



## **Decision of the Commission further to Referral by the 2008 Aviation Appeal Panel**

Commission Paper 2/2009

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## **1. Introduction**

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- 1.1 Following requests received from four interested parties – Aer Lingus, Dublin Airport Consultation Committee (DACC), the Dublin Airport Authority (the DAA) and Ryanair Limited – the Minister for Transport established an Appeal Panel (the Panel) on 29 September 2008 pursuant to section 40 of the Aviation Act 2001.
- 1.2 The Panel was tasked with hearing the requested appeals against the Commission for Aviation’s Determination of 30 July 2007 on “Maximum levels of airport charges at Dublin Airport, Final Decision on interim review of 2005 Determination.” The Determination is published as CP6/2007 and is available, along with associated papers, on the Commission’s website at [www.aviationreg.ie](http://www.aviationreg.ie)
- 1.3 On 23 December 2008, the Panel issued its decisions in relation to the appeals. For certain matters in the DAA and Ryanair appeals the Panel decided to refer the Determination back to the Commission for review. The Panel found that there was no basis for it to refer the Determination back in respect of matters raised by Aer Lingus and DACC. The decisions of the Panel are available on the Commission’s website at [www.aviationreg.ie](http://www.aviationreg.ie).
- 1.4 Pursuant to the referral, the Commission undertook a review for the purpose of deciding whether or not to affirm or vary the Determination. Prior to undertaking the review, the Commission issued Commission Paper CP1/2009 notifying interested parties of the review and inviting submissions in respect of those matters referred back to the Commission by the Panel. A list of those matters, together with a description of the scope of the review was set out in CP1/2009.
- 1.5 The purpose of this paper is to describe the outcome of the review and to set out the Commission’s decision in relation to affirming or varying the 2005 Determination, and to set out the reason for the decision in this regard.
- 1.6 Section 2 of the paper describes the review process. Section 3 sets out the decision of the Commission. Section 4 sets out the reasons for the decision.

## **2. Review Carried Out by the Commission**

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- 2.1 The scope of the review was set out in CP1/2009. The review was limited to those matters identified by the Panel as constituting sufficient grounds for referring the Determination back to the Commission. In conducting the review, the Commission considered the decision of the Panel and the reasons given by the Panel for the referral.
- 2.2 In response to CP1/2009 the Commission received submissions from the following parties: Aer Lingus, Cityjet, the DAA and Ryanair. The Commission has considered the submissions of the parties in conducting the review and making its decision. In addition, the Commission has had regard to the statutory objectives and the statutory factors set out in Section 33 of the 2001 Act (as amended by the 2004 Act) and the Ministerial Directions that the Commission received in 2005 and 2007.
- 2.3 The DAA, in its response to CP1/2009 criticised the procedure followed by the Panel. The DAA noted that each of the 2008 Hearings had been conducted in isolation. The DAA was disappointed that this meant that it had not had an opportunity to comment before the Panel on the matters in the Ryanair appeal. The DAA stated that the 2008 Panel's approach was arguably unlawful, in that the Panel's decision had adversely affected the interests of the DAA without the DAA having been allowed to be heard in that procedure. The DAA argued that in considering the Panel's referrals, the Commission should balance the views of the different appellants.
- 2.4 Under the Act, a Panel is empowered to set its own procedures. The Panels of 2001, 2005 and 2008 have each adopted a different approach to fundamental procedures, e.g. who should participate and the availability of transcripts. This may give rise to concerns regarding the purpose and process of the appeal regime. Neither the 2001 nor the 2005 Panel sought the involvement of the Commission in its work; neither the 2005 nor the 2008 Panel heard parties other than an appellant on the matters in that appeal. The 2008 Panel decided to conduct separate oral hearings in the case of each of the four appellants. DACC declined the opportunity to have an oral hearing. None of the appellants had an opportunity to comment on each other's appeal.
- 2.5 In 2001, the Panel invited Aer Rianta (now the DAA), though not itself an appellant, to make written submissions on matters arising from the appeals and to participate in oral hearings, including an oral hearing at which all of the appellants and Aer Rianta were present. The decision of the 2001 Panel shows that it gave careful consideration to the question of the involvement of the Commission and concluded that it would be inappropriate to ask the Commission to participate in the process given that if its arguments in support of its decision were to be rejected by the Panel, the Commission would then have to adjudicate on its own argument, which could be seen as its being a judge in its own cause.
- 2.6 The 2005 Panel had before it an appeal from the DAA against the Commission's 2005 Determination. That Panel considered that given its relatively limited role and functions, and as the matters raised by the DAA concerned the reasoning and general approach adopted by the Commission only in so far as they might affect the ability of the DAA to operate and develop Dublin Airport in a sustainable and financially viable manner, it was unnecessary to circulate any other persons for comment or to allow other persons to intervene. Ryanair sought to be heard by the Panel but the Panel was of the view that no party other than the DAA need be heard. The DAA does not appear in that case to have considered it necessary that all parties that would be affected by its 2005 appeal should be heard by the Panel.

- 2.7 The 2008 Panel asked the Commission to act in the role of Respondent, a matter rejected by the previous Panels. In reply, the Commission pointed out that given the Commission's role under the Act, it was not in its view, appropriate it to act in the capacity of Respondent. The Panel, however, took the view that it was not only entirely appropriate for the Commission to act as Respondent but that if it did not, there would be no Respondent and that "this would not help narrow the matters which the Appeal Panel needs to consider..." The Commission's position was that given its statutory role, the availability on the record of its Determination and all the related publications and consultations leading to that decision, the most appropriate way to assist the Panel was by drawing its attention to all the relevant materials, statements, and the analysis which informed its Determination.
- 2.8 In addition, the Commission provided a written response to each separate appeal and also provided a detailed reference to the exact part of the relevant documentation that contained its consideration of the issues raised in the appeals. Additionally, the Commission pointed out that it would respond during the oral hearings to any questions raised by the Panel or to any issues of concern to them. At the oral hearing, the Panel did not engage with the appellants or the Commission on the matters raised on appeal or any issue contained in the Determination, save for one enquiry at the DAA hearing regarding the appropriateness of hearing an appeal in a scenario where the issues raised might be revisited in 2009, and one enquiry at the Ryanair hearing in relation to the Dublin airport Local Area Plan (LAP). No issues of any kind were raised by the Panel at the Aer Lingus appeal.
- 2.9 The Panel produced four separate decisions on 23rd December 2008, and the issues arising from that approach, including some anomalies, are dealt with later in this decision. In its decisions, the Panel's view seemed to be that because the Commission did not systematically address and rebut each issue arising under appeal for the benefit of the Panel during the Oral Hearings, that this meant the Commission did not "vigorously seek to have its Determination upheld".
- 2.10 However, as explained, it was and is the Commission's view that it is not the role of the Commission to "vigorously seek to have its determination upheld." It is the task of the Panel, in the Commission's view, to assess the appeals before it by reference to the Determination. The Commission attempted to assist it in so doing by drawing its attention to the most salient parts of the Determination. It is the task of the appellant to demonstrate a sufficient ground for referral by reference to the Determination already made. It is for the Panel to consider that argument by reference to that Determination. The time for the Commission to consider a sufficient ground is after one is identified by the Panel, in other words, on referral. It is not, in the Commission's view, the role of the Commission to argue for or against the proposition that a sufficient ground exists.
- 2.11 It appears to the Commission that where it did not explicitly rebut an appellant's criticism of the Determination in the Oral Hearing the Panel tended to accept the view of the appellant and referred those matters back to the Commission for review. This is despite the fact that, the Commission in advance had drawn the Panel's attention to the parts of the Commission's Determination (including the annexes) where the Commission's reasoning was set out in relation to those criticisms.
- 2.12 In section 4 of this decision, the Commission, in reviewing the matters referred back by the Panel, sets out, amongst other things, where its reasoning on that matter at the time of its July 2007 interim review decision was to be found as brought to the attention of the Panel during the appeals process.

- 2.13 Section 40(8) of the 2001 Act requires the Commission to “either affirm or vary its original Determination”. In doing this, the Commission is confined to consider information available to it at the time of the Determination and not subsequently. Post-determination facts and events cannot be considered.

### **3. Decision of the Commission**

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- 3.1 The Commission has decided to affirm its determination.
- 3.2 The following section explains why the Commission has reached this conclusion, discussing each of the issues referred back to the Commission in turn.

## **4. Reasons for the Commission’s Decision**

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4.1 There have been particular challenges in considering the Panel’s referral. A notable one has been how to address a situation in which a determination made more than 18 months ago was required to be revisited while adhering to the requirement not to update or augment the data and knowledge base in which the determination was made. The Commission has sought to rely only on the situation as known or presented in July 2007. However, this is not always straightforward. For example, how should the Commission treat the opinions expressed by parties? Is a party responding to CP1/2009 providing views on a topic that it would have provided in July 2007 had it been asked, or is it providing views that have changed since, perhaps because of the change in the global economy? As discussed in the material that follows, all parties appear to have made submissions that may or may not be consistent with the understanding that the Commission had of their positions in July 2007. For example, in their comments to the Panel or responses to CP1/2009, it might be argued that to accept Cityjet’s comments regarding congestion in T1, the DAA’s arguments concerning the methodology for measuring the busy hour, and Ryanair’s comments about the required annual capacity for T2 would be to accept positions that were not presented in that manner to the Commission prior to its determination in July 2007. In what follows, the Commission has sought to set out clearly what material and information was known to it in July 2007.

4.2 Another challenge has been how to address the specific points referred back to the Commission in a way that is consistent with the overall determination. The July determination proposed a framework designed to protect the interests of current and prospective users while allowing the DAA to operate the airport in a sustainable and financially viable manner and build a second terminal by the end of 2009. The Commission makes a series of judgements, in many cases deciding between a range of acceptable alternatives. The components making up the determination are not necessarily independent of one another; the Commission’s decision to allow a certain amount of costs for one project is made in the knowledge of and consistent with a decision to allow a certain amount of costs for other projects; the decision to set a trigger for “box 2” is made with reference to both judgements about existing and required capacity and the ability of the DAA to finance a second terminal. The Commission remains satisfied that in concluding on the individual points referred back to it, the overall determination complies with the Commission’s statutory objectives.

4.3 The remainder of this section addresses, in turn, the eight topics that the Commission identified in CP1/2009 as being referred back to the Commission. These were

The assessment of capacity at Terminal 1 (T1) at Dublin airport;

The consequential assessment of the required capacity for a second terminal;

The “correct” sizing of the Terminal 2 (T2) that the DAA proposed to build;

The consideration of the appropriate T2 associated projects capital expenditure which should be included in box 1 or box 2;

The decision to exclude €25 million in respect of contingency costs in reaching its determination;

The decision to exclude certain airfield projects costs in the determination;



The consequential appropriation of capital expenditure into box 1 and box 2, particularly the treatment of Pier E as either part of box 1 or 2;

The remuneration of box 2.

- 4.4 In the submissions received, some parties used the same material to address a number of these points. The Commission accepts in some cases there may be a relationship between the points. Nevertheless, for the purposes of this document it has maintained the eight headings previously identified.
- 4.5 All of the capex figures presented in this section are in 2006 prices, i.e. the price basis for capex as presented in the DAA's 2006 CIP, unless otherwise stated.

### **Assessment of T1 capacity at Dublin airport**

- 4.6 The Panel was of the view that to properly assess the proper size of T2, and accordingly the appropriate parameter for box 2, the Commission should first establish and identify the capacity of T1. The Panel was unclear what the Commission considered the capacity of T1 to be. This capacity should be stated, and should include the Terminal 1 extension (T1X), Pier D and Area 14 since these were all known to the Commission in July 2007. The Panel suggested that this might best be done by reference to the competing contentions of the DAA and Ryanair, by way of a joint hearing/meeting.

### **Responses to CP1/2009**

- 4.7 The Commission has sought below to summarise, without comment, the observations and arguments that parties made on this referral topic in their responses to CP1/2009. Their full responses are available on the Commission's website ([www.aviationreg.ie](http://www.aviationreg.ie)).

#### *Aer Lingus*

- 4.8 Aer Lingus suggested that the matters referred back by the Panel should be considered afresh in the next determination.

#### *Cityjet*

- 4.9 Cityjet noted that the 2001 Determination was based on a RAB designed to deliver 19.7 million passengers per annum (mppa) in T1 by 2006. Additional projects completed since 2006 must have increased capacity above that level.
- 4.10 It shared Ryanair's view that the capacity of T1 was in the order of 25-26 mppa in 2009, particularly once airline efficiency improvements are taken into account. At the time of the 2007 Determination the Commission should have been aware of industry trends, including the use of kiosk and internet check-in. Cityjet claimed the Panel expressed support for the Ryanair's view as it had not been challenged.

#### *The DAA*

- 4.11 The DAA was surprised by the Panel's suggestion that the Commission had considered T1 and T2 in isolation. The T2 programme had from the beginning had reference to the capacity of T1. The capacity of T1 was deemed to be 18-20 mppa after the construction of T1X. T2 (first phase) will add capacity to process an additional 11-12 mppa. The evidence available to the Commission shows a combined capacity of approximately 32 mppa.
- 4.12 There was an inconsistency in Ryanair's position regarding capacity at the Eastern campus. Ryanair opposed the DAA's T2 plans on the grounds that the capacity

would exceed the local area plan (LAP) ceiling, yet it supported an earlier proposal for a 10 mppa second terminal. Such a facility would breach the LAP if Ryanair's assessment of T1 capacity was correct.

- 4.13 Ryanair had repeatedly confused T1's capacity with the number of passengers currently processed. T1 is operating at an inferior level of service – its design capacity is not 21.6 mppa in 2006 just because it processed that number of passengers. The DAA thought that that the existing facility cannot deliver a consistent, reliable and acceptable experience given current levels of traffic and represents a significant risk if unexpected events occur.
- 4.14 Capacity of a terminal evolves over time. For instance, security screening requirements today are considerably greater than in 1999. Similarly, the size of aircraft had increased significantly, applying more pressure on check in and security. As a result, the DAA estimates that T1 will have a capacity of 18-20 mppa after the facilities upgrade (including T1X which is primarily a retail development).
- 4.15 The DAA stated that demand and level of service are really about peak hour of a planning day schedule, not annual passengers. Capacity is not the same as throughput and Ryanair's approach to converting peak-hour demand to annual demand is flawed. Interchanging throughput and capacity results in the illogical conclusion that a facility can handle 3 mppa more passengers while at the same time passengers and many airlines (including Ryanair) castigate the facility for being excessively congested.
- 4.16 While the DAA has undertaken a number of measures designed to improve the passenger experience in T1, it has not been able to address all the congestion problems in circulation and retail areas. Moreover, some of the additional capacity provided cannot always be used to its maximum extent. For example, Area 14 adds check in desks but does not assist in reducing queues for Ryanair or US carriers since those airlines are unwilling or unable to use the capacity in that area. Because of this IATA planning standards are of limited use since they fail to recognise specific building constraints of a particular terminal.

#### *Ryanair*

- 4.17 Ryanair referred to its submission to CP5/2007, which stated that the DAA was on record as saying T1's busy hour capacity will be 4,800 once T1X has been constructed and taking into account the capacity of Pier D and Area 14. Using busy hour ratios and analysis similar to that used by Rogerson Reddan and Vector (RR&V), this implied an effective capacity of at least 25 mppa. The figure may be higher if the available capacity is used more efficiently after T2 is built and T1's predominant user is Ryanair.
- 4.18 The 2001 Determination was based on a RAB designed to deliver 19.7 mppa in T1 by 2006. This was consistent with the DAA's 1999 Annual Report which recorded the capacity of T1 as 20 mppa upon completion of Pier C and the earlier terminal extension. This was prior to the construction of Area 14, Pier D and T1X which the DAA has confirmed add some additional capacity of 6 mppa to T1's capacity.
- 4.19 Once the planned works are complete the capacity of T1 will be about 26 mppa. This conclusion relies on statements by the DAA. At a consultation meeting on 2 March 2007 Bob Hilliard of the DAA accepted that T1 would have a capacity of 4,800 departing passengers per hour. This is equivalent to 26 mppa using a multiplier of 5,570 to convert hourly departure capacity to annual passenger volumes. This multiplier corresponds to T1 handling 23.3 million passengers in 2007 with a departure hourly capacity limit of 4,050. The capacity would be 25.1 mppa if using 2006 data to derive the multiplier.

- 4.20 The DAA contended that T2 opening would alleviate T1 which was currently operating at unacceptable levels of congestion. However, as an airport gets busier, demand spreads out over the day and over the year. The DAA was achieving fewer busy hour departing passengers per mppa than would be the norm at BAA airports in the UK.
- 4.21 Ryanair was unclear about the Commission's assumption about T1 capacity: it appeared to be approximately 20 mppa. Ryanair believed that the capacity of T1 was in the order of 25-26 mppa in 2009, particularly once airline efficiency improvements are taken into account. At the time of the 2007 Determination the Commission should have been aware of industry trends, including the use of kiosk and internet check-in. Ryanair claimed the Panel expressed support for the Ryanair's view as it had not been challenged. If the Commission concluded that the capacity of T1 was not 20 mppa before recent expansions and as extended is 26 mppa, it will have to explain clearly its view by reference to specific supporting evidence.

### **Commission's review**

- 4.22 Following the referral and the responses to CP1/2009, the Commission sought to revisit the question of T1's capacity. This section describes the information available to the Commission at the time of its July 2007 decision, including information that the Commission had received at various dates prior to the determination. It then describes how the Commission sought to interact with the DAA and Ryanair to understand their respective positions relating to T1. Finally, it provides the Commission's conclusions.
- 4.23 In parallel to this work-stream, the Commission also considered the referral back relating to the consequential implications for T2 of a judgement relating to the capacity of T1. Based on that work, the Commission is minded to conclude that the issue of T1's capacity is less significant than the Panel appeared to believe in making its referral back to the Commission. Moreover, for reasons outlined, the notion of an annual capacity for an airport terminal is not a concept for which there is a single right answer. Reasonable people may reach different conclusions. Indeed, some views may simply point to an acceptable range of capacity figures.

#### *Information available to the Commission in July 2007*

- 4.24 Prior to making its determination in July 2007, the Commission did review the capacity of T1 to the extent it felt was necessary at the time. The Commission was also aware of a number of prior studies that had looked at this question, often for different reasons. The information relating to T1 available to the Commission in July 2007 seemed sufficient for the purposes of reviewing the price cap in the context of CIP2006.
- 4.25 During the interim review, in response to a statutory request from the Commission concerning T1 the DAA referred to a number of significant investments in progress or just complete (Area 14, departures concourse reconfiguration, temporary boarding gates, and Pier D). The DAA claimed that these developments, along with the deployment of significant numbers of terminal service agents, meant the terminal could now process 4,050 passengers per busy hour. Despite this, the DAA believed that the passenger experience was frequently not in line with its target service standard despite the declared capacity. Some of the developments did not increase capacity to its maximum extent. For example, Area 14 added check-in capacity but this did not reduce queues for Ryanair or the US handlers since they did not operate there. The DAA argued that there was a complex relationship between busy hour and annual capacity. Once T1 was reconfigured, it would have an annual throughput in the region of 15-18 mppa. The DAA also claimed that the combined capacity of two terminals will be less

than the capacity of a unitary terminal of the same size because of the need for the two separate facilities to meet separate peaks, whereas a unitary facility could take advantage of the fact that individual airlines may have peaks that do not fully overlap. This inefficiency could amount to 10-20%.

- 4.26 The An Bord Planeala hearings for T2 (at which the Commission attended throughout as an observer) included some references to T1's capacity. Ryanair claimed at those hearings that the combined capacity of T1 and T2 was approximately 46 mppa, possibly 52 mppa. It quoted Aer Rianta's 1999 annual report stating that the 6-bay extension and Pier C would increase handling capacity to at least 20 mppa. The DAA stated that it did not want T1 to handle this number of passengers, preferring instead if T1 handled 15 mppa once T2 became operational.
- 4.27 The DAA's CIP2006 assumed that T1 would have a residual operating capacity of 20 mppa. The terminal was currently processing 21 mppa.
- 4.28 During the 2005 determination (which the 2007 interim review followed on from), the Commission had procured consultancy work from Dr Hynes. In May 2005, his capacity analysis concluded that "the overall total annual terminal capacity is considered to be approximately 19-20 mppa".
- 4.29 In 2003 Aer Rianta (the DAA's predecessor) claimed that T1's capacity was between 16 and 17 mppa. This estimate allowed for a "detuning" process that was underway. Two years earlier, Ryanair had claimed that a Department of Public Enterprise draft document from 2000 stated that Dublin airport had capacity in excess of 20 mppa. The Commission had a copy of that report.
- 4.30 The Commission received a number of comments from respondents to consultation papers in 2006 and 2007. The overwhelming majority of these responses expressed dissatisfaction with the existing facilities. For example, in response to the draft determination in 2007, Chambers Ireland commented

*"DAA has used the current facilities to the maximum benefits of all stakeholders in the airport, but services are unsustainable in the context of current constraints"*<sup>1</sup>

- 4.31 The Irish Business and Employers Confederation (IBEC) claimed that the airport as a gateway

*"remains a severe bottleneck to economic growth and inward investment.*

*'...Congestion at Dublin Airport is fuelling the negative view that Ireland is one of the worst OECD countries for the efficiency of our transport infrastructure."*<sup>2</sup>

- 4.32 The Irish Tourist Industry Confederation (ITIC) expressed concerns that all airports users' interests should be considered, arguing

*"No carrier should be allowed to dictate levels of facilities and services which are at odds with what can be reasonably be expected in a developed economy"*<sup>3</sup>

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<sup>1</sup> See Chambers Ireland's response to CP5/2007, [www.aviationreg.ie](http://www.aviationreg.ie).

<sup>2</sup> See page 1, IBEC's response to CP5/2007, [www.aviationreg.ie](http://www.aviationreg.ie).

<sup>3</sup> See page 2, ITIC's response to CP5/2007, [www.aviationreg.ie](http://www.aviationreg.ie).

In an earlier consultation, ITIC had responded to CP1/2007 arguing that

*"Dublin Airport is operating well beyond its design and carrying capacity, resulting in congestion, delays, safety concerns and a less than overall satisfactory user experience. ...The inadequacy of the current terminal facilities at Dublin Airport is well demonstrated by objective external indicators: Ireland and Dublin ranked poorly among industrialists as to the quality of air transport infrastructure."*<sup>4</sup>

4.33 Other parties to CP1/2007 also expressed dissatisfaction with the existing terminal. For example Fingal County Council stated:

*"It is aware that the existing terminal falls significantly below those standards [IATA level of service C] and notes that the development of T2 will relieve the current extreme pressure on T1, thereby allowing T1 to be upgraded to provide for IATA level of service C. In this context it is concerned to see computation of pax numbers per square metre for the existing T1 contrasted with the same calculation of extra passenger delivered by T2, without reference to the standard of service. This calculation and analysis seems overly simplistic in the context of the urgent and widely acknowledged need to upgrade standards at this facility."*<sup>5</sup>

4.34 Forfas argued that

*"The current situation of congestion and over-crowding at Dublin Airport is damaging to our international competitiveness and reputation. It cannot be allowed to continue."*<sup>6</sup>

4.35 In September 2006, during a consultation on whether there should be an interim review, the Investment and Development Agency (IDA) supported any initiative that

*"...brings about a solution to the current congestion at Dublin Airport; in particular plans to develop additional capacity are welcome, along with future plans by airlines to increase route choice and frequency. An efficient functioning Dublin Airport, capable of presenting a modern image of Ireland as a well developed economy, is critical to IDA's existing client base, and is a key differentiator in Ireland maintaining its status as a leading location for FDI."*<sup>7</sup>

4.36 ITIC complained that

*"In reality the conditions which are endured daily at peak times by airport passengers are demeaning, intolerable, unacceptable and for older passengers frightening.*

*'...There is an urgent need to extend and improve facilities at Dublin Airport to accommodate new services and to reverse the increasing dissatisfaction of visitors, their agents, and carriers, with the current inadequate facilities."*<sup>8</sup>

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<sup>4</sup> See page 1, ITIC's response to CP1/2007, [www.aviationreg.ie](http://www.aviationreg.ie).

<sup>5</sup> See page 2, Fingal County Council's response to CP1/2007, [www.aviationreg.ie](http://www.aviationreg.ie).

<sup>6</sup> See page 1, Forfas' response to CP1/2007, [www.aviationreg.ie](http://www.aviationreg.ie).

<sup>7</sup> See page 2, IDA's response to CP6/2006, [www.aviationreg.ie](http://www.aviationreg.ie).

<sup>8</sup> See pages 3 and 4, ITIC's response to CP6/2006, [www.aviationreg.ie](http://www.aviationreg.ie).

- 4.37 Cityjet made a number of comments suggesting dissatisfaction with the capacity of the current facilities at the airport

*"The disparity between the level of infrastructure provided in Dublin compared to the major airport hubs we operate out of such as Paris CDG and Amsterdam Schipol is huge. Dublin Airport is heavily congested and this leads to delays and unnecessary stress for current and future passengers.*

*'...Development at Dublin Airport continues to be frustrated by a combination of political indecision and intensive lobbying of a single interest party.*

*'...Cityjet strongly supports the growth of Dublin Airport and it is our view that the current airport infrastructure is not sufficient to cope with either the current traffic or the projected traffic growth over the next few years.'*<sup>9</sup>

- 4.38 Between the date of this quote and July 2007, Cityjet at no stage informed the Commission that its views on the congestion of T1 had changed. For this reason, the Commission believes that Cityjet's submission to CP1/2009, insofar as it relates to T1's capacity, includes views not submitted to the Commission at the time of the interim review.
- 4.39 The one party to adopt a dissenting opinion about T1's adequacy was Ryanair. In its response to the draft determination, Ryanair referred to the 25 mppa of capacity provided by T1. The response included correspondence between the DAA and Ryanair, including a letter of 2 May in which Ryanair claimed that the DAA had previously confirmed that T1, with the latest expansion, would be capable of handling 26 mppa (4,800 per hour). In its response to CP1/2007, Ryanair had argued that a capacity assessment based on an appropriate level of service for users at the airport would enable a one-way departure flow for T1 of over 5,000 passengers per hour, taking into account the scope for extension.
- 4.40 A full capacity analysis of the airport was carried out in the latter half of 2006, leading to a decision by the Commission to designate Dublin airport as coordinated under the relevant EC Regulations on the allocation of slots. This included work by Jacobs Consultancy. It concluded that the terminal and stand capacity at Dublin airport is up to 24.7 mppa for the period 2007-2010. This capacity could be achieved by 2009 and would amount to 4,081 busy hour passenger movements. The study considered Area 14's capacity. It suggested that this would depend on what type of check-in operation was adopted in the area. Jacobs' study referred to a May 2006 report by the consultancy firm of Arup that gave pier capacities of 1,323 for Pier A, 868 for Pier C and a theoretical capacity of 973 passengers for Pier B immigration. During consultation, the only party to oppose the decision to designate Dublin airport as coordinated was Ryanair.
- 4.41 At the time of the interim review, the Commission was aware that the majority of respondents to consultation papers were dissatisfied with the current facilities. It was also aware of, at times conflicting, claims relating to the capacity of T1, either in terms of busy-hour processing capacity or annual passenger throughput. Some of these studies had referred to Pier D and Area 14.

#### *Meeting to discuss T1 capacity*

- 4.42 Following receipt on 21 January 2009 of responses to CP1/2009, and in light of the suggestion by the Appeal Panel that as part of revisiting the issue of T1

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<sup>9</sup> See pages 1 and 2, Cityjet's response to CP6/2006, [www.aviationreg.ie](http://www.aviationreg.ie).

capacity, there ought be a joint meeting involving all parties where conflicting views could be discussed, the Commission issued by letter of 23 January 2009 an invitation to both Ryanair and the DAA (together with any experts the parties wished to bring) to a meeting on 3 February to discuss T1 capacity. In the event despite considerable engagement between the parties over a number of weeks, it was not possible for either joint or bilateral meetings to be arranged. In those circumstances and in order to ensure that both the DAA and Ryanair had a final opportunity to present their views on issues relating to T1 capacity, the two parties were requested to submit comments in writing by 16 February 2009.

4.43 In particular comments were invited on the following two questions:

- What is the busy-hour capacity of T1, and how do Pier D, Area 14 and T1X affect this busy-hour capacity?
- How does this busy-hour capacity convert into an annual throughput capacity?

4.44 A response was received from both parties and these submissions were considered by the Commission.

*Written submissions of the parties*

4.45 The DAA and Ryanair submissions are attached as annexes to this decision. A very brief summary of their responses follows.

4.46 The DAA suggested that the planning busy-hour capacity of T1 is 3,650 departing peak-hour passengers and that the annual throughput capacity of the terminal is 18-20 mppa. While the declared departures peak hour capacity of T1 is currently 4,050, the DAA claimed that this concept is different from a planning capacity. In particular, the declared capacity is not set so as to achieve a defined level of service throughout the airport. Area 14 had resulted in an increase in the declared capacity from 3,250 in Summer 2006 to 3,850 in Winter 2006/7. Operational improvements and increased use of self-service kiosks had increased the declared capacity to 4,050 in Summer 2007. Pier D increased boarding gate capacity, but did not affect the constraining terminal element (the departure concourse) so had not affected the declared capacity. The DAA claimed that T1X is no longer designed to provide additional terminal processing capacity, but as Ryanair noted in their response of January 2009 is primarily a retail facility. The DAA believed that there was no supporting information for Ryanair's assertion that T1 is capable of 4,800 passenger movement per hour. The DAA did not believe that there was a simple or single answer to the question of how to convert the busy-hour capacity into an annual throughput. It will depend on a number of factors, such as load factors, size of aircraft, demand for less popular off-peak periods, and seasonal fluctuations. The DAA also argued that in recent years the airport has been operating at a constrained level, and that this distorts the relationship between the peak hour and annual throughput. Using an unconstrained busy hour demand – what the volume of traffic would be in the busiest hour if the existing facility could meet all demand – of 6,000 (as estimated independently by ACL), then the ratio of peak hour demand to annual throughput in 2007 would imply a facility with T1's annual throughput capacity of around 14.2 mppa. A more conservative estimate would be between 18-20 mppa.

4.47 Ryanair's submission re-iterated its claim that the annual capacity of T1 as extended is around 26 mppa. This was a conservative estimate. For the purposes of assessing the scale of T2 development required, Ryanair argued that it is reasonable to assume 4,800 departing passengers per hour to be the capacity of T1. This figure of 4,800 was consistent with the capacity that the DAA had advised attendees at a workshop in March 2007 T1 would have following completion of

T1X. To convert the hourly capacity into an annual capacity figure, Ryanair referred to the ratios of declared hourly capacity to annual throughput in 2006 and 2007. Applying the 2006 ratio to an hourly capacity of 4,800 departing passengers put the annual capacity at around 25 mppa, whereas using the 2007 ratio put the capacity at around 27.6 mppa.

*Conclusions regarding T1 capacity*

- 4.48 The Panel's referral of T1 capacity back to the Commission did not provide any additional analysis. There was no discussion of how different parties might consider capacity, nor any assessment of competing claims. The responses from the DAA and Ryanair draw out some of the subtleties associated with discussing capacity in an airport context.
- 4.49 The processing capacity – how many passengers the airport can process in an hour – will depend in part on the level of service that is to be provided. Different parties will have different views on what is an acceptable level of service. Such differences may also reflect differences between parties about whether the declared capacity for scheduling purposes should be used when planning new capacity. Some parties may believe that an existing facility can process 4,050 passengers per hour comfortably. Others might feel that passengers are being processed in less than ideal conditions; they might judge that in the short run it is better to process that high number of passengers rather than restrict how many people can travel in that hour; in the long run they may feel that capacity should be added so that the existing facility is not required to process 4,050 passengers in an hour.
- 4.50 The evidence available to the Commission in July 2007 was that many users were not receiving a level of service that corresponded to what they wanted. In the busiest periods, T1 was processing more passengers than ideally would be processed. The Commission accepts the DAA argument that the declared capacity and planning capacity may not be the same, and that in the case of Dublin airport in 2007 the declared capacity was higher than a suitable planning capacity. Many users were not satisfied with the existing facilities. This suggests that more capacity was required – the DAA proposed building a new terminal, one way of addressing the reasonable requirements of current and prospective users.
- 4.51 Ryanair's claim for the hourly processing rate for T1 appears to rely on the Commission reaching a different conclusion about the adequacy of Dublin airport's facilities in 2006 and 2007. If the Commission concluded that T1 was acceptable in those years for the given declared capacities, then there might be merit in using an estimate of the declared capacity post T1X for the purposes of determining the busy-hour capacity of T1 when considering investment needs. Since the Commission does not accept this premise, it does not accept that T1's busy-hour capacity for planning purposes should be 4,800 because the DAA has stated that will be the declared capacity after T1X is built.
- 4.52 The relevance of T1X for the purpose of T2 capacity needs is questionable. There is the debate between the DAA and Ryanair about whether or not T1X adds capacity. The minutes that Ryanair refers to support its contention that the DAA did suggest it would increase declared capacity. If the Commission was to accept that T1X added capacity, there would then be the question of whether this should influence the allowed size of T2. Both projects were included in the same CIP. As discussed later in this document, Ministerial Directions required the Commission to facilitate the development of a second terminal. Given a second terminal was to be built, it is premature to immediately conclude that T1X's capacity should be included in assessing existing capacity before deciding what size T2 needs to be. It might be equally valid instead to ask what additional capacity T1X needs to provide given T2 is to be built. In the end the Commission's decision relating to



T1X means that the price cap will not increase to allow the DAA to fund the project, since it was ultimately presented as a retailing concept that would generate sufficient incremental commercial revenues to be self-financing. If the argument to the Commission for including T1X in the RAB was to permit additional capacity, the Commission may have included the project in the RAB without any conditions about demonstrable incremental commercial revenues or it may have refused to allow some or all of the costs into the RAB, either because of T2 or because the Commission concluded that T1X was unnecessarily expensive (in the interim review the Commission commented that it considered the costs of the project to be high).

- 4.53 Both the DAA and Ryanair make reference to 2007 data to convert busy-hour capacities into an annual capacity figure. Such data was not available to the Commission in July 2007, so the Commission does not believe it can rely on these data. However, this turns out to be a second-order concern. A more fundamental question is whether and how busy-hour capacities can be converted into annual capacities.
- 4.54 A lay-person's understanding of capacity might envisage it being simply a case of multiplying the busy-hour capacity (assuming that debates surrounding that can be resolved) by the number of hours in the year to get an annual capacity. Neither the DAA nor Ryanair has adopted such a simple calculation. For the purposes of planning airport facilities, it would not be a useful exercise. Instead, when parties discussing airport capacity refer to an annual throughput capacity, they are really making a comment on how many people they believe that facility might reasonably be expected to process in a year. That includes a number of judgements about what the level and nature of demand is likely to be throughout the year.
- 4.55 Both the DAA and Ryanair identify factors that might influence the relationship. Examples include the seasonality of travel, the assumed load factors, the size of the aircraft, the demand to fly at different times of the day. When these different concepts are included in the thinking about the annual throughput of a terminal, the conclusions about annual capacity will depend on assumptions about how carriers in the facility will behave. With a different mix of carriers, the conclusions about the likely annual throughput of the facility may differ. A terminal that is used solely for long-haul flights is likely to have fewer passengers go through the facility in a year than if the same terminal was used solely for short-haul flights by low-cost carriers.
- 4.56 Thus, statements about the annual throughput of T1 for the planning purposes do not readily lend themselves to a single number. Such a statement would have to be qualified by what assumptions the Commission was making about which carriers would be using T1, the mix of flights that would be occurring, the load factors that seemed reasonable, the seasonality of flights it expected and so on. Nor would reaching this conclusion suffice for the purposes of determining the required capacity for T2. If it was accepted that T1 and T2 should have a combined annual throughput of 30 mppa, a finding that T1 had an annual capacity of 25 mppa (given various assumptions) would not necessarily mean that T2 should therefore have an annual capacity of 5 mppa. Both the DAA and Ryanair acknowledge that two terminals may require up to 20% more capacity than is required in a single terminal to handle the same volume of traffic. A major reason for this is that the flight schedules in the two terminals may mean that the busiest hours do not coincide.
- 4.57 At the time of the interim review a statement about the capacity of T1 was not necessary for the Commission's purposes of setting a price cap. Representations made to the Commission by almost every interested party representing airport users, as summarised earlier, suggested that T1 was inadequate then and more

capacity was required. Only Ryanair differed on this point. But as reported in the next section, even Ryanair sought a new terminal with an annual capacity of between 10 and 15 mppa (depending on the dates of its submissions).

### **Consequential assessment of the required capacity for a second terminal**

4.58 The Panel referred back to the Commission a consequential assessment, in light of T1's assessed capacity, of the required capacity of a second terminal. In doing so, the Commission was instructed to have regard to

*"the constraints imposed upon the utilisation of that capacity by*

*(a) the delay in the provision of a second runway, and*

*(b) the local area plan of Fingal County Council which suggested a limit to the airport campus at the eastern campus to 30 million passengers per annum."<sup>10</sup>*

The Commission should also to have regard to the Ministerial Direction that proposed a third terminal on the western campus.

4.59 The Panel did not explicitly refer back to the Commission the need to consequentially assess either the trigger for box 2 or the unitisation methodology following an assessment of the capacity of T1. The Commission's 2007 Determination made reference to the comfortable capacity of T1 in determining the trigger for when it would allow the costs in box 2 to enter the RAB and for how it would remunerate such costs.

### **Responses to CP1/2009**

4.60 The Commission has sought below to summarise, without comment, the observations and arguments that parties made on this referral topic in their responses to CP1/2009. Their full responses are available on the Commission's website ([www.aviationreg.ie](http://www.aviationreg.ie)).

#### *Aer Lingus*

4.61 Aer Lingus suggested that the matters referred back by the Panel should be considered afresh in the next determination.

#### *Cityjet*

4.62 Cityjet referred to the Panel's view that the required capacity of T2 should be the difference between the capacity of T2 and the ceiling of 30 mppa planning cap under the LAP. Only the costs relating to this increment should be allowed in the RAB. This equates to the order of 5 mppa's worth of capacity or 45% of the cost of T2 overall. Any development beyond this should be at the DAA's risk.

4.63 Of particular concern to Cityjet was the timing of when T2 entered the RAB given runway constraints. Cityjet suggested that this may not be a matter for the review, but for the next Determination later in 2009.

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<sup>10</sup> See page 58, Decision of the Aviation Appeals Panel "Appeal of Ryanair Limited against determination of Commission for Aviation Regulation CP6/2007".

### *The DAA*

- 4.64 The DAA argued that the Commission had adequately consulted on the implications of the second runway not being ready when T2 opened. The design year for T2 was 2013. At this date the DAA's plans envisaged the second runway being operable. It was most unusual for airports to attempt to deliver both a second terminal and a parallel runway at the same time, because of the operational and financial implications.
- 4.65 The LAP was never intended to apply a maximum capacity figure of 30 mppa on the Eastern Campus. Rather, the LAP indicated that once throughput reached about 30 mppa, another tranche of capacity would have to be considered. An Bord Planeala's decision was issued after the Commission's decision, so Commission could not consider any planning limits it may have imposed.
- 4.66 The DAA claimed an inconsistency with Ryanair's position regarding capacity at the Eastern campus. Ryanair opposed the DAA's T2 plans on the grounds that the capacity would exceed the LAP ceiling, yet it supported an earlier proposal for a 10 mppa second terminal. Such a facility would breach the LAP if Ryanair's assessment of T1 capacity was correct.
- 4.67 The DAA listed occasions when the Commission had considered the capacity of T1, dating back to a consultation paper published in October 2004 (and a study by the consultants WHA for the Commission completed in September 2004), and including materials published at the time of the draft and final 2005 determination. It also referred to the Dublin Airport Capacity Review that Jacobs had undertaken for the Commission prior to the interim review as part of the process leading to the decision that Dublin airport should be slot co-ordinated. The latter report clearly demonstrated outstanding issues regarding the level of service in T1. On this basis, the DAA felt that the Commission had considered the issue of T1 capacity in the course of the development of the last determination.
- 4.68 Similarly, the DAA listed occasions when the Commission had considered the size and capacity of T2. It also referred to an Oral Hearing into the T2 project held on 16 April 2007 at which the Commission was represented where there were discussions held between the various parties. On this basis, and notwithstanding its serious reservations about some aspects of the various references cited, the DAA believed that the Interim Report did not require any variation to comply with the Ryanair Panel referral since there had been numerous instances in which specific issues regarding T1 and T2 capacity had been discussed.

### *Ryanair*

- 4.69 Ryanair stated that the correct approach was for the Commission to assess the capacity of T1 as a first step in assessing the need for and scale of T2.
- 4.70 It referred to its submission to CP5/2007. The logic that T2 has to be large enough to accommodate all of Aer Lingus and partners' operations is flawed as operations will be split between Pier E and the existing Pier B. A further consideration determining the scale of T2 is the Fingal LAP which places a ceiling on the capacity of the eastern airport campus of 30 mppa, a limit due to surface access constraints implied by the Airport Box.
- 4.71 Ryanair referred to the Panel's view that the required capacity of T2 should be the difference between the capacity of T1 and the ceiling of 30 mppa planning cap under the LAP. Only the costs relating to this increment should be allowed in the RAB. This equates to the order of 5 mppa's worth of capacity. Any development beyond this should be at the DAA's risk. Ryanair acknowledged that there would

be some increase in the hourly capacity required given loss of utilisation efficiency caused by demand being split between two terminals.

- 4.72 Given a busy hour departing passenger volume of 4,200, T2 Phase 1 equated to a terminal with a capacity of between 22 and 24 mppa, using the ratio of busy hour demand to annual throughput to which Ryanair had previously referred. This was double the size the DAA had claimed, and implied an overall terminal capacity on the Eastern Campus of approximately 40 mppa, given some loss of efficiency from demand being split between two terminals.
- 4.73 RR&V's assessment that for an annual passenger throughput of 11.4 mppa, an hourly departure capacity was between 40% and 56% too large was broadly similar to Ryanair's view, although Ryanair did not accept a facility with that annual throughput was needed. Ryanair did not know on what basis the Commission considered 13.2 mppa annual capacity was required within the overall limits of the LAP yet on this basis the Commission had concluded that 54,000sq.m was justified for a terminal. This was approximately 73% of the total area of T2 and significantly greater than assessed by its own consultants as required.
- 4.74 Ryanair believed that the Panel's referral to the available capacity in T1 and LAP meant that RR&V's analysis was no longer relevant. It had looked at T2 in isolation. York Aviation, consultants for Ryanair, had assessed that with passenger throughput at the Eastern campus capped at 30 mppa and based on benchmark data, the busy hour departing passenger capacity required across the two terminals was no greater than 5,575. Splitting demand between two terminals might reduce efficiency compared to a single terminal, but by no more than 20%. So the effective capacity required would be no more than 6,690 departing passengers per hour to match a total of 30 mppa. Given T1's capacity, this meant that T2's maximum hourly required capacity was no more than 1,890 departing passengers, similar to the lower bound required in the RR&V analysis. This suggests that no more than 45% of the costs being incurred should be allowed into the RAB, assuming that the floor area is appropriately sized relative to hourly demand (notwithstanding that Ryanair considered there was excessive space allocated to retail activities).
- 4.75 The DAA appeared to have raised a new argument during the Appeal claiming that economies of scale justified a large T2. Ryanair was not aware of any evidence to support this contention.
- 4.76 Ryanair was concerned about the timing of when T2 entered the RAB given runway constraints. The capacity in the two terminals could not be fully utilised until such time as additional runway capacity is in place. Ryanair accepted that synchronisation between the provision of runway and terminal capacity is not always possible, but that it is easier to develop terminal capacity in incremental steps. The cost-benefit analysis by CEPA was wrongly assessed on the basis of a passenger forecast that wrongly assumed additional capacity in place concurrently with the provision of a new terminal. It is not possible to separate the benefits of a new terminal from the benefits of a new runway. Given this, there is no case for allowing the costs of the terminal to enter the RAB before additional runway capacity is added. Ryanair suggested that this may not be a matter for the review, but for the next Determination later in 2009.

### **Commission's review**

- 4.77 As discussed above, the Commission has considered the capacity of T1 following the Panel's referral. Based on this analysis, the Panel suggested that the Commission should then consider whether this analysis has any consequential implications for the required size for T2. In addressing this, the Panel referred to a

number of factors that it considered relevant. These are first discussed, to establish the information relating to these items that was available to the Commission at the time of its 2007 determination.

#### *Local Area Plan*

- 4.78 The Panel referral appears to have accepted Ryanair's suggestion that the Fingal County Council LAP capped numbers in the Eastern campus at 30 mppa and that the Commission's 2007 determination had no regard to this plan.
- 4.79 As stated during the oral hearing, the Commission sought to understand the significance of the LAP prior to making its 2007 Determination. Fingal County Council's statement granting planning permission in October 2006 stated that:

*"The year a capacity of 30mppa is reached (and assuming an expectation of continuing growth), the applicant shall submit detailed plans for the future expansion of the western campus in accordance with the policies and objectives of the Dublin Airport LAP. Reason: In the interests of proper planning and sustainable development having regard to LAP content and capacity constraints on the eastern campus"<sup>11</sup>*

- 4.80 Although not referred to by the Panel, there were different interpretations concerning the significance of the LAP. These differences were apparent during the oral hearings held by An Bord Pleneala. The Commission had an observer attend those hearings. While Ryanair suggested that the LAP capped capacity at the Eastern campus at 30 mppa, other parties did not believe this was a hard cap. For example, during questioning from Ryanair at the hearings, Sean O'Faircheallaigh (Fingal County Council senior planner) stated that while 30 million was the driving capacity of the eastern section it was a general guideline, and in the context of the current growth the planning authority had considered it was reasonable to accept 35 million.
- 4.81 During those hearings, it appeared to the Commission that An Bord Planeala was being asked to decide between three different positions concerning a cap on passenger throughput at the eastern campus. Ryanair believed that there should be a hard cap of 30 mppa, claiming that this was consistent with the LAP. Fingal County Council, the authors of the LAP, sought a hard cap of 35 mppa with a requirement that the DAA submit plans for a third terminal once passenger numbers reached 28 mppa. The DAA opposed a hard cap on passenger throughput in the eastern campus. It was ultimately for An Bord Planeala to decide between these competing requests when deciding whether to grant planning permission for T2 and what planning conditions, if any, to attach.
- 4.82 During the interim review the Commission also received correspondence from Ryanair that sometimes made reference to the LAP or events at An Bord Planeala's oral hearings. On 9 March 2007 Ryanair claimed there could be no justification for building a terminal that could handle 46-50 mppa when the airport did not have the facilities and the Fingal County Council's LAP limited throughput at the existing site to 35 mppa. On 23 April 2007 Ryanair claimed that during the oral hearings Fingal County Council had confirmed that the absolute cap on the development of the Eastern campus was 35 mppa and that the Council may have to strengthen the planning conditions to enforce this cap strictly. On 9 May 2007 Ryanair claimed that Fingal County Council had now imposed a 35 mppa maximum passenger cap on the development of the eastern campus. On 11 May 2007 Ryanair argued that Fingal County Council's planning restriction of 35 mppa

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<sup>11</sup> Condition 28, Decision Order No. 3554, Fingal County Council Notification of Decision to Grant Permission Planning and Development Acts, 2000 to 2006.

on the Eastern campus effectively demonstrated that the increased size and scale of T2 was unnecessary and contrary to planning restrictions.

- 4.83 The Commission made its 2007 determination prior to An Bord Pleanála's decision. Based on the information available to the Commission at that time, no party could claim with certainty that there would be a cap of 30 mppa on passenger throughput at the airport should T2 get planning permission. Nor could they claim that there would be no cap. Nor that there would not be other planning conditions that might affect the costs of building T2 or the benefits to users that the facility might provide. This was the position known to the Commission at the time of its 2007 determination.

*Timing of the second runway*

- 4.84 Regarding the delay in the provision of a runway, the Commission assumes that the Panel was not referring to announcements since July 2007 that the DAA will not build a second runway before 2013. To have regard to such announcements would be to consider information not known to the Commission at the time of its decision.
- 4.85 Instead the Commission assumes that the Panel was referring to the plans in the CIP2006 as they were known to the Commission at the time of its determination. This anticipated that the DAA would commence work on a second runway in 2010, after completion of the second terminal.

*Ministerial Direction's reference to a third terminal*

- 4.86 There were two Ministerial Directions that were potentially relevant to the Commission's decision in July 2007. Neither specifically made reference to a third terminal, notwithstanding the Panel's suggestion that the Commission make its decision having regard to the Ministerial Direction proposing a third terminal on the western campus.
- 4.87 Prior to the original determination, on 18 August 2005, Martin Cullen TD, Minister for Transport wrote

*"I am directing that the Commission make every reasonable effort to ensure that its final determination reflects the importance Government has attached to implementation of its policies on infrastructure development at Dublin airport and the restructuring of the State airports."*

- 4.88 During the interim review, the Commission received a letter dated 3 April 2007, from Martin Cullen TD, Minister for Transport, in which he wrote

*"I am directing that the Commission take due and manifest account of*

*(a) the importance Government has attached to implementation of its policies on infrastructure development at Dublin airport and the restructuring of the State airports*

*(b) the Government policy, in the public interest, that there be a 2nd terminal fully operational in 2009 so as to serve passenger growth needs and the requirements of a growing economy; and*

*(c) the need to enable Dublin Airport Authority to operate and develop Dublin Airport in a sustainable and financially viable manner having regard to Government policy that Dublin Airport Authority should operate on a commercial basis without recourse to Exchequer funding or an equity injection by the State"*

4.89 While the specific directions to the Commission do not include a reference to a third terminal, the references to government policy could be interpreted as requiring the Commission to ensure its decision is consistent with the Aviation Action Plan. This plan included two bullets that specifically relate to the third terminal:

- *"Examination of the current legal and regulatory framework governing Dublin Airport, identifying and making any changes necessary to facilitate a third Terminal. This ensures that when passenger volumes determine the need for additional capacity beyond that offered by Terminals One and Two, extra capacity can be brought on stream.*
- *'Terminal Three will be delivered in the most cost efficient and timely way, with this outcome being underpinned by an open competitive process.'*

4.90 The Commission does not believe even these two references have material implications for the price-cap determination it made in 2007. The statements do not provide clear guidelines about how the Minister believed plans for a second terminal should be constrained, if at all, by the possibility of a third terminal

4.91 None of the responses to CP1/2009 identified how terminal three plans should affect the Commission's decision given the Ministerial Directions.

#### *Required capacity for a second terminal*

4.92 The suggestion of the Panel that the Commission first have regard to the size of T1 and then determine the required capacity for T2 could only be appropriate to the extent that the determination that emerges is consistent with the Ministerial Direction, in particular the requirement that a second terminal be built by end 2009, as well as the Commission's three statutory objectives. The Panel acknowledged that the Commission faced a difficult problem making a determination that was consistent with its statutory objectives and the Ministerial Direction.

4.93 The Panel noted in the DACC Appeal that the Ministerial Direction required that T2 be built. In so far as it was built efficiently the cost of same should be remunerated.

4.94 Any Ministerial Direction must be read in light of section 33 of the Act. As the Panel rightly points out, it is the function of the Commission to give effect to the provisions of section 32 and 33 when making an airport charges determination whilst also complying with any general policy direction of the Minister given under section 10.

4.95 However, it is important to note that it is for the Commission to decide how to do so and in so doing it must be primarily lead by the objectives set out in section 33. This requires it to balance the requirements and protection of interests of current and prospective users of Dublin airport with enabling the DAA to operate and develop Dublin airport in a sustainable and financially viable manner. Consequently, any Ministerial Direction must be assessed and complied with in the context of this balance.

4.96 One aspect of Dublin Airport's development that the Ministerial Direction does directly affect is timing of development. The Government gave a clear direction to DAA to build a second terminal at Dublin airport and secondly a clear direction to the Commission that when making a determination it must have regard to the fact that Government policy was for a second terminal to be built and to be operational in 2009.

- 4.97 The DAA was seeking planning permission for a terminal described in CIP2006, the investment plan that was the focus of the Commission's interim review. The only reasonable prospect of a second terminal being operational by the end of 2009 was if the plans in the CIP proceeded. Consequently, it was not open to the Commission to refuse to consider remuneration of capital expenditure for a second terminal until some date into the future, such as 2015. The Commission's determination had to allow for the development of a terminal prior to 2009.
- 4.98 The question then became, what would be the appropriate level of expenditure to allow, and when and how should that be remunerated. This draws attention to what the Commission's role was and is: the Commission sets a price cap on airport charges. It does not grant planning permission or in other ways have the power to manage Dublin airport. It is for the DAA to operate the airport. The Commission cannot mandate the DAA to build a terminal of a specific size, nor can it prohibit the DAA from building a facility that the Commission considers does not meet the reasonable interests of current and prospective users. What the Commission can do is set a price cap that only remunerates the DAA to the extent that its investments meet those requirements.
- 4.99 So given a second terminal was to be built, how much revenues from airport charges should the DAA be allowed to collect to build such a facility? How big did a terminal need to be? During the interim review, the Commission received conflicting opinions from parties. The DAA presented T2 as a facility with a busy-hour processing capacity of 4,200 departing passengers, to meet the needs of the airlines using that facility. It was anticipated that this would serve 11.4 mppa.
- 4.100 In correspondence with the Commission Aer Lingus confirmed that it supported the T2 plans as designed, including a busy hour processing capacity of 4,200 departing passengers.
- 4.101 Ryanair at various dates indicated support for building a second terminal, although not the facility proposed by the DAA. Its submission to the Commission following publication of the draft determination included the following:

*"Based on the above, we expect CAR's Final Decision on the review of the 2005 Determination to:*

- 1. Permit DAA only to recover the financing costs on 10 mppa worth of capacity in T2, given the current planning restrictions, taking into account the 25 mppa threshold of capacity provided by Terminal 1;*
- 2. Permit DAA only to recover the reasonable costs for T2, i.e. no more than €150 million necessary to build a 10 mppa terminal facility;"<sup>12</sup>*

- 4.102 This submission suggested that Ryanair considered that Dublin airport required a second terminal capable of handling 10 mppa. Ryanair did not explain how this figure would be consistent with its assertions that the LAP imposed a binding constraint of 30 mppa and that T1 had a capacity of 25 mppa. In an earlier consultation, Ryanair's response suggested that it favoured a second terminal capable of handling more passengers than its response to the draft determination. In response to CP1/2007, Ryanair wrote:

*"Based on this submission, Ryanair therefore calls on the CAR to postpone any further review of the Dublin Airport charges until such time as the DAA provides sufficient information to users, properly consults with them on their requirements, and proposes a competitive cost efficient 15 mppa*

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<sup>12</sup> Page 3, Ryanair's response to CP5/2007, [www.aviationreg.ie](http://www.aviationreg.ie)



*terminal facility which reflects the cost of similar capacity terminal facilities being built at other European airports*<sup>13</sup>

- 4.103 That document also included Ryanair's conclusions about a suitable busy-hour capacity for T2 – 2,800 departing passengers – given T1's capacity. It believed that T1's capacity could handle a one-way departure flow of over 5,000 passengers, taking account of the potential for extension. This would be sufficient capacity, with a single terminal, to meet demand until 2015. Ryanair acknowledged that two terminals might be expected to have capacity between 15 and 20% more than a single terminal because of co-ordination issues.
- 4.104 In July 2007, the information available to the Commission suggested that the two main airlines at the airport and the DAA all supported a second terminal providing capacity for an annual throughput of at least 10 mppa. These demands were made by parties aware of T1 upgrades, including Area 14, Pier D and T1X (to the extent that the latter was a factor for the Commission to consider in deciding on the appropriate scale and cost for a second terminal). The suggestion that the Commission should have only allowed remuneration for a facility capable of handling only 4 or 5 mppa would therefore require the Commission to ignore the sizing requirements for a second terminal expressed by the two biggest current users of the airport. In fact, the only respondent to consultation papers published by the Commission between 2005 and 2007 that expressed views consistent with support for a terminal no larger than 4 mppa was UPROAR, the Portmarnock Residents Association: it opposed any expansion of Dublin airport.
- 4.105 The Commission is satisfied that its decision had due regard to planning matters. Planning permission and planning limits have only limited application to airport charges regulation.
- 4.106 The Commission has to have regard to the current and prospective users. If the Commission concluded that the requirements of users could not be realised because of planning or other constraints, it would be entitled to disallow capital expenditure from the RAB even where existing users and the airport expressed support for the investment. However, there was not information available to the Commission in July 2007 that suggested it should disallow from the RAB any expenditure that took the combined capacities of T1 and T2 above 30 mppa. Even Ryanair's concerns about the LAP varied as to whether it would cap passenger throughput of the terminals at 30 mppa or 35 mppa.
- 4.107 The job of the Commission is to assess the business of the airport from a number of points of view. If an airport management company plans but then fails to build a facility due to planning refusal or other constraints the job of the Commission is to assess that factual outcome for the airport in so much as it affects the calculation of airport charges. In other words, has the airport charges calculation relied on a plan to build in a certain way or size? If so and the plan is thwarted then airport charges must inevitably be altered in a review. In the face of a known binding constraint on development the Commission must assess the airport managing body's plans by reference to the objectives of the Act and the fact of any such planning restriction by reference to those objectives.
- 4.108 The question in relation to T2 from an airport charges regulation point of view could thus be reduced to how big (small) must the new terminal be so as to protect and meet the requirements of users whilst enabling development by DAA at Dublin Airport in a sustainable and financially viable manner? Whether or not the DAA could later get planning permission to build that terminal of that size is a matter for DAA and the planning authorities. It is not the role of the Commission to decide whether a proposed terminal should get planning permission or to

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<sup>13</sup> Page 2, Ryanair's response to CP1/2007, [www.aviationreg.ie](http://www.aviationreg.ie)

decide any alteration of the plans to ensure compliance with planning parameters. That is a matter for the planning authorities. It is the role of the Commission to decide whether the proposed development should have any impact on airport charges, and if so, on what basis having regard to the provisions of section 33 of the Aviation regulation Act, 2001.

- 4.109 It has been suggested that the size of the T2 building breaches planning parameters. This claim was not before the Commission at the time it made its decision for the simple reason that the building did not have final planning permission when the Commission made its decision. Simply put, the development did not need planning permission to be considered for the purposes of setting airport charges. The Commission has already assessed the development by reference to its own statutory remit and has decided that remunerating it in total without any triggers does not either protect or meet the requirements of users but that remunerating it in part, through airport charges, does enable the DAA to operate and develop Dublin Airport in a sustainable and financially viable manner and protects the interests of users and meets their requirements.
- 4.110 In addition, if there was a prohibition on constructing a building of that size and capacity at Dublin Airport, as is alleged, why did the planning authorities that set such planning parameters give the building planning permission in the knowledge of the presence of those parameters? It is not clear on what basis the Panel concluded that a building breaches planning parameters when the building has already received the required permission from the authorities before which such an argument should be made and that permission has been the subject both of an unsuccessful planning appeal and a withdrawn judicial review. The figures mentioned from the LAP and the size and throughput thresholds for box 1 and box 2 were matters of public knowledge at the time An Bord Pleanála made its decision.
- 4.111 The LAP states that it makes provision for a new terminal T2 and Pier E to be located at the south east of the existing terminal T1. The reconstruction and development of piers A and B and the provision of a new pier, Pier D, will complement the new terminal. This will bring the capacity of the existing and proposed passenger handling facilities on the Eastern campus to approximately 30 mppa. Again this figure is presented as an approximate guide, not a cap. The LAP goes on to state that terminal facilities to cater for further demand will be provided on the Western Campus.
- 4.112 The Commission has assessed airport charges by reference to a threshold of 33 million passengers at Dublin airport levied by the DAA in return for its services. This relates to those parts of Dublin airport that are used by the DAA to provide services that are the subject of airport charges. Dublin airport in this context means “the aggregate of lands comprised within an aerodrome (Dublin Airport) and all the land owned or occupied by an airport authority including the aircraft hangars, roads and Commission parks, used or intended to be used in whole or in part for the purposes of or in connection with the operation of an aerodrome.”
- 4.113 As an airport charges determination is both time bound and company bound this necessarily means it relates to the land and buildings used or intended to be used by DAA over the course of that determination. If these buildings do not exist or are not planned to exist within the timeframe of a determination on airport charges then considering their existence is not relevant to that determination. Accordingly, the third terminal on a Western Campus and references to it are moot at this time. Similarly, if these buildings are owned or operated by another firm then the airport charges legislation as currently written will not apply. The 33 million relates to the number of passengers to be served by the DAA at Dublin Airport as a whole regarding the land and buildings that are constructed, in the midst of construction and planned to be constructed during the currency of this

determination. In reality this means the Eastern Campus. If a binding condition subsequent to the review of the determination is imposed on Dublin Airport whereby only 32 million passengers can be served by DAA on the Eastern Campus then box 2 will not be remunerated through airport charges.

- 4.114 The request by the Panel that the Commission consider the delay on the provision of a second runway is at odds with its decision in the Aer Lingus Appeal when it found there were not sufficient grounds to make a referral. In that appeal it stated that it was of the view that deferral of remuneration until the full utilisation of the second terminal would be inconsistent with the Ministerial Direction which mandated DAA to build a second terminal by the end of 2009 without pre-condition of a second operational runway. It notes that the second terminal will be used by passengers prior to the building of the second runway.
- 4.115 The question arises as to how the Panel took one view in the Aer Lingus case while at the same time state in the Ryanair referral that the Commission must comment on how it had regard to constraints imposed upon the utilisation of terminal capacity by the impact of the delay of the second runway in its decision in relation to terminal two? It would appear that the Commission, according to the Panel, did not have to have regard to such constraints due to the nature of the Ministerial mandate to DAA and direction to the Commission. That is to say, the Panel answers its referral question in Ryanair in its refusal of Aer Lingus. The principle that T2 be remunerated prior to it being fully used is accepted in the Aer Lingus appeal but appears to be referred back in Ryanair.
- 4.116 The Panel noted in relation to a similar point made by DACC (whether the capacity provided in box 1 of T2 could be effectively used because of the limits on existing runway capacity) that the timing of the entry of matters into the RAB is a matter for the Commission.
- 4.117 Moreover, the final decision of the Commission does protect the reasonable interests of users from the possibility that a second runway is not forthcoming. It attaches conditions such that the DAA will only be able to recover the full costs associated with building T2 should passenger numbers exceed 33 mppa. If a second runway is not built, this is likely to hinder the prospects of the airport processing such a volume of passengers.
- 4.118 In conclusion, the Commission is satisfied that its decision concerning remuneration of T2 and the size of the two boxes is appropriate. The size of box 1 costs is based on a judgement concerning an appropriate size for T2 that met the reasonable interests of the generality of current and prospective airport users. To revise box 1 to reflect the costs of building a facility with an annual capacity of 5 mppa or 1,890 busy hour departing passengers would be to move away from users' stated requirements for additional capacity at the airport that the Commission was aware of at the time of the Interim Review. The decision to only allow the remaining box 2 costs to enter the RAB if passenger numbers exceed 33 mppa was made in the final determination having regard to the reduced financing concerns that arose following decisions to reduce the size of box 2 and Ryanair's reference to recent capacity enhancing projects in T1 not captured in the draft determination.
- 4.119 Nor does the Commission believe that it needs to vary its determination having regard to how the LAP, delay in the development of a runway or the Ministerial Direction on a third terminal might affect the appropriate size of T2. The use of two boxes was a method of protecting users against the possibility that planning conditions would restrict the use that could be made of T2. Moreover, the referral by the Panel with regard to the LAP and the Ministerial Direction's reference to a third terminal both appear to be based on interpretations that do not accord with the Commission's understanding. The Panel itself appears to have answered its

own referral regarding the runway, noting that deferral of remuneration until the full utilisation of the second terminal would be inconsistent with the Ministerial Direction which mandated DAA build a second Terminal by the end of 2009 without pre-condition of a second operational runway. The Commission concurs with this assessment.

## **The size of T2**

4.120 The Panel referred for review the issue of the correct sizing of T2. It stated that the Commission should take account of, and demonstrate that it had taken account of, the allegations of the DAA and must state clearly and transparently what it regards as the appropriate size of T2. The Panel did not consider it sufficient for the Commission to simply state that it adopts its consultants view over the views of the DAA; the Commission must state why this is so.

## **Responses to CP1/2009**

4.121 The Commission has sought below to summarise, without comment, the observations and arguments that parties made on this referral topic in their responses to CP1/2009. Their full responses are available on the Commission's website ([www.aviationreg.ie](http://www.aviationreg.ie)).

### *Aer Lingus*

4.122 Aer Lingus suggested that the matters referred back by the Panel should be considered afresh in the next determination.

### *Cityjet*

4.123 Cityjet supported Ryanair's view that, based on its evidence, the size of T2 required should only be 45% of what the DAA was actually building.

### *The DAA*

4.124 The DAA called on the Commission to re-assess the information available to it at the time if the final determination given that the DAA's evidence demonstrated that the conclusion that T2 was oversized was flawed. The DAA's plans for T2 had been the result of a detailed planning process, drawing on the expertise of consultants. The design planning hour of 4,200 was arrived at on the basis of input from prospective T2 tenants. Delivering airport capacity on a "just in time" basis was neither practical nor cost efficient, so a key decision for an airport is how much headroom to build.

4.125 The DAA blamed many of the shortcomings in the Commission's approach to the lack of consultation between the Commission's consultants and the DAA. The DAA alleged that the Commission's consultants had incorrectly identified the 95% busy hour, and made other errors, such that its conclusions that T2 is over-sized are not robustly founded. The appropriate size of T2 is a function of the profile of traffic at the airport. The DAA referred to the Gateway 2 document provided to the Commission and users which was the basis on which the design busy hour was constructed. The key forecast parameters are the number of Dublin-based aircraft and the percentage of those departing in the morning peak hour.

4.126 Finally, the DAA suggested that the Panel misunderstood the consequences of a decision not to remunerate the DAA for T2. The timing of the Aviation Action Plan meant that the DAA was no longer able to revise the size of T2. A failure by the Commission to remunerate T2 would endanger DAA's financial viability.

*Ryanair*

4.127 Ryanair referred to its argument that the size of T2 required should only be 45% of what the DAA was actually building. This assessment had regard to the capacity of T1, the planning cap of 30 mppa and the loss of effective efficiency as a consequence of splitting demand across two facilities. It called on the Commission to conduct a new assessment, using experts in the field, following the criteria set out by the Panel.

**Commission’s review**

4.128 In considering this issue, there are various questions that might be relevant. Is there evidence that there is an error? Is it appropriate for the decision to be revised given the timing of when the party first identified the purported error? If there is an error, what are the possible implications for the purposes of the determination? The Panel’s referral does not address these questions, instead its rationale for referring the matter back appears to be that the DAA alleged an error and no party during oral hearings refuted this point. Having reviewed the issue following the referral, the Commission does not believe that there was an error, but that instead the DAA was seeking to make new arguments about how the Commission should consider an aspect of its decision. Moreover, the Commission does not believe that the argument is material for the purposes of setting a price cap.

4.129 The debate about the appropriate size of T2, for the purposes of price-cap regulation, is not merely a question of planning parameters. The Commission is not a planning authority; nor is it empowered to manage the airport and make investment decisions. Its role is to set a price cap on the level of airport charges that the DAA may levy. In doing this, it has regard to three statutory objectives. This distinction is important when considering the referral back to the Commission concerning T2’s size and the question as to why the Commission preferred its consultants’ views to those of the DAA.

4.130 It is not simply a question of the Commission selecting one set of consultants’ recommendations concerning the appropriate size of T2 over another parties’ views. From the perspective of determining the appropriate scale of a facility, both may be making an appropriate judgement given different planning parameters. Those planning parameters may, or may not, depend on judgments about how the facility should be financed. This is the crux of the debate between the Commission and the DAA concerning the size of T2.

4.131 The Commission accepts that the DAA designed T2 based on a design busy hour that depended on forecasts of the number of Dublin-based aircraft and the percentage of those departing in the morning peak. This is a decision that the DAA is entitled to make. The question for the Commission is whether all users of the airport should be asked to pay for the facility that the DAA proposed to build.

4.132 Throughout the interim review, the Commission afforded parties a number of opportunities to comment on different charging structures that might be used to fund the facility. One option particularly relevant for the debate about the size of T2 was the possibility of peak pricing. The Commission believed that this was an efficient pricing mechanism for funding the costs of building a facility designed to cope with a large peak hour demand, such as T2. Assuming the demand warrants the extra capacity, charging users who value the ability of being able to operate at the busiest hours of the day to fund the extra costs, including the costs of extra capacity, would be in the interests of such users. In contrast in non-peak hours, the facility would have considerable spare capacity and the costs of the extra capacity would afford such users no benefits.

- 4.133 The DAA's responses to consultation papers and the draft determination rejected the option of recovering some costs from peak pricing – whether applied just to T2 users operating in the busiest hours or to all airport users operating at times of the day that give rise to the aggregate capacity needed at the airport. On this basis, the Commission chose to make the recovery of all the costs of T2 conditional on annual passenger numbers reaching 33 mppa. As the DAA has argued in the context of T1, there is no unique relationship between annual passenger throughput and the busy hour. Nevertheless, based on data provided to it by its consultants, the Commission considered that a busy-hour capacity for T2 in the range 2,900-3,300 seemed reasonable for the annual throughput envisaged.
- 4.134 The DAA argued it was wrong to attempt to benchmark a new (uncongested) terminal in Dublin with some UK airports. The profile of operations differed, or those airports were already congested. The DAA argued that they had hired consultants with worldwide experience who spent 12 months designing T2, such that the design was based on both best-in-class knowledge about worldwide airport design and the unique requirements of Dublin airport users. The DAA argued that to have the design summarily dismissed because it is not particularly similar to other airports was simplistic at best, deceptive at worst.
- 4.135 This arguably misses the point, made previously in this section, that the Commission's job is not to design a terminal: the Commission's job instead is to set a price cap. The demands at Dublin airport may justify the facility being proposed by the DAA, but if the airport is providing a facility specific to Dublin airport users' needs, the charging profile should reflect this.
- 4.136 The Commission stated in its final decision on the interim review that the available evidence suggested that the DAA had designed a new terminal with considerable excess capacity over what normally might be expected.
- 4.137 The Commission recognises that there is no single "correct" planned capacity for T2 at Dublin airport. However, the evidence before the Commission showed a sufficient difference between the T2 design capacity and what might have been expected for the generality of users to give the Commission confidence that its conclusions did not depend exclusively on the specifics of a single piece of evidence.
- 4.138 Insofar as the DAA has used a busy-hour rate methodology to design its new terminal, the DAA has recognised the critical importance of any excess of planned capacity over what might normally be expected, since the BHR method exists in order to balance considerations of capacity with cost considerations.
- 4.139 The evidence before the Commission included calculations by Mr Ian Rowson of IMR Solutions related to a "rolling" measure of the busy-hour rate, which were one of the matters appealed by the DAA to the Panel. Other evidence of the DAA having designed T2 with considerable capacity was presented during the work leading to the Commission's final decision.
- 4.140 In making the case for T2 at the time of publication of CIP2006, the DAA relied upon features of the business of the proposed users of T2. These features included airport-wide traffic growth assumptions, as well as specific Aer Lingus "high-growth" forecasts, to allow between 70% and 80% of the fleet of T2 users to depart the airports in the busy hour. On this basis, the Commission queried whether the costs of T2 ought to be charged in full to the generality of airport users or recovered on a different basis, such as the two-box approach later adopted.

- 4.141 In February 2007, alongside the first consultation paper by the Commission following publication of CIP2006, the Commission published a number of supporting documents. One of these was a high-level analysis of the DAA's investment plans by IMR Solutions. Chart 3 of the paper compared the design busy-hour departure capacity of T2 with actual busy hours at Dublin airport over the previous decade and a half. Chart 8 presented this information as the ratio between the number of departing passengers in the busy hour to mppa. This ratio for T2 was compared to the departing BHRs at a number of other airports and for the main user groups at Dublin airport for a period of years.
- 4.142 It seemed from this evidence that the design of T2 was for considerably more capacity than at comparator airports and for the main Dublin airport user groups. The paper posed the question as to whether the design capacity of the new terminal was attributable to meeting the needs of all airport users, a subset of users, or to future users?
- 4.143 In May 2007, the Commission published a set of reviews carried out by RR&V consultants, one of which addressed the size of T2. As well as again comparing the BHR for T2 with that of T1 and some airlines using Dublin airport, Figure 1 also included historic data for a number of BAA airports and terminals. Consistent with the evidence from IMR Solutions' earlier paper, the T2 design BHR value lay outside the values of the other airports and Dublin airport user groups.
- 4.144 Recognising there was no single measure of correct planned capacity for T2, but taking account of the evidence before it, including the basis of the DAA's own justification for the size of T2, the (overlapping) comparative BHR values presented in the data presented by IMR Solutions and RR&V, the rolling BHR computed by IMR Solutions (now challenged by the DAA's appeal) and the sensitivity of the design BHR to assumptions that appeared generally to be at the high end of expectations, the Commission decided to take the two-box approach to remunerating the costs of T2.
- 4.145 For these reasons, the DAA's allegation that there is a serious error in one aspect of this work may not have implications for the price cap decision that the Commission made. Nevertheless, the Commission has sought to understand the basis of the DAA's claim.
- 4.146 The Commission is satisfied that the DAA has not identified an error in its consultants' work as the phrase "error" might commonly be understood. There is no evidence of a mistake in the calculations. Following publication of the draft determination the DAA also alleged error by the Commission's consultants, although then it related to a different perceived error. At that time, as now, the allegation actually turns on a judgement about which calculations might best inform judgements about the appropriate busy-hour capacity to design T2 for and not whether the calculations that the Commission's consultants made were correctly executed. The Commission questions whether it is appropriate for the DAA to use the term "error" in such circumstances.
- 4.147 If there was an error in the sense of mistaken calculation, then clearly it would be appropriate following a Panel referral for the Commission to correct such an error, even if a party only alerted the Commission to the error after its determination. However, in this case the Commission is being asked to consider an argument that the DAA did not make prior to July 2007 about the competing merits of different approaches to deriving a busy hour for the purposes of determining the design capacity. Moreover, the DAA's criticism of the approach that the Commission's consultants took appears to apply at least as strongly to the approach that the DAA advocated prior to July 2007.

- 4.148 The basic idea of choosing a representative busy hour is standard across the industry. It is recognised that there is a trade-off between the costs of providing terminal space and the desire to build a facility with sufficient space to provide as many passengers as possible with a suitable service level and not encounter congested facilities. This discussion draws attention to the fact that the size of a terminal depends on demand and supply. The design for a facility that has no regard to demand and how the facility will be funded may yield very different proposals to a terminal designed with reference to the price sensitivity of demand. Airports do not ordinarily design facilities to cater for passengers travelling in the busiest hour of the year, but instead select some other representative measure.
- 4.149 The BAA, a UK airport operator, has used the Busy Hour Rate (BHR) method for some decades. This approach has historically been used by the DAA. In criticising the Commission’s consultants the DAA alleged that the methodology used did not fit the definition of the 95% BHR. To support this claim, the DAA described a method that ranks all rolling hour-long periods in order, deducting passengers already counted (a passenger travelling at 6.54 will appear in rolling hours starting at 6.00, 6.15, 6.30 and 6.45 for that day.) Using this approach, the DAA identified the hourly departure rate at which 95% of passengers would not experience a busier hour-long period. The BHR identified under this method in 2006 was 3,441, whereas the rolling method used by the Commission’s consultants had a busy hour of 3,144. The DAA argued that using the new method outlined shows that almost 12% of passengers would have travelled in hours greater than a BHR measure of 3,144.
- 4.150 The DAA also described two other approaches to BHR estimation that it considered valid. One would use standard clock-hour based measures. This ranks the number of passengers travelling at different hours (with each hour defined as starting at the same time on the clock, e.g. 5.00-5.59, 6.00-6.59, 7.00-7.59) and select the busy hour such that 95% of passengers would not experience a busier clock-hour experience. Finally, the DAA considered valid an approach that used clock-hour calculations for hours commencing at x.00, x.15, x.30, and x.45 but then took as the BHR the series that generated the maximum value at which 95% of passengers would experience a less busy period.
- 4.151 Both of these approaches, despite being deemed valid by the DAA, yield a BHR in 2006 that would involve more than 5% of passengers travelling in a busier hour if using the measure used by the DAA to criticise the BHR of the Commission’s consultants. The table below summarises the findings.

Method	Used by	BHR	% Pax departing in busier hour, using DAA’s new BHR method
DAA’s new BHR method*	DAA Appeal	3,441	5
<i>Other measures DAA deems valid</i>			
Standard x.00 clock hour BHR	BAA	3,079	13.8
Max of 4 BHR measures		3,216	9.8
<i>Commission’s consultant’s measure</i>			
Rolling BHR measure	IMR Solutions	3,144	11.7

Source: IMR Solutions

- 4.152 Any or all of the measures identified might have merit in deciding on the busy-hour rate that a terminal design will seek to serve comfortably. The Commission has to exercise judgement. It does not believe that the DAA has established that the Commission’s consultants identified an unreasonable BHR. Looking at 2006 data, the value generated by the Commission’s consultants for Dublin airport’s BHR (3,144) falls within the range of BHR’s generated by different methodologies that the DAA deems valid (3,079-3,441).



- 4.153 There is a range of busy hour capacities for T2 that the Commission might consider appropriate if the facility is being built for the generality of users and not being built to reflect the specific requirements of a subset of users at Dublin airport (be that, the requirements for a particular airline, or for users wishing to fly at specific hour of the day). The DAA proposed a facility with a busy hour capacity of 4,200 that was considerably outside this range of 2,900-3,300. It is for this reason that the Commission continues to believe that a two-box approach is appropriate if it is to protect the reasonable interests of all current and prospective users.
- 4.154 For the purposes of calculating a price cap, the Commission has allocated 73% of T2 costs to box 1, and the remainder to box 2. The DAA will only be allowed to collect those costs allocated to box 2 from the generality of airport users if and when annual throughput at the airport exceeds 33 mppa. In making such an allocation of costs between the two boxes, the Commission has judged it not necessary to undertake a detailed exercise to estimate exactly how much it would cost to build a terminal with a busy-hour capacity of, say, 3,062 (a busy-hour capacity that the Commission suggested seemed reasonable in its draft determination)<sup>14</sup>. Instead the Commission has instead relied on industry benchmarks for cost per square metre, and the required square metres per busy hour passenger to arrive at numbers that suffice, in the Commission's judgement, for the purposes of setting a price cap.
- 4.155 Nor is the Commission stating that there is a unique annual throughput that a facility with a busy-hour capacity of 3,062 should handle. It believes that it would not be unreasonable to expect a figure in the range of 12 to 15 mppa.
- 4.156 In re-considering this issue, the Commission is also reminded of the relatively limited material that the DAA was willing to expose to public scrutiny in justifying the proposed size of T2. The DAA was afforded opportunities throughout the interim review to provide additional supporting evidence for its case that the terminal should have a busy-hour capacity of 4,200 paid for by all airport users. The DAA has failed to convince the Commission on this point. In that sense, even if it accepted the DAA's criticisms of its consultants the Commission would not automatically conclude that it should set charges that require all airport users to pay for a facility of the size that the DAA advocates.
- 4.157 The Commission has decided not to vary its decision because of the DAA's allegation of error concerning the method relied upon to determine an appropriate size of terminal.

### **Treatment of T2 associated projects**

- 4.158 In paragraph 8.17 of the Panel's decision on Ryanair's appeal, the Panel referred back to the Commission the "appropriate T2 associated projects capex which should be included in Box 1 or Box 2".

### **Responses to CP1/2009**

- 4.159 The Commission has sought below to summarise, without comment, the observations and arguments that parties made on this referral topic in their responses to CP1/2009. Their full responses are available on the Commission's website ([www.aviationreg.ie](http://www.aviationreg.ie)).

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<sup>14</sup> See page 97, Commission for Aviation Regulation (2007) "Draft Decision. Interim Review of 2005 Determination on Maximum Levels of Airport Charges at Dublin Airport." [www.aviationreg.ie](http://www.aviationreg.ie).

*Aer Lingus*

4.160 Aer Lingus suggested that the matters referred back by the Panel should be considered afresh in the next determination.

*Cityjet*

4.161 The Cityjet suggested that the costs of T2 associated projects should be subdivided into box 1 and box 2 roughly in proportion to the division of terminal related costs. The approach proposed by the Commission in its draft determination was correct, and it should re-instate this. The DAA's response to CP5/2007 to justify excluding the costs of Pier E and T2 ancillary developments from the two-box approach was not persuasive. The DAA had merely noted that the size of these facilities related to peak-hour demands, a conclusion based on the same peaked aircraft schedule used to generate the excessive terminal busy hour demand. The DAA had merely asserted that other costs cannot be reduced in scale if a lower design hour throughput is adopted. Cityjet quoted RR&V's comment that "Reducing the level of demand, in line with alternative busy hours could result in a reduction in the size of Pier E". It contended that the only logical consequence of adopting a significantly lower design hour passenger flow for the purposes of sizing the terminal building applies equally to the pier, apron and associated works, with any risks that the DAA is building too large a pier and any phasing implications being placed in box 2.

*The DAA*

4.162 The DAA argued that its sustainable viability would be adversely affected by uncertainty should the Commission vary from previous statements in relation to the remuneration of T2 and the structure of the Box 1/Box 2 model. It argued that

(a) its credit profile and access to debt finance would suffer from a lack of regulatory clarity – regulatory practice in other jurisdictions reviewed investment plans and determined whether to allow them into the RAB before the operator builds the facility;

(b) other parties, such as Aer Lingus in its response to CP1/2007, had recognised the potential adverse consequences of not acting in a consistent manner in relation to the remuneration of investment; and

(c) Mr Justice Clark had pointed out that an unclear regulatory framework could only mitigate against financial viability.

4.163 The DAA further noted that Section 6.19.8 of the Decision referred to the counterbalancing items of different elements of building blocks. Changing any single item would require a consequential need for a change in the others. Given the structure of the DAA's financial ratios, increasing the size of box 2 would not allow the Commission to facilitate its obligation to enable the DAA to operate and develop the airport in a sustainable and financially viable manner. The improvements in the DAA's financeability came about principally because of the reduced debt levels following the sale of Birmingham airport, an asset never part of the regulated till.

*Ryanair*

4.164 Ryanair suggested that the costs of T2 associated projects should be subdivided into box 1 and box 2 roughly in proportion to the division of terminal related costs. Ryanair had supported the approach proposed by the Commission in its draft determination, and it believed the Commission had erred in allowing all T2

associated costs into box 1. The DAA's response to CP5/2007 to justify excluding the costs of Pier E and T2 ancillary developments from the two-box approach was not persuasive. The DAA had merely noted that the size of these facilities related to peak-hour demands, a conclusion based on the same peaked aircraft schedule used to generate the excessive terminal busy hour demand. The DAA had merely asserted that other costs cannot be reduced in scale if a lower design hour throughput is adopted. Ryanair quoted RR&V's comment that "Reducing the level of demand, in line with alternative busy hours could result in a reduction in the size of Pier E". It contended that the only logical consequence of adopting a significantly lower design hour passenger flow for the purposes of sizing the terminal building applies equally to the pier, apron and associated works, with any risks that the DAA is building too large a pier and any phasing implications being placed in box 2.

### **Commission's review**

4.165 The Panel's referral to T2 associated projects does not transparently identify what costs are being discussed.

4.166 In its draft and final determinations, the Commission grouped the projects into eight major headings, one of which it called *T2 Associated Projects*. Annex 11 to the draft determination includes a list of the CIP projects grouped under the *T2 Associated Projects* heading: temporary forward lounge; utilities reconfiguring; customs and border protection; landside roads reconfiguring; short-term car parking; and programme management. The Commission did not include any of those costs in box 2 in either its draft or final determination. At the time of making the Interim Review, the Commission was not aware of any information that suggested these costs were driven by the large size of T2, or that there was some other reason why it would be appropriate for the Commission to make the recovery of some of these costs conditional on 33mppa passing through the airport. Neither the appellants nor the Panel mention these specific projects in any of the documents produced. For these reasons, the Commission has decided not to vary its decision by reallocating some costs for *T2 Associated Projects* into box 2.

4.167 At the time of the May 2007 draft decision on the interim review, the two-box approach proposed by the Commission related solely to costs included under the heading *T2 Main Projects*. In its final decision, the Commission allowed €582m for *T2 Main Projects*, including €379m for the T2 facility, and €203m for Pier E, apron remodelling works and 'other works'. For the purposes of this referral, the Commission has assumed that the Panel intended for the Commission to reconsider how it allocates the costs of *T2 Main Projects* between boxes 1 and 2. The split of Pier E costs between the two boxes is addressed later in this document, since the treatment of these costs was referred to separately by the Panel.

4.168 At the time of the final determination for the interim review, the Commission

*"...accepted the DAA's contention that the costs of Pier E and other T2 works should be outside the scope of the two-box approach. The argument that these costs would be of a similar scale, even if T2 were smaller, is persuasive."<sup>15</sup>*

4.169 The Panel was not convinced that the Commission was right to find the DAA's argument persuasive. From its comments it is unclear whether the Panel

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<sup>15</sup> "Maximum Levels of Airport Charges at Dublin Airport Final Decision on Interim Review of 2005 Determination" (CP6/2007), July 2007, page 37 - 38.

considered the DAA's arguments unpersuasive, or whether it was not convinced that the Commission had been sufficiently transparent in finding the DAA's arguments persuasive. The following material is taken from the DAA's response to the draft determination, and includes arguments that the DAA made for why the two-box approach should only apply to the T2 terminal (should the Commission find against more fundamental objections the DAA had to the Commission's conclusions regarding the size of T2 and the need for a two-box approach):

*"The enabling works (€6m), access and roads (€39m) and energy centre (€12m) are required in order to deliver the new terminal and would be of a similar scale within any reasonable range of the current size of T2. On this basis, a further €57m should be extracted from CAR's Box1/Box2 methodology.*

*'Enabling Works - This project involves the diversion of existing underground services, which have been installed across the T2 site over many years. The diversion project collects these services into a structured services trench which follows a route which will enable later access to these services if required. Even if the size of the Terminal Building were reduced, the philosophy of a structured services trench would not change and therefore the costs would not reduce.*

*'Kerbs - The kerbs/roads to be constructed are sized for the total T2 requirement. We are not part constructing these elements because it does not make sense to do so - we would simply have ended up with longer approach road lengths and shorter kerb lengths i.e. the basic kerbs/roads system would have been the same. The kerbs/roads are sized for peak hour passenger demands - it would be nonsensical to construct half a kerb. Furthermore the difficulties that would be presented by having to revisit the area to do so would be prohibitive in terms of operational disruption, reduced service quality and increased cost.*

*'Energy Centre - This has been sized to provide space for Plant to serve the total T2 requirement. The future extension of this building would mean substantial disruption and possibly loss of critical services for the period of extension along with a recommissioning of the building completion. The risk of disruption to the operation of T2 would be too great in this situation so the decision was therefore taken to construct the Energy Centre in line with the Planning Application. On this basis, therefore, the costs of the Energy Centre should not be reduced".*

- 4.170 Having reconsidered these arguments, the Commission remains satisfied that it was appropriate not to include the costs related to the enabling works, kerbs and the energy centre in the two-box approach. The Commission is persuaded that the costs of the enabling works are unlikely to have been significantly different had the proposed size of T2 been smaller.
- 4.171 The Commission's decision to introduce a two-box approach was motivated by a desire to protect current, and prospective, users of Dublin airport from having to pay for a facility that is too large. However, the Commission recognizes that designing for possible growth scenarios can represent an efficient and economic development of Dublin airport to meet the requirements of current and prospective users. There is a judgment to be made about whether it is efficient to incur additional costs today to avoid the risk of having to incur significantly greater costs at a later date should events subsequently evolve to justify a larger build. In the case of the costs of kerbs and the energy centre, the Commission has decided that the DAA's proposal to build them in a single development is, on balance, in the interests of users. Any short-term savings that might have been realized for these projects by building a smaller sized facility are likely to be small

relative to the consequential disruption associated with re-sizing at a later date. It is therefore reasonable for the Commission to allow all the costs into box 1.

## **T2 contingency costs**

4.172 The Panel was unclear why the Commission concluded the contingency costs were too high and had accepted its consultants approach over that of the DAA and the Government appointed verifier, as same point was not clearly stated in the Determination. It instructed the Commission to clearly state why it prefers one view over the other in reaching a conclusion on the allowance or disallowance of the cost. The Panel noted that the RR&V report suggested that a further independent review would be appropriate.

## **Responses to CP1/2009**

4.173 The Commission has sought below to summarise, without comment, the observations and arguments that parties made on this referral topic in their responses to CP1/2009. Their full responses are available on the Commission's website ([www.aviationreg.ie](http://www.aviationreg.ie)).

### *Aer Lingus*

4.174 Aer Lingus suggested that the matters referred back by the Panel should be considered afresh in the next determination.

### *Cityjet*

4.175 Cityjet noted that by the time the opening RAB for 2010 is set, it will be clear the extent to which the DAA required the contingency allowances to build T2. If the allowances have been spent, then they could enter the RAB (subject to box 1 and box 2 conditions and that the costs were incurred efficiently). If they are not spent, they should not enter the RAB.

### *The DAA*

4.176 The DAA argued that the Commission must not accept the views of its own consultants over those of the DAA's consultants without explaining why. This was especially true where a government appointed verifier had accepted the €25m contingency and RR&V's report suggested that an independent review of its conclusion be carried out. The DAA argued that RR&V's suggestion that the typical level of contingency cost would be a 15% margin in the early design stage, falling to 10% for the construction phase was not substantiated by reference to airport or other relevant examples of comparable size. The DAA's proposed contingency provision was in line with international regulatory precedents, such as those used for the BAA London airports. The DAA referred to the same arguments it had made in its CP5/2007 submission, in particular that the risk register was arrived at following a best in class scientific approach. It was inappropriate and unreasonable to disallow an element of the cost plan that

1. had been developed following 8 months of detailed assessment;
2. comprised a range inter-related projects, the subject of detailed constructability studies; and
3. had been subjected to a comprehensive quantitative risk assessment reflecting the unique and specific attributes of the development.

*Ryanair*

4.177 Ryanair noted that by the time the opening RAB for 2010 is set, it will be clear the extent to which the DAA required the contingency allowances to build T2. If the allowances have been spent, then they could enter the RAB (subject to box 1 and box 2 conditions and that the costs were incurred efficiently). If they are not spent, they should not enter the RAB. Ryanair argued that this will require the Commission to undertake an in-depth analysis of the means by which the DAA procured T2 during the next review. It will be essential that the Commission satisfies itself that the actual costs have been efficiently incurred, specifically in relation to the procurement of the construction of T2 as well as to the size of T2 and its overall costs.

**Commission's review**

4.178 The Panel did not comment on the written submission that the Commission made. That written submission included the following text relating to its decisions concerning what level of capital expenditure to allow for three specific projects, including T2 contingency costs.

*"For the convenience of the Panel the Commission has listed the relevant documents and extracts that set out the Commission's thinking that led to the exclusion of these costs. These documents are as follows:*

*CP5/2007 (May 2007, Exhibit 10) Section 7, pages 87-95, 115.*

*RR&V Report 3 (attached as Exhibit 21) – Review of DAA CIP which deals with the customs and border protection and airfield projects.*

*RR&V Report 2 (attached as Exhibit 22) – Review of T2 non-construction costs page 11 & 12, which deal with T2 contingency costs.*

*CP6/2007 (Exhibit 11) Section 3.4 pages 24-40 in particular pages 35 and 36.*

*RR&V response to DAA comments on RR&V reports which discuss all three projects (Exhibit 13).*

*'One must recall that, unlike the DAA and its consultants, the Commission (and its consultants) were able to consider completed project plans, which might be expected to account for the difference in the relative time taken to carry out the various reviews.'*

4.179 It is unclear to what extent the Panel considered this written submission, and the documents listed, in deciding to refer the matter back to the Commission. Pages 90 and 91 of the draft determination discussed the work of the independent verifier. On page 91 the Commission explained why it did not feel that it could accept the level of costs included in the CIP just because of the review undertaken by Boyd Creed Sweet (BCS), the government's independent verifier.

*"Based on the information that the Commission received, the Commission concluded the following:*

- *BCS's conclusion that the estimated costs of T2 are "within industry norms for this type of project in a European capital city" relates only to the construction costs of T2, which account for half of the proposed total cost of T2;"*

It was RR&V's review of the non-construction costs of T2 that led the Commission to conclude that it should disallow €25m of contingency costs.

- 4.180 Page 35 of the Commission's final decision included the following paragraph setting out its reasoning for disallowing €25m of contingency costs:

*"Consistent with the Draft Decision, the Commission has decided to disallow €25 million of contingency costs for T2. If this sum were allowed, it would mean contingency costs were in excess of 20% of construction costs, a level of provision that the Commission considers too high. It is outside the range RRV has indicated it would expect for a project at a planning stage. RRV suggested that a typical level of project contingency, including a design development allowance, would be 15% in the early design stage, falling to 10% for the construction phase. RRV's assessment of the DAA benchmark indicates that construction costs for T2 would be 19% above the benchmark calculation if all contingency costs were included."*

- 4.181 Based on the above, the Commission is satisfied that it was correct not to accept the costs in the CIP merely because a government appointed verifier had been commissioned to review the CIP. Correspondence between the Commission and BCS had not provided the Commission with sufficient confidence that it could rely solely on that study to allow all the costs proposed in the CIP for the basis of setting price caps. The Panel in other matters has implicitly accepted that the findings of the government verifier were not sufficient when considering the costs in the CIP – for example, in its decision not to refer back to the Commission for re-consideration the decision to disallow €9m in respect of customs and border protection.
- 4.182 Having decided that it could not rely solely on the independent verifier, the Commission received a number of reports from RR&V looking at the proposed costs in the CIP. The paragraph quoted above from the final decision in 2007 identified two pertinent factors in the Commission's decision not to allow €25m in contingency costs. First, RR&V considered that the total contingency costs were high given the stage of the project. Second, if the Commission included all the contingency costs, the total cost of the T2 project would be high relative to benchmarks. For these reasons, the Commission decided to disallow the costs.
- 4.183 In assessing costs, the Commission will not necessarily consider a single factor. Looking solely at individual cost items creates the possibility that while each individual cost element appears reasonable, the aggregate cost of the project bears no relationship to the total costs that might be expected for a comparable project. Conversely, looking solely at the costs of benchmarks may lead the Commission to ignore important features specific to the actual project that affect its costs. For the T2 project, the evidence available to the Commission suggested that disallowing €25m costs was consistent with the evidence from a "line-by-line" assessment of the costs *and* the benchmark data.
- 4.184 On benchmark data, the Commission is satisfied that it was appropriate for it to favour the conclusions of its consultants to those employed by either the DAA or other interested parties. There is no single, unique set of comparators. Parties with an interest in a finding that costs are either reasonable or unreasonably high might be expected to select comparators that support this conclusion. The Commission is satisfied that its consultants did not have such incentives in selecting their comparators, and that the comparators it relied upon were reasonable. So on an aggregate project cost basis, there were good reasons for disallowing €25m of contingency costs.

- 4.185 Considering the projects individually, the Commission is satisfied that it was right to disallow €25m for contingency costs. Its consultants advised that the sum proposed in the CIP was relatively high given the stage of the project. Given the costs in question are contingency costs there are good incentive properties, consistent with realising the objective of facilitating the efficient development of Dublin airport, for not including large allowances for contingency costs when setting a price cap. The Commission is keen to provide incentives for the DAA to manage such a large project efficiently and find cost-effective solutions as and when unanticipated problems during a project arise. A generous allowance for contingency costs risks muting such an incentive.
- 4.186 The relevance of contingency allowances that other regulators have allowed is tempered by the fact that the circumstances leading to such a decision will differ to those facing the Commission. As RR&V observed at the time, the size of a project contingency that is appropriate will depend in part on how far developed the plans are. The CAA decided that the BAA's inclusion of a 25% project contingency allowance was reasonable at that stage of the project, but it expected a more considered analysis of contingencies and project specific costs at the completion of the options development stage.<sup>16</sup> The ORR in 2008 allowed a contingency allowance of 10-15%, but exceptionally up to 25%.<sup>17</sup>
- 4.187 The fact that the overall cost of the project would be high relative to other benchmarks that RR&V had looked at was an important reason for the Commission's final decision to disallow €25m in contingency costs. There would be consequential implications for how the Commission considered other individual cost items were it to decide to make a more generous allowance for contingency costs. There were a number of cost categories where the advice from RR&V suggested a range of possible cost estimates. In many instances, the Commission settled on the figure at the top of the range. Were it to allow the sum for contingencies sought by the DAA, the Commission would be minded to re-visit some of the sums allowed for other individual cost items. For this reason, the Commission has chosen not to commission further work looking at the risk register. Based on all the information available to it, the Commission was satisfied that it was appropriate to allow €582m for T2 main projects, and not the €607m sought by the DAA.
- 4.188 The Commission rejects the Cityjet and Ryanair suggestion that it defer consideration of this issue until its next determination. Users and the airport benefit from clarity about the level of investments that will be remunerated in advance of the investment being incurred. Put another way, the Commission believes that it is preferable to consider an investment before it has been made.

### **Airfield project costs**

- 4.189 With respect to the exclusion of €4 million in respect of airfield projects, the Panel found no transparent reasoning for changing the reduction from €17 million in the interim decision to €4 million in the Determination under appeal. It felt the matter was not addressed by the Commission at the oral hearing and that the Commission should clearly state why the sum is excluded (if upon review it decides to exclude it).

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<sup>16</sup> See page 100, Civil Aviation Authority (2008) "Economic regulation of Heathrow and Gatwick airports 2008-2013", [http://www.caa.co.uk/docs/5/ergdocs/heathrowgatwickdecision\\_mar08.pdf](http://www.caa.co.uk/docs/5/ergdocs/heathrowgatwickdecision_mar08.pdf)

<sup>17</sup> See page 181, Office of the Rail Regulator (2008) "Determination of Network Rail's outputs and funding for 2009-14" <http://www.rail-reg.gov.uk/upload/pdf/383.pdf>



## Responses to CP1/2009

4.190 The Commission has sought below to summarise, without comment, the observations and arguments that parties made on this referral topic in their responses to CP1/2009. Their full responses are available on the Commission's website ([www.aviationreg.ie](http://www.aviationreg.ie)).

### *Aer Lingus*

4.191 Aer Lingus suggested that the matters referred back by the Panel should be considered afresh in the next determination.

### *Cityjet*

4.192 Cityjet argued that at the time of the next review the actual costs of the airfield projects will be known and the RAB can be set on that basis, subject to the test of efficient procurement.

### *The DAA*

4.193 The DAA argued that the Commission had failed to provide any reasoning or justification to support its deduction from its capital expenditure allowance of €4m for airfield projects. It speculated that the decision related back to the Commission's proposal in the draft determination to reduce the allowance for airfield projects by €17m given the findings of its consultants, RR&V, that there appeared to be greater value to be obtained at the tender stage such that tender costs may fall below the benchmark average. The DAA response to the draft determination had provided additional information discounting this assumption. The Commission had revised its assumption to take account of this additional evidence. The DAA speculated that the exclusion of €4m was simply an oversight. This sum should be reinstated into the RAB.

### *Ryanair*

4.194 Ryanair argued that at the time of the next review the actual costs of the airfield projects will be known and the RAB can be set on that basis, subject to the test of efficient procurement.

## Commission's review

4.195 In its referral back to the Commission, the Panel claimed that the Commission had not addressed the point during the oral hearing. The Panel did not comment on the written submission that the Commission made. That written submission included the following text relating to its decisions concerning what level of capital expenditure to allow for three specific projects, including airfield projects.

*"For the convenience of the Panel the Commission has listed the relevant documents and extracts that set out the Commission's thinking the led to the exclusion of these costs. These documents are as follows:*

*CP5/2007 (May 2007, Exhibit 10) Section 7, pages 87-95, 115.*

*RR&V Report 3 (attached as Exhibit 21) – Review of DAA CIP which deals with the customs and border protection and airfield projects.*

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*CP6/2007 (Exhibit 11) Section 3.4 pages 24-40 in particular pages 35 and 36.*

*RR&V response to DAA comments on RR&V reports which discuss all three projects (Exhibit 13).*

*'One must recall that, unlike the DAA and its consultants, the Commission (and its consultants) were able to consider completed project plans, which might be expected to account for the difference in the relative time taken to carry out the various reviews.'*

- 4.196 It is unclear to what extent the Panel was familiar with these documents in deciding to refer the matter back to the Commission. In particular, page 35 of the Commission's final decision included the following paragraph setting out its reasoning for disallowing €4m.

*"For airfield projects, the Commission proposes to disallow €4 million of the costs, rather than the €17 million it proposed to disallow in the Draft Decision. The DAA has provided, following an information request, tender receipts for six additional projects. The out-turn costs for tendered projects is €76 million, €3 million less than forecast in CIP2006. The Commission believes it is better to base its decision on this additional evidence, rather than relying solely on the overall estimated cost savings from one particular airfield project."*

- 4.197 For the avoidance of any doubt, the Commission will elaborate on its thinking in arriving at a decision to exclude €4m for the airfields projects. Consistent with the history outlined in the DAA's submission, the Commission initially proposed allowing €86 million, a reduction of €16.5 million from the €103 million included in CIP2006 for work on *Phase 5 & 6 Apron Stands* and *'Other' Airfield Works*. This followed RR&V's analysis that showed tenders for general runway, apron and taxi-related work to be more competitive than expected. In particular, it noted that the per-square metre for the projects was 30% lower than in the DAA's initial benchmarking report.

- 4.198 Subsequent to the draft Determination, the DAA argued that RR&V had been wrong to infer from the tender return on the taxiway bypass for phase 6 that all subsequent airfield projects would be less than the benchmark norm. The DAA observed that RR&V had stated that the benchmarks for airfield projects appeared credible and reasonable.

- 4.199 On 9 July 2007 the Commission sent a letter to the DAA which included the following request:

*"The Commission notes that the DAA considers it inappropriate to infer from a single airfield project (CIP6.030) the costs of all airfield projects. Can the DAA please provide details on the costs of all airfield projects that have now gone out to tender? This includes tenders concluded between October 2006 and the present day."*

- 4.200 The DAA replied on 12 July 2007. The response included current information from tendered projects, which the DAA conceded indicate that the costs were marginally less than those indicated in the CIP. Given these facts, the DAA did not believe the Commission's proposed reductions in airfield projects as set out in CP5/2007 were warranted. Later in the letter, the DAA argued that the Interim Review was focussed on the capital development programme developed to address the Aviation Action plan as represented by the October 2006 CIP. The DAA had agreed that the focus of the RR&V review should be on projects as existed in the CIP and on information available at the time it was developed.

- 4.201 The data the DAA provided showed tendered contracts of €76m for six of the projects which the CIP had estimated would cost €79m. There remained a further seven projects for which no tender information was provided and that the October 2006 CIP had estimated would cost €23.8m. The Commission chose to allow €98.9m, pro-rating down the €23.8m based on the evidence for the six projects for which it had more up-to-date information.
- 4.202 Consequently, the Commission’s decision to exclude €4m of the costs was based on the latest tender information available to the Commission. It was not an oversight. In making this decision, the Commission rejects the DAA’s contention that the Commission should only have regard to the costs in the CIP and on information available at the time it was developed. In July 2007 both the DAA and, following an information request, the Commission knew the actual tender costs for six of the airfield projects for which CIP2006 only contained estimates. The Commission would have failed to protect the reasonable interests of current and prospective users if had allowed €79m for projects that would only cost the DAA €76m. The additional €1m that has been disallowed, resulting in a total of €4m being disallowed for airfield projects capex, results from a judgment of the Commission to scale the estimates in the CIP for the costs of the remaining airfield projects down. The evidence available to the Commission in July 2007 suggested that the DAA’s estimates in CIP2006 for airfield projects were too high. For those projects which had not yet been tendered, the Commission chose to scale the costs down by the same percentage as the difference between the CIP forecast costs and the out-turn costs for the six airfield projects that already been tendered.
- 4.203 The Commission rejects the Cityjet and Ryanair suggestion that it defer consideration of this issue until its next determination. Users and the airport benefit from clarity about the level of investments that will be remunerated in advance of the investment being incurred.

### **Treatment of Pier E as part of box 1 or box 2**

- 4.204 In paragraph 8.16 of the Panel’s decision on Ryanair’s appeal, the Panel states the following:

*“The Panel is of the view that in considering the projects which should be included in Box 1 of the two box approach, the Commission should consider afresh whether the facilities proposed for Pier E suffer the same over sizing (assuming same to exist ) as Terminal 2.”*

### **Responses to CP1/2009**

- 4.205 The Commission has sought below to summarise, without comment, the observations and arguments that parties made on this referral topic in their responses to CP1/2009. Their full responses are available on the Commission’s website ([www.aviationreg.ie](http://www.aviationreg.ie)).

#### *Aer Lingus*

- 4.206 Aer Lingus suggested that the matters referred back by the Panel should be considered afresh in the next determination.

#### *Cityjet*

- 4.207 Cityjet suggested that the costs should be subdivided into box 1 and box 2 roughly in proportion to the division of terminal related costs. The approach proposed by the Commission in its draft determination was correct, and it should re-instate this. The DAA’s response to CP5/2007 to justify excluding the costs of

Pier E and T2 ancillary developments from the two-box approach was not persuasive. The DAA had merely noted that the size of these facilities related to peak-hour demands, a conclusion based on the same peaked aircraft schedule used to generate the excessive terminal busy hour demand. The DAA had merely asserted that other costs cannot be reduced in scale if a lower design hour throughput is adopted. Cityjet quoted RR&V's comment that "Reducing the level of demand, in line with alternative busy hours could result in a reduction in the size of Pier E". It contended that the only logical consequence of adopting a significantly lower design hour passenger flow for the purposes of sizing the terminal building applies equally to the pier, apron and associated works, with any risks that the DAA is building too large a pier and any phasing implications being placed in box 2.

#### *The DAA*

4.208 The DAA argued that its sustainable viability would be adversely affected by uncertainty should the Commission vary from previous statements in relation to the remuneration of T2 and the structure of the box 1/box 2 model. It argued that

(a) its credit profile and access to debt finance would suffer from a lack of regulatory clarity – regulatory practice in other jurisdictions reviewed investment plans and determined whether to allow them into the RAB before the operator builds the facility;

(b) other parties, such as Aer Lingus in its response to CP1/2007, had recognised the potential adverse consequences of not acting in a consistent manner in relation to the remuneration of investment; and

(c) Mr Justice Clark had pointed out that an unclear regulatory framework could only mitigate against financial viability.

4.209 The DAA further noted that Section 6.19.8 of the Decision referred to the counterbalancing items of different elements of building blocks. Changing any single item would require a consequential need for a change in the others. Given the structure of the DAA's financial ratios, increasing the size of box 2 would not allow the Commission to facilitate its obligation to enable the DAA to operate and develop the airport in a sustainable and financially viable manner. The improvements in the DAA's financeability came about principally because of the reduced debt levels following the sale of Birmingham airport, an asset never part of the regulated till.

4.210 Finally, the DAA believed that no new evidence had been provided during the Panel process that required revising the decision to appropriate Pier E costs into box 2. The process had denied the DAA the opportunity to persuade the Panel that its response to the Interim Review with regards to Pier E's allocation between the two boxes was appropriate. The DAA set out what it considers to be the salient factors:

1. The premise that T2 was oversized, even if correct, is not relevant in relation to Pier E which is not in any way oversized;
2. The airport gating study that the DAA had submitted to the Commission illustrated an acute shortage of gate served stands at Dublin airport, which would continue right up to the opening of Pier E;
3. Pier E capacity is needed to satisfy existing and forecast demand;
4. The report for the Commission by Booz Allen Hamilton in 2005 had indicated the scale of towing at Dublin airport, significantly increasing

the operational complexity for air traffic control, the DAA and the airlines, potentially increasing airline delays. All these impacts that will be reduced once Pier E opens.

#### *Ryanair*

4.211 Ryanair suggested that the costs should be subdivided into box 1 and box 2 roughly in proportion to the division of terminal related costs. Ryanair had supported the approach proposed by the Commission in its draft determination, and it believed the Commission had erred in allowing all T2 associated costs into box 1. The DAA's response to CP5/2007 to justify excluding the costs of Pier E and T2 ancillary developments from the two-box approach was not persuasive. The DAA had merely noted that the size of these facilities related to peak-hour demands, a conclusion based on the same peaked aircraft schedule used to generate the excessive terminal busy hour demand. The DAA had merely asserted that other costs cannot be reduced in scale if a lower design hour throughput is adopted. Ryanair quoted RR&V's comment that "Reducing the level of demand, in line with alternative busy hours could result in a reduction in the size of Pier E". It contended that the only logical consequence of adopting a significantly lower design hour passenger flow for the purposes of sizing the terminal building applies equally to the pier, apron and associated works, with any risks that the DAA is building too large a pier and any phasing implications being placed in box 2.

#### **Commission's review**

4.212 The Panel was not convinced that the Commission was right to find the DAA's argument persuasive. From its comments it is unclear whether the Panel considered the DAA's arguments unpersuasive, or whether it was not convinced that the Commission had been sufficiently transparent in finding the DAA's arguments persuasive.

4.213 Relating to the remuneration of Pier E capex, the Commission's final decision on the interim review of the 2005 determination stated the following:

*"The Commission has accepted the DAA's contention that the costs of Pier E and other T2 works should be outside the scope of the two-box approach. The argument that these costs would be of a similar scale, even if T2 were smaller, is persuasive."<sup>18</sup>*

4.214 The following material is taken from the DAA's response to the draft determination, and includes arguments that the DAA made for why the two-box approach should not extend to Pier E costs (should the Commission find against more fundamental objections the DAA had to the Commission's conclusions regarding the size of T2 and the need for a two-box approach):

*"There is an acute shortage of gate served stands at Dublin Airport at present... Pier E is required in full as soon as it can be developed. As a result €157m relating to Pier E and its associated Apron Works should be extracted from CAR's Box1/Box2 methodology."*

4.215 The Commission accepted the argument that the need for additional pier capacity was separate from the need for additional terminal capacity. While terminal capacity and the number of stands required will bear some relationship, they are not perfectly correlated. RR&V reported to the Commission that from its discussions with DAA, Aer Lingus and York Aviation (consultants for Ryanair) there

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<sup>18</sup> "Maximum Levels of Airport Charges at Dublin Airport Final Decision on Interim Review of 2005 Determination" (CP6/2007), July 2007, page 37 - 38.

appeared to be a requirement for a high level of on-pier/contact stand performance from the airlines operating at Dublin airport. In a subsequent report to the Commission RR&V commented that

*"On the basis of the requirement to all airlines operating at Dublin for high on pier performance, the proposed location of T2 and the difficulties associated with phasing construction in an airside environment we would conclude, without having the opportunity to undertake a more detailed analysis, that it is likely that Pier E is required in its proposed form and size."*

4.216 These preliminary findings from RR&V were not contradicted from other evidence that the Commission had received. For example, Ryanair submitted alternative plans for a terminal and pier that envisaged a smaller terminal but a pier with a larger net increase in the number of narrow-body contact stands than Phase 1 of the DAA's T2 project. Consequently, the Commission is satisfied that there was demand from current and prospective users for a pier with at least the number of contact stands that the DAA proposed. The Commission did not think that the case for making payment for a larger pier conditional on passenger numbers exceeding 33mppa was appropriate.

4.217 As previously discussed, the Commission's decision to introduce a two-box approach was motivated by a desire to protect current and prospective users of Dublin airport from having to pay for a facility that was larger than most users might reasonably require. In the case of Pier E costs, there does not appear to be evidence that the costs arose because the DAA was proposing to build an over-sized facility given reasonable projections of future demand.

4.218 The Commission has decided not to vary its decision by reallocating Pier E capex costs into box 2. Because of this, the request from the DAA to consider how the allocation of costs between boxes 1 and 2 inter-relates with other aspects of the Commission's final decision does not arise.

## **Remuneration of box 2**

4.219 The Panel referred back to the Commission for reconsideration the remuneration of box 2, insofar as the Determination allowed a return on the capital costs associated with box 2. The Panel believed that it is not appropriate to provide any remuneration whatever in respect of box 2 until the trigger of 33 mppa is achieved.

## **Responses to CP1/2009**

4.220 The Commission has sought below to summarise, without comment, the observations and arguments that parties made on this referral topic in their responses to CP1/2009. Their full responses are available on the Commission's website ([www.aviationreg.ie](http://www.aviationreg.ie)).

### *Aer Lingus*

4.221 Aer Lingus suggested that the matters referred back by the Panel should be considered afresh in the next determination.

### *Cityjet*

4.222 Cityjet argued that the Commission erred in allowing the DAA any remuneration of costs eventually placed in box 2 before the trigger of 33 mppa is reached. To the extent that the DAA was doing so as a consequence of the decision to leave the price cap unchanged, the Commission should claw back the excess income at

the time of the next Determination. Cityjet also contended that the trigger for allowing a return on and a return of the costs in box 2 should relate solely to throughput of the Eastern campus.

#### *The DAA*

4.223 The DAA argued that its sustainable viability would be adversely affected by uncertainty should the Commission vary from previous statements in relation to the remuneration of T2 and the structure of the box 1/box 2 model. It argued that

(a) its credit profile and access to debt finance would suffer from a lack of regulatory clarity – regulatory practice in other jurisdictions reviewed investment plans and determined whether to allow them into the RAB before the operator builds the facility;

(b) other parties, such as Aer Lingus in its response to CP1/2007, had recognised the potential adverse consequences of not acting in a consistent manner in relation to the remuneration of investment; and

(c) Mr Justice Clark had pointed out that an unclear regulatory framework could only mitigate against financial viability.

4.224 The DAA further noted that Section 6.19.8 of the Decision referred to the counterbalancing items of different elements of building blocks. Changing any single item would require a consequential need for a change in the others. Given the structure of the DAA's financial ratios, increasing the size of box 2 would not allow the Commission to facilitate its obligation to enable the DAA to operate and develop the airport in a sustainable and financially viable manner. The improvements in the DAA's financeability came about principally because of the reduced debt levels following the sale of Birmingham airport, an asset never part of the regulated till.

#### *Ryanair*

4.225 Ryanair argued that the Commission erred in allowing the DAA any remuneration of costs eventually placed in box 2. To the extent that the DAA was doing so as a consequence of the decision to leave the price cap unchanged, the Commission should claw back the excess income at the time of the next Determination. Ryanair also contended that the trigger for allowing a return and a return of the costs in box 2 should relate solely to passenger numbers handled on the Eastern campus.

#### **Commission's review**

4.226 As identified by the DAA, the determination in 2007 had regard to a number of potentially inter-related factors. When thinking about the capital costs for T2 and their potential remuneration, the following factors are important:

1. The Commission's approach to remunerating capital projects has always sought to provide a stream of revenues that, over the assumed lifetime of the asset, is equal to the original capital outlay of the DAA in net present value terms (where the Commission has concluded that the investment meets the reasonable needs of current and prospective users).
2. The 2005 Determination that was subject to review in the 2007 interim review included an allowance for T2, including both a return on and a return of the costs of a project expected to cost considerably less than the costs included in CIP2006.

3. The revised costs for T2 were motivated by higher traffic volumes. The Commission does not believe that the DAA should receive a lower price cap because traffic outperformed forecast levels.
  4. The significant increase in the projected cost of the second terminal between 2005 and 2007 has motivated the Commission to reconsider whether to allow the costs of the project into the RAB without attaching any conditions. For smaller levels of capital expenditure, linking the price cap to specified outputs runs the risk of perverting the DAA's incentives to respond appropriately to evolving needs at the airport. However, for large investments, allowing the costs of the project into the RAB without conditionality would arguably grant the DAA too much discretion concerning investment and run the real risk that the Commission was failing to enable only efficient investment at the airport.
  5. The Commission is keen to align the prices paid by consumers with the costs associated with their use of the airport. For capital projects, the Commission would like a "user-pays" principle to apply, with users who benefit from an asset paying higher charges. This is a motivation for proposing a trigger on collecting funds even for "box 1", so that only those users that benefit from the extra capacity that T2 provides pay for this facility.
  6. The Commission is keen to incentivise the DAA to complete a second terminal by the end of 2009, consistent with the government's policy objectives alluded to in the 2007 Ministerial Direction. This is a motivation for proposing a trigger on collecting funds even for "box 1" should the DAA fail to complete the terminal by the time the current determination expires at the end of 2009.
  7. The possibility that T2 may be unnecessarily large is a risk that the Commission wanted to protect the generality of current and prospective users from assuming. The trigger for "box 2", allowing this sum of money to enter the RAB if and only if passenger numbers exceed 33 mppa, places the risk with the DAA.
  8. The Commission had to have regard to enabling the DAA to operate Dublin airport in a sustainable and financially viable manner. Cash-flow considerations may, in certain circumstances, require a treatment of capital costs that deviates from what the Commission might otherwise deem an optimal solution.
- 4.227 These various factors point to potentially contradictory conclusions. The rationale for the triggers would suggest that there should be no return on or return of any capital costs associated with the second terminal unless and until the terminal is built. Yet the Commission is also convinced that it would be perverse incentive regulation that reduced the price cap because of increased passenger numbers, given that the price cap sought to incentivise the DAA to assume the risks (positive and negative) associated with deviations in passenger numbers from the forecast levels. Since the price-cap calculation already included an allowance for a return on and a return of some costs associated with a second terminal (albeit a lower cost estimate), this would suggest that there should be some return on or return of capital costs associated with the second terminal in the existing price cap.
- 4.228 The consequence of this latter observation is that the net present value of the costs remaining to be added to the RAB from 1 January 2010 (or later) will be less than the net present value of the capital costs associated with the second terminal



(since the existing price cap is based on a calculation that assumes the DAA will already have collected some monies). Notwithstanding the policy rationales for introducing triggers, the DAA will have earned a return on or return of some of the costs of T2.

4.229 Having received and considered the referral on this ground, the Commission also accepts that it is both possible and desirable to preserve the idea that the DAA should assume all the financial risks associated with the possibility that T2 is too big. The size of box 2 in net present value terms on 1 January 2010 should be exactly the same as the costs attributed to box 2. Revenues collected from users between 2005 and 2009, to the extent that they relate to the costs of T2, should be netted off the costs of box 1 allowed to enter the RAB when the second terminal achieves operational readiness. This will be a matter for the Commission to consider when determining a starting RAB for the purposes of the next determination.