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26 September 2024

**Ref: Draft Decision on Summer 2025 Coordination Parameters at Dublin Airport (the 'Draft S25 Decision')**

Dear Adrian,

I refer to the above. I also refer to our letter to you of 10 September 2024 in which we set out our position on (i) why the 32mppa Conditions (as defined below) should not be treated as a relevant constraint in the Draft S25 Decision pending determination of ongoing legal proceedings; (ii) the lack of any legal basis for the withdrawal of historic slots in the current circumstances and (iii) other non-PATM related coordination parameters.

With regard to the non-PATM related coordination parameters referred to in point (iii) above, Aer Lingus supports the hourly runway and terminal limits as set out in the S25 Draft Decision. However, for the reasons outlined below, Aer Lingus does not support the approach taken by the IAA in respect of the 32mppa Conditions in the Draft S25 Decision. More specifically, Aer Lingus does not agree with the IAA's conclusion that the 32mppa Conditions are matters which the IAA is required to take account of in declaring capacity for the S25 Season and reiterates its position that pending determination of ongoing legal proceedings they should not be considered. Furthermore, Aer Lingus disagrees with the IAA's conclusion that "slots" are not intended to be regarded as property rights and that historic slots can be withdrawn. In addition, and entirely without prejudice to these views, Aer Lingus also takes issue with the IAA's proposals in relation to the practical implementation of the PATM seat cap for the reasons set out below.

## 1. The treatment of the 32mppa Conditions as a relevant constraint

As set out in Aer Lingus's letter dated 10 September 2024, the IAA's Decision on the Winter 2024/25 Coordination Parameters at Dublin Airport dated 7<sup>th</sup> May 2024 ("**W24 Decision**"), in which the IAA imposed a Passenger Air Traffic Movement ("**PATM**") seat cap of 14,405,737 passengers, is currently the subject of three separate challenges brought by Aer Lingus, Ryanair and daa. These proceedings have been listed for hearing on 3 December 2024.

A fundamental question to be determined in the proceedings brought by Aer Lingus and Ryanair against the W24 Decision is the lawfulness of IAA's decision to treat condition 3 of planning permission F06A/1248 (An Bord Pleanála Reg. Ref. PL06F.220670) (the "**Terminal 2 Permission**") and condition 2 of Planning Permission F06A/1843 (An Bord Pleanála Reg. Ref. PL06F.223469) (the "**Terminal 1 Extension Permission**") (together referred to as the "**32mppa Conditions**") as relevant constraints under Article 6(1) of Council Regulation (EEC) No. 95/93, as amended (the "**Slot Regulation**") for the purpose of determining coordination parameters at Dublin Airport.

As set out on a number of occasions previously and as outlined by Aer Lingus in its challenge to the IAA's W24 Decision, Aer Lingus's position is that the 32mppa Conditions are not relevant constraints under Article 6(1) of the Slot Regulation. Aer Lingus's position is that the IAA acted unlawfully by taking them into account in making the W24 Decision and would be acting unlawfully if it takes account of these conditions in making its decision on the Summer 2025 coordination parameters, as per the proposal set out in the Draft S25 Decision.

Further, as also set out previously, other issues are also before the Court, as part of *inter alia* the Aer Lingus challenge to the W24 Decision, which are fundamental to the IAA's consideration of the summer 2025 coordination parameters. These include

- (i) The question of the correct interpretation of the 32mppa Conditions if they are relevant constraints (which is not accepted by Aer Lingus), and Aer Lingus has outlined in its proceedings that at least three different interpretations of these

conditions have been advanced by different relevant parties (as acknowledged by IAA at §4.17 of the Draft S25 Decision).

- (ii) The question of whether the IAA can impose a PATM seat cap in order to give purported effect to those conditions.
- (iii) That the implementation of the relevant IAA decisions cannot in fact achieve compliance with the 32mppa Conditions, since the latter relate to throughput and the former relates to capacity, which is acknowledged by the IAA at §4.18 of the Draft S25 Decision. By proposing to set a PATM seat cap the IAA is in effect attempting to limit passenger throughput (as opposed to capacity), which it has no jurisdiction to do.

In circumstances where a number of questions which are central to the decision to be made by the IAA, in relation to the 32mppa Conditions, are before the Courts, it would not be appropriate for the IAA to take account of these conditions in making the Final S25 Decision. To do so would be to prejudge the outcome of the challenges to the W24 Decision and would, in addition, lead to inevitable further challenges to the Final S25 Decision, with all of the cost and uncertainty that would follow.

As such the correct course would be for the IAA not to take account of these conditions in making the S25 Decision, and not to impose a PATM seat cap in order to give effect to these conditions, pending the bringing of legal certainty to these issues in the context of the challenges to the W24 Decision. If notwithstanding this, the IAA intend to take account of the 32mppa Conditions, then we would ask that the implementation of the PATM be deferred until the issues surrounding same are clarified by the Courts.

## **2. The approach taken by IAA in relation to the 32mppa Conditions is inconsistent with that taken to Condition 5 of the North Runway planning permission**

The IAA has consistently refused to treat Condition 5 of the North Runway planning permission as a constraining factor and the reason for doing so is stated at §3.25 of the Draft S25 Decision:

*“3.25 In recent capacity declarations, we have sought to take account of the potential constraining factor represented by Condition 5 of the North Runway planning This condition gives rise to complex questions of planning law, EU law, and international law, and is currently the subject of High Court proceedings to which the IAA is a notice party. In August 2023, daa obtained leave to apply for judicial review of Fingal County Council’s enforcement notice (issued on 28 July 2023) in relation to alleged non-compliance by daa with Condition 5. A stay on the enforcement notice was also granted. The hearing commenced before the High Court on 12 March. On 13 March, with the consent of all parties, the proceedings were adjourned, with a view to the Court being updated at a later date in relation to An Bord Pleanála’s decision regarding the introduction of a new noise quota count system to replace Condition 5. The stay on the enforcement notice remains in place.*

*3.26 Thus, with any clarification of this matter still pending, and consistent with each declaration since S22, we propose no changes to the R60 limits in the night hours relative to those which were in place prior to completion of the North Runway. This again means that no capacity has been added between 2300 and 0700 local time since completion of construction of the North Runway, meaning that the North Runway cannot lead to more flights in this period than were previously possible under the single Runway 28L based capacity declaration.*

Aer Lingus in its letter of 10 September 2024 maintained that that the IAA should adopt the same approach to the 32mppa Conditions particularly in circumstances where there is litigation pending before the Court as to the status and interpretation of the 32mppa Conditions and the power of the IAA to impose a PATM seat cap in order to give purported effect to those conditions. The IAA refused to follow its own precedent and replied to Aer Lingus’s request in the following terms (§3.25 of the Draft S25 Decision):

*“In that regard, the IAA considers that, in circumstances where the W24 Decision was made on the basis that the 32mppa Conditions are a relevant constraint, the Court has not yet determined the proceedings challenging the W24 Decision, and there is no order restraining the IAA from proceeding on foot of that Decision or making any further decision; and the determination of coordination parameters is a time bound process*

which cannot be deferred in that regard, it must proceed on the basis that it has a function to determine coordination parameters, which falls to be exercised now for S25, and which it must exercise taking account of what it considers to be relevant constraints. The IAA notes also that the pending legal proceedings include a challenge by daa, who is of the view that the 32mppa Conditions do represent a relevant constraint and that the IAA did not properly or adequately reflect that constraint. Therefore, it is not the case that the inevitable outcome of the various pending legal proceedings is that Aer Lingus' position that the 32mppa Conditions are not a relevant constraint will be found to be correct."

A number of the factors which the IAA rely on apply equally to the daa proceedings brought in respect of condition 5 of the North Runway Permission including (i) the proceedings have not been determined; (ii) the determination of the coordination parameters is a time bound process and (iii) daa's challenge to condition 5 might be unsuccessful.

The other two factors relied on by the IAA, that the conditions were considered to be a relevant constraint for W24 and there was no order restraining the IAA from proceeding on foot of that decision, fail to appreciate that such an Order would not have been made by a Court where Aer Lingus, due to unique circumstances was able to mitigate the impact of the decision to impose the PATM seat cap for this winter season.

Furthermore, the letter from the (then) CAR of 5<sup>th</sup> January 2021 in relation to Condition 5 applicable to the North Runway acknowledges that if historic slots were going to be affected that CAR would have to be sure that it is accurately implementing the condition:

"On the basis of this advice, and on the assumption that the runway becomes operational thus making the condition apply, the CAR can and would be required to implement this reduction in the declared capacity for the crystallisation of this condition. In order to eliminate historic in line with the regulation, the CAR would need to ensure that it is accurately implementing the condition to the extent that it is applicable only." (emphasis added)

As set out above, the 32mppa Conditions can be interpreted in three ways and until the Courts determine the correct interpretation of the conditions, the IAA cannot be satisfied that “*it is accurately implementing the condition*” and the conditions should not be treated as relevant constraints until the matter is determined by the courts.

### **3. The lack of a legal basis for withdrawing the historic slots**

As noted previously, and as identified in the Draft S25 Decision, the imposition of a PATM seat cap in the S25 season along the lines proposed by the IAA may require a significant reduction in historic slots. Any such reduction in historic slots would be unlawful, would interfere with Aer Lingus’s property rights and would have very significant financial implications potentially causing irreparable harm given our planned growth for S25 and beyond.

We note that in the Draft S25 Decision the IAA has attempted to set out the legal basis for withdrawing historic slots. For the avoidance of doubt, Aer Lingus rejects IAA’s interpretation of the nature of the rights conferred on the holders of historic slots under the Slot Regulation. In particular:

- 1) As previously submitted by Aer Lingus and as acknowledged by IAA at §4.24 of the Draft S25 Decision, there is no authority, in the form of decisions of relevant courts of competent jurisdiction, which indicates that there is any legal basis for withdrawing historic slots in the current circumstances;
- 2) As previously submitted by Aer Lingus, to our knowledge, there is no precedent in any EU Member State for the withdrawal of historic slots in the current circumstances. We note that the Draft S25 Decision does not disagree with this position;
- 3) We note the IAA’s reliance on Article 8b of the Slot Regulation as providing a potential legal basis for withdrawing historic slots. However, firstly, Article 8b provides no such legal basis but instead merely provides that a claim for compensation would not arise “*in respect of any limitation, restriction or elimination thereof imposed under Community law, in particular in application of the rules of the Treaty relating to air transport*” (emphasis added). Secondly, even if (which is denied) an implied right to

eliminate historic slots under community law could be read into Article 8b, this does not assist the IAA in this case. The 32mppa Conditions are not imposed under Community law or the application of EU rules on air transport but were imposed solely as a matter of policy, primarily in order to facilitate the future development of a western campus at Dublin Airport. The 32mppa Conditions cannot therefore provide any legal basis for the interference with historic slots.

- 4) We note that the IAA relies on various materials in support of the position that slots should not be considered as property rights e.g. the explanatory memorandum by the European Commission in relation to its proposal to amend the Slot Regulation, the United States Code of Federal Regulations and World Airport Slot Guidelines (“WASG”). Firstly, these do not constitute binding legal authorities in this jurisdiction. Insofar as the IAA seeks to rely on documents generated by the European Commission we would note that the European Commission of 30 April 2008 (COM(2008) 227) supports the argument that historic slots constitute property rights in that it acknowledges that *“exchanges of slots for monetary and other consideration more commonly referred to as secondary trading, are taking place at a number of congested Community Airports”* and further notes that the Regulation is *“silent on the question of exchanges with monetary and other consideration to reflect differences in value between slots at different times of day and other factors”*. Furthermore, the (then) CAR itself in 2019 expressed support for the practice of trading slots for monetary consideration, and stated that *“one-for-one slot exchanges which include monetary or other consideration are permissible at Dublin Airport”* and provided a form for stakeholders to use to facilitate such exchanges.<sup>1</sup>

Secondly, even if (which is not accepted by Aer Lingus) historic slots should not be conceived of strictly as property rights, they clearly constitute explicit statutory rights or entitlements, under Article 8(2), which are enjoyed by the holders of historic slots where certain conditions are satisfied. In order for such entitlements to be extinguished, there would need to be an explicit basis or mechanism spelled out for such

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<sup>1</sup> CAR, “CN2/2019: Clarification on secondary slot trading and slot series misuse”, 7 March 2019, [https://www.iaa.ie/docs/default-source/car-documents/slots/notice-on-secondary-slot-trading-and-series.pdf?Status=Master&sfvrsn=50a514f3\\_0](https://www.iaa.ie/docs/default-source/car-documents/slots/notice-on-secondary-slot-trading-and-series.pdf?Status=Master&sfvrsn=50a514f3_0)

extinguishment to occur. As previously submitted by Aer Lingus, there is no such legal basis or mechanism set out in the Slot Regulation or elsewhere to provide for the withdrawal or extinguishment of historic slots. The IAA has not, in the Draft S25 Decision, identified any such legal basis or mechanism. The matters relied upon by the IAA at §§4.22 to 4.42 of the Draft S25 Decision simply are not sufficient to permit the IAA to extinguish or withdraw such statutory entitlements, given the absence of explicit statutory authority to do so.

- 5) For the avoidance of doubt, Aer Lingus further disputes that the matters relied on by the IAA at §§4.22 to 4.42 of the Draft S25, on their own terms, support the proposition that historic slots can be withdrawn:
- a. The provisions of Article 8b, discussed at §4.27 of the Draft S25 Decision, are discussed above;
  - b. The argument made at §4.31 based on Article 8a(1)(c) relates to whether the historic slots are property rights or not, it does not support the argument that these statutory rights/entitlements can be withdrawn.
  - c. With reference to the matters set out at §4.32-4.33, in the event that an airport is no longer designated as coordinated, airlines which previously held historic slots will continue to be able to use such slots. This in no way supports the position that the statutory entitlement to historic slots at a coordinated airport can be extinguished;
  - d. With reference to §4.34, firstly this is not a binding legal authority. Secondly, even on its own terms, this does not go any further than supporting an argument that historic slots do not constitute property rights. This does not support the position that the statutory entitlements to historic slots can be withdrawn;
  - e. With reference to §4.35, the terms of Recitals 8 and 9 do not support the position that “grandfather rights” are subject to the ability of member states to take account of operational and environmental constraints; rather, it indicates that the ability of member states to take account of operational and environmental constraints must take place without impacting on such rights;
  - f. With reference to §4.36, firstly, this is clearly of no binding authority in this jurisdiction. Secondly, this in fact supports the position that, had the EU legislature wished to provide that historic slots are not property rights and/or

can be withdrawn, it could have done so in similar terms as did the US legislature. The EU legislature, unlike the US legislature, did not do so;

- g. With reference to §§4.37-4.38, this is of no binding authority in this jurisdiction. Furthermore, again, this supports the position that the EU legislature, having provided a statutory entitlement to historic slots, had it wished to provide that historic slots can be withdrawn in exceptional circumstances, could have done so in similar terms to this provision in the WASG. In the context of the explicit provision of statutory entitlement to historic slots, it is striking that the EU legislature did not do so.
- h. Finally, at §4.40 the IAA states that even if the historic slots are properly to be regarded as property rights, they are rights that are circumscribed by the provisions of the Slot Regulation. However even if this is correct, there is nothing in the “circumscribing” provisions of Slot Regulation to provide that the explicit statutory entitlement to these slots can be withdrawn. In other words, the circumscription included in the Slot Regulation, contended for by the IAA, does not extend as far as providing for withdrawal of historic slots.

Given the absence of a legal basis for the withdrawal of historic slots in the current circumstances, the IAA should not impose a PATM seat cap in respect of the S25 season which results in the withdrawal of any historic slots.

#### **4. Proposed Means of Implementing the PATM Seat Cap**

In the Draft S25 Decision, the IAA proposes that the reduction in seats take place at the time of the SALs (i.e. by 7th November) rather than after the Series Return Deadline (SRD) (i.e. currently 15th January 2025) as was proposed by Mott McDonald in its presentation to the Coordination Committee meeting of 22 August 2024. Entirely without prejudice to our position as set out above that the IAA should not imposed a PATM seat cap, if the IAA should nevertheless proceed to do so in its final S25 Decision, we believe that any seat reductions should be implemented immediately after the Historic Baseline Date (“**HBD**”) (i.e. 31st January 2025). This would at least facilitate the voluntary handback of slots/seats between the date of the SAL and the HBD and potentially reduce the amount of capacity required to be withdrawn.

In addition, applying the reduction in seats / slots at HBD (rather than at SAL) would facilitate the application of section 8.7.2.2 of the WASG (Cancellations Before the Historic Baseline) which permits carriers to return voluntarily seats / slots between the SAL and the HBD for periods of up to 5 weeks without impacting their historic rights to such seats / slots provided that the total number of cancellations does not exceed 20% between the first and last date of the slot series. This would potentially further reduce the number of seats / slots required to be removed as a result of the PATM seat cap. While we understand that ACL does not currently apply section 8.7.2.2 of the WASG at airports which it coordinates, we believe that it should do so in the event of a PATM seat cap being applied in order to minimise the impact on carriers.

Deferring the application of the PATM seat cap to the HBD would have the further benefit of taking place after the hearing of the pending legal proceedings concerning the W24 Decision and a judgment may have been delivered by this time which will clarify the role and powers of the IAA under the Slot Regulation.

We note the objections of the IAA, at §4.44 of the Draft S25 Decision, to the approach proposed by Mott McDonald on the basis that it “... *does not address the basis for withdrawal of seats/slots under the Slot Regulation, once those have already been allocated through the SALs and if airlines do not comply with their pro-rata reduction contribution.*” However, this objection on technical grounds does not stand up to scrutiny given the IAA’s very broad interpretation of its powers under the Slot Regulation which it believes includes a power to apply a reduction in historic slots despite the lack of a legal basis in the Slot Regulation (a position with which, as outlined above, we strongly disagree).

We also disagree with the IAA’s proposal that any required reduction to capacity be imposed on a pro-rata basis across all carriers with incoming historic seats from S24. As pointed out in our submission on the Draft W24 Decision, the IAA’s decision to disregard the 32mppa Conditions as a relevant constraint for the purpose of determining the coordination parameters in Summer 24 (despite being fully aware that the 32mppa Conditions were likely to be breached in 2024 when using the approach to counting passengers as proposed by daa and as accepted by the IAA) resulted in new airlines being allocated slots for the first time at Dublin Airport in Summer 24. The harm caused to Aer Lingus by the IAA’s inconsistent treatment of the 32mppa Conditions will therefore be exacerbated if reductions are carried out on a simple pro-rata basis

as carriers who acquired slots for the first time in Summer 2024 (thereby causing a potential breach of the 32mppa Conditions) will retain the bulk of those slots under the approach proposed by the IAA at the expense of carriers who held slots prior to any such breach arising. As a result, under a pro-rata approach, the level of capacity reductions which Aer Lingus would be required to implement for S25 is significantly greater than would have been the case if the IAA had implemented a PATM seat cap in the S24 season.

The approach proposed by the IAA cannot therefore be considered to be fair, transparent and non-discriminatory. Accordingly and without prejudice to our firm opposition to any forced reduction in the capacity of historic slots, if such a reduction is nevertheless imposed, this should be done on a “Last-In, First-Out” basis giving precedence to those slots held prior to any purported breach of the 32mppa Conditions arising (i.e. as at Summer 2023). Such an approach would at least ensure some level of consistency and coherence in the IAA’s approach such that any reductions would be targeted at the additional capacity which has given rise to the purported breach of the 32mppa Conditions.

## **5. Requests for Clarification**

Strictly without prejudice to Aer Lingus’s position that there is no legal basis for the course of action IAA proposes to adopt in the Draft S25 Decision, and to Aer Lingus’s submissions above, Aer Lingus wishes to make the following requests for clarification arising from the Draft S25 Decision.

In terms of the practicalities, the IAA states in §4.46 of the Draft S25 Decision that the PATM seat cap would be implemented by ACL by removing “*seats from historic slots up to the percentage reduction required and leaving all other elements intact*”. It is further stated that ACL could make an effort to “*concentrate on slots in off-peak periods based on terminal capacity leaving carriers flexibility to move seats as required*”. In this regard, further detail should be provided by the IAA as to what precise criteria will be applied for this purpose. In particular, the following should be clarified:

- What is meant by “off-peak periods”?
- Will the same level of reduction be applied by ACL to all slots within a slot series or to specific identified slots within a slot series?
- Will seat capacity on the slots identified by ACL for reduction be reduced by a specified percentage / number or be removed entirely?
- Can a carrier transfer capacity from a slot which has not been subject to a reduction to a slot which has been subject to a reduction (subject to the original seat limit of the slot subject to the reduction and to compliance with its allocated PATM seat cap)?

We also note that the IAA does not indicate whether or not any reduction in slots/seats pursuant to the application of the PATM seat cap will be subject to the provisions of Article 10.4 of the Slot Regulation which provides alleviation from the 80/20 usage requirement in certain specified circumstances should the 32mppa Conditions be subsequently amended or removed such that a PATM seat cap is no longer required or should a Court hold that the PATM should not have been applied. Again without prejudice to our opposition to any forced reduction in the capacity of historic slots for the reasons outlined above, we believe that any such reduction if required by the IAA clearly falls within the scope of Article 10(4)(b) of the Slot Regulation which provides for alleviation where the non-utilisation of slots can be justified on the basis of *“interruption of air 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”*. The application of the PATM seat cap and the forced removal of slots/seats would clearly constitute such an action.

In this regard, we would highlight the position of ACL when it applied a Local Rule in London Heathrow Airport during the S22 season which imposed a reduced daily terminal limit of 100,000 passengers and a daily ATM Cap due to staffing shortages. ACL granted alleviation for reductions made in compliance with this Local Rule in accordance with Article 10(4)(b) of the Slot Regulation. We see no reason why a similar approach should not be adopted in respect of any reductions arising from the application of the PATM seat cap and we request that the IAA confirm that such reductions will be subject to alleviation in accordance with Article 10(4)(b).

Responses to the above questions are necessary to enable us to fully assess the impact of the proposed PATM seat cap as set out in the Draft S25 Decision on our operations. We therefore request that the IAA respond to the above questions no later than close of business on Friday 27 September and permit us to submit further comments on these responses by close of business on Monday 30 September.

## **Conclusion**

For the avoidance of all doubt, should the IAA seek to give effect to the 32mppa Conditions by way of a PATM in the S25 Decision and/or should that result in the withdrawal or prevention of use of our historic slots in any way, either temporarily or otherwise, Aer Lingus will have no option but to challenge the decision of the IAA in that regard and will seek a stay on the operation of the S25 Decision and / or the PATM seat cap for the purpose of the Slot Allocation List.

We request that the IAA consider this submission before it finalises its S25 Decision.

Aer Lingus remains available to discuss any of these point with IAA in more detail.

Yours sincerely,



Laurence Gourley  
General Counsel