

DECISION OF THE
AVIATION APPEALS PANEL

Established by Order of the Minister for Transport

29th September, 2009

APPEAL OF AER LINGUS
AGAINST DETERMINATION OF
THE COMMISSION FOR AVIATION REGULATION CP6/2007

1. **INTRODUCTION**

1.1 Section 40 of the Aviation Regulation Act, 2001 provides:

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

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

(6) An Appeal Panel shall notify the person who made the request under sub-section (2) of its decision under sub-section (5).”

1.2 Section 33, as amended by the State Airports Act, 2004, provides:

“(1) In making a Determination the objectives of the Commission are as follows -

(a) to facilitate the efficient and economic development and operation of Dublin Airport which meet the requirements of current and prospective users of Dublin Airport,

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

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

- (2) *In making a determination the Commission shall have due regard to-*
 - (a) *the restructuring including the modified functions of Dublin Airport Authority,*

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

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

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

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

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

- (g) *the cost competitiveness of airport services at Dublin Airport,*
- (h) *imposing the minimum restrictions on Dublin Airport Authority consistent with the functions of the Commission, and*
- (i) *such national and international obligations as are relevant to the functions of the Commission and Dublin Airport Authority.”*

1.3 **Order of the Minister for Transport establishing the Appeal Panel**

By Order of the Minister for Transport of 29th September, 2008 the Minister established an Appeal Panel to consider the Appeal of, inter alia, Aer Lingus against the Determination of the Commission for Aviation Regulation published on 30th July, 2007 “*Maximum levels of airport charges at Dublin Airport, Final Decision on interim review of 2005 Determination*”. This Determination is published as Commission Paper 6/2007 (CP6/2007).

- 1.4 The Appeal Panel members are Paul Gardiner S.C. (Chairman), Niall Greene and Alan Doherty.

2. **POWERS OF THE APPEAL PANEL - SCOPE OF REVIEW**

- 2.1 Section 40(4) of the 2001 Act provides that an Appeal Panel shall determine its own procedure.

- 2.2 As stated, the provisions of Section 40(5) require the Appeal Panel to consider the Determination and having so considered it, to either:

Confirm it or, if it considers that in relation to the provisions of Section 33 or 36 there are sufficient grounds for doing so, to refer the decision in relation to the Determination back to the Commission for review.

2.3 The power of the Panel does not therefore extend to one where it may substitute its own view for the view of the Commission. It may only refer the decision in relation to the Determination back to the Commission for review if it considers that there are sufficient grounds for doing so by reference to the provisions of Section 33 (in this instance).

2.4 The Appeal Panel determined that:

- (a) If the Appeal Panel was not satisfied that the Commission had considered the matters referred to at Section 33 it would refer the Determination back to the Commission for further consideration.
- (b) If the Panel was satisfied that the Commission has considered the matters referred to at Section 33 but was satisfied that it has manifestly erred in that there were sufficient grounds to refer that consideration back to the Commission it would refer the Determination back to the Commission for further consideration.
- (c) In all other events, it would uphold the Determination.

2.5 The Panel also determined that it would have regard only to material which was before the Commission when it made the Determination and not to subsequently procured materials or subsequent events.

3. **THE DETERMINATION AS CLARIFIED**

3.1 Determination CP6/2007 was significantly clarified on foot of High Court proceedings brought by Ryanair against the Commission and which were the subject of two decisions by Mr. Justice Clarke, the first on 11th April, 2008 and the second on 20th May, 2008.

3.2 It is against this Determination as clarified that Aer Lingus appealed.

3.3 In his decision of 11th April, 2008, Clarke J. observed that there was a significant lack of clarity as to what was or was not regarded by the Commission as being properly

considered to be part of the formal determination made by it under the provisions of Section 32 and recorded by it in CP6/2007. In those circumstances he referred the matter back to the Commission with the Direction that the Commission clarify what matters contained within its decision were regarded by it as forming part of the formal statutory Determination rather than other non-binding matters (such as whether the allowed capital expenditure into the RAB was a Determination or an indication).

3.4 Clarke J. then went on to consider whether the decision (whether it be a Determination or an indication) of the Commission was rational or not. He found that the role conferred by statute on the Commission was *“very much at the end of the spectrum where the body concerned has to exercise a general judgment based on the materials available to it, including those which may be provided by interested parties, but also bringing to bear on its conclusions its own expertise. It is, indeed, an expertise which the Courts do not share. It is clear that the overall approach of the legislation is to attempt to fix maximum prices by reference to a regime which is fair to all. It is necessary to provide reasonable security for the continuing operations of a vital element of national strategic infrastructure in the shape of an airport. However, it is also necessary that those using the airport are treated fairly and reasonably. A balance has to be struck. Precisely where that balance is to be struck and the manner in which an appropriate price regime is to be structured, are matters which require considerable expertise which the CAR has and the Courts do not.”*

3.5 Mr. Justice Clarke referred the decision back to the Commission *“for the purposes of the CAR clarifying the extent to which the statements contained within the decision paper concerning the inclusion of capital expenditure in the RAB form, in its view, part of its Determination in the exercise of its statutory function on the one hand or simply indications of its current thinking on the other. I propose directing the CAR to come to a revised decision which makes those matters clear in exercise of what I have found to be an inherent power of the Court. I will arrange for the matter to be listed before me again when the CAR has issued such a revised decision.”*

3.6 The Commission on foot of that direction clarified that in its view *“those elements of the review decision concerning the inclusion of capital expenditure into the RAB formed part of its Determination in the exercise of its statutory powers.”*

3.7 The terms of that clarification are set out by Clarke J. in his Judgment of 20th May, 2008 and are as follows:

“As part of the exercise of its statutory function to review its earlier Determination and, if it saw fit, to amend that Determination, the Commission for Aviation Regulation (CAR) set out in its final decision on its interim review of the 2005 Determination (“the Review Decision”) the reasoning which led the CAR to the conclusions it reached on such review. The CAR regards such reasoning and the individual decisions which it takes in the course of such reasoning as an integral part of its Determination in the exercise of its statutory functions. In particular, in the view of the CAR, statements and decisions contained in the Review Decision concerning the inclusion of capital expenditure in the Regulatory Asset Base (RAB) form part of its Determination in the exercise of its statutory functions. Decisions such as decisions on the inclusion of capital expenditure in the RAB have to be taken to enable the CAR to decide on the maximum level of airport charges or whether (on a review) a previous Determination should or should not be amended. Thus, such decisions are regarded by the CAR as necessarily part of the formal exercise of its statutory powers. The CAR’s reference in the Review Decision to making no change to the existing Determination was intended to be and, looking at the document as a whole is, in the view of the CAR, clearly a reference to the fact that it decided to make no change to the maximum level of airport charges. So understood, there is in the view of the CAR no inconsistency between (a) the fact that some of the factual circumstances, reasoning and individual decision leading to the conclusion differ from the earlier Determination and (b) the fact that the conclusion is to leave the maximum level of airport charges unchanged.”

3.8 Clarke J. in his decision of 20th May, 2008 stated that he was not bound by the clarification offered by the Commission, and found that:

“The statutory determination, properly construed, is to the effect that the Determination was in fact changed in the sense that there was an alteration in an important building block of the regulatory model even though other counterbalancing changes did lead to there being no alteration in the maximum price permitted. For those reasons I am satisfied that the proper construction to be placed on the statutory determination of the CAR is that it gave effect to a change in the original Determination by virtue of the alteration of the RAB.”

4. PROCEDURE

4.1 The Appeals Panel adopted the following procedure:-

1. Aer Lingus was invited to set out its grounds of appeal and reasons therefor in writing.
2. The Commission was invited to respond.
3. Aer Lingus was invited to respond to the Commission’s response.
4. An oral hearing of the Appeal was held where:
 - (a) Aer Lingus presented its appeal.
 - (b) The Commission responded.
 - (c) Aer Lingus responded to the Commission’s response.

5. COMMISSION APPROACH TO THE APPEAL PROCESS

5.1 The Commission expressed itself to be concerned with the process proposed in light of the fact that it would have to consider any matter referred back to it for review. It decided that it would therefore confine its response to drawing the attention of the Panel to materials, statements, analysis and decisions which informed its Determination and which were presented in the consultation on the interim review which ran from September, 2006 to July, 2007.

6. **AER LINGUS' GROUNDS OF APPEAL AND COMMISSION RESPONSE**

6.1 Aer Lingus submitted its Grounds of Appeal to the Appeals Panel by document dated 3rd November, 2008. The Commission responded on 20th November, 2008.

6.2 The grounds of appeal put forward by Aer Lingus are in bold type:-

Specification of Terminal 2

6.2.1 Aer Lingus submitted that the Commission should properly satisfy itself as to the appropriateness of the sizing of Terminal 2.

6.2.2 It referenced the Rogerson Reddan Report of 16th May, 2007 "Review of Dublin Airport Authority Capital Expenditure Programme" and contended that "*It is Aer Lingus' view that the Commission must be satisfied as to the justification for this increased capacity.*"

6.2.3 It asserted that it had been consistently stated by Aer Lingus that its requirement was for a 3,000 passenger departure busy hour. It appeared critical of the DAA planned busy hour for Terminal 2 of some 4,200 passengers.

6.2.4 It was critical of the consultation process in relation to the construction of Terminal 2 stating that it had been "*limited to Aer Lingus' operational requirements and has not addressed the impact it will have on airport charges*".

6.2.5 It requested that "*the Commission should be certain as to the appropriateness of the specification for any capital expenditure. Aer Lingus therefore requests that the Appeal Panel requires the Commission to review its final decision in this regard to ensure that Terminal 2 is not being constructed to overcapacity.*"

6.3.1 In its response, the Commission queried whether Aer Lingus was appropriately using the appeal process in order simply to "clarify issues". It asserted that the Appeal Panel should confine its review to matters which were current in July, 2007 and not to the "*greatly altered and more challenging economic environment for the aviation industry*".

6.3.2 The Commission pointed out that the Commission had significant concerns over the sizing of Terminal 2 on foot of its Consultants' Reports and asserted that the findings of the Rogerson Reddan and Vector Report - to the effect that Terminal 2 was being developed with considerable potential excess capacity - had led the Commission to develop a two box approach to remunerating T2 capital expenditure.

6.3.3 The Commission referenced what appeared to be an entirely contradictory attitude of Aer Lingus to the consultation process leading to the Determination now under appeal and that asserted by Aer Lingus in its Appeal. The Commission referenced the Aer Lingus:

- Response to CP1/2007 where Aer Lingus had stated that there had been a wide ranging consultation process.
- Response to CP5/2007 where Aer Lingus had stated that the process of consultation was "*exactly what airports should go through in determining the level of future facilities that should be provided*".
- Failure in a letter of 3rd July, 2007 from Laurence Gourley, Aer Lingus Company Secretary and Manager of Legal Affairs to John Spicer of the Commission to alter any of the foregoing submissions.

6.3.4 Insofar as the consultation process was concerned, the Commission again queried the stance now taken by Aer Lingus.

Inclusion of CAPEX in the RAB – The Runway

6.4.1 Aer Lingus asserted that the additional capacity at Dublin Airport created by Terminal 2 could not be utilised until the northern runway was completed. It therefore asserted that "*Terminal 2 as envisaged will be completed prematurely and will provide no useful new airport capacity until such time as the new runway can utilise such capacity. Capital expenditure in respect of Terminal 2 should not therefore be included in the RAB until such time as its benefits are fully realisable, i.e. when the full capacity of the Terminal is utilised upon completion of the new runway*".

- 6.5.1 In its response the Commission pointed out that its decision in particular in relation to the two box approach was consistent with proposals for the new runway that were available to it at the time of the interim review.
- 6.5.2 It contended that the key question in this context was whether it is ever feasible for an airport operator in any jurisdiction to perfectly synchronise the provision of terminal and runway capacity, given the time scales involved and the provision of the capital programme and the attendant issue of the varying timetables for planning and regulatory decisions.
- 6.5.3 It referenced the fact that the decision to remunerate CAPEX was consistent with the Ministerial Direction of April, 2007 which the Commission was obliged to take account of and which was independent of the delivery of the second runway.
- 6.5.4 It also pointed out that unless the DAA delivers the second runway, it will be unlikely to realise the 33 million passengers per annum threshold for box two and its associated capital costs. The Commission contended that this was a strong financial incentive for the DAA to deliver the second runway in a timely manner.

Differential Pricing

- 6.6.1 Aer Lingus submitted that differential pricing for Terminal 2 and Terminal 1 was not economically justified and it introduced an unreasonable degree of uncertainty regarding future pricing levels and structures. It contended that Terminal 1 and Terminal 2 should be treated as homogeneous terminal capacity and be priced identically. Its support for T2 was conditional upon the application of uniform pricing across both terminals.
- 6.6.2 Aer Lingus pointed out that although it was asked to move its operations to Terminal 2, it was flawed to suggest that because an airline might locate all its operations in one terminal this might justify charging it more.
- 6.6.3 It stated *“Given that the DAA has stated that it is not minded to introduce differential pricing, Aer Lingus requests that the Panel seek clarification from the Commission as to its definitive views on the implementation of differential pricing and particularly*

that the DAA will remain free not to impose such a regime. This clarification is essential if Aer Lingus is to give a firm commitment to move its operations to Terminal 2.”

6.7.1 In its response the Commission stated:

“It is not clear from its submission if Aer Lingus is merely stating an opposition to differential pricing or if Aer Lingus wants the Panel to review the Commission’s willingness to allow the DAA to use a differential pricing approach to recover some of the capital costs associated with box 2 before annual throughput reaches 33 million passengers per annum.”

6.7.2 It referred the Panel to the Commission’s thinking and conclusions on the issue of differential pricing set out in:

- Section 6, pages 24 and 25 of CP1/2007.
- Section 6.4, in particular pages 84-86 of the May, 2007 draft Determination CP5/2007.
- Pages 20-24 of the July Determination, CP6/2007 (the matter under Appeal).

Other Clarifications

7.1 In its submission Aer Lingus also raised various other matters as follows:

(a) Aer Lingus stated it:

“would also like to make the Panel aware and to seek clarification from the Commission in respect of some inconsistencies appearing in the Commission’s Determination viz:-

1. *Various references are made throughout the Determination which appear to state that the pre-*

financing costs of Terminal 2 are to be included in price limits, even though Terminal 2 will not enter the RAB until it is operational. In competitive markets pre-financing costs cannot be recovered from current customers. These costs too need to be capitalised and added to the RAB only when the asset is operational. The Commission's treatment of pre-financing costs is inconsistent with its general approach to Terminal 2 costs and, further, inconsistent with economic theory and competitive pricing."

7.1.2 In its response the Commission stated that it was unclear what changes, if any, Aer Lingus wanted made to the 2007 Determination should the matter be referred back to the Commission. It pointed out that:

"Throughout the interim review the Commission discussed issues relating to the time profile of the charges necessary to recover capital costs associated with large investment projects. Following publication of the draft Determination, the Commission made a presentation to the industry, at which Aer Lingus was represented, and made available a ready reckoner financial model to allow parties to better understand its proposals. Aer Lingus' response to CP5/2007 did not seek any specific changes to the Commission's proposed approach to remunerating CIP2006.

The Panel may also wish to refer to the 2007 Determination including page 26:

'Recognising the financial constraints that a significant capital project on the scale of T2 places on an airport's finances the Commission proposed (in the draft Determination) full pre-funding of financing for T2.'

The Commission also discusses remuneration of the DAA's CAPEX plans on pages 37-40. On page 40 the Commission stated that DAA will not receive financing costs after 2009 should T2 not be operationally ready nor will the DAA receive financing costs for box two after 2018 should demand not exceed the 33mppa by then. Despite using a trigger to remunerate capital costs while allowing for some of the return on capital to be earned before the realisation of the trigger the Commission's approach is entirely net present value neutral such that the DAA will only receive ever the net present value of the capital costs of Box 1 and Box 2 (assuming it reaches the 33mppa Box 2 threshold by 2018)."

7.1.3 (b) Aer Lingus asserted:

"The Commission has applied a unitised per passenger depreciation to Terminal 1 Extension and Terminal 2 expenditure, but not to other expenditure. Whereas it is appreciable that from a purely theoretical economic point of view, the unitised approach may be preferable and consistent with competitive market pricing, this differing treatment is arbitrary and leads to an inappropriate acceleration of charges."

7.1.4 In response the Commission stated that it was again unclear what changes to the determination Aer Lingus wanted.

7.1.5 It pointed out that Aer Lingus did not express any concerns or make any comments on the Commission's proposed approach to depreciation in its response to the Commission's draft Determination.

7.1.6 It referenced the following extracts discussing the approaches to depreciation from Commission documents during the interim review:

- CP1/2007, Section 3.3, pages 11 -15.

- CP5/2007, Section 6.2, pages 74-77.
- CP6/2007, Section 3.3, pages 22-24.

7.1.7 It stated:

“During the interim review the Commission stated the preference for a unitised approach to depreciation. In noting the risks associated with such an approach, it opted to gradually introduce a unitised approach and allowed some capital costs to be depreciated using a conventional straight line approach.”

7.1.8 It referred the Panel to page 22 of the 2007 Determination where it stated:

“Arguably a unit cost approach to depreciation better aligns the costs and benefits to passengers of long lived assets. For this reason and consistent with the conclusions it has reached after consulting on the issue during this interim review the Commission is now minded to prefer such an approach over straight line depreciation. However the Commission will only introduce such an approach gradually and with consultation, being careful to ensure that switching away from straight line depreciation does not create cash flow difficulties for the DAA.”

7.1.9 (c) Aer Lingus asserted that

“In its illustrative price panel for the period 2010 to 2014 the Commission uses a pre-tax cost of capital of 7.4%. This is much higher than the range used by the United Kingdom Competition Commission in 2007 for Gatwick and Heathrow Airports and it would appear to be over generous.”

7.1.10 In its response the Commission stated again that it was not clear whether Aer Lingus objected to the indicative price path post 2010 or the cost of capital in the current determination nor what the Panel was being asked to refer back to the Commission.

7.1.11 It pointed out that the final determination did not include any indicative post 2010 price paths and that the cost of capital issues were outside the scope of the interim review which focused on the DAA's new capital programme CIP 2006. It pointed out that Aer Lingus was supportive of the narrow scope of the review and did not seek a review of the cost of capital when the Commission consulted on the scope of the interim review. It pointed out that Aer Lingus had stated:

"We agree that the Review should in general be limited to considering the data and arguments as they were in September, 2005 except that the CIP 2006 should be substituted for the May, 2005 Investment Plan and should focus on the implications of CIP2006 for airport charges at Dublin Airport."

7.1.12 (d) Aer Lingus asserted that airport users should be made aware of how the Commission has treated the proceeds of sale of non-core assets by DAA.

7.1.13 The Commission responded by stating again that it was not clear what Aer Lingus wanted the Panel to refer back to the Commission. It stated:

"While Aer Lingus does not state what assets it is referring to, the Commission assumes that it is referring to sales by the DAA group as opposed to the regulated entity Dublin Airport. These non-core assets are not part of the regulated asset base and accordingly the costs and revenues of non-core assets are not taken into account in calculating airport charges."

7.1.14 (e) Aer Lingus asserted that:

"The Commission states that capital expenditure not directly related to Terminal 1 Extension, Terminal 2 or Pier D will enter the RAB as incurred and according to the CIP2006 timetable. Elements of other expenditure where DAA spending occurs a long time before the subject of the spending is

operational should be treated in the same way as Terminal 2, i.e. included in RAB only when operational. Such a rule should always apply to all investment and any distinction is arbitrary and encourages the DAA to cut corners on investment.”

7.1.15 In its response the Commission stated that it had consulted on the use and implementation of triggers in CP1/2007 and that it had published a study by CEPA on CAPEX triggers. It asserted that following responses to the consultation paper, including from Aer Lingus, the Commission set out its thinking on CAPEX triggers in its draft Determination CP5/2007 where it had stated that:

“There is some merit in the argument that introducing a trigger in the middle of the Determination would be inappropriate. For this reason the Commission does not intend to introduce an output based trigger for the prevailing Determination.”

7.1.16 The Commission stated that

“In line with this reasoning the Commission did not introduce a trigger in respect of ongoing CAPEX expected to be completed during the current determination, although it did leave open the possibility of introducing output triggers should T2 not be complete by end 2009. In its response to the draft Determination Aer Lingus did not make any comments on this approach.

The forthcoming determination for the price control period commencing 1 January, 2010 will afford all parties an opportunity to consult on the starting RAB (assuming that the Commissioner persists with this approach). Aer Lingus will have an opportunity then to raise concerns about allowing into the RAB CAPEX allowances made in previous determination for investments that have not been completed.”

7.1.17 (f) Aer Lingus asserted that there was a threat that depreciation charges could be accelerated in circumstances where the DAA encounters short term cash flow

difficulties. *“This again introduces an unreasonable degree of uncertainty regarding future pricing levels”.*

7.1.18 In its response the Commission pointed out that it was not clear what Aer Lingus wanted referred back to the Commission. It stated *“The statements in the 2007 Determination regarding possible acceleration of depreciation charges are policy statements on how the Commission might satisfy its statutory objectives in the event that it had concerns that the existing depreciation profile would not enable the Airport operator to operate the Airport in a financially viable manner. As stated in the final Determination, if depreciation profiles were accelerated, the calculation would be net present value neutral: there is no intention to allow the DAA to collect a duplication of depreciation charges.*

It referred to pages 9, 22, 23 of CP6/2007 (the Determination under Appeal).

8. THE APPEAL HEARING

8.1 In accordance with the procedure already set out, Aer Lingus was invited to present its Appeal to the Panel on 26th November, 2008.

8.2 Present on behalf of Aer Lingus were Neil Walsh, Deputy Chief Executive, Laurence Gourley, Company Secretary and Head of Legal and Dermot Kilbane, Legal Adviser.

8.3 Present on behalf of the Commission for Aviation Regulation were Commissioner Guiomard, John Spicer, the Commission’s Head of Economics, and Patricia Lambe, the Head of Legal Affairs.

8.4 Mr. Gourley opened the Appeal on behalf of Aer Lingus and stated that Aer Lingus did not pursue the Appeal in respect of the matters identified in its Submissions in respect of sizing of the Terminal nor in respect of the matters set out above in this Report under the heading “Other Clarifications”.

8.5 Accordingly the Aer Lingus Appeal was limited to a request that the Panel consider referring to the Commission the issues identified at 6.4.1 and 6.6.1 above – inclusion of CAPEX in the RAB and Differential Pricing.

- 8.6 Mr. Gourley asserted that Aer Lingus generally supported the two box approach to remunerating capital, but that the trigger for Box 1 and Box 2 should be clearer and that users should not pay for the T2 asset until they got use from it. He referenced the delay caused by the planning process in respect of the second runway the completion of which was pushed out to 2013.
- 8.7 He asserted that the Commission did not have sufficient regard to the impact of this delay on the timing of the inclusion of T2 CAPEX in the RAB. He asserted that the DAA should bear the risk and that users should not have to pay until the asset delivered value in terms of increased capacity for users.
- 8.8 In respect of differential pricing, Aer Lingus sought clarity from the Commission that the Commission would not require the DAA to impose differential pricing in respect of T2 and T1. It supported the DAA approach to the effect that T1 and T2 are substitutes for each other. It asked that the uncertainty be resolved in a revised interim determination and that the Commission be more explicit in relation to the circumstances, if any, in which it would require the DAA to impose differential pricing.
- 8.9 In his response to the Aer Lingus Submission, Commissioner Guiomard confined his response to those matters which remained live in the Appeal.
- 8.10 In respect of the timing of CAPEX in the RAB, Commissioner Guiomard asserted that the Commission had taken account of the matters now raised by Aer Lingus and that the industry would, in any event, have an opportunity in the next Determination to canvas its views in respect of the precise defining of how T2 becoming operational is to be treated.
- 8.11 In respect of differential pricing Commissioner Guiomard pointed out that the Determination under Appeal did not impose differential pricing in respect of the period 2006/2009. He referenced in particular page 20 of the Determination.

8.12 He asserted that the Commission's current view was that it was not proposing to impose differential pricing as between 2006 – 2009 or in the next Determination, on the assumption that DAA builds the proposed facilities in T2, and on the basis of broad comparability between the quality of service to be available in T1 and T2.

8.13 He asserted that the Commission had respected the three statutory requirements of taking account of:

1. User views;
2. The sustainability and financial viability of the DAA;
3. Government policy and in particular the Ministerial Direction that T2 be built by 2009.

8.14 In its response to the Commission Mr. Gourley reiterated Aer Lingus' proposition with respect to differential pricing. It was reassured by Commissioner Guimard's comments but believed that the Commission's position had not been clearly stated in the Determination.

8.15 Mr. Gourley (and Mr. Walsh) reasserted Aer Lingus' view that the DAA should bear the risk of non-synchronisation of the operational use of T2 and the Northern runway.

9. **DECISION OF THE APPEAL PANEL**

9.1 On the basis of the Appeal as presented by Aer Lingus:-

9.1.1 The Panel is satisfied that the Commission has had regard to the matters to which it is obliged to have regard under Section 33 of the Act and is not satisfied that there are otherwise sufficient grounds by reference to the provisions of Section 33 to refer the Determination back to the Commission.

9.1.2 The matter in dispute may be reduced to whether the appropriate trigger for the remuneration of T2 is when it is operationally ready, as decided by the Commission, or such time as its benefits are fully realisable, i.e. when the full capacity of the terminal is utilised upon completion of the new runway, as contended by Aer Lingus. The Panel is of the view that the deferral of remuneration until the full utilisation of

the terminal would be inconsistent with the Ministerial mandate to the DAA to build T2 by the end of 2009 without pre-condition of a second operational runway. T2 will be used by passengers prior to the building of the second runway. The definition of when T2 becomes operational will be considered in the 2010/2014 Determination and any matters to be considered can be considered within that consultative process, so that referral of the matter back to the Commission within the parameters of this Determination is not necessary

9.2 With respect to the issue of differential pricing, the Panel considers that differential pricing is not imposed within the time period of this Determination. Neither does the Determination state that differential pricing will be imposed in the future, although it does leave open the question of differential pricing in the future. It seems to the Panel that this is a matter for future Determinations and not a matter to be referred back to the Commission.

9.3 In the circumstances the Panel has determined that there is nothing to refer back to the Commission in respect of the Appeal under consideration and to the extent raised in this Appeal (and only to that extent) confirms the decision of the Commission.

Signed:


PAUL GARDINER
Chairman


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Dated the 23rd day of December 2008.