OCS, while maintaining a quality of service that is suitable for airlines and passengers. Those changes are set out in Table 28 of the daa submissions. They are lower than those set out in the Final Determination. daa submits that, under these circumstances, there is very little possibility that OCS will achieve the targets set in the Final Determination. It says that this SQM will need to be adjusted in order to maintain consistency with the OCS LSA as agreed with the airlines.

The Commission's submissions

191. The Commission recognised the inherent difficulty for Dublin Airport to improve its performance in respect of passenger walking distance. However,

it said that the target was set below the outturn in 2017 and 2019. The Final Determination provides that the Commission will monitor this measure as an indicator of passenger needs that should be mitigated in the short term, but ultimately can be addressed by future capital investment programmes. It suggested that this will incentivise daa to consider walking distance when deciding on future airport design.

192. On ground transport information on arrival, the Commission did not agree that there was no indication that this would become a metric in the Final Determination. It referred to the Draft Determination, where it stated that the issue was being considered. It submitted that daa could have made the point in consultation that there was no historical performance data to inform the level at which a target should be set, but that daa did not raise this point before publication of the Final Determination.

193. On wait times for passengers requiring additional assistance, the Commission confirmed that the objective was to use the SLA targets that were in place at the time of publication of the 2019 Final Determination.

Subsequent exchange

194. Subsequent to the oral hearing, the Panel raised with daa and the Commission the question of what information (if any) daa gave to the Commission in advance of the Final Determination about any steps that had been taken, or any intention that it may have had, to seek revision of the wait times for passengers requiring additional assistance in the SLA between Dublin Airport and OCS.

195. Both confirmed that no information was provided to the Commission prior to the Determination about reviewing the SLA targets. daa explained that, in June 2019, it communicated that the actual service scores were low, and that this primarily resulted from delay with vehicles and equipment required for the operation of the new contract. The expectation at that time was that once the required equipment was in place, the SLA would be more achievable. The full complement of equipment and resources was not in place until November 2019. It was not until then that discussions with the AOC subgroup commenced. Agreement on the new SLA targets was achieved on the 23rd December 2019.

The Panel's consideration

196. The Panel did not regard the Commission as having made an error in respect of the inclusion of a walking distance metric. It recognises the difficulties that Dublin Airport has in improving its performance in this area. However, it believes that the approach of the Commission was reasonable. That approach is to monitor this metric as an indication of passenger needs that should be mitigated in the short term, but ultimately to be addressed by future capital investment programmes. The Panel accepts that this will incentivise daa to consider this issue when deciding on future airport designs.

197. Likewise, on ground transport information on arrival, the Panel does not think that an error was made. It does seem that the daa was informed that the issue was being considered, and that it had opportunities to challenge its inclusion. It appears that daa could have opposed the inclusion of the metric on the grounds that there was no historical performance data to inform the level at which a target should be set, and that this point was not raised before publication of the Final Determination. The levels were set in line with the airport's own internal target. The Panel did not think that the Commission made a mistake in the circumstances.

198. Likewise, the Panel did not think that the Commission made an error in respect of the wait times for passengers requiring additional assistance. It used the SLA targets that were in place at the time of publication of the 2019 Determination. At that stage, it had been told that the scores were low, and that this resulted from delays with vehicle and equipment required for the operation of the new contract. The expectation was that once all the required equipment was in place, the SLA would be more achievable. While a 100% target is undoubted challenging for this metric, it was in fact the target in the SLA in place at the time. It was therefore not unreasonable for the Commission to set targets that it had been informed were to be found in the SLA.

199. It was only after publication of the Determination that discussion to alter the SLA began. The Panel was informed that the terms of the new SLA are not fixed for any particular period. They are therefore open to renegotiation and

further discussion, although that of course does not necessarily mean that they can easily be altered. Overall, while it is unfortunate that the SLA at present provides for a service level that falls below the metric set by the Commission, the Panel does not see what else the Commission could reasonably have done in the circumstances at the time. The Panel has explained above that it must approach its task based on the evidence that was before the Commission at the time of the Final Determination. Inevitably, events occur post a price control determination that are not in line with the details and assumptions of the determination. Some of these will benefit the regulated entity, and some will not. It would be wrong in principle to re-open the price control for each of those.

200. Accordingly, the Panel does not believe that the Commission made an error in respect of this ground of appeal. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

CONCLUSION

201. The Panel emphasises that its decision was based on the facts as they stood at the time of the Commission's Final Determination. This is the approach that is mandated by the legislation. The decision therefore does not take account of events after the 24th October 2019, and in particular does not take account of the consequences of the Covid-19 pandemic. That is of importance for the purpose of this appeal, given the likely impact of Covid-19 on many of the assumptions underlying the Commission's Determination. The impact of events subsequent to that Determination is a matter exclusively for review under section 32(14) of the 2001 Act, if there is such a review.

202. In the circumstances, with one exception, the Panel did not find that the grounds of appeal raised by daa gave rise to sufficient grounds to refer the Commission's decision back for review.

203. The exception is in respect of one aspect of daa's appeal ground 2. Both daa and the Commission were happy that the Panel should refer back to daa

the question of whether the K factor included an error. In the circumstances, the Panel agreed to refer back to the Commission the question of whether the K factor formula is working as it was intended, namely to ensure that any throughput adjustment between final costs incurred and those estimated by the Commission in the W factor is adjusted for two years later.

Eoin McCullough S.C.

Hannah Nixon

Andrew Charlton

4 May 2020