26 September 2024

BY POST & EMAIL (consultation@iaa.ie)

Irish Aviation Authority
The Times Building
11-12 D'Olier Street
Dublin 2
D02 T449

RE: Draft Decision on Summer 2025 Coordination Parameters at Dublin Airport (the "Draft S25 Decision")

Dear Sirs,

We refer to the Draft Decision on Summer 2025 Coordination Parameters at Dublin Airport ("**Draft S25 Decision**") which the Irish Aviation Authority ("**IAA**") issued for consultation on 12 September 2024.

Airlines for America ("**A4A**"), on behalf of its members,[1] strongly disagrees with the provisional conclusions in the Draft S25 Decision. For the reasons set out in this submission, which submission A4A is duly authorised to make for and on behalf of its passenger-carrying members serving Dublin, we consider that the approach taken by the IAA is marked by a number of fundamental errors, is inconsistent with the applicable regulatory frameworks for slot allocation, disregards the wider obligations of international agreements governing "open skies", and does not take appropriate account of the specific features of capacity allocation at Dublin Airport at this time.

These errors, if reflected in the final coordination parameters for Summer 2025, will have a direct and profoundly adverse effect on our members and their operations between North America and Ireland. Furthermore, if a final decision is made in the terms of the Draft S25 Decision, it will inevitably reduce the range of routes available, undermine competition, reduce choice and diminish connectivity to and from Ireland's primary airport and thereby be harmful to thousands of passengers. The Draft S25 Decision should not be adopted because it fails to comply with Council Regulation (EEC) No. 95/93

[1] Members: Alaska Airlines, Inc.; American Airlines Group, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc., Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines; and UPS Co. Air Canada is an associate member. American Airlines Group, Inc., Delta Air Lines, Inc., JetBlue Airways Corp., United Airlines and Air Canada serve Dublin.

(as amended) (the "**Slot Regulation**") and the US-EU and Canada-EU Air Transport Agreements (the "**Open Skies Agreements**"). A4A member airlines and their customer base have already been harmed as a result of the IAA's winter 2024/25 seat cap through denial of airline requests for additional slots and/or to operate larger aircraft to meet consumer demand.

In this submission, A4A makes six main points regarding the Draft S25 Decision:

- First, the IAA's approach is inconsistent with Ireland's obligations as a State Party under the Open Skies Agreements and constitutes a unilateral limitation or restriction on traffic, frequency and regularity of services offered. The IAA appears not to have taken any account whatsoever of the Open Skies Agreements in the Draft S25 Decision.

- Second, the IAA's approach to setting the coordination parameters does not comply with the requirements of the Slot Regulation. In particular, the planning conditions regarding passenger numbers in respect of Terminal 1 and Terminal 2 at Dublin Airport, on which the IAA bases its decision, are not relevant "*technical, operational or environmental constraints*" that ought to be taken into account for the purposes of airport coordination or slot allocation.

- Third, the IAA failed to have any or any adequate regard to the proposals made and advice provided to it by the Coordination Committee. In failing to have adequate regard to the proposals and advice of the Coordination Committee on the coordination parameters to be determined in accordance with Article 6, the IAA failed to have regard to a relevant consideration and failed to comply with Article 5 of the Slot Regulation. Moreover, the IAA failed to engage with the Coordination Committee to increase the capacity and number of slots available for allocation, before a final decision on the parameters for slot allocation is taken, as required by Article 6(3).

- Fourth, the IAA's approach in declaring a Passenger Air Traffic Movement ("**PATM**") seat cap of 25.2 million would likely – on the IAA's own calculations – affect historic slots held by airlines operating at Dublin Airport in Summer 2025, in contravention of Article 8(2) of the Slot Regulation, which prescribes the specific circumstances in which historic slots may be lost (none of which apply). As far as A4A is aware, this would be an unprecedented move at a major international airport. It would constitute an interference with the property rights of airlines or, at a minimum, a valuable vested statutory entitlement enjoyed by airlines. The IAA has incorrectly determined that historic slots held by airlines operating at Dublin Airport are not a property right and has failed, by reason of this error, to appreciate that the relevant airlines have an *entitlement* to historic slots where the "use it or lose it" rule is complied with. The IAA has thereby failed to give any or any proper consideration to the proportionality of the proposed measures or the requirement to implement them in a lawful manner, having due regard to the property rights and vested statutory entitlements of the airlines.

- Fifth, notwithstanding these fundamental concerns regarding the appropriateness of the PATM seat cap, to the extent that the IAA maintains a seat cap in the final coordination parameters decision, seat reductions should be allocated on a more equitable basis which preserves all carrier-specific historic operations and applies seat reductions on a *pro rata* basis. In this regard, the IAA's proposed split in the PATM seat cap between winter and summer seasons is arbitrary and inflexible and reduces the scope for airlines to preserve capacity in the peak summer season. It is unacceptable for local carriers to be allowed to reduce regional operations to maintain long-haul operations to/from the U.S. and Canada if our member airlines are forced to reduce flights on the same trans-Atlantic routes. Doing so would create an imbalance in market access and competition, in clear violation of the Open Skies Agreements and the fundamental objective of the Slot Regulation, which is to ensure that "*the allocation of slots at congested airports should be based on neutral, transparent and non-discriminatory rules*".

- Sixth, to the extent a carrier chooses to reduce services to meet its seasonal target, the IAA must ensure that the appointed coordinator, Airport Coordination Limited ("**ACL**"), awards Justified Non-Use of Slots ("**JNUS**") for any such reductions on the basis that they are due to mandatory caps beyond the airline's control.

In light of these serious concerns, many of which are shared by other airlines operating at Dublin Airport, we request that the IAA urgently reconsider its provisional views before reaching a final determination on capacity parameters for the Summer 2025 season.

Issue 1: The IAA's approach is incompatible with the Open Skies Agreements

Pursuant to section 14(1)(j) of the Irish Aviation Authority Act 1993, an object of the IAA is to take such measures as it considers necessary or expedient to give effect to the purposes of international agreements or conventions to which the State is a party. It is, therefore, surprising that the IAA proposes to make a decision that would impede the operation of the Open Skies Agreements.

The Draft S25 Decision is plainly incompatible with the US-EU Air Transport Agreement ("**US-EU ATA**") and the Canada-EU Air Transport Agreement ("**Canada-EU ATA**") to which Ireland is a party (along with the European Union and its Member States).

Article 3.4 of the US-EU ATA states that:

> "*[e]ach Party shall allow each airline to determine the frequency and capacity of the international air transportation it offers based upon commercial considerations in the marketplace. Consistent with this right,* ***neither Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party****, nor shall it require the filing of schedules, programs for charter flights, or operational plans by airlines of the other Party, except as may be required for customs, technical, operational, or environmental (consistent with Article 15) reasons under uniform conditions consistent with Article 15 of the Convention.*" (emphasis added).

Article 13.2 of the Canada-EU ATA provides the following:

> "[e]*ach Party shall allow any airline of the other Party to determine the frequency and capacity of the air services it offers under this Agreement based upon the airline's commercial considerations in the marketplace.* ***No Party shall unilaterally limit the volume of traffic, frequency or regularity of service, or the aircraft type or types operated by the airlines of the other Party****, nor shall it require the filing of schedules, programmes for charter flights, or operations plans by airlines of the other Party, except as may be required for technical, operational or environmental (local air quality and noise) reasons under uniform conditions consistent with Article 15 of the Convention*" (emphasis added).

These provisions have not been referred to and appear not to have been taken into account by the IAA in the Draft S25 Decision, the net effect of which unilaterally limits the volume of traffic, frequency and regularity of service that airlines that are protected by the Open Skies Agreements may provide. These concerns are especially acute for new entrants impacted by the S25 Decision.

The US-EU ATA

Article 2 of the US-EU ATA provides that: "*Each Party shall allow a fair and equal opportunity for the airlines of both Parties to compete in providing the international air transportation governed by this Agreement*."

Article 15(2), dealing with environmental matters, provides that, where one of the signatories (e.g. Ireland) "*is considering proposed environmental measures at the regional, national, or local level, it should evaluate possible adverse effects on the exercise of rights contained in this Agreement, and, if*

such measures are adopted, it should take appropriate steps to mitigate any such adverse effects". This has not occurred.

Moreover, Article 15(3) provides that any environmental rules are to be applied "*in accordance with Article 2 and Article 3(4) of this Agreement*" – in other words in accordance with the concept of "*fair and equal opportunity*" in Article 2, and the prohibition on unilateral restriction in Article 3 (4) cited above.

The European Court of Justice has held that Article 15(3), read in conjunction with Articles 2 and 3(4) thereof, has direct effect – *Case C-366/10 Air Transport Association of America* EU:C:2011:864.

The Canada-EU ATA

Article 11(2) of the Canada-EU ATA refers to the principle of "*fair and equal opportunity*" and this is repeated in Article 13 (1). Article 11(3) refers specifically to slots, and provides that:

"*Each Party shall ensure that its procedures, guidelines and regulations to manage slots applicable to airports in its territory are applied in a transparent, effective and non-discriminatory manner*."

Article 18 refers to the environment with Article 18(3) providing that: "*When a Party is considering proposed environmental measures, it should evaluate possible adverse effects on the exercise of rights contained in this Agreement, and, if such measures are adopted, it should take appropriate steps to mitigate any such adverse effects*".

These international agreements and obligations must be taken into account by the IAA. In this regard, we note the recent decision of the Netherlands Supreme Court quashing the Dutch government's unilateral 20% reduction of capacity at Amsterdam's Schiphol Airport (purportedly on environmental grounds) on the basis that it violated the government's obligations under international law (in that case, the "*balanced approach*" to noise regulation set out in EU and international law).[2]

Issue 2: The IAA's approach to relevant "environmental factors" in the Draft S25 Decision is misconceived

<u>Planning permission conditions are not a relevant consideration for coordination parameters</u>

As the competent authority, the IAA is responsible for determining the coordination parameters at Dublin Airport (as a coordinated airport) in line with Article 6 of the Slot Regulation. The IAA considers the following two items to be the primary questions to address in the Draft S25 Decision:

- whether the 32 MPPA Conditions (as defined below) are a relevant constraint within the meaning of the Slot Regulation and the manner in which they should be taken into account; and

- if they are a relevant constraint, whether it is permissible to take account of them such that certain historic slot series will not be reallocated for S25.

While A4A agrees these are the relevant questions, we do not accept that condition 3 of Planning Permission Register Reference No.: F06A/1248 and condition 2 of Planning Permission Register Reference No.: F06A/1843 (the "**32 MPPA Conditions**") are a relevant technical, operational or environmental constraint for the purposes of Article 6 of the Slot Regulation. In our view, Article 6 of

[2] See BTN Europe. (16 July 2024). Schiphol flights cut plan declared 'unlawful' by top court. Accessible at https://www.businesstravelnewseurope.com/Air-Travel/Schiphol-flights-cut-plan-declared-unlawful-by-top-court. The obligations to apply the "balanced approach" are set out in Regulation (EU) No 598/2014 of the European Parliament and of the Council of 16 April 2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC and Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise. See also Articles 15.3 and 15.4 of the US-EU ATA and Articles 18.3 to 18.6 of the Canada-EU ATA.

the Slot Regulation and the definition of "*coordination parameters*" in Article 2(m) of the Slot Regulation have been misinterpreted and misapplied in the Draft S25 Decision.

Specifically, the first paragraph of Article 6(1) of the Slot Regulation requires the IAA to determine the coordination parameters "*while taking account of all relevant technical, operational and environmental constraints as well as any changes thereto".*

The second paragraph of Article 6(1) goes on to stipulate that the exercise of determining the parameters for slot allocation must be based on "*an objective analysis of the possibilities of accommodating* ***the air traffic****, taking into account the different types of air traffic at the airport,* ***the airspace congestion*** *likely to occur during the coordination period and the* ***capacity situation***." (emphasis added here and below). It is clear from this that an environmental constraint is only relevant insofar as it relates to the capacity of a coordinated airport to accommodate air traffic and that it is not the case with the 32 MPPA Conditions.

That is reinforced by the definition of "Coordination parameters" in Article 2(m) of the Slot Regulation as "*the expression in operational terms of all* ***the capacity available for slot allocation at an airport*** *during each coordination period,* ***reflecting all technical, operational and environmental factors that affect the performance of the airport infrastructure and its different sub-systems***".

For the reasons set out in detail below, the 32 MPPA Conditions are not relevant "*environmental constraints*" in determining co-ordination parameters, to calculate the capacity available specifically for slot allocation. The IAA has not provided any justifiable basis for treating them as such. A4A's position that the 32 MPPA Conditions are not a relevant constraint in decisions determining the coordination parameters at Dublin Airport is supported by the fact that they have not been taken into consideration by the IAA in any of the previous decisions, save for in relation to the recent Winter 24 Decision on Coordination Parameters (the "**W24 Decision**"), the validity of which, for the avoidance of doubt, is also not accepted by A4A, and is the subject of three separate ongoing judicial review proceedings.

A4A contends that the 32 MPPA Conditions are not a relevant consideration for the following reasons:

1. We note that coordination parameters are expressly limited to the expression of capacity available for slot allocation "*at an airport*" (Article 2(m), Article 3(3) of the Slot Regulation). They do not encompass an expression of passenger throughput capacity at the airport pursuant to the 32 MPPA Conditions. Passenger throughput capacity, along with other land-based capacity considerations, such as traffic and transport infrastructure external to the airport, are regulated by the planning authority via planning permission. Passenger throughput capacity has been prescribed by the 32 MPPA Conditions, from 2007 and 2008, which state respectively that: "*[t]he combined capacity of Terminal 2 as permitted together with Terminal 1 shall not exceed 32 million passengers per annum unless otherwise authorised by a further grant of planning permission.*" and "*the combined capacity of Terminal 1 (including the extension authorised by this grant of permission) and Terminal 2 granted permission under planning register reference number F06A/1248 (An Bord Pleanála appeal reference number PL 06F.220670) shall not exceed 32 million passengers per annum unless otherwise authorised by a further grant of planning permission*."

2. On a related point, the reference in the "co-ordination parameters" definition at Article 2(m) to the capacity for slot allocation "*at an airport*" makes clear that coordination parameters are concerned solely with activities at the airport. The 32 MPPA Conditions were prescribed by the planning authority to constrain passenger throughput based on historic lack of capacity of the surrounding transport network, which is necessarily outside the airport. The limitations were imposed "*[h]aving regard to the policies and objectives of the Dublin Airport Local Area Plan and capacity constraints (transportation) at the eastern campus*."

3. No regard or no proper regard has been had by the IAA to the distinction between capacity for slot allocation, which is the only capacity consideration relevant to the IAA in determining co-ordination parameters, and capacity for passenger throughput as prescribed in the 32 MPPA Conditions. The IAA has failed to take into account properly or at all this distinction in the Draft S25 Decision. Indeed, the effect of the approach proposed by the IAA is that, rather than taking account of a constraint on the capacity of the airport to accommodate air traffic as part of the slot allocation process, the IAA proposes to create such a constraint and that is no part of its function, under Article 6 or otherwise.

4. We note that the reflection required in the IAA's determination of coordination parameters is limited to technical, operational and environmental factors that affect the "*performance of the airport infrastructure and its different sub-systems*". The 32 MPPA Conditions constrain and relate only to the throughput of passengers at Dublin Airport, not the performance of the airport infrastructure.

5. We note that the Draft S25 Decision prescribes parameters in respect of "*Airfield Coordination Parameters*" (stated to include runway parameters and stand parameters) and "*Terminal Building Coordination Parameters*". It is clear therefore that the focus of the Draft S25 Decision is properly on airport infrastructure and the capacity for slot allocation "*at an airport*". However, the 32 MPPA Conditions, which are intrinsically linked to external land-based considerations (namely public transport capacity external to Dublin Airport) are not an environmental constraint for the purposes of the Slot Regulation.

6. The decision-making process required by Article 6(1) of the Slot Regulation is required to be "*based on an objective analysis of* ***the possibilities of accommodating the air traffic****, taking into account the different types of traffic at the airport, the airspace congestion likely to occur during the coordination period and the capacity situation*" (emphasis added). While there is no definition of "*capacity situation*" in the Slot Regulation, it is clear from the context of Article 6(1) that the "*capacity situation*" to be taken into account in this context is in respect of the air traffic specifically.[3] Planning conditions attached by a planning authority for reasons relating to traffic and transport infrastructure capacity outside of Dublin Airport are not relevant environmental constraints and thus not valid considerations for the purposes of Article 6(1) of the Slot Regulation.

The IAA has no role ensuring compliance with the "32 MPPA Conditions"

Put simply, it is neither the IAA's function nor within the scope of its powers (under the Slot Regulation or otherwise) to effectively concern itself with enabling compliance with any planning permissions or conditions attaching thereto, namely the 32 MPPA Conditions, by imposing a seasonal PATM seat cap. Despite recognising in the Draft S25 Decision that this is not its role or function[4], however, the IAA nonetheless proposes to impose a seat cap identical to that proposed by the DAA "*to take account of the constraint represented by… the 32 mppa Conditions*". Moreover, the IAA proposes to adopt this position in the absence of any alternative proposals being presented, notwithstanding that (as the IAA has noted) the Coordination Committee voted overwhelmingly against the imposition of any cap.

[3] In this regard, see ACI Europe Working Paper underpinning the revision of Regulation 95/93 (Practices and Recommendations relating to Declared Capacities) (June 2021), at paragraph 2.5, which refers to noise abatement procedures, night bans and carbon reduction strategies as types of environmental factors that can affect declared capacity. Planning considerations are not referenced.

[4] Draft S25 Decision, paragraph 4.18: "*it is for DAA, as the owner of the relevant planning permissions and as the entity proceeding with development in accordance with those permissions, to determine the appropriate actions to ensure that it complies with conditions attached to those permissions.*"

Indeed, if the 32 MPPA Conditions constitute an environmental constraint to be taken into consideration in the allocation of slots, this is a matter for local guidelines made by the Coordination Committee, not the IAA in making a decision under Article 8 of the Slot Regulation.

In any event, we note that compliance with the 32 MPPA Conditions cannot be ensured by the slot allocation process and/or the determination of coordination parameters. In these circumstances, the imposition of a seat cap for the stated purpose of achieving compliance with the 32 MPPA Conditions is irrational and unreasonable.

Ambiguity in respect of the "32 MPPA Conditions"

Even if the 32 MPPA Conditions did properly constitute relevant technical, operational or environmental constraints for the purposes of Article 6 of the Slot Regulation (which is denied), the IAA has acknowledged in the Draft S25 Decision that there are a number of different possible interpretations of the 32 MPPA Conditions. It has further acknowledged that there is uncertainty regarding what they require.

The IAA has erred in relying on conditions which it has acknowledged are open to interpretation and the meaning of which is uncertain. In these circumstances, it is unreasonable and irrational for the IAA to rely on the 32 MPPA Conditions to determine coordination parameters. Given the severity of the effects of the restricted coordination parameters, it is not sufficient for the IAA to "*reiterate that [it] is not responsible for the enforcement of, or compliance with, the 32mppa Conditions,* ***nor for determining how they ought to be interpreted****...*", only to then proceed to rely on a proposed estimate of 25 million seats as a seat cap parameter which is based on the 32MPPA Conditions which it acknowledges are open to interpretation and uncertain conditions.

Furthermore, even if the 32 MPPA Conditions did constitute relevant constraints (which is denied), such that the IAA was entitled to "*take account of*" them, the IAA has nonetheless failed in the Draft S25 Decision to have regard to a related relevant consideration – *i.e.* that the reason for imposition of the conditions was because of historic traffic and transport capacity reasons and that, since the imposition of the conditions, public transport capacity has substantially increased.[5] Simply put, the capacity constraints on which the 32 MPPA Conditions are based no longer exist because of improvements in road infrastructure and the availability of significant bus service to and from the airport that did not exist in 2007.

Issue 3: The IAA's failure to have regard to the proposals and advice of the Coordination Committee is not compatible with the Slot Regulation

The IAA failed to have regard to the proposals made and advice provided to it by the Coordination Committee. This error originated in the W24 Decision, §§4.6 and 4.11, and is compounded in the Draft S25 Decision. This can be seen, in particular, from §2.24 of the Draft S25 Decision, which states:

"*We note that the voting process is an indicative part of the Coordination Committee's advice to the IAA, rather than the IAA being bound by the result. As part of the process, we seek to take into account all positions set out by the Coordination Committee members as well as any associated comments or evidence relevant to the parameter declaration*."

It is unclear what is meant by this, and the legal basis for this view on the part of the IAA, which is erroneous, is not explained by reference to the provisions of the Slot Regulation. The Draft S25 Decision goes on to describe controversy and contention within the Coordination Committee at §§ 2.31 – 2.36 of

[5] In particular, planning permission has been granted for the BusConnects Swords to City Centre Bus Corridor Scheme (Case Ref. HA06D.317121) on 19 June 2024. In its observation in respect of the application, DAA noted that it considers that it will provide improved infrastructure for active travel and bus priority for staff and passengers at Dublin Airport and that "*BusConnects will impact passengers travelling to the airport by private car as it will create a reduction in the operational capacity of the roads for general traffic...*"

the Draft S25 Decision. The IAA does not express any concluded view in respect of the status of the advice provided by the Coordination Committee. It is evident, however, from the reasoning in §§ 4.12 – 4.20 of the Draft S25 Decision that the IAA only had regard to the views of Dublin Airport and ignored the views expressed by the majority of the members of the Coordination Committee.

In failing to have any adequate regard to the proposals and advice of the Coordination Committee on the coordination parameters to be determined in accordance with Article 6, the IAA failed to have regard to a relevant consideration and failed to comply with Article 5 of the Slot Regulation.

Moreover, the IAA failed to engage with the Coordination Committee to seek to accommodate air traffic and increase the capacity and number of slots available for allocation, as required by the Slot Regulation. It is notable that the IAA explicitly recognised in the W24 Decision, §2.5-2.6, that it is appropriate to tend toward a maximal rather than minimal approach as regards declaring the airport capacity parameters, having regard to the provisions of Article 6.1 and 6.3 of the Slot Regulation. Having recognised these requirements in the W24 Decision, the IAA inexplicably failed to comply with them in its Draft S25 Decision.

The IAA is under an obligation, in accordance with Article 6.1, to determine the parameters for slot allocation on the basis of an objective analysis of, *inter alia*, "*the possibilities of accommodating the air traffic*". The IAA is further required, in accordance with Article 6.3, to discuss the determination of the parameters and the methodology used, as well as any changes thereto, in detail with the Coordination Committee, "*with a view to increasing the capacity and the number of slots available for allocation*", before a final decision on the parameters for slot allocation is taken. The IAA has failed to comply with its obligations in this regard prior to the issuance of the Draft S25 Decision.

Issue 4: The IAA's approach encroaches impermissibly and without justification on historic slot allocations

By adopting the proposed PATM seat cap, the IAA anticipates that "*there is likely to be insufficient capacity for the coordinator to reallocate all historic slot series from S24… with the effect that certain historic slot series will not be reallocated by the coordinator for S25.*"

As far as A4A and its members are aware, prescribing a seat cap at a major international airport that deprives airlines of historic slots is unprecedented. More importantly, such an approach constitutes a clear breach of Article 8(2) of the Slot Regulation, which guarantees airlines the right to historic slots if they meet the 80/20 use-it-or-lose-it rule. Article 8(2) provides that the process for slot allocations shall not apply (*i.e.* historic slots are to be maintained) when the following conditions are satisfied:

- a series of slots has been used by an air carrier for the operation of scheduled and programmed non-scheduled air services, and

- that air carrier can demonstrate to the satisfaction of the coordinator that the series of slots in question has been operated, as cleared by the coordinator, by that air carrier for at least 80% of the time during the scheduling period for which it has been allocated.

Article 8(2) of the Slot Regulation makes clear that "*in such case* ***that series of slots shall entitle the air carrier concerned to the same series of slots in the next equivalent scheduling period****, if requested by that air carrier within the time-limit referred to in Article 7(1).*" (emphasis added)

On the basis of the IAA's own analysis, it is clear that the implications of the Draft S25 Decision will "likely" result in a breach of Article 8(2) of the Slot Regulation. There is no justification for failing to honor historic slot allocations, least of all in circumstances (as outlined above) where the basis for doing so is not clearly in compliance with the Slot Regulation itself. The IAA's approach in the Draft S25 Decision is in striking contrast with the W24 Decision, which at least appeared to recognise the obligations imposed by Article 8(2) and preserved all historic slots.

The IAA does not identify any lawful basis for its proposal to effectively force airlines to relinquish their historic slots in order that the capacity for Summer 2025 is below the IAA's PATM seat cap. Neither the Slot Regulation nor the Worldwide Airport Slot Guidelines ("**WASG**") support any reduction in historic slots in the manner contemplated in the Draft S25 Decision. On the contrary, Article 6.10.3 of the WASG provides that a "*capacity reduction that cannot accommodate historic slots must be avoided except in exceptional circumstances*". The IAA has failed to demonstrate that any such exceptional circumstances exist here. Surface transportation access to and from Dublin Airport which has in recent years significantly improved does not constitute an exceptional circumstance.

The IAA appears to recognise the difficulty which arises in this regard, noting in §4.21 of the Draft S25 Decision that Dublin Airport failed to set out what it considered to be the legal basis for not reallocating 4% of historic seats. The IAA further acknowledges that it has been unable to find any authority dealing with the nature of the entitlements of air carriers under Article 8(2). The IAA then engages in a tortured analysis of the Slot Regulation and suggests that Article 8(2) – which is perfectly clear in its terms – requires to be interpreted in the light of Article 8b. Article 8b provides that:

"*The entitlement to series of slots referred to in Article 8(2) shall not give rise to any claims for compensation in respect of any limitation, restriction or elimination thereof imposed under Community law, in particular in the application of the rules of the Treaty relating to air transport*."

It is suggested by the IAA that this provision contemplates that the entitlement to series of slots referred to in Article 8(2) can be the subject of '*limitation, restriction or elimination'*. As is perfectly clear from Article 8b, however, this is only the case where the "*limitation, restriction or elimination*" is imposed under EU law, in particular in the application of the rules of the Treaty relating to air transport. This provision has no application here, and does not justify the withdrawal of historic slot entitlements under any other circumstances.

Following on from this erroneous analysis, the Draft S25 Decision suggests (tentatively) in §4.29 that: "*It therefore seems that the Slot Regulation contemplated that the slots available for allocation in any coordination period would proceed from a prior declaration of the capacity available for allocation in that coordination period*." No provision of the Slot Regulation is cited for this conclusion, which certainly does not follow from Article 8 (or, indeed, Article 8b).

The Draft S25 Decision then engages in a lengthy discussion as to whether slots constitute property rights, in which extensive reliance is placed on the Commission's proposal to amend the Slot Regulation. We note that the IAA invokes language from the Commission proposal which was not adopted in the final Council text. Not only is the Commission not conferred with the authority to conclusively interpret EU legislation, which is a matter for the CJEU, but this also refers to a proposed change in the law and, as such, does not provide any reliable guidance in respect of the current position. The IAA - again, tentatively – expresses the view in §4.39 that the entitlements provided for in the Slot Regulation are not to be regarded as property rights. It goes on to suggest, in §4.40 that, even if the entitlements conferred by the Slot Regulation are properly regarded as property rights, the precise nature and extent of these rights are delineated and circumscribed by the provisions of the Slot Regulation. On this basis, it is suggested that:

"*Accordingly, on the premise that the IAA is correctly taking into account the 32mppa Conditions in the determination of the parameters for slot allocation as a 'relevant constrain' within the meaning of Article 6(1), and on the premise that the process currently being undergone to determine the parameters is an appropriate one being appropriately conducted, any right that may exist, and that may be restricted or limited as a consequence of the IAA's final parameters decision for S25, would be so restricted or limited to an extent, and in a manner, contemplated by the Slot Regulation, and therefore, in a lawful manner*."

This reasoning is incoherent and ignores the fact that, even if historic slot allocations are not a property right and are characterised "merely" as a valuable vested entitlement under the Regulation, they can only be taken away in accordance with the Regulation. The IAA has failed to identify any basis

whatsoever in the Slot Regulation for interfering with existing historic slot allocations to which the air carriers are entitled under Article 8(2) of the Regulation. Article 8b plainly does not apply on the facts here. Article 8(2) is mandatory in its terms and the Draft S25 Decision does not identify any other provision of the Slot Regulation said to authorise the IAA to interfere with the entitlements of air carriers acquired thereunder. A4A contends that, were the IAA to purport to do so, it would be acting ultra vires its powers under the Slot Regulation and the Aviation Regulation Act 2001, as amended.

For the avoidance of doubt, A4A considers that the vested rights and entitlement of air carriers to historic slot allocations under Article 8(2) are properly characterised as property rights. As has been correctly pointed out by a number of other airlines, in proposing to impose a PATM seat cap which will deprive air carriers of their entitlement to historic slot allocations under Article 8(2) of the Slot Regulation, the IAA has failed to vindicate and protect the constitutionally protected property rights of the air carriers under Articles 40.3 and 43 of the Constitution, Article 17 of the Charter of Fundamental Rights of the European Union, and Article 1 of Protocol No. 1 of the ECtHR. We remind you that the IAA, as a State body, is under an obligation to carry out its functions in compliance with the ECHR in accordance with section 3 of the European Convention on Human Rights Act 2003. In this regard, the proposed imposition of a PATM seat cap which interferes with acquired entitlements under Article 8(2) does not satisfy the requirement of legality and, as such, falls at the first hurdle. Entirely without prejudice to the foregoing, it is also not in the public interest. The IAA has carried out no proportionality analysis and there is no provision for compensation. It is relevant to note (again) in this context that Article 8b of the Slot Regulation has no application on the facts. Moreover, the rights of the air carriers in accordance with Article 6.1 of the ECHR have not been respected.

Furthermore, even if historic slot allocations do not constitute property rights, they are, at a minimum, valuable vested statutory entitlements that are critical to the carrying on by airlines of their business. The freedom to conduct a business is protected by Article 16 of the Charter of Fundamental Rights of the European Union and any limitation on the exercise of that right can only take place in accordance with Article 52 of the Charter, which requires that the limitation be provided for by law and be proportionate. As noted above, interference with the historic slot allocations is not provided for by law, and the IAA has not carried out any proportionality analysis, as required by Article 52.

Finally, we note that, in addition to the expected adverse effect on historic slot allocations, the PATM seat cap has severe implications for those carriers (including prospective users of the airport) that are reliant on *ad hoc* pool slots, which are virtually eliminated by the IAA's approach. The effect of the PATM seat cap in both the W24 Decision and the Draft S25 Decision disproportionately impacts these carriers meaning that new entrant carriers (including A4A members such as JetBlue), or carriers that do not already fly to and from Dublin, are much more likely to be denied slots, which effectively preclude opportunities for new entrant carriers to operate at Dublin Airport to provide competition for existing airlines and choice for passengers. This is wholly incompatible with the Open Skies Agreements[6] and the objectives of the Slot Regulation, which expressly and repeatedly emphasises the importance of facilitating competition. The following recitals to the Slot Regulation are of relevance in this regard:

- "*Whereas it is Community policy to facilitate competition and to encourage entrance into the market, as provided for in Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (4), and whereas these objectives require strong support for carriers who intend to start operations on intra-Community routes;*"

- "*Whereas there should also be provisions to allow new entrants into the Community market;"*

- "*Whereas it is also necessary to avoid situations where, owing to a lack of available slots, the benefits of liberalization are unevenly spread and competition is distorted;"*

[6] See Art. 3.4 of U.S.-EU ATA and Art. 13.2 of Canada-EU ATA.

- "*Whereas the application of the provisions of this Regulation shall be without prejudice to the competition rules on the Treaty, in particular Articles 85 and 86*;"

The denial of slots to new entrants constitutes a "serious problem" for new entrants and would require the government to convene a meeting to examine possibilities to remedy the situation, to which the European Commission would have to be invited in accordance with Article 10(9) of the Slot Regulation.

Having regard to the foregoing, A4A invites the IAA to reconsider the draft conclusion expressed in §4.42 of the Draft S25 Decision, which it considers to be clearly incorrect as a matter of law.

Issue 5: The proposed approach to seat reductions is, in any event, not proportionate or fair

Strictly without prejudice to our position regarding the unlawfulness of the PATM seat cap set out above, the IAA's proposed approach to seat reductions is not in any event proportionate even on its own terms. In particular, A4A considers that any approach to such reductions should preserve all carrier-specific historic operations and apply seat reductions on a *pro rata* basis after the Historic Baseline Date, as set out in the Mott McDonald proposal presented to the Coordination Committee and summarised in the Draft S25 Decision. Within the confines of the PATM seat cap, we believe that this approach is the most equitable way of assigning seat reductions.

In addition, we consider that, when setting seasonal targets, the IAA should not divide the PATM seat cap on a straight 7/12 summer; 5/12 winter basis, but rather in a manner which allows airlines to preserve capacity in the peak summer season. To the extent the seat cap is to apply in 2024 and 2025, airlines should have the flexibility to be able to reduce services/seats in non-peak winter periods and preserve services/seats during peak summer months to best meet customer demand in the circumstances.

Issue 6: The IAA should make clear airlines will not be adversely affected

Finally, to the extent a carrier chooses to reduce services to meet its seasonal target, we reiterate that the IAA must ensure that the ACL awards JNUS for any such reductions on the basis that they are due to mandatory caps beyond the control of an individual airline and therefore qualify as "*an interruption of a series of services due to action intended to affect these services, which makes it practically and/or technically impossible for the air carrier to carry out operations as planned*" under Article 10(5)(e) of the Slot Regulation.[7]

Conclusion

Constraining capacity at Dublin Airport violates international and European law and risks unnecessarily, amongst other things, reducing competition among airlines, increasing costs for passengers and damaging economic growth.

The approach proposed by the IAA is fundamentally flawed, irrational, wholly disproportionate, unlawful and it takes into account irrelevant considerations and does not take into account relevant considerations. We have set out in detail in this submission our concerns and those of our members regarding the Draft S25 Decision. We urge the IAA to reconsider its provisional views in light of these concerns.

A4A will continue to ventilate through all other available avenues open to it the matters of profound importance raised in this submission and it reserves all of its rights to take further action in this regard to protect the interests of its members.

[7] A flexible approach in relation to JNUS was set out in the Recommendation of the WASB concerning the Northern Winter 2022 Season and Slot Use Alleviation in circumstances where the existing restrictions set out in Article 8.8 of the WASG does not capture specific restrictions (then arising from the COVID-19 pandemic). The Recommendation is available here: https://aci.aero/wp-content/uploads/2022/05/WASB-Recommendation-Airport-slot-alleviation-measures-for-Northern-Winter-2022.pdf.

Yours sincerely,

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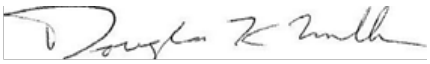

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Airlines for America