**DECISION OF THE**

**AVIATION APPEALS PANEL**

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

**4 March 2010**

# APPEAL OF AER LINGUS

## AGAINST DETERMINATION OF
## THE COMMISSION FOR AVIATION REGULATION CP4/2009

**MICHAEL DURACK SC**
**PROFESSOR GEORGE YARROW**
**JOHN BULTER CPA**

## 1. THE DETERMINATION

1.1 The Commission for Aviation Regulation *("the Commission"*) published its final determination on airport charges at Dublin airport for the period 2010 – 2014 on 4 December 2009. The determination has effect from 1 January 2010.

1.2 The table below shows the maximum revenue per passenger Dublin Airport Authority (*"DAA"*) can collect at Dublin airport per the Commission's final determination CP4/2009:

| | 2010 | 2011 | 2012 | 2013 | 2014 |
|---|---|---|---|---|---|
| Maximum revenue per passenger if T2 **not operationally ready** | €8.93 | €8.11 | €7.90 | €7.70 | €7.50 |
| Maximum revenue per passenger if T2 **operationally ready 1st November 2010** | €9.32 | €10.44 | €10.23 | €10.03 | €9.83 |

1.3 The maximum revenue per passenger in 2009, under the previous determination, was €7.39 per passenger.

1.4 The above figures or "price cap" represents the maximum amount that the DAA can charge on a per passenger basis for each year between 2010 and 2014. The Commission has pointed out that it is open to the DAA to charge passengers less than this price cap and/or to charge passengers on a *"**differential basis** for the*

*facilities that they might or might not want to use, subject to the constraints of competition law and ICAO rules"*[1].

## 2. THE OBLIGATIONS OF THE COMMISSION

2.1 Section 33 of the Aviation Regulation Act 2001 (as substituted by section 22 of the State Airports Act, 2004 provides:

*"(1) In making a determination the objectives of the Commission are as follows—*

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

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

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

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

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

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

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

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

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

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

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

[1] *Per* 'press statement' published by the Commission on 4 December 2009, accompanying determination CP4/2009.

*(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.*

2.2 Section 10(1) of the Aviation Regulation Act, 2001 empowers the Minister for Transport to *"give such general policy directions to ... the Commission as he or she considers appropriate to be followed by the Commission in the exercise of its functions"*. Subsection (2) goes on to provide that *"the Commission shall comply with any direction given under subsection (1)"*.

## 3. MINISTERIAL DIRECTION

3.1 By letter dated 27 October 2009, the Minister for Transport issued a Direction (*"the Ministerial Direction"*) to the Commission under Section 10 of the 2001 Act. The Commission was directed to:

*"ensure that the Dublin Airport Authority's financial viability is protected in order to implement government policy on:*

*(a) The role of Dublin Airport as an international gateway for Ireland and its key strategic role in relation to air access, inward investment and general economic development;*

*(b) The desirability that Dublin Airport should have the terminal and runway facilities to promote direct international air links to key world markets, such as new and fast-developing markets in the Far East and the importance of ongoing and planned infrastructure development in this context;*

*(c) the development of Terminal 2 as quickly as possible as set out in the Government decision of May 2005;*

*(d) the operation of Dublin Airport Authority on a commercial basis without recourse to Exchequer funding or an equity injection by the State and in that context the need to secure lender confidence and raise debt financing on a cost efficient basis".*

## 4. APPEALS:

4.1 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)."*

### 4.2 The Establishment of the Appeal Panel:

The Minister for Transport received requests from 3 parties aggrieved by the determination of 4 December 2010 and by Order of 4 March 2010 the Minister for Transport established an Appeal Panel to consider the Appeals of: Aer Lingus; Ryanair and DAA against the Determination published as Commission Paper (CP4/2009).

4.3 The Appeal Panel members are: Michael Durack S.C. (Chairman); Professor George Yarrow and John Butler CPA.

## 5. PROCEDURES FOLLOWED BY THE PANEL

5.1 Section 40(4) of the 2001 Act provides that an Appeal Panel shall determine its own procedure. The Panel took the view that, on the proper interpretation of the section, each of the Appeals should be considered individually. The Appeal Panel adopted the following procedure:-

(i) Each Appellant was invited to make written submissions;

(ii) The Commission was invited to respond to each submission in writing;

(iii) Each Appellant was invited to reply in writing to the Commission's response;

(iv) An oral hearing of each Appeal was held where the Appellant presented its appeal in the presence of the Commission. The Panel decided to conduct these oral hearings otherwise than in public. A stenographer kept a record of each oral hearing and the Appellant and the Commission was provided with a copy of the transcript.

## 6. POWERS OF THE APPEAL PANEL – SCOPE OF REVIEW

6.1 The provisions of Section 40(5) require the 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".*

6.2 The Panel may not substitute its own view for the view of the Commission. It does not have the power to reject the Determination or amend the Determination

in any respect. It may only refer the decision in relation to the Determination back to the Commission for review where it considers that there are sufficient grounds for doing so by reference to the provisions of Section 33 (in this instance).

6.3 Notwithstanding the limitations on the scope of the review by the Appeal Panel, Aer Lingus submits that it is still open to the Panel, as an expert body, to take a strong view on how it believes the Commission should deal with matters (if any) that it may decide to refer back for review and further that it is not a prerequisite to any referral to show that there has been a breach of procedure or that the Commission had acted unreasonably, as the power granted the Appeal Panel under section 40 is not so limited[2].

6.4 Ryanair went further and submitted that an appeal under section 40 was a "full appeal" and as such on any review the Commission could not, on review, ignore information thrown up through the appeal process and confine itself only to facts that were available to it at the time of the Final Determination[3]. By way of example, it submitted that to do otherwise would have the absurd result of the Commission ignoring the €19.4 million dividend paid to the State by DAA.

6.5 Having considered all of the above submissions the Appeal Panel determined that:

(a) If the Panel was not satisfied that the Commission had properly considered the matters referred to at Section 33 and the Ministers Direction 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 and the Minister's Direction but was satisfied that there were sufficient grounds to do so, it would refer the Determination back to the Commission for further consideration.

(c) In all other events, it would uphold the Determination.

[2] Pages 6 and 7 of transcript of Aer Lingus oral hearing, 28 April 2010.

[3] Pages 33 to 36 transcript of Ryanair oral hearing, 29 April 2010.

6.6 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 except in circumstances where the later materials or events clearly and directly imply that previous judgments and conclusions, capable of having significant effects, could no longer be reasonably sustained.

## 7. THE COMMISSION'S APPROACH TO THE APPEAL

7.1 The Commission was concerned with the process proposed by the Panel. It took the view that it could not be a respondent in the ordinary sense. It could not argue for its Determination or make submissions that its decisions were correct as the Panel may decide to refer issues back to it for review and it would then become responsible for making the final decision. It maintained that it was necessary for it to take an independent stand. 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.

7.2 The Panel took the view that there was merit in this submission, particularly as the Panel could only decide that there were "sufficient grounds" for a review but the ultimate decision lay with the Commission.

7.3 While the Panel accepts that the Commission may not wish to argue in favour of its Determination, merely stating where its reasoning for a decision is to be found does not protect the decision from review under Section 40. Where the Panel considers the reasoning adopted by the Commission is inappropriate, it is entitled to say so and refer it back for review. The Panel recognises the logic of the Commission's position that, as it may be asked to review material and aspects of its Determination, its needs to keep an open mind and should therefore avoid getting drawn into having to defend all aspects of its Determination. Nevertheless, the Panel is of the view that it is over-formulistic for the

Commission to refuse to engage at any level. It is entirely to be expected that there may be points raised where the Commission itself can quickly and easily come to the view that it should look at the matter again, for example, where there has been a simple misunderstanding or error. It would greatly facilitate the Appeal process if such misunderstandings, once identified and in respect of which there is no fundamental disagreement, could be confirmed by the Commission as matters which should be reviewed. This would allow the Panel to concentrate on areas of fundamental dispute between the Appellant and the Commission.

7.4 Since the Commission was set up in 2001, there appears to have been ongoing interaction between it and the various interested parties which is reflected in a vast amount of correspondence, issue papers, consultants' reports, expert evidence, draft and final determinations and Appeal Panel Decisions. The parties clearly have an intimate knowledge of its contents which is not, and could not, be shared by the Panel. Without the assistance of the Appellants and the Commission in identifying the relevant documents and issues, the Panel could not complete its task in the limited time provided by statute. The Panel is grateful for the assistance offered by all the parties.

7.5 At the Panel's request, the Commission provided written details of this consultation process in a letter dated 23 March 2010. This included a helpful table summarising this process, a copy of which is annexed hereto at **Appendix A.**

## 8. AER LINGUS' GROUNDS OF APPEAL AND COMMISSION RESPONSE

8.1 Aer Lingus submitted written grounds of Appeal to the Appeal Panel on 24 March 2010. The Commission responded in writing to Aer Lingus' submissions on 7 April 2010. An oral presentation was made to the Panel by Aer Lingus, in the presence of the Commission, on 28 April 2010.

8.2 Aer Lingus' submission to the Panel focussed on 5 specific areas or grounds:

(i) The time-profile of airport charges;

(ii) The application of the Terminal 2 trigger;

(iii) The over specification of Terminal 2 (and consequent over specification of retail space);

(iv) The treatment of the Ministerial Directive by the Commission;

(v) Some aspects of the quality of service standards.

## 8.3 Time-profile of airport charges:

8.3.1 Aer Lingus submitted that the even before any allowance for T2 is made, the current Determination allows for an approximate 21% increase in the price cap from its level in 2009 to 2010 (from €7.39 to €8.93). Further significant increases occur when T2 becomes operationally ready, which is assumed for the purposes of the determination to be 1st November 2010. Aer Lingus pointed to the timing of these increases occurring in a period when passenger numbers are declining by about the same amount in a time of *"unprecedented economic recession"*[4].

Aer Lingus submitted that:

*"airlines using Dublin airport cannot pass on the full extent of these cost increases to passengers in the form of higher ticket prices. Ticket prices are determined by competition and market demand which is highly price sensitive; they are not based on mark-ups over given levels of cost. The consequence of the Commission's decision is that the airport's users, the airlines, will not be able to maintain capacity at previous levels while passing on the increased airport charges in full to customers in the form of higher fares as the reduced load factors would render routes uneconomic This is particularly so in the current economic environment. Consequently, airlines will have no option but to absorb the cost of increased airport charges in order to attempt to maintain demand levels.*

[4] *Per* page 9 transcript of Aer Lingus oral hearing, 28 April 2010.

*This outcome is economically inefficient. It fails to protect the interest of current airport users, passing on virtually all the financial risk associated with fluctuating passenger numbers from the airport operator to the airlines."*[5]

8.3.2 The alternative approach proposed by Aer Lingus to the Commission during the consultation process was for the Commission to apply a unitised approach to all CAPEX, not just Terminal 2 CAPEX. This, Aer Lingus submitted, would mean that "*the increase in airport charges would be more smoothly spread over a longer period of time"*[6]. The Panel was provided with a number of graph charts at the oral hearing seeking to illustrate this point. It was acknowledged by Aer Lingus that such an approach "*might raise financeability issues which might mean you end up with a financeability adjustment but that is something that would need to be addressed once we look into it"*[7].

8.3.3 In its written reply to Aer Lingus' appeal the Commission pointed to its description of its treatment of passenger numbers at paragraphs 3.16 – 3.23 of the Final Determination, as well as the consultation process engaged in during the 2007 interim review (attaching Commission Paper CP1/2007) concerning who should bear the risk if traffic is lower that the initial traffic forecast.

8.3.4 On the unitisation point, it described Aer Lingus' position on unitisation being presented in its response to the Commission's draft determination "*It suggested that total capital related costs for T2 are smoothed over time similar to mortgage payments. The Commission addressed this point in paragraphs 3.18. and 3.23 of the Final Determination. The Commission addressed its use of unitisation in paragraph 3.23 and figure 3.1 of the Final Determination, CP4/2009"*[8]. It also pointed to its discussion of its choice of depreciation profile for all assets in the RAB in chapter 8 of the Final Determination including its response to "*comments*

[5] Page 4 Aer Lingus written Appeal.

[6] *Per* page 10 transcript of Aer Lingus oral hearing, 28 April 2010.

[7] *Per* page 21 transcript of Aer Lingus oral hearing, 28 April 2010.

[8] Paragraph 10, page 3, the Commission's written response to Aer Lingus Appeal.

*received from the DAA and the Dublin Airline Consultation Committee (DACC) concerning the use of various forms of depreciation, including unitisation."*

*8.3.5* Aer Lingus expressed frustration at this approach by the Commission, which it alleged, failed to address in both the Final Determination and the response to its appeal, Aer Lingus' position on the unitisation of *all* capital costs, not just those associated with T2.

> ***"Mr. Gourley:*** *I think our frustration here is that the Commission seems to have just missed the point in terms of we have been arguing this, both in their response to the appeal they have either misunderstood or misapplied the approach we have been suggesting and referring back to the determination where they did their own graph of what they felt would have been the result of applying our approach showing an increase. It was just a total misunderstanding of what we were actually suggesting. So in terms of the Appeal Panel's decision whether to refer this back, there may need to be discussions in relation to the effect on financeability in the short if they are going to consider that. But we didn't even get to that stage. It was just dismissed on a total misinterpretation of what we were actually arguing for.*[9]*"*

8.3.6 The Panel then sought to clarify with the Commission whether there was a misunderstanding on this issue:

> ***"Prof. Yarrow:*** *Does CAR agree that there is some misinterpretation of the Aer Lingus arguments? I mean that is irrespective of whether they matter or not, having implications for how you might decide, just a straight misunderstanding.*
>
> ***Mr. Spicer:*** *One problem with answering that is that one party -- You know, it is always open to a party to say you have misinterpreted whether we have or not.*
>
> ***Prof. Yarrow:*** *I just want your views.*
>
> ***Mr. Spicer:*** *Yeah. I am probably just going to hold it to, you know, we pointed you both to the approaches to regulation which sets out the issue of the T2 depreciation, there is also in the chapter on capital costs a discussion and in fact certainly the DAA was arguing for a single approach to depreciation there and so there is a discussion there as to whether you should have a single approach to depreciation.*

[9] *Per* page 41 (line 27 onwards) and page 42 transcript of Aer Lingus oral hearing, 28 April 2010.

***Prof. Yarrow:*** *So we should just stick to what is on the paper.*

***Mr. Spicer:*** *Yeah.*

***Prof. Yarrow:*** *That is fine.*

***Chairman:*** *All right."*[10]

8.3.7 The position adopted by the Commission on this issue is consistent with its approach to the entire appeal process and its preference not to participate as a Respondent to the appeal(s). However, the difficulty for the Panel is that, (regardless of the merits or otherwise of Aer Lingus' submission) the failure of the Final Determination and/or the Commission's written responses to Aer Lingus' appeal to deal expressly with this argument for unitisation applying to *all* CAPEX, coupled with the position adopted by the Commission on this issue at the oral hearing, means that it is unclear to the Panel whether *any* consideration was given by the Commission to Aer Lingus' argument on this issue – which issue forms one of the grounds of this appeal.

8.3.8 In light of this uncertainty, it would be possible to refer the matter back to the Commission, but the Panel is concerned that this approach, if followed generally, would lead to unnecessary reconsideration of too many minor matters. The Panel has therefore gone on to consider whether or not the Commission's decision was a reasonable one, and whether or not re-consideration might realistically lead to a different outcome. Proceeding in this way, the Panel is of the view that the deferral of the recovery of capital expenditure on T2 and the introduction of unitisation as a basis for future charges is a fair and reasonable approach. In contrast, to apply unitisation to all capex retrospectively could, precisely because it would be such a major step-change in approach, create regulatory uncertainty and could cause concern in capital markets.

8.3.9 **In the circumstances the Panel considers that sufficient grounds have NOT been established to refer the Commission's decision back for review.**

[10] *Per* page 42 (line 14 onwards) and page 43 transcript of Aer Lingus oral hearing, 28 April 2010.

**8.4 The application of the T2 Trigger:**

*8.4.1* Aer Lingus submitted that *"the Commission's application of the T2 Trigger is inappropriate because it misidentifies the point at which T2 becomes economically necessary...*

*... As currently specified, the current maximum capacity of Dublin Airport is limited by the existing runway. T2 will release little or no incremental capacity until the second runway is complete. Hence, our suggestion that the trigger point for T2 should be the completion of the second runway"*[11].

8.4.2 Once again Aer Lingus accepted that this proposal could mean a substantial delay between T2 being completed and cost recovery commencing which in turn could lead to financeability issues but submitted that *"any financeability adjustment of this sort would need simply to be a matter of timing. That is, it should be NPV neutral in the long run. Furthermore, any short-term financeability adjustment should be significantly smaller than the figure of €2.33 per passenger, which represents the Commission's estimate of the full economic costs of the terminal."*[12]

*8.4.3* In its written response the Commission pointed to the fact that the Government's 2005 Aviation Action Plan required that the new terminal should open at Dublin airport no later than the end of 2009. It also pointed to paragraph 9.41 of the Final Determination where it says it *"explained that the trigger for T2's capital costs had addressed the interests of users by not requiring them to pay for a facility that is not open for business."*[13]

8.4.4 The Commission also pointed to the fact that the possibility of linking the trigger to the opening of a second runway was discussed at paragraph 9.29 of the Draft Determination (CP3/2009)[14].

[11] Page 7, Aer Lingus Appeal.
[12] Page 8, Aer Lingus Appeal.
[13] Paragraph 14, page 4 the Commission's written response to Aer Lingus' Appeal.
[14] Paragraph 15, page 4 the Commission's written response to Aer Lingus' Appeal.

8.4.5 The Panel is of the view that the approach taken by the Commission in deferring charges for T2 until it is operational is a reasonable one. T2 was designed to deal with overcrowding and to cater for projected growth and was a project independent of the new runway. It will provide an improved passenger experience for those using it and for Aer Lingus (who confirmed to the Panel that it was its intention to move to T2).

**8.4.6 In the circumstances the Panel considers that sufficient grounds have NOT been established to refer the Commission's decision back for review.**

## 8.5 Over Specification of T2:

8.5.1 Aer Lingus' submission related to specific concerns relating to excess retail space in T2 which the Commission itself has estimated is some 40% greater than the international and European averages. It submitted this retail space will not be efficiently used for the foreseeable future because traffic numbers are insufficient, which has the effect of passing the cost of this excess retail space onto airport users:

*"In our view this is an unusual circumstance within single till regulation. This form of regulation derives from the difficulty of separating the costs of aeronautical and non-aeronautical aspects of airport facilities. Rather than do this, all costs are included, but estimated revenues from non-aeronautical services are netted from total costs before computing allowable airport charges. This approach works provided non-aeronautical facilities are efficiently used. But if the airport simply develops a significant amount of excess retail space in advance of it being needed, as in this case, then the effect is to make airport users provide pre-financing for excess retail space the airport has built. In our view this is a material error in the Commission's determination.*

*In this case we believe that the appropriate response should have been to use benchmarks of average retail revenue per $m^2$, from T1 or other airports, to attribute notional revenue to the surplus retail space."*[15]

[15] Page 9, Aer Lingus Appeal.

*8.5.2* In its written response the Commission pointed to Chapter 7 of the Final Determination where it set out its final conclusions regarding a forecast level of commercial revenues. It referred to its general approach which was to generate commercial revenue forecasts using a "top-down approach" based on observed historical relationships between commercial revenues and passenger numbers, GDP or CSO retail sales. It also pointed to fact that the:

> *"Responses to the Draft Determination identified two main reasons why retailing revenues at Dublin airport might deviate from past relationships:*
>
> - *The downturn in the economy might cause consumer behaviour to differ to the past (the DAA's view); and*
> - *The design of T2 should allow the DAA to generate greater revenues than in the past (the view of DACC, which represented Aer Lingus among others).*
>
> *The Commission sets out in paragraph 7.21 why it ultimately decided not to adjust its top-down forecast on account of these two points, while not rejecting either contention outright."*[16]

8.5.3 The Commission commenced its written reply to Aer Lingus' Appeal by pointing out that *"one reading of the appeal suggests that Aer Lingus' concern actually relates to how the Commission arrived at a final estimate for commercial revenues"*[17]. Aer Lingus clarified at the oral hearing that this was not the point they were making[18].

> ***"Mr. Elliot:*** *...So the sort of presumption in the single till is that that will include the costs but will include the revenues as well, so that what will come out in the wash is that retail space is being broadly efficiently used. Whereas, the trouble with a largely empty terminal building is that that retail specie really largely isn't being sufficiently used. So as a*

[16] Paragraphs 21 and 22, page 5 the Commission's written response to Aer Lingus' Appeal.

[17] Paragraph 17, page 5, the Commission's written response to Aer Lingus' Appeal.

[18] Page 49, line 23 onwards, transcript of Aer Lingus oral hearing, 28 April 2010.

*consequence, you have the costs, you don't have the revenues, and the DAA as a consequence of that get the protection for that - - that element of T2 which is commercial speculation on their part generating future revenues is insured by just an increase in airport charges."*[19]

8.5.4 At the oral hearing the Panel sought clarification on whether, in light of the unitisation of CAPEX for T2, in effect, Aer Lingus was really seeking the Commission to do something similar on OPEX related to retail space. Aer Lingus accepted this was correct, apart from the dispute over the timing of when the annuity should start (which is a separate point)[20].

8.5.5 In its development of T1X and T2, DAA has chosen to provide a much larger proportion of retail space than similar airports abroad. In the absence of a significant increase in passenger numbers, the existing sales seem likely to be spread over a larger floor area and with greatly increased overheads. This was a decision which involved risk. It may be that in the long run, it will prove to be a commercial success. In the meantime, however, the Panel is of the view that the airlines should not be required to subsidise this overhead from current airport charges. One solution is to factor in notional revenues for the retail space (which could be deducted from commercial revenues in future periods when passenger numbers are higher to maintain the present value of the revenue stream). Another is a form of unitisation of relevant operating expenses.

**8.5.6 In the circumstances, the Panel considers that sufficient grounds HAVE been established to refer this aspect of the Commission's decision back for review. Specifically, the Commission should consider how the recovery of such overheads could be postponed until they are commercially justified.**

[19] Page 51, line 3 onwards, transcript of Aer Lingus oral hearing, 28 April 2010.

[20] Page 53 transcript of Aer Lingus oral hearing, 28 April 2010.

**8.6 Treatment of the Ministerial Directive:**

*8.6.1* Aer Lingus viewed the points (a) and (b) of the Ministerial Direction (set out at paragraph 3 above) as entirely consistent with the Commission's existing statutory duties. It acknowledged that the direction regarding the building of T2 at point (c) *"forces the hand of the DAA to develop T2 whether or not it is justified"* but went on to state that *"in our view these duties are met by ensuring that T2 is of an efficient size and is remunerated only once its capacity is actually needed"*[21]. Aer Lingus' primary concern was the treatment of point (d).

*8.6.2* Aer Lingus pointed to the fact that at paragraph 2.21 of the Determination it is noted that *"in many cases, a regulator would assume any financeability problems for a company occurring part way through the next five years would be dealt with by new capital formation. Government Policy that the DAA would operate without recourse to Exchequer funding or on an equity injection, notified to the Commission in the 2009 Direction means it is not open to the Commission to make this assumption"*.

8.6.3 Aer Lingus submitted that the above comment implied that the Commission may have altered it determination as a result of the Ministerial Direction. Aer Lingus' concern and ground of appeal related to the what it said was the Commission's failure to indicate if the Ministerial Direction did in fact have an impact on the Final Determination and if so, to set out the extent of that impact (if any).

*8.6.4* In the Commission's written reply to the appeal it stated that *"since there had been no determination when the Ministerial Direction was received, there was no determination per se to alter"* and referred the Panel to its Final Determination. It did not however, make any specific comment on the impact of the Ministerial Directive (if any) over what was already set out in its Final Determination.

*8.6.5* At the oral hearing Aer Lingus pointed out that the impact (if any) of the Ministerial Directive would become more important if grounds (i) and/or (ii) of

[21] Page 10 Aer Lingus Appeal.

their appeal were successful and submitted for review, as both suggested approaches may have financeability consequences for DAA.

8.6.6 The Panel is of the view that while the Commission was obliged to take into account the Ministerial Directive in its overall approach, it does not consider that Aer Lingus has made out any good ground of appeal on the issue.

8.6.7 **In the circumstances, the Panel considers that sufficient grounds have NOT been established to refer the Commission's decision back for review.**

**8.7 Quality of Service:**

8.7.1 While Aer Lingus welcomed the fact that the Commission has introduced a quality term into the price cap for the first time it submitted that the maximum level of penalty is fixed too low at 4.5%. It pointed to an up to 7% rebate at Stansted airport and submitted that such a level of penalty is required to ensure that DAA is sufficiently motivated to meet the quality measures.

8.7.2 Aer Lingus also submitted that the quality measure relating to security passenger search times (no longer than 30 minutes) is inadequate as it may not leave sufficient time for passengers to reach the departure gate having cleared security, as most airlines allow check-in up to 45 minutes prior to departure.

8.7.3 In its written reply the Commission pointed to an extensive consultation process on quality of service issues at Dublin Airport. It drew the Panel's attention to an email sent to *inter alia* Aer Lingus in February 2009 inviting airlines to engage with the Commission on aspects relating to quality of service and noted that it did not receive any response to this invitation.[22]

8.7.4 The Commission also pointed to the fact in its response to the Draft Determination Aer Lingus did not provide independent suggestions from DACC concerning how passenger queuing times might best be measured and that the Commission held a meeting with a consultant appointed by DACC to represent them on quality of

[22] Paragraph 33, page 8 the Commission's written response to Aer Lingus' Appeal.

service issues on 21 October 2009. Following this meeting the DACC submitted detailed proposals on 9 November 2009 and from both the meeting and the submission the Commission concluded that DACC's principal concern regarding security queues was when passengers experienced lengthy delays in security queues, greater than thirty minutes, causing them to miss their flights[23].

8.7.5 The Panel does not consider that any good ground of appeal has been made out by Aer Lingus under this heading.

8.7.6 **In the circumstances, the Panel considers that sufficient grounds have NOT been established to refer the Commission's decision back for review.**

## 9. CONCLUSIONS:

9.1 The Panel concludes that sufficient grounds have been established by Aer Lingus to refer the following matter back to the Commission for review:

(a) **Over Specification of T2:** the Panel refers this matter back to the Commission for it to consider how the recovery of increased overheads associated with the over specification of retail space in T2 could be postponed until they are commercially justified.

**Dated 1 June 2010**

**Michael Durack SC**
**Professor George Yarrow**
**John Butler CPA**

[23] Paragraph 35, page 8 the Commission's written response to Aer Lingus' Appeal.