



**PROCESS LEADING TO A DETERMINATION ON
AIRPORT CHARGES UNDER THE AVIATION
REGULATION ACT, 2001, AS AMENDED BY THE STATE
AIRPORTS ACT, 2004.**

Commission Paper CP6/2004

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1. INTRODUCTION

On February 27, 2001, the Minister for Public Enterprise established the Commission for Aviation Regulation ('the Commission') under Section 5 of the Aviation Regulation Act, 2001 ('the 2001 Act'). Under the Act, one of the principal functions of the Commission is the making of a determination on the maximum level of airport charges.

Under the Act, the Commission was required to make a determination specifying the maximum levels of airport charges that may be levied by Dublin, Cork and Shannon Airports. In setting maximum airport charges, the objective of the Commission was to facilitate the development and operation of cost effective airports which meet the requirements of users. This was interpreted by the Commission as the "statutory objective". In arriving at its determination, Section 33 of the Act required the Commission to have due regard to ten specified factors. These were classed as the " statutory factors".

The State Airports Act, 2004, (the "2004 Act") amended the 2001 Act. The 2004 Act requires the Commission as soon as is practicable, but not later than twelve months after the Dublin appointed day, to make a new determination specifying the maximum levels of airports charges at Dublin Airport. This new determination will effectively super-cede the current determination made by the Commission in August 2001 as reviewed in March 2004. The 2004 Act also amended the regulatory objectives of the Commission in setting airport charges. In particular section 22(4) of the 2004 Act substitutes a new section 33 into the Act. Section 33 relates to the statutory objectives of the Commission when making a determination on airport charges and the factors to which it must have due regard when making a determination.

Experience gained to date from applying economic regulation in an Irish context together with developments in other jurisdictions with analogous legal regimes, indicates that the determination of airport charges is without doubt, a complex regulatory task. The purpose of this paper is to give notice to the industry and to any interested party, of how the Commission intends to manage the process leading to this second determination, which is to be in respect of Dublin Airport only.

In administering the process, the Commission is eager to ensure the widest possible input into its deliberations, as well as the fullest possible access to information bearing on its determination. In that regard, the Commission wishes in particular, to draw the attention of interested parties and the public to the twelve-month timetable (at a maximum) that has been imposed by the 2004 Act for the purposes of producing a new determination.

In reaching its determination, the Commission shall be guided by the principles set out in the Government White paper setting out six Principles of Better Regulation published in January 2004, which is available on the government website www.irlgov.ie.

The principles of Better Regulation that the Government wishes to promote are:

- NECESSITY - is the regulation necessary? Can we reduce red tape in this area? Are the rules and the structures that govern this area still valid?
- EFFECTIVENESS - is the regulation properly targeted? Is it going to be properly complied with and enforced?
- PROPORTIONALITY - are we satisfied that the advantages outweigh the disadvantages of the regulation? Is there a smarter way of achieving the same goal?

- TRANSPARENCY - have we consulted with stakeholders prior to regulating? Is the regulation in this area clear and accessible to all? Is there good back-up explanatory material?
- ACCOUNTABILITY - is it clear under the regulation precisely who is responsible to whom and for what? Is there an effective appeals process?
- CONSISTENCY - will the regulation give rise to anomalies and inconsistencies, given the other regulations that are already in place in this area? Are we applying best practice developed in one area when regulating other areas?

Finally, the Commission wishes to point out that the process proposed in this paper is unique to airport charges. Different processes may be required for other activities falling within its remit.

William Prasifka
Commissioner

2. EXECUTIVE SUMMARY

The 2001 Act, as amended, requires that the Commission make a determination on airport charges as soon as is practicable but not later than twelve months after the Dublin appointed day specifying the maximum levels of airport charges that may be levied by Dublin Airport Authority in respect of Dublin Airport. It also requires that during that time period, the Commission must give notice of its determination and allow interested parties and the public an opportunity to make representations. However, the Act does not specify when consultation should take place within the twelve month period nor the form of notice to be given, save for requirements as to publicity.

Given the nature of economic regulation, and having regard to the statutory objectives laid down for the Commission in making a determination, as well as the other requirements of the Act, the Commission has decided that consultation with interested parties and the public needs to be as comprehensive as possible. Accordingly, it has been decided to supplement and amplify the requirements in relation to consultation as follows.

To begin the process, the Commission is, in conjunction with this paper, today publishing a paper dealing with the legislative changes made to the 2001 Act by the 2004 Act. Interested parties and the public will be given a period of one month to make comments. They will also have the opportunity of seeing and making comments on any submission received as part of the consultation.

The Commission also intends to engage independent consultants to engage in studies on its behalf regarding the issues of the Capital Expenditure and Operational Efficiency. It is intended that these studies will take place as parallel strands to the Commission led process but will ultimately feed into the draft determination. The various interested parties shall be consulted in

relation to these studies and accordingly will be aware of their progress over time.

It is the Commission's intention that its position on the effect of legislative changes made to the, 2001 Act should be known by the end of December 2004.

As with previous determinations, the Commission will publish notice of its determination. That notice will be by way of a draft determination and an explanatory memorandum. The publication of these documents will commence the one-month period of statutory consultation specified in the 2001 Act. Following the receipt of representations, the Commission will at the end of this period, make its final determination and report.

The Commission is unable at this time to give a definite date upon which it will publish a draft determination. However, it notes the requirement in the, 2004 Act that it must make its determination as soon as practicable, and in any event, no later than twelve months after the Dublin appointed day, which has now been designated by the Minister for Transport as 1st October 2004. Therefore, the Commission will make every effort to move the process along as quickly as is practicable and in accordance with its legal obligations.

3. STATUTORY CONTEXT

3.1. Statutory Function

Under the, 2001 Act, as amended by the 2004 Act, the Commission shall as soon as practicable, but not later than twelve months after the Dublin appointed day make a determination specifying the maximum levels of airport charges that may be levied by Dublin Airport Authority in respect of Dublin Airport. Under the 2001 Act, the definition of airport charges is that contained in the Air Navigation and Transport (Amendment) Act, 1998. Section 2 of that Act defines airport charges as:

- (a) charges levied in respect of the landing, parking or taking off of aircraft at an aerodrome including charges for air-bridge usage, but excluding charges in respect of air navigation and aeronautical communications services levied under section 43 of the Act of 1993,¹*
- (b) charges levied in respect of the arrival at or departure from an airport by air of passengers, or*
- (c) charges levied in respect of the transportation by air of cargo, to or from an airport.*

These are the categories of charges that the Commission is obliged to regulate under Section 32 of the, 2001 Act. In doing so, it must aim to:

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

¹ Irish Aviation Authority Act, 1993.

- (b) protect the reasonable interests of current and prospective users of Dublin Airport in relation to Dublin Airport, and*
- (c) enable Dublin Airport Authority to operate and develop Dublin Airport in a sustainable and financially viable,*

The Commission must also have due regard to all of the factors specified in Section 33 of the 2001 Act as amended.

3.2 Statutory Procedures

The 2001 Act, as amended, requires the Commission to issue a determination in respect of airport charges as soon as is practicable but not more than 12 months after the Dublin appointed day. Notice is to be given specifying the Commission's intention to make a determination, and in doing so, the Commission must provide for a minimum period of one month during which interested parties may make representations. A report must also be made, giving an account of the Commission's reasons for making the determination, together with a statement of reasons for accepting or rejecting representations. That report must then be furnished to the Minister, as well as to interested parties and the public.

3.3 Statutory Powers

Section 32(13) and Part 4 of the 2001 Act set out the powers available to the Commission in the discharge of its statutory functions. Included within those powers, is an entitlement to request information or to require that information to be prepared or retained in a certain form.

4. DEVISING A PROCESS

In adopting a process for the determination of airport charges, the Commission has had regard to a number of factors, specifically, the procedures specified in the Act, its experience to date, the nature of economic regulation and procedural matters which fall to be determined by the Commission. The Commission has attempted to devise a process that complies, not just with the statutory requirements, but also with the need for procedural fairness in what is a complex area of economic regulation.

4.1 The Nature of Economic Regulation

This is a crucial consideration in adopting any regulatory process. The calculation of maximum airport charges is a complex matter. This is not surprising given the sophistication of modern airports, and the corresponding number of difficult issues that regulation must tackle. In Ireland's case, that complexity is exemplified by the breadth of factors specified in Section 33, to which the Commission is required to have due regard.

As with the current determination on airport charges, it will not be sufficient for the Commission to decide on how the statutory objectives should be achieved or the degree of regard to be had to each of the nine factors specified in Section 33, and to then issue guidance to Dublin Airport Authority on how it should calculate maximum charges. The Act requires the Commission to set maximum charges, and in so doing, it is empowered, among other things, to adopt a formula or series of formulae by which the charges may be calculated in respect of a particular period of time.

In order to make its determination, the Commission must first of all identify an approach which achieves the statutory objective, having due regard to the specified factors. That approach will then be used to arrive at a formula or series of formulae, from which maximum charges may be derived.

4.2 Matters not prescribed by the Act

As mentioned earlier, the 2001 Act requires that the Commission give notice of its intention to make a determination, and that a period of one month be allowed for receipt of representations by interested parties and the public. The timing of this within the twelve-month period is not specified in the legislation. If it takes place too early in the process, this may mean that interested parties and the public may not be able to make useful and relevant submissions. Similarly, if the selected consultation period takes place too late in the process, there is a risk that it may present logistical difficulties for the Commission in revising its methodology.

The, 2001 Act, does not stipulate what form the notice of the Commission's determination should take. However, the Commission has decided that it will maintain current practice and will give the public notice by publishing a draft determination.

4.3 Supplementing the Statutory Consultation

Clearly, interested parties, as well as the public, may wish to make observations not just on the approach, but also on the Commission's use of that approach in arriving at a formula, or series of formulae, from which charges may be calculated. In addition, interested parties may wish to comment on the data or other inputs, which will be used by the Commission to calculate maximum charges. Based on this analysis, the Commission is of the view that interested parties and the public should be consulted not only on the approach to be adopted by the Commission, but also on the Commission's interpretation of the statutory requirements in order to arrive at a formula or series of formulae.

Therefore, while the Act only requires a single period of statutory consultation, it is proposed to supplement this by a more general

consultation exercise at the beginning of the process covering a number of issues. In the Commission's view, it is to the advantage of interested parties as well as the public to make comprehensive representations at the beginning of the consultation period, to ensure that the Commission is fully apprised when developing the approach for a new determination.

The general consultation at the beginning of the consultation period will include:

- (1) A Commission Consultation Paper on the legislative changes made to the Aviation Regulation Act, 2001 by the State Airports Act, 2004. Submissions expressing views on this paper will be invited by the 1st November 2004.
- (2) An independent consultation regarding the current capacity of Dublin Airport carried out on behalf of the Commission. It is envisaged that this consultation will involve the convening of workshops that will explain to the various interested parties, the methodologies employed by the independent consultant.
- (3) An independent analysis carried out on behalf of the Commission regarding operational efficiency at Dublin Airport.

4.4 Notice by way of draft Determination

The Act requires the Commission to receive and consider representations with respect to the proposed determination. It would be possible for the Commission to make an announcement without further engagement, of its intention to make a determination. However, the Commission is of the view that the representation process should be as relevant and meaningful as is possible to achieve within the timeframe. Therefore, it will publish a notice of its intention to make a determination that contains a sufficient level of detail.

This will enable interested parties and the public to ascertain in general terms the impact or effect of the proposed determination. Otherwise, the rights of interested parties, as well as the public, to make representations could be rendered nugatory.

Accordingly, as mentioned earlier, it is the Commission's intention to publish a draft determination and explanatory memorandum.

5. PROCESS

Process Leading to a Determination on Airport Charges		
Stage	Activity Type	Date(s)
1.	Publication of Consultation Paper on Legislative Changes and commencement of Independent Studies	October /November/ December 2004
2.	Responses to Consultation Paper on Legislative Changes	1 November 2004
3.	Commission position on effect of Legislative Changes	End December 2004
4.	Notice of Determination	t.b.c. 2005
5.	Statutory Representations due	t.b.c. 2005
6.	Making of Determination & Report	1 October 2005

Table: 1.1

5.1 Process Timetable

Table 1.1 is a proposed schedule leading to the Commission's determination on airport charges. It identifies some of the major milestones leading to the determination, but it is not exhaustive as to the elements of the process. This timetable is indicative only of how the Commission proposes to approach the determination. It may be necessary to lengthen or shorten certain periods, except of course, for periods prescribed by the Act 2001.

5.2 Elements of the Process

5.2.1 Publication & Responses to Consultation Paper

The Commission proposes that the consultation period will commence with the publication of a Consultation Paper that will discuss the legislative changes to the 2001 Act made by the 2004 Act and the impact that these changes may have on how the Commission will make a determination on airport charges.

Included in this paper is a discussion of the range of factors which the Commission must have due regard to under Section 33 of the 2001 Act in order to pursue the statutory objectives. That Consultation Paper, CPx/2004 is posted on the Commission's website, www.aviationreg.ie, and includes an invitation to interested parties and the public, to respond in writing by 1st November 2004. The Commission requests that particular attention be given to responding to specific points raised in the Consultation Paper. This paper will be followed by two more Consultation Papers discussing (a) current capacity of Dublin Airport and (b) operational efficiency at Dublin Airport.

In order to assist the debate, the Commission intends posting on its website, all submissions received as part of the consultation process. It is open to an interested party as well as to members of the public to request that certain information be treated as confidential. Such information should be included in a separate schedule. Further guidance on the treatment of confidential information is contained in Section 5.3.

5.2.2 Invitation to Comment on Responses

Given that the Commission proposes to publish submissions which it receives, on its website, the Commission also proposes that any person should be free to comment in writing on any or all of the written submissions received in response to the Consultation Papers. A period of at least fourteen days will be allowed for making such comments. Any person may make a written comment, irrespective of whether or not they have responded separately to the Consultation Papers. These written comments will also be published on the Commission's website. Again, interested parties are referred to Section 5.3 of this paper in relation to the treatment of confidential information.

5.2.3 Independent Studies on Capacity and Operational Efficiency at Dublin Airport.

The Commission has asked independent consultants to engage with the various interested parties on these two issues. Parties will be able to make their submissions directly to these consultants. The Commission's intention is that the results of these studies will feed into its draft determination. They will also be made public and placed on our website.

5.2.4 Publication of Notice

As set out in Section 4.4, the Commission will publish a draft determination as well as an explanatory memorandum. Collectively, the contents of these documents will be such as to allow an interested party to estimate in general terms, the likely financial effects, of the regulatory regime, which the Commission intends to adopt by way of a determination.

5.2.5 Receipt and consideration of Representations

The Commission will allow a period of one month in order to receive representations from interested parties as well as the public.

5.2.6 Determination and Report

The Commission will make its determination and report available to the interested parties and the public.

5.3 Conditions of Process

5.3.1 Timing

The timetable is based on what the Commission considers to be the likely chain of events leading up to its determination. As such, it is a statement of intention on the part of the Commission. The Commission reserves the right to adopt or amend elements of the consultation process (including their timing) in the light of changes in circumstances, unforeseen developments in the process, or so as to ensure the integrity of the consultation process.

5.3.2 Deadlines

The Commission wishes to emphasise the importance of making submissions and representations in good time. Where a date is expressly or impliedly stipulated, then the closing time for receipt of submissions by the Commission will be 5.00 pm on the day in question.

5.3.3 Delivery of Documents

The Commission requests that all written submissions be typed. Submissions may also be sent to the Commission in electronic form either on floppy disk

or by e-mail to info@aviationreg.ie and should be either in Microsoft Word (".doc") or portable document format ("pdf").

In all cases the sender shall have an obligation to ensure that the information is actually received by the Commission on or before the specified deadline.

5.3.4 Information

Having regard to the principles of better regulation, the Commission is concerned to ensure that the process leading to its determination is administered in an open, accessible manner. This is reinforced by the requirements contained in Section 5(4) of the Act that the Commission ensure that its determinations and requests be objectively justified, non-discriminatory, proportionate and transparent. To that end, details of all statutory requests for information by the Commission will be posted on its website.

Dublin Airport Authority will be the source of much of the information that will be needed by the Commission to make a determination. It is vital that all interested parties, as well as the public, have sight of all relevant information (subject to the requirements of confidentiality) relied upon by the Commission for the purpose of its determination, otherwise their ability to fully participate in both the initial consultation as well as the statutory consultation could be impeded.

While parties are free to designate part or all of their submissions as confidential (and should do so clearly, as is their obligation) this has the potential to create difficulties for the Commission. If the Commission is to make available the information leading to its determination, then all of the information upon which it relies for the purpose of its determination should, as a general rule, be put into the public domain. As a result, the Commission

proposes to counteract any information asymmetry, which may otherwise arise in the following manner:

Confidential Information

The Commission acknowledges that circumstances may arise where the disclosure of highly sensitive confidential information may cause damage to the party supplying the information. Clearly, the Commission will have access to and will analyse all relevant information, but it is also desirable that interested parties and the public have access in turn, to information that is relied upon by the Commission for the purpose of its determination. The Commission has a statutory obligation to give reasons for its determination. Consequently, as a general rule, unless the Commission is able to put all of the information that it is relying on into the public domain, it will be reluctant to rely on that information for the purpose of making its determination. Nonetheless, the Commission is of the view that even where information is regarded as highly sensitive by the disclosing party, it may be possible, whether by means of aggregation or otherwise, to disclose the information in a modified manner. Where justified, the process of aggregation or restatement will be performed by the disclosing party in consultation with the Commission after the Commission has seen all of the information in original form.

Use of the Commission's website

As indicated, the Commission proposes to place all of the submissions and representations that it receives in response to requests, on its website. Ordinarily, the Commission will not be editing this material. As a result, the content of any submission is solely a matter for the submitting party, and in that regard, interested parties are referred to the legal notice and indemnity concerning use of the Commission's website which is contained in Annex I to this paper.

Annex I

LEGAL NOTICE

While the Commission for Aviation Regulation ("the Commission") at all times uses its best endeavours to ensure that all of the information on its website is up to date and accurate, the Commission accepts no responsibility in relation to and expressly excludes any warranty or representations as to the accuracy or completeness of the contents of its website.

INDEMNITY

Any party submitting information to the Commission for Aviation or Regulation ("the Commission") in response to a document inviting submissions acknowledges that the Commission intends to publish that information on the website of the Commission, in reports of the Commission and elsewhere as required or appropriate. Parties submitting such information to the Commission consent to such publication. Any party submitting information to the Commission shall have sole responsibility for the contents of such information and shall indemnify the Commission in relation to any loss or damage of whatsoever nature and howsoever arising suffered by the Commission as a result of publication or dissemination of such information either on its website, in its reports or elsewhere.