

**DECISION OF THE**  
**AVIATION APPEALS PANEL**

**Established by Order of the Minister for Transport**

**29<sup>th</sup> September, 2009**

**APPEAL OF**  
**DUBLIN AIRPORT CONSULTATION COMMITTEE**  
**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.”*

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

1.3 By Order of the Minister for Transport of 29<sup>th</sup> September, 2008 the Minister established an Appeal Panel to consider the Appeal of, inter alia, Dublin Airport Consultation Committee (“DACC”) against the Determination of the Commission for Aviation Regulation published on 30<sup>th</sup> 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 that there were nevertheless sufficient grounds for doing so, 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 11<sup>th</sup> April, 2008 and the second on 20<sup>th</sup> May, 2008.

3.2 It is against this Determination as clarified that the DACC has appealed.

3.3 In his decision of 11<sup>th</sup> 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 20<sup>th</sup> 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 20<sup>th</sup> 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. DACC was invited to set out its grounds of appeal and reasons therefor in writing.
2. The Commission was invited to respond.
3. DACC was invited to respond to the Commission’s response.
4. An oral hearing of the Appeal was to be held where:
  - (a) DACC was to present its appeal.
  - (b) The Commission was to respond.
  - (c) DACC was to respond 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, together with the Determination itself.



6. **SUBMISSION OF DACC, RESPONSE OF COMMISSION, RESPONSE OF DACC**

6.1 In its Submission the DACC (which was formed in Spring 2008 in response to a perceived lack of consultation on capital development) stated that it believed:

*“that CAR erred in allowing into the RAB the full costs associated with DAA’s Terminal 2 Phase 1 for the purpose of DAA earning its financing costs and wrongly specified the size of Box 1, upon which DAA will be able to recover depreciation from the date at which the terminal is operational.”*

6.2 It asserted that it was

*“important to remember that regulation of airport charges is imposed in circumstances where an airport operator has substantial market power, which in the case of DAA derives from there being no competition in the provision of airport services serving the Dublin area. The primary purpose of airport regulation is, hence, to protect users of the airport from any abuse of that market power by the airport operator.”*

6.3 The DACC highlighted that the duties of the Commission when making a Determination are:

- *“to facilitate the efficient and economic development and operation of Dublin Airport which meet the requirements of current and prospective users of Dublin Airport;*
- *To protect the reasonable interests of current and prospective users of Dublin Airport in relation to Dublin Airport;*
- *To enable Dublin Airport Authority to operate Dublin Airport in a sustainable and financially viable manner.”*

and asserted that:

*“A key issue, therefore, is what steps the CAR took to ensure that the capital expenditure it has allowed into the RAB actually meets the requirements of current and prospective users at Dublin Airport.”*

6.4 The DACC complained about the lack of consultation carried out by the DAA with the generality of its airline users at Dublin Airport. It asserted that:-

*“The original plans by DAA for the second terminal, about which it consulted with users in the context of CIP2005 and that formed the basis of the CAR’s original charges Determination (CP3/2005 and as amended in CP5/2006), was for a terminal costing €165.2 million attached to Pier D, with an additional Pier E to be added to Terminal 1 at a later date.*

*Having announced this proposed development in September 2005, DAA engaged architectural consultants to work up the proposals in more detail. From that point onwards, engagement was concentrated on those airlines that the DAA wished to relocate from Terminal 1. Even where airlines were considered as potential users of the new terminal, the cost implications of the emerging proposals for a substantially larger second terminal in a location to the south of the existing terminal were never adequately explained. In particular, DAA did not consult with the full range of current and prospective airlines using Dublin Airport on the overall implications of the revised Terminal 2 proposal for the utilisation of existing airport capacity overall and the likely increases in costs to all users of Dublin Airport.*

*The revised terminal proposals were made public by DAA in August, 2006. Although the airline users, through the Airline Operators Committee, asked CAR to attend consultation meetings arranged between DAA and the airlines, the CAR declined to get involved in the*

*consultation process or to ensure that airlines were given sufficient information to enable an informed discussion on the implications of the DAA's plans. Rather, the CAR engaged in bilateral meetings with DAA alone and so could not properly evaluate whether users' concerns regarding the scale and cost of the proposed development had been properly taken into account in DAA's plans."*

6.5 DACC requested that:

*"the CAR properly discharge its duty to ensure that the Terminal 2 and other capital development proposals being put forward by DAA are efficient and meet the needs of users of Dublin Airport, and to ensure that user interests are protected. In particular, the CAR should be required to ensure that Terminal 2 is not being constructed to over-capacity and at excessive cost."*

6.6 DACC contended that:-

*"The CAR's own consultants verified that the first phase of Terminal 2 is 40 to 56% too large, and hence similarly too expensive, for the passenger and aircraft demand it is allegedly being planned to handle. Furthermore, it would not appear that adequate account was taken of the available capacity in Terminal 1 following the extensive programme of building works, including Area 14, Pier D and T1X, to enhance its capacity. DACC submits that the CAR should now be required to reconsider whether this should have given rise to the disallowing of substantial amounts of the planned capital expenditure covering both the terminal building itself and other associated facilities. In other words, the CAR allowed an excessive amount of the cost of Terminal 2 into the RAB within Box 1.*

*Furthermore, the financing costs associated with a correctly specified Box 2, comprising those elements over sized relative to demand, should have been disallowed entirely until such time as demand at the*

*Airport warrants the provision of that additional capacity, at or around 33 mppa or later, subject to the Local Area Plan and conditions on the planning approval being amended. Instead, the CAR has allowed DAA to earn a return, by way of recovering its financing costs, on more than half of the building under construction despite its own consultants clearly advising that there is no justification for such expenditure.”*

- 6.7 DACC referred to recent reports of the UK Competition Commission dealing with BAA and the use of an RAB system, as an example of ways in which the regulatory process can fail and stated:

*“The DACC is concerned to ensure that the behaviours attributed to BAA are not replicated by the DAA. It appears to the DACC that the CAR has failed to meet its statutory duties and, in common with the UK CAA, has adopted a light-handed approach, which favoured the regulated entity.”*

- 6.8 DACC asserted that:

*“the increased airport charges that will arise from this Determination will contribute substantially to the cost pressures on the airlines at Dublin, resulting in a material slowing in traffic growth below levels assumed by DAA in planning the development of T2 and other infrastructure improvements.*

*Not only should this have been apparent to the CAR but also the CAR was aware, from its own consultants’ reports, that the additional capacity provided by Terminal 2 cannot be used until the new runway is in operation, which is not now expected before the end of 2012 at the earliest. The CAR should therefore have ensured that the capital expenditure in respect of any additional capacity should not be included in the RAB until such time as the additional capacity can be fully utilised.*

*In summary, the effect of the CAR's Determination has been to guarantee that DAA will be remunerated over time for the full cost of a terminal asset, notwithstanding any deferral of depreciation on a small part of the cost into Box 2, regardless of whether it is being constructed larger than it need be and before it is needed. This is of particular concern as the CAR stated at a meeting with the Dublin Airline Operators Committee on 17<sup>th</sup> November, 2006 that airport charges may have to nearly double from their current level as a result of DAA's planned expenditure."*

6.9 The matters which the DACC said should be referred back to the Commission for reconsideration were:

- The scale of T2 costs allowed into the RAB; and
- The timing of when those costs enter the RAB.

6.10 In its response the Commission observed that during the course of the interim review, DACC members expressed a diverse range of views on T2 and CIP2006. In this connection the Commission observed that while the DACC forum did not exist at the time of the 2007 Determination, all of its members had an opportunity to respond to the consultation papers that the Commission published leading up to the Determination. Ryanair and Aer Lingus made submissions to CP1/2007 and CP5/2007. CityJet made a written submission in response to CP6/2006 and later made oral representations to the Commission but it did not respond to CP1/2007 or CP5/2007. IATA responded to CP1/2007 and CP5/2007.

6.11 The Commission referred to the diversity of responses received by the Commission, as evidenced by a number of responses received by it:

*“Aer Lingus supports the development of T2 and Pier E with a peak capacity of 4200 per hour and achieving IATA Service Level C” (Aer Lingus response to CP1/2007, Exhibit 2).*

*“the Commission would be wrong to alter the specification of T2 as part of its Determination as this would fail to provide users with the facilities they need” (Aer Lingus response to CP5/2007, Exhibit 4.)*

*“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 on the other hand, continues to be frustrated by a combination of political indecision and intensive lobbying of a single interest party” (CityJet response to CP6/2006, Exhibit 5).*

*“DAA [has] ignored the reasonable requests of users, and repeatedly refused to provide information and valid justifications for proposed developments ... the size and cost of T2 are grossly excessive and ... it has been designed specifically for Aer Lingus. If T2 is allowed to go ahead, then Aer Lingus should be forced to pay for it – something Aer Lingus has already signalled they are not willing to do” [Ryanair Response to CP5/2007, Exhibit 3).*

6.11.1 In its response to the Commission’s response the DACC confirmed that it was not formally constituted until May, 2008 and refuted the suggestion that its submission was inconsistent with the thrust of airline comments made at various times between 2006 and the Determination in July, 2007. It stated:

*“In essence all airlines were making the same fundamental point that it was essential that the CAR assured itself that development at Dublin Airport was cost efficient and met users needs.”*

6.11.2 DACC proposed to set out key aspects of each airline's position.

6.11.3 It referenced Aer Lingus' submissions on the interim review and stated "*Aer Lingus was clearly signalling that inefficient and over expensive investments should not be allowed into the RAB. This is clearly consistent with the position of the DACC in this Appeal that the CAR has allowed excessive costs to the RAB.*"

6.11.4 Similarly DACC asserted that Aer Lingus' position with respect to peak pricing was entirely consistent with the position of the DACC in its submission to the Panel "*that the development of T2 is premature prior to additional peak period runway capacity being made available at Dublin Airport*".

6.11.5 Similarly with respect to the question of when or to what extent DAA should be allowed to recover its financing costs associated with T2.

6.11.6 With respect to Ryanair, the DACC asserted that there was nothing in the submission of the DACC to the Panel which was inconsistent with the views expressed at length by Ryanair in its earlier submissions to the Commission regarding the importance of the development of Dublin Airport proceeding on a cost effective basis to meet the needs of all carriers having regard to the extensive development works already underway to improve the capacity of T1 and the constraints imposed by existing runway capacity in the short term and the Fingal Local Plan in the medium term.

6.11.7 With respect to CityJet, the DACC pointed out that the CityJet submission was related to the question of whether or not there should be an interim review rather than the substance of the review itself. It referred to the completion of the Terminal 2G at Paris CDG for regional operations which was completed at a cost of €94m.

6.11.8 It asserted that the views summarised by it "*better reflect the overarching nature of airline concerns than the selective quotations cited by the Commission in paragraph 5 of its response*".

6.12 With respect to the scale of costs allowed into the RAB, the Commission asserted that it carefully considered same and referred the Panel to:-

- *Rogerson Reddan and Vector (“RR&V”) review of DAA costs benchmarks (Exhibit 6)*
- *RR&V review of T2 non-construction costs (Exhibit 7)*
- *RR&V review of DAA capital investment programme (Exhibit 8)*
- *RR&V review of T2 sizing (Exhibit 9)*
- *CP5/2007 Section 7, pages 87 to 116 (Exhibit 10)*
- *CP6/2007 Section 3.4 pages 24 to 39 (Exhibit 11)*

6.13 The Commission stated that:

*The Commission’s views on the level of capacity being developed in T2 are set out in a series of documentation already before the Panel. The Commission and its consultants IMR Solutions expressed concerns regarding the size of T2 at the time of CP1/2007, its first consultation paper of the 2007 Determination. The Commission sought further consultancy advice from RR&V which confirmed its concerns that T2 was being built with likely excess capacity.*

*The Commission proposed a two-box approach to the remuneration of T2 costs which required the DAA to bear some of the demand risk associated with building a large T2 with potential excess capacity. It further sought to protect current users from bearing a disproportionate burden in terms of charges compared with users in later years by backloading depreciation charges by using a unitised approach to depreciation. The Commission believes that the proposals in the 2007 Determination are in line with its statutory objectives, as well as being consistent with other obligations apparent*



at the time: notably, the 2005 Aviation Action Plan (Exhibit 13) and the Ministerial Direction of April 2007 (Exhibit 14).

*The Commission's views on T2 costs are set out in CP5 and CP6/2007 (Exhibits 10 and 11) and are based on analysis undertaken by its consultants RR&V. In its final Determination on the interim review the Commission excluded some €40million of costs from the RAB on the basis that they were excessive compared with benchmarks. The Panel are referred to Section 7 and 3.4 of CP5/2007 and CP6/2007 respectively."*

6.14.1 The Commission asserted that:

*"In paragraph 10 DACC appear to suggest that the Commission did not take into account the views of its consultants on the size of T2. The Commission disputes this, and refers the Panel to page 38 of CP6/2007 (Exhibit 11), which demonstrates how RR&V's analysis informed the Commission's proposals on the size of the boxes. The following extracts are particularly informative*

*"RRV's conclusion remains that T2 is large, and it stands by its alternative sizing estimates for a facility of between 50,980 sq/m and 58,262 sq/m"*

*The mid-point of the two RRV estimates of T2-sizing (50,980 sq/m and 58,262 sq/m) divided by the DAA's proposed sizing (74,555 sq/m) is 75%. This is the proportion of T2 costs that the Commission will include in box one."*

6.14.2 In its response to the Commission's submissions, DACC stated that while it was clear the Commission amassed a range of evidence concerning the size and cost of T2, it was concerned that the Commission was inconsistent in its treatment of this information. It was also concerned that a Report by Jacobs Consultancy into low cost

terminal development had apparently not been taken account of by the Commission in making its Determination. It observed that this document was not referred to in the Commission response to the DACC submission.

6.14.3 In its response DACC also submitted that the Commission did not always follow the advice of its consultants and furthermore referenced the advice of RR&V which highlighted that the capacity being provided by T2 could not effectively be used until such time as the new runway was available. The DACC asserted that it considered that the *“CAR erred in allowing the costs of T2 to enter the RAB before the capacity can effectively be utilised through additional flights being operated to and from Dublin Airport.”*

6.14.4 DACC furthermore submitted that the Commission’s own consultants, RR&V had clearly highlighted that the capacity being provided by T2 could not effectively be used until such time as the new runway was available to allow the constraint on early morning departing traffic to be lifted. It referenced RR&V Report at page 23 which stated:

*“As the runway capacity ultimately determines the capacity of the airport, we are concerned that without delivery of additional runway capacity by 2009 the proposed terminal capacity at Dublin Airport will far exceed runway capacity, resulting in the inefficient use of capital investment.”*

6.14.5 The DACC submitted that the Commission had erred in allowing the costs of T2 to enter the RAB before the capacity could effectively be utilised through additional flights being operated to and from Dublin Airport.

6.15.1 With respect to DACC’s submission on T2 capacity, the Commission stated that it:-

*“had regard to T1’s capacity in making its Determination. In its draft Determination the Commission took the view that the capacity of T1 was approximately 18.5 mppa and proposed that Box 1 for the purposes of T2 remuneration would be based on passenger throughput*

*from 18.5 mppa to 30 mppa. For reference see page 107 of the CP5/2007 (Exhibit 10). Having considered respondents' views submitted following the draft Determination – including those of DACC member Ryanair – the Commission increased the threshold for Box 2 to enter the RAB to 33 mppa. In setting these thresholds the Commission also had regard to the level of service at Dublin Airport given the strong representations it received during the interim review regarding the inadequacy of existing facilities at the airport and to the Ministerial Direction requiring the Commission have regard to the Aviation Action Plan that required the DAA have the second terminal operational by end 2009.”*

*The Commission believes that, contrary to the assertion in paragraph 9 of the DACC Submission, it did “properly discharge its duty” and meet its statutory objectives in considering the scale of costs allowed into the RAB. In line with its statutory duties, the Commission was mindful of the interests of current and prospective users, the need for DAA to develop the airport in an efficient manner and the requirement that the airport operator be able to operate the airport in a financially viable and sustainable manner.*

6.15.2 In its response to the Commission's response with respect to this issue the DACC asserted that:

*“It is unclear how raising the threshold for Box Two addressed the concern of airlines that, having regard to the available capacity of T1 and to the overarching constraint provided by the local plan, the size of T2 was too large in terms of the overall requirement for terminal capacity at Dublin Airport to meet user needs. The correct response in terms of deciding how much of the costs should have been allowed into the RAB should have been to retain the Box Two threshold at 30 mppa and to have raised the starting threshold for Box One to a higher existing capacity to reflect investment in Pier D, Area 14 and T1X. Furthermore, it was beholden on the CAR to ensure not just that*

*the hourly and annual capacity of the proposed T2 was reasonable, but that the actual areas and costs proposed were consistent with the requirements of airlines. Overall this should have resulted in a smaller cost for Box One than set out in the CAR's draft Determination in CP5/2007 and by implication, a larger Box Two. What the CAR did in its Determination was the exact opposite."*

6.15.3 The DACC did not consider that the indication in the Aviation Action Plan that T2 should be operational by 2009 could be taken to override the triple safeguards envisaged by the Minister within the Action Plan to ensure that the Terminal was delivered in a manner which met the growth and economic needs identified. DACC observed that significantly regulation was seen as the third of the safeguards.

6.15.4 The DACC asserted that the Commission appeared to be suggesting that somehow it was absolved from ensuring efficient and timely provision of terminal capacity at Dublin Airport in light of the Aviation Action Plan. DACC asserted that this could not be so as the Plan was contingent on the triple safeguards including effective regulation being adopted.

6.16.1 With respect to the consultation process, the Commission stated:-

*"The entire chapter of the draft Decision (CP5/2007, Chapter 5, Exhibit 10) presented the Commissions' views on the DAA consultation process. Both Ryanair and Aer Lingus submitted responses to CP5/2007 (Exhibits 3 and 4 respectively), presenting contrasting views of the DAA consultation. The Commission did consider consultation leading up to the production of CIP2006, insofar as it was relevant for satisfying its statutory objectives, contrary to the claim by DACC in paragraphs 6 – 8 of its submission to the Panel."*

6.16.2 In its response to the Commission reply to the DACC original submission, the DACC maintained its position that the Commission was remiss in failing to ensure that effective consultation took place between DAA and all users of Dublin Airport in respect of T2. It argued that the chapter referred to in paragraph 12 of the

Commission's response expressly highlighted the shortcomings of consultation on T2. The DACC considered:

*"This to be a particularly material consideration and indeed the failures of consultation on T2 were a prime driver in the establishment of the DACC to provide a vehicle by which the airlines could more effectively engage together in future consultations with the DAA. The DACC considers that the failure by the CAR to ensure and participate in consultation meetings between DAA and the airline users of Dublin Airport was a major factor in its inability to reach correct judgments about the efficient provision of additional terminal capacity at Dublin Airport."*

6.16.3 The DACC referenced the UK Competition Commission in its recent report on Stansted Airport as an example where a failure to consult had adverse effects on charges levied and on operational activities of the airport and its users.

6.16.4 With respect to the timing of entry of costs into the RAB, the Commission asserted that it:-

*"consulted extensively on how the costs of the projects included in DAA's CIP2006 might be remunerated, including on different charging profiles which might be used and how this would affect the charging profile. This included discussions on "trigger pricing". The Panel are referred to:*

- *CP1/2007 Section 3, pages 9-11 (Exhibit 12)*
- *CP5/2007 Section 6.1, pages 69-74 (Exhibit 10)*
- *CP6/2007 Section 3.3, pages 16-17 (Exhibit 11)."*

6.17.1 With respect to DACC's concerns about financing costs, the Commission referred the Panel to CP6/2007, Section 2, pages 3-7 and Section 3.4, page 40 (Exhibit 11) and asserted. *"Users will not pay for capital costs relating to box 2 unless the 33 mppa threshold is satisfied."*

6.17.2 In its response to this assertion, DACC stated that:

*“This is not what the CAR committed to at page 40 of CP6/2007 where it is clearly stated that:*

*‘The Commission proposes to allow €1,107m of DAA’s capital expenditure [DACC submits that this includes the full cost of T2 Boxes One and Two and all T1 related costs except for €31m relating to the overspend on Pier D which is deferred for consideration at the next Determination] to receive a regulated rate of return on capital from the date when it is incurred. This allows for full pre-funding of financing costs for capital expenditure that is deferred from entering the RAB until T2 is operationally ready and the subsequent second box.’”*

6.17.3 The DACC asserted that:

*“It is clear that DAA has been allowed to earn a return on the cost of Box 2 since 2007 and that the expenditure entered the RAB for this purpose from the date when construction commenced. This was also confirmed in the ‘ready reckoner’ recently issued to the DACC by the CAR in connection with the forthcoming consultation on issues in relation to the next regulatory review where DAA is shown as earning a return on all its T2 expenditure at its full WACC from the date when construction commenced.”*

6.18.1 With respect to the second runway, the Commission stated:-

*“The Commission believes that its 2007 Determination did satisfactorily consider the implications of uncertainty around the delivery of a second runway. This issue was considered in work*

*undertaken on behalf of the Commission by RR&V and Cambridge Economic Policy Associates (“CEPA”) published in conjunction with CP1/2007 and CP5/2007 respectively. The Panel is referred in particular to:*

- *RR&V Report no. 4, Review of T2 sizing, see page 24 (Exhibit 9)*
- *CEPA’s Cost Benefit Analysis of Terminal 2 and Runway 2 at Dublin Airport (Exhibit 15)*

*The Panel will appreciate that a key question in this context is whether it is ever feasible for an airport operator in any jurisdiction to perfectly synchronise the provision of terminal and runway capacity given the timescales involved in the provision of a capital programme, and the attending issue of the varying timetables for planning and regulatory decisions.*

*Notwithstanding the fact that the Commission’s Determination was made in advance of An Bord Pleanála’s ruling in relation to the runway, the Commission’s Determination was also made in the context of the Aviation Action Plan and the Ministerial Direction of April, 2007 (Exhibit 14) which required the Commission to “take due and manifest account of Government Policy, in the public interest, that there be a 2<sup>nd</sup> terminal fully operational in 2009 so as to serve passenger growth needs and the requirements of a growing economy”. The Ministerial Direction to the Commission was independent of the delivery of the second runway.*

*Finally, unless the DAA delivers the second runway, it will be unlikely to realise the 33 mppa threshold for Box 2 and its associated capital costs. It is the view of the Commission that this provides a strong financial incentive for the DAA to deliver the second runway in a timely manner.”*

6.18.2 In its response DACC accepted that it would not always be possible to synchronise capacity. However, it asserted that there was no need for more terminal capacity until additional runway capacity was provided as *“the case for additional terminal capacity to be provided in the short term would only arise if there were spare runway slots available in the peak (period), which there are not.”*

6.18.3 In its response DACC agreed that the Ministerial direction did not link the provision of a new terminal to the provision of a new runway, but argued that

*“This did not override the criticality of the CAR’s role in providing the third safeguard in respect of the provision of a second terminal at Dublin Airport, namely the development must be efficient.”*

6.18.4 DACC argued that

*“It is clearly inefficient to provide new capacity which cannot be used because of constraints elsewhere in the system.*

*The issue is not whether the runway will be delivered before the 33 mppa Box 2 threshold is reached, as the CAR contends at paragraph 19 of its Response, the issue is that the capacity provided by Box 1 of T2 cannot effectively be used because of the limits on existing runway capacity. CAR was advised of this by its own Consultants as we have set out in paragraph 12 above.”*

6.19 The Commission concluded its submissions by saying:

*“Consequently, the Commission is satisfied that regarding the timing of recovery of costs its Determination fully considered the interests of current and prospective users, the facilitation of DAA in developing the airport in an efficient manner and the requirement that the airport operator be able to operate the airport in a financially viable and sustainable manner.”*



7. **APPEAL HEARING**

- 7.1 The DACC informed the Panel that it did not wish to have an oral hearing as had been scheduled. The Commission were content that the Appeal Panel deliberate upon the Appeal on the basis of the written submissions delivered and did not require a hearing either.
- 7.2 In light of that position there was no oral hearing.

8. **THE DECISION OF THE APPEAL PANEL**

- 8.1 The decision of the Appeal Panel is confined to the matters raised in this Appeal. The Panel is of the view that the Commission has demonstrated that it considered those matters referred to in Section 33 of the Aviation Act, 2001.
- 8.2 The DACC did not request that the Commission be asked to reconsider matters relating to the manner of consultation leading to the Determination under Appeal. It appears inappropriate to the Panel therefore to express an opinion as to the adequacy of the consultation both as between the DAA and airlines and the role of the Commission in that consultation process.
- 8.3 With respect to the request of the DACC that the Panel refer for reconsideration by the Commission the scale of T2 costs allowed into the RAB, the Panel is not satisfied on the basis of the submissions made by the DACC that there are sufficient grounds made out for asking the Commission to reconsider that matter.
- 8.4 The Panel is of the opinion that it is not sufficient for an appellant to simply assert matters without producing detailed supporting materials/evidence to support the matters asserted. In the circumstances of this Appeal the Panel is satisfied to accept the submissions of the Commission by reference to the materials/evidence relied upon by the Commission in refutation of the assertions made by the DACC.
- 8.5 With respect to the timing of when the costs allowed into the RAB are permitted to enter the RAB, by reference to the issue of the availability of the second runway, the

Panel is satisfied that the Ministerial Direction required the building of Terminal 2 and consequently required that insofar as it was built efficiently that the cost of same was remunerated. On the evidence adduced by the DACC, the Panel is not satisfied that there are sufficient grounds to refer back to the Commission for reconsideration the issue of timing of the entry of costs into the RAB.

8.6 In the circumstances of this Appeal, and limited only to the matters referred to in this Appeal and as presented in this appeal, the Panel therefore confirms the Determination.

Signed: 

PAUL GARDINER  
Chairman

  
NIALL GREENE

  
ALAN DOHERTY

Dated the 23rd day of December 2008.