

DECISION DATED 16th November 2012

OF

AVIATION APPEALS PANEL

ESTABLISHED BY ORDER OF

THE MINISTER FOR TRANSPORT, TOURISM and SPORT

27th August 2012

Statutory Provisions:

The following are the statutory provisions which are relevant to this Appeal and those which are most relevant have been set out in bold print:-

Section 40 of the Aviation Regulation Act, 2001¹ (“the 2001 Act”) provides:-

- (1) This section applies to –
 - (b) The Irish Aviation Authority in respect of a determination under Section 35(2)².
- (2) The Minister shall, upon a request in writing from a person to whom this section applies, who is aggrieved by a determination under Section 32(2) or **35(2)**³ establish a panel (“appeal panel”) to consider an appeal by that person against the determination.
- (3) An appeal panel shall consist of at least three, but not more than five, persons appointed by the Minister, one of whom shall be designated by the Minister to be the chairperson of the Appeal Panel.
- (4) **An Appeal Panel shall determine its own procedure.**
- (5) **An Appeal Panel shall consider the determination and not later than three months from the date of its establishment, may confirm the determination, or, if it considers that in relation to the provisions of Section 33⁴ or 36⁵, there are sufficient grounds for doing so, refer the decision in relation to the determination back to the Commission for review.**
- (6) An Appeal Panel shall notify the person who made the request under sub-section (2) of its decision under sub-section (5).

¹ As amended by State Airports Act, 2004 (No. 32) and Aviation Act, 2006 (No. 7).

² “(2) On the expiration of a determination, the Commission shall make a determination specifying the maximum levels of aviation terminal service charges that may be imposed by the [Irish Aviation] Authority”.

³ Bold printing and underlining of excerpts are made for emphasis of relevance to this Panel.

⁴ “Regulatory objectives in respect of airport charges”.

⁵ “Regulatory objectives in respect of aviation terminal services charges”.

Section 35 provides:

- (2) **On the expiration of a determination, the Commission shall make a determination specifying the maximum levels of aviation terminal services charges that may be imposed by the Authority.**
- (3) A determination shall be:
 - (a) In force for such period of not less than four years and
 - (b) Come into operation on such day as the Commission specifies
- (4) A determination may –
 - (a) Provide
 - (i) For an overall limit on the level of aviation terminal services charges;
 - (ii) For limits to apply to particular categories of such charges or
 - (iii) For a combination of any such limits;
 - (b) Operate to restrict increases in any such charges, or to require reductions in them, whether by reference to any formula or otherwise or
 - (c) Provide for different limits to apply in relation to different periods of time falling within the period to which the determination relates.
- (5) Prior to making a determination, the Commission shall:
 - (a) Give notice to any person concerned stating that it proposes to make a determination,
 - (b) Publish such notice in a daily newspaper published and circulating in the State, and

- (c) Specify the period (be not less than two months from the publication of the notice) within which representations with respect to the proposed determination may be made by interested parties or the public.

Subsections (6) to (9) refer to representations and publication of the report. Subsections (10) to (13) refer to procedures for notices, requests and the continuation in force of a determination.

Section 36 of the 2001 Act provides:

“In making a determination, the Commission shall aim to facilitate the development and operation of safe, cost-effective terminal services which meet international standards and shall have due regard to:

- (a) The relevant charging principles of the International Civil Aviation Organisation and of Eurocontrol;**
- (b) The level of investment in aviation terminal services by the Authority, in line with safety requirements in commercial operations, in order to meet current and prospective needs of the airline industry,**
- (c) The efficient and effective use of all resources by the Authority,**
- (d) The level of the Authority’s income from aviation terminal services and other revenue earned by the Authority generally,**
- (e) Operating and other costs incurred by the Authority in providing aviation terminal services,**
- (f) The level and quality of aviation terminal services, and the reasonable interests of the users of these services, and**
- (g) The cost competitiveness of aviation terminal services with respect to international practice.”**

ORDER OF THE MINISTER ESTABLISHING THE APPEAL PANEL:

The Minister established the Panel (“**the Appeal Panel**”) on Monday 27 August 2012 to consider the appeal by the Irish Aviation Authority (“**IAA**”) in respect of the determination of the Commission for Aviation Regulation (“**CAR**”) published on 24 October 2011 “*maximum levels of aviation terminal service charges*”. This determination (“**The Determination**”) was published as Commission Paper 2/2011.

The Appeal Panel members were Tony O’Connor SC (Chairman), Richard Cummins and Liam Twohig.

POWERS AND PROCEDURE OF THE APPEAL PANEL:

The Appeal Panel cannot substitute the view of CAR with the Appeal Panel’s view. It may only refer the decision in relation to the Determination back to CAR if there are sufficient grounds for doing so by reference to the matters set out in Section 36 of the 2001 Act.

The Appeal Panel decided that:-

- (a) If the Appeal Panel is not satisfied that CAR has had due regard to all of the issues set out in Section 36 it would refer the Determination back to CAR for further consideration;
- (b) If the Appeal Panel is satisfied that CAR has had regard but it has manifestly erred in its consideration, it would refer the Determination back to CAR;
- (c) In all other scenarios it would confirm the Determination.

The Appeal Panel decided this as it appeared futile to refer a determination back to CAR where it had already considered the issues.

PROCEDURE:

The Appeal Panel requested the Appellant, the IAA, to set out its grounds of appeal with particular reference to matters in the CAR Determination which the IAA considered relevant to the appeal. This document was to be called the “**Notice of Appeal**”. On the 21 September 2012 the IAA furnished the Notice of Appeal to the Appeal Panel and served a copy as requested by the Appeal Panel on CAR.

The Appeal Panel requested the assistance of CAR on six specific questions which were as follows:-

“1. “EU Regulation No. 1191/2010 that amends Regulation no. 1794/2006 states at Article 6.2 *“staff costs shall include gross remuneration, payments for overtime, employers’ contributions to social security schemes as well as pension costs and other benefits. Pension costs may be calculated using prudent assumptions according to the governance of the scheme or to national law as appropriate. These assumptions shall be detailed in the national performance plan.”*

Was there a reason for CAR to overlook Article 6.2 of the Regulation in its decision relating to the IAA pension costs?

2. If it is correct that CAR introduced a “quality of service” metric for the first time in this determination, why did it do so when it appears that common EU wide criteria will be introduced on the 1st January 2015?
3. Is the IAA correct in its submission that the said introduction of “quality of service” “is inconsistent with the European Best Practice”?
4. Are similar “quality of service” metrics in operation in other EU countries and if so where?
5. Are there different models of “quality of service” metrics in operation in other countries and if so, please give the panel examples?

6. The IAA has stated in its submission to the Appeal Panel that the Dublin Airport Authority (DAA) does not have a strike penalty as part of its service metric. Is that correct, and if it is correct, please explain why the IAA has been treated differently to the DAA which appears to be a sensitive issue?”

CAR’S RESPONSE:

By letter dated 5 October 2012, CAR explained that it would be inappropriate for CAR to act in the role of respondent in the appeal panel process, but it expressed an understanding that the appeal panel should be apprised of all issues relevant to the matters raised under the appeal. CAR offered to provide a note of the references in the draft determination, final determination documents and in any related materials, where it shows that it dealt with the matters raised by the IAA in its appeal.

Whether CAR can be a Respondent:

The Appeal Panel agreed that it would be inappropriate for CAR to act in the role of respondent for the reasons which were summarised in the decision of the first Aviation Appeals Panel decision dated January 2002 where it explained:-

- “ a) *Where a panel decides to refer a decision in relation to the determination back to the Commission, the panel does not substitute its judgment for that of the Commission. It merely decides that there are “sufficient grounds” for referring the decision relating to the determination back to the Commission for review.*
- b) *Upon a referral back to the Commission, it is required to exercise a judgment as to whether it will “affirm or vary its original determination”. An anomaly could arise if the Commission participated in the process before the panel and argued against the existence of “sufficient grounds” and urged on the panel that its determination should be confirmed. If this contention was rejected by the panel, the Commission would then ultimately have to adjudicate on its own argument. That could be seen as*

the Commission being a Judge in its own cause, albeit that the panel was only concerned with the existence of sufficient grounds. Thus, in the interests of the overall fairness of procedures under the Act, the Panel considered this an unsatisfactory situation and one to be avoided by it in the procedures that it set for the appeal.

- c) The Panel also took account of the fact that in general, a statutory decision making body is not usually a party to an appeal. Where there are exceptions to this, e.g. a planning authority in the context of appeals from An Bord Pleanála, such appeals are full and qualified appeals involving a substitution of the decision of the appellate body for that of the decision maker. That is not the position in the case of appeals to the Panel, which makes a decision as to the existence of “substantial grounds” and then refers the decision relating to the determination back to the Commission.”*

CAR’s Assistance – 12 October 2012:

In accordance with the Appeal Panel’s request, CAR referred the Appeal Panel to the references in its “Issues Paper”⁶, draft determination⁷ Analysis of QoS metrics and final determination⁸ which related to each of the grounds of appeal of the IAA (a copy of the 11 page “Response” of CAR is attached as an appendix to this Decision).

⁶ Commission paper 3/2010 dated 29 October 2010.

⁷ Commission paper 1/2011 dated 27 May 2011.

⁸ Commission Paper 2/2011 dated 24 October 2011.

The Decision concerning the Grounds of Appeal:

Preliminary:

The Appeal Panel in making this decision determined that it would have regard only to material which was before CAR when it made the Determination and not to subsequently procured material or events.

GROUND 1 – Quality of Service Metric:

Despite the IAA's belief that the approach of CAR was flawed for the reasons set out in the Notice of Appeal, the Appeal Panel is satisfied that CAR had due regard to the matters set out in section 36 of the 2001 Act without making any manifest error in that consideration.

GROUND 2 – Equipment Failure:

The IAA contended that the penalty for equipment failure is “*unsafe discriminatory and contrary to the requirements of Section 36*” as set out in the Notice of Appeal. The Appeal Panel is satisfied that CAR had due regard to the matters set out in section 36 of the 2001 Act without making any manifest error in that consideration.

GROUND 3 – ATC Strike Action:

The Appeal Panel is satisfied that CAR had due regard to the matters set out in section 36 without making any manifest error in that consideration in relation to strike action.

GROUND 4 – Pension costs:

The Appeal Panel was not satisfied that CAR had due regard to Section 36 (e) which should be applied with the effect of Article 6.2 of Regulation 1794/2006⁹ and “*the decision by Ireland not to apply the provisions of Regulation 1794/2006 as amended by Regulation 1191/2010 to terminal charges until 31 December 2014 as allowed under Article 2 of Regulation 1191/2010*”¹⁰. The Appeal Panel set out below the relevant regulations and analysis.

Article 6 of Regulation 1794/2006 provides:

“Calculation of Costs:

- 1. The costs of eligible services ... shall be established in such a manner as to be consistent ...*
- 2. The costs referred to in paragraph 1 shall be broken down into staff costs, other operating costs, depreciation costs, costs of capital and exceptional items, including non-recoverable taxes and custom duties paid, and all other related costs.*

Staff costs shall include gross remuneration, payments for overtime, employers’ contributions to social security schemes as well as pension costs and other benefits.

Other operating costs shall ...”

⁹ Commission Regulation (EC) No. 1794/2006 of 6 December 2006 laying down a common charging scheme for air navigation services.

¹⁰ Letter dated 29 April 2011 from the Department of Transport to CAR and included at page 52 of the Draft Determination dated 27 May 2011.

EU Regulation 1191/2010:

The EU Commission decided that Regulation 1794/2006 needed to be updated and brought into force Regulation 1191/2010 which it sought to apply to air navigation service costs in the year 2012¹¹.

Transitional Provisions:

Article 2 of Regulation 1191/2010 enabled Member States with national regulations which existed prior to 8 July 2010 to establish a reduction on the unit rate beyond the Union wide targets to exempt air navigation service providers from Article 11A(3) of Regulation 1794/2006. Article 2 also allowed Member States to defer the application of the provisions of Regulation 1794/2006 as amended by Regulation 1191/2010 to terminal charges until 31 December 2014.

Amendment of Article 6.2 of Reg 1794/2006:

The 2010 Regulation added:

“Pension costs may be calculated using prudent assumptions according to the governance of the scheme or to national law, as appropriate. Those assumptions shall be detailed in the national performance plan”

Government Decision:

In its “Response” dated 12 October 2012 CAR, advised¹² the Appeal Panel that the effects of Regulation 1191/2010 “on the 2011 determination were limited because the Irish government chose to defer the application to terminal charges of the Regulation”. CAR referred the Appeal Panel to its draft determination which had stated that it was not attempting to comply with the methodologies that might be used to set charges under SES II as there is too much uncertainty around what a performance plan might look like in 2015. CAR explained to the Appeal Panel that there was no change in the statutory environment between the time of the draft determination and the final determination.

¹¹ Commission Regulation (EU) 1191/2010 of 16 December 2010 amending Regulation (EC) 1794/2006 laying down a common charging scheme for air navigation services.

¹² Page 9 of the Response.

Decision under Section 40 (5):

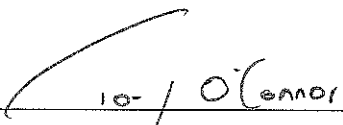
The Appeal Panel was not satisfied that the Commission for Aviation Regulation (“CAR”) in its determination dated 24 October 2011 entitled “*Maximum level of aviation terminal services charges that may be imposed by the Irish Aviation Authority*” (“the Determination”) had due regard to the pension costs incurred by the Irish Aviation Authority (“IAA”) in providing aviation terminal services.

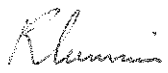
In its “Notice of Appeal” to the Appeal Panel, the IAA outlined the actions which it has agreed with staff to eliminate the pension fund deficit in 2018. The IAA’s submission quoted Commission Regulation (EU) No 1191/2010 of 16 December 2010 which at Article 6 Paragraph 2 makes specific reference to pensions. This regulation amended Commission Regulation (EU) No 1794/2006.

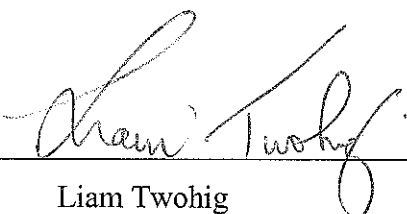
In reply to the Appeal Panel, CAR advised that the Department of Transport had notified CAR in April 2011 of the Government’s decision “*not to apply the provisions of Regulation 1191/2010 to terminal charges until 31 December 2014*”. In light of this the Appeal Panel concluded that Article 6.2 of Regulation 1794/2006 applied and that this Article allows the IAA to recoup its pension costs through Aviation Terminal Services Charges for staff involved in the provision of Terminal Services at Dublin, Cork and Shannon Airports. The Appeal Panel examined all of the written material furnished and was not satisfied that CAR had due regard to pension costs in its determination dated 24 October 2011.

In that context the Appeal Panel determined that there were sufficient grounds for referring the Determination back to CAR for review.

Dated this 16th day of November 2012.

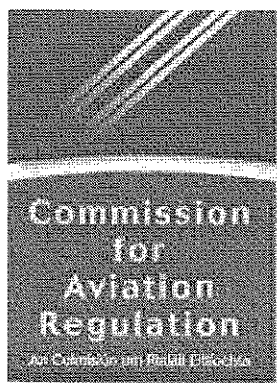
Signed: 
Tony O'Connor SC

Signed: 
Richard Cummins

Signed: 
Liam Twohig

APPENDIX

**Commission for Aviation Regulation
Response to the 2012 Appeal Panel
Dated 12 October 2012.**



Response to the 2012 Appeal Panel

12 October 2012

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Glossary of Terms

ANSP	Air Navigation Service Provider
ATC	Air Traffic Control
ATFM	Air Traffic Flow Management
ATSC	Aviation terminal service charge
IAA	Irish Aviation Authority
IATA	International Air Transport Association
ICAO	International Civil Aviation Organisation
Opex	Operating expenditure
PRU	Performance Review Unit
SDG	Steer Davies & Gleave Limited
SES II	Single European Skies II
TWR	Aerodrome Control Tower
QoS	Quality of Service

1. Introduction

- 1.1 In its Notice of Appeal to the Aviation Appeal Panel, the IAA raises the following aspects of the CAR's Determination:
- the quality of service metric,
 - the financial penalty for equipment failure,
 - the financial penalty for ATC strikes, and
 - the treatment of pension costs.
- 1.2 As already indicated to the Chairman, the Commission's view is that the correct legal approach for it to adopt in responding to an appeal is to confine itself to summarising how it addressed the various matters raised under appeal. This note provides a reference guide to published material from 2010 onwards which demonstrates how matters were progressed and concluded by the Commission. This document sets out the Commission's response to each of these grounds by referring the Panel to the information relied and consulted upon by the Commission during the Determination process. Each ground is dealt with in the order set out above.
- 1.3 The compatibility of the Final Determination with legal requirements, including in regard to pension spending (as part of opex) and service quality, are set out in Chapter 8 of the Final Determination entitled "Compliance with Statutory Requirements".
- 1.4 The CAR, in working towards the IAA Determination for 2012-15 engaged in a three-part process, extending over 12 months. We refer the panel to the following documents:
- 1.5 Issues Paper (Chapter 3 and 5) which discussed inter alia the importance of quality of service and how IAA expenditure on pensions evolved in the 2007-2011 price control period.
- 1.6 Draft Determination (Chapter 5 and 7) which set out the CAR's draft proposals in respect of a quality of service regime and future opex allowances, including for pensions.
- 1.7 Final Determination (Chapter 3 and 5) which set out the CAR's final Quality of Service metrics as well as the opex allowance, including for pension costs in the 2012-2015 period.
- 1.8 All documents referred to in this note are contained on a CD provided to the members of the Appeal Panel. Three reports prepared by Steer Davis Gleave (SDG) in relation to the quality of service metric are also included. The two first reports, entitled "Study of other jurisdictions" and "Selection of metrics", represent background research material for the CAR, and consist of information compiled from published sources and industry knowledge. The third and final report entitled "Level of target" was published as an Annex of the Draft Determination.

- 1.9 This document is structured as follows. Sections 2 to 5 treat separately each ground raised in the Notice of Appeal. Within each of these sections, the main issue raised in the Appeal is summarised before we present the work that the Commission undertook in relation to this issue. The Commission's work is presented in a chronological manner, starting with the Issues Paper and ending with the Final Determination.
- 1.10 Finally, section 6 presents the CAR's answers to the six questions raised by the Appeal Panel in its letter to the CAR of 2 October 2012.

2. Ground 1 – The Overall Quality of Service metric

- 2.1 In the Notice of Appeal, the IAA seeks to have the QoS metric of the 2011 Determination referred back to the CAR for review because it leads to negative incentives and is uneconomic, unrealistic and inconsistent with the development of performance metrics in the EU. The IAA would prefer to see the abolition of the current QoS term.
- 2.2 There was no QoS element in the 2007 Determination. Consequently, despite significant ATC disruptions during the 2007-2011 period, in particular
- Radar failure in July 2008, and
 - Industrial action in January 2010
- no penalty was applied to the terminal services charge.
- 2.3 The Issues Paper (Chapter 3) set out for comment the matters relating to quality of service that the CAR might have regard to when making the determinations. It noted that section 36(f) of the 2001 Aviation Regulation Act requires the Commission to have due regard to the "level and quality of aviation terminal services, and the reasonable interests of the users of these services".
- 2.4 Responses were submitted by Aer Lingus, the IAA and IATA. Aer Lingus welcomed a quality of service scheme including financial penalties for missed service targets. It cited the IAA radar failure of July 2008 which resulted in additional costs and lost revenues to Aer Lingus of in excess of €1m. IATA considered that delay performance was crucial to airlines' service quality. Subject to costs of any scheme not outweighing benefits, it supported a scheme to incentivise delay reduction.
- 2.5 The IAA questioned the need for a formal quality of service scheme, citing examples of what it argued were proactive measures on its part responding to the needs of its customers. It referred to favourable assessments customers gave of its service quality. It thought the cost of providing information on service quality would outweigh the benefits, and it argued that a penalty of up to 8% of revenues was unreasonable.
- 2.6 In preparing the Draft Determination, the CAR obtained consultancy support from SDG on technical aspects of developing a QoS scheme for terminal navigation services. The advice obtained was summarised in paragraph 5.8 of the Draft Determination, and an SDG report on establishing metrics and targets for a terminal ANS service quality scheme was published for comment as an annex to the Draft Determination.
- 2.7 In the first stage of its work for the CAR, SDG interviewed a number of stakeholders, including Eurocontrol. The consistency between a terminal services QoS regime in Ireland and later EU requirements was raised with Eurocontrol. SDG reported to the CAR as follows:
- 2.8 "The PRU [performance review unit of Eurocontrol] has advised that ... it is unlikely that the implementation of a terminal ANS service quality incentive scheme by an individual State would result in a conflict with future requirements as part of RP2 [Eurocontrol's reference period 2: 2015-2019], and indeed the introduction of a mechanism such as this in one State could provide useful lessons

for EU-level regulators in developing targets for RP2. There is therefore no conflict with the Performance Scheme.” (SDG report no.1, Feb. 2011, para. 5.10)

- 2.9 The Draft Determination (Chapter 5) proposed a QoS metric which would penalise instances of ATC delay under the control of the IAA. Delays might result in a maximum reduction in charges capped at 10 per cent.
- 2.10 Responses to the Draft Determination were submitted by the DAA, the IAA, IATA and Ryanair. The IAA, IATA and Ryanair submissions specifically addressed the proposed QoS regime. The IAA supported a quality of service scheme that formed part of a European-wide delay management programme. The IAA felt that the CAR's scheme was unclear and counter-productive, punishing the IAA for delays outside its control. Both IATA and Ryanair fully supported the introduction of a QoS term incentivising the IAA to avoid delays due to industrial action, equipment failure and other factors under its control.
- 2.11 The Final Determination (Chapter 3) set a QoS metric that focused narrowly on areas where the regulated entity, as opposed to any third party or other outside factors, is responsible for a diminution for the service it provides. This logic is in line with the fact that “service providers do not normally get paid if they are unable to provide their service because of staffing problems or equipment failure” (para 3.10). Four specific codes were included to try to capture all delay reports that might relate to problems with staffing and equipment. The CAR considered that the financial implications of the QoS term would be modest, if the IAA conducted its business efficiently and effectively. In 2010 there were only three events that would have been captured by the new QoS penalty. The CAR considered that the level of satisfaction with the service that the IAA provides did not obviate the benefit of having an explicit service quality regime, which would offer some protection to users against a significantly impaired service.

3. Ground 2 – Equipment failure

- 3.1 In the Notice of Appeal, the IAA argues that the financial penalty for equipment failure is unsafe by having the potential to drive behaviour focused on financial return rather than safety concerns. It further argues that the equipment failure penalty is discriminatory and contrary to section 36 of the Aviation Regulation Act.
- 3.2 The few specific references to equipment failures in the consultation materials published by the CAR or in the responses received, above and beyond general statements in relation to the QoS scheme are already cited in the previous section (Ground 1) of this note.
- 3.3 Delays caused by the equipment issues were identified by SDG as being under the control of the ATC provider (SDG report no 1, Table 2.1). The CAR was aware that for some disruptions, such as a failure of ATC equipment, longer recovery durations of four or more hours would usually be observed (SDG report no 3, para 2.19). SDG recommended that "a relatively low delay length is set as a trigger (such as 15 minutes) given the exceptional nature of the events the Commission wishes to capture." (SDG report no. 3, para. 3.3.)
- 3.4 The Aer Lingus response to the Issues Paper (p.3) referred to an IAA radar failure in July 2008 related to equipment quality, which it said had cost the company in excess of €1m. The IATA and Ryanair response to the Draft Determination supported the inclusion of equipment failure in the QoS metric.
- 3.5 The Commission addressed the IAA's concerns about the equipment failure aspect of a QoS scheme in the Final Determination, stating that "it is possible that the IAA may wish to assign responsibility to a supplier for equipment failures, but even in such circumstances introducing some financial incentive for the IAA to avoid such outcomes is no different to the financial incentives that face most service providers in the economy" (para. 3.10).
- 3.6 The CAR also considered that the QoS scheme ought not to have significant financial implications if the IAA conducted its business efficiently and effectively (Final Determination, para. 3.7). The CAR also saw no reason for safety to be compromised because of the required cost-efficiencies (Final Determination, para. 5.25)
- 3.7 The choice of an absolute delay threshold was made in order to focus on significant events and exclude shorter delays. The size of the financial penalty was not linked to the length of delay for reasons of simplicity (SDG report no. 3, para. 3.16). In the Draft Determination the CAR argued that the "case for defining a baseline level of service for any price-cap regime seems strong. It acts as a check against the regulated entity securing "false" savings by merely offering a lesser service. At the same time, it is desirable to avoid a regulatory regime that creates perverse incentives for stakeholders to seek to "game" a series of key performance indicators so as to realise a more favourable price cap." (para. 5.7.)

4. Ground 3 – ATC Strike Action

- 4.1 The IAA Notice of Appeal claims that placing a financial penalty on ATC strikes takes away the company's right-to-manage by weakening the management's position in union negotiations. The IAA also considers that it is doubly penalised as, in the event of a service disruption, it will suffer a loss of revenue associated with the interruption but also the costs associated with the QoS penalty for strikes. The IAA points out that there is no similar penalty applied to the DAA for strike action.
- 4.2 Appendix C of the first SDG report gives an overview of service and quality indicators in Europe. The effect of industrial action by different groups forms part of material events in the UK CAA's Service and Quality rebate scheme at Heathrow and Gatwick airports (para. 3.9). Strikes are excluded from the French scheme to measure ATC delays (para. 2.11). Italy had an indicator for service continuity, which includes staff management. SDG proposed industrial action under the IAA's control as one possible material event in the context of delays or interruption to service (SDG report no. 2, para. 3.2.). Table 2.1 of SDG report 3 showed there had been two delays in 2010 of more than 15 minutes caused by IAA industrial action (para. 2.5).
- 4.3 The IAA was the only party to specifically mention industrial action in its response to the Draft Determination. It was concerned that the proposed reduction in the price cap might give rise to industrial action by its staff (page 26 and 27).
- 4.4 It was the CAR's view that the QoS scheme ought not to have significant financial implications if the IAA conducted its business efficiently and effectively (Final Determination, para. 3.7).

5. Ground 4 – Pensions

- 5.1 In its Notice of Appeal, the IAA sought a 'pass through' into the cost base of the total funding costs of its pension scheme in 2012-2015, as it considered that the CAR's allowance in the 2011 Determination undermined the pension scheme.
- 5.2 The IAA also argued for retrospective recovery of pension costs where these had exceeded the allowance set by the CAR in its previous (2007) Determination for the years 2007-2011. The IAA argued that pension costs are different to opex costs and the full costs should therefore be allowed.
- 5.3 We address each issue in turn.

Pass-through of total pension funding costs in 2012-2015

- 5.4 The legal basis for considering the IAA's operating costs (including pensions) is found in section 36(e) of the 2001 Aviation Regulation Act. The CAR also had regard to ICAO and Eurocontrol charging principles, as required under section 36(a) of the Act. CAR's compliance with its statutory requirements was discussed in Chapter 8 of the Final Determination.
- 5.5 The opex chapter of the Issues Paper reported the IAA's opex performance over time; against the CAR's 2007 opex allowance; and with reference to trends in potential comparators.
- 5.6 Submissions were received from Aer Lingus, the International Air Transport Association (IATA) and the IAA. Both Aer Lingus and IATA noted that the airline industry had successfully cut its costs in the face of the economic downturn, and urged the CAR to rigorously scrutinise the IAA's cost base and to adopt the most progressive approaches to operating cost control.
- 5.7 The IAA submission argued that it had pro-actively addressed the pension issue with a number of actions to bring the fund into surplus. It thought pension costs should be allowed in full for the purposes of the next determination.
- 5.8 The Draft Determination (Chapter 7) contained an assessment of the IAA's operating efficiency. The CAR proposed an opex allowance for the next regulatory period set with respect to total operating expenditure, rather than its constituents such as pension costs. The objective was that by 2015 the company's operating costs would have been brought back to their level (in real terms and adjusted for traffic movements) when traffic had last been very similar to the 2015 traffic forecast. The rationale for this approach was contained in paragraphs 7.33-7.35.
- 5.9 Four responses were received to the Draft Determination; from the DAA, IAA, IATA and Ryanair. The DAA, IATA and Ryanair responses did not address pension costs specifically. IATA endorsed the overall efficiency target for the IAA. Ryanair welcomed the CAR's "belated recognition that the IAA's costs are excessive..." (p.3). It disputed the IAA's contention that it was difficult to respond to unplanned reductions in traffic, claiming Ryanair provided an example of successfully overcoming challenges.

- 5.10 The IAA response reiterated the actions that it had taken to bring the pension fund into surplus; it continued to think that pension costs should be allowed into the cost base in full for the next determination. The IAA also cited SES II's amended Charging Regulation (EU Regulation 1191/2010) which treats pension contributions as a 'pass through' cost. At the time of the Determination, this Regulation did not apply in Ireland by virtue of having been deferred to 31 December 2014 by a decision of the Government as allowed by the Regulation. (Annex 2, Draft Determination. See also section 6 below, reply to Question 1.)
- 5.11 The Final Determination included an opex allowance for the four years 2012-2015. The CAR's reasoning in regard to its treatment of opex in general is set out at paragraphs 5.13 to 5.25 of Chapter 5. The CAR's position on pension costs may be found at paragraph 5.22.

Retrospective allowance of full 2007-2011 pension funding costs

- 5.12 The IAA's Notice of Appeal also seeks a recovery of the full costs of pensions incurred in the previous Determination (2007 to 2011) where these exceeded the costs allowed by the CAR.
- 5.13 The CAR's response to this request was treated in the setting of an overall opex allowance; the Panel is referred back to the previous section of this note. In this section, only direct references to retrospective recovery of earlier over-spends, including on pension, are cited.
- 5.14 The Issues Paper (Chapter 5) contained an analysis of the IAA's outturn expenditures for the period 2007-11. Compared to the CAR's 2007 opex allowance, the IAA had over-spent (including on pensions) in each of the years 2007-2009, and this pattern was expected to continue in 2010 and 2011.
- 5.15 The CAR re-stated its general regulatory stance towards spending over-runs by a regulated firm at paragraph 5.4 of the Issues Paper. "The incentive system operated by the CAR ensures that the risk and cost of underperformance against an opex allowance is incurred by the firm and not by its users within a regulatory period."
- 5.16 The IAA response to the Issues Paper argued that earlier over-spends had been beyond its control. On pension overruns, it cited the policy of the UK regulator towards the British air navigation service provider's pension costs to argue that it was conventional to take account of opex overruns. It cited SES II's amended Charging Regulation which protected pension contributions as a 'pass through' cost.
- 5.17 Chapter 5 of the Final Determination contains the CAR's opex target for the IAA. The rationale may be found at paragraphs 5.13 to 5.25. The CAR's position on pension costs is located at paragraph 5.22.

6. Response to six questions raised by the Appeal Panel

In a letter of 2 October 2012, the chairperson of the Appeal Panel wrote to the CAR seeking its assistance on the six specific questions enumerated below. In this part of the note, the CAR has sought to provide clarification [as far as possible] on the basis of references to published price review documentation.

Q1 EU Regulation NO 1191/2010 that amends Regulation NO 1794/2006 states at Article 6.2 “*Staff costs shall include gross remuneration, payments for overtime, employers contributions to social security schemes as well as pension costs and other benefits. Pension costs may be calculated using prudent assumptions according to the governance of the scheme or to national law as appropriate. These assumptions shall be detailed in the national performance plan.*”

Was there a reason for the Commission for Aviation Regulation (CAR) to overlook article 6.2 of the Regulation in its decision relating to the Irish Aviation Authority (IAA) pension costs?

The Issues Paper drew the attention of interested parties to the potential importance of proposed amendments to Regulation 1794/2006 and the significant alteration proposed to certain aspects of that framework. This was set out at a general level in paragraphs 7.7 to 7.9 of the Issues Paper and, in terms of expected impact on particular aspects of the regulatory regime, in paragraphs 2.13 to 2.24.

However, the effects of the amended Regulation on the 2011 determination were limited because the Irish government chose to defer the application to terminal charges of the Regulation. In April 2011, the Department of Transport wrote to advise the CAR of the Government's decision to “not to apply the provisions of Regulation 1191/2010 to terminal charges until 31 December 2014”, as allowed for under the Regulation. The full text of the Department's letter is contained as Annex 2 to the Draft Determination.

Paragraph 4.3 of the Draft Determination set out the CAR's approach to EU regulations:

“For the purposes of making this determination, the statutory environment is similar to that prevailing in 2007. There have been significant developments relating to SES II initiative in the intervening period, but the Irish government has chosen to defer those provisions that would otherwise have had implications for terminal charges until 31 December 2014. Perhaps most importantly for this determination, the IAA will not separately have to comply with a national performance plan for terminal charges in the period 2012-2014. Consequently, we have made this determination without necessarily attempting to comply with the methodologies that might be used to set charges under SES II, given there is no binding performance plan for terminal charges for the next three years and there is too much uncertainty around what a performance plan might look like in 2015.”

As there was no change in the statutory environment between the time of the Draft and Final Determinations, the latter document does not elaborate on what the CAR had said on this matter in the Draft Determination just cited.

Q2 If it is correct that CAR introduced a "Quality of Service" metric for the first time in this determination why did it do so when it appears that common EU wide criteria will be introduced on 1st January 2015?

It is correct that the CAR included a QoS scheme in the terminal services price cap for the first time in 2011. Under section 36(f) of the 2001 Aviation Act, the CAR is required to consider quality of service.

In its absence, there would have been no protection for service users arising from a significant deterioration in service in 2012-2014, such as had occurred with the July 2008 radar failure and the January 2010 industrial action; the position for 2015 was not known.

Q3 Is the IAA correct in its submission that the said introduction of "Quality of Service" "is inconsistent with European best practice"?

The trend at EU level towards developing performance indicators, as has been done for en-route services and is under discussion for terminal services, suggests that the introduction of QoS metrics might be considered as best practice, though ultimately this is a matter of judgement.

As part of its background research for the CAR, SDG conducted interviews with a number of stakeholders. Concerning the compatibility of a national scheme with a later EU scheme:

"The PRU [Eurocontrol's productivity review unit] has advised that ... it is unlikely that the implementation of a terminal ANS service quality incentive scheme by an individual State would result in a conflict with future requirements as part of RP2 [reference period 2: 2015-2019], and indeed the introduction of a mechanism such as this by one State could provide useful lessons for EU-level regulators in developing targets for RP2. There is therefore no conflict with the Performance Scheme." (SDG report no.1, February 2011, para. 5.10.)

Q4 Are similar "Quality of Service" metrics in operation in other countries and is so where?

The design of the CAR's QoS incentive scheme was informed by reports prepared by SDG for the CAR.

- The first two were background research for the Commission. The first report (February 2011) surveyed QoS regimes in other European countries in the context of forthcoming EU regulations. It also gave an overview about available data sources and data quality. The second report (April 2011) dealt with the selection of metrics and assessed the suitability and reliability of two metrics: a delay metric and a runway throughput metric.
- The third report (May 2011) "Level of target" proposed and tested a specific QoS metric, and was published as an annex to the Draft Determination.

Information on QoS regimes operated in other countries was collected by SDG for the CAR, and is presented in Appendix C of the first SDG report. The table shows that equipment performance forms part of the general delay metric in the vast majority of the

13 countries investigated. Some countries have also introduced specific indicators for equipment service, such as Italy or Estonia. In France, the measurement of ATFM delays excludes strikes or exceptional weather related events from the causes of delay (para. 2.11). Italy has introduced an indicator for service continuity, which includes staff management.

Only three ANSPs had any externally imposed performance management regime (the UK, the Netherlands and France) and only the UK scheme had financial incentives linked to terminal ANS service quality (para. 2.10). As described more fully in paragraphs 3.1 to 3.15, the UK has no terminal financial performance incentive *scheme* per se but terminal ANS in the UK had become a contestable market and there exist service level agreements between the service provider and the airport operator.

In the UK, ATC equipment failure and industrial action by TWR (aerodrome control tower) and airport operations staff form part of material events in the Service and Quality rebate scheme at Heathrow and Gatwick airports (para. 3.9). In France, the department of air navigation services considered in 2009 introducing financial incentives but opted to wait for RP1 to see whether financial incentives would become mandatory. Later, the French department opted not to design financial incentives on capacity for RP1 (para. 2.13 and 2.14)

Q5 Are there different models of “Quality of Service” metrics in operation in other countries and is so please give the Panel examples?

Please see the CAR's reply to question 4; the table in Appendix C of SDG's first report reviews local and regional performance planning, consultation and management processes in 13 EU countries.

Q6 The IAA has stated in its submission to the Appeal Panel that the Dublin Airport Authority (DAA) does not have a strike penalty as part of its service metric. Is that correct and if it is correct please explain why the IAA has been treated differently to the DAA which appears to be a sensitive issue?

In a number of stages between June 2008 and December 2009, the CAR developed an airport QoS scheme linked to charges at Dublin airport. The discussion in a preliminary Consultation Paper, the subsequent Issues Paper (Chapter 3), and the Draft (Chapter 5) and Final Determinations (Chapter 4) indicate that there were a number of considerations for the CAR in designing this scheme. These publications are all available on the CAR's website at <http://www.aviationreg.ie/regulation-of-airport-charges-dublin-airport/2010-airport-charges.122.html>.

In particular, the CAR was keen that each QoS scheme should reflect the views of service users. For this reason, quality of service metrics between the DAA and the IAA might easily differ. For example, airport users placed great importance on departure security queue delays, and the airport QoS regime reflects this. Terminal navigation service users, as noted above, advised the CAR that they supported the inclusion of delays arising from equipment failures and strikes in the QoS metric.