

**DECISION OF THE AVIATION APPEALS PANEL 2020**

**Established by order of the Minister for Transport, 4<sup>th</sup> February 2020**

**Appeal of Ryanair against Determination of the Commission for Aviation  
Regulation CP8/2019**

**Eoin McCullough S.C.**

**Hannah Nixon**

**Andrew Charlton**

## THE DETERMINATION

1. The Commission for Aviation Regulation (“**the Commission**”) published its final Determination (“**the Determination**”) on airport charges at Dublin Airport for the period 2020/2024 on the 24<sup>th</sup> October 2019.
2. The table below shows the maximum revenue per passenger that Dublin Airport Authority (“**daa**”) can collect at Dublin Airport per the Commission’s final Determination CP8/2019.

	2020	2021	2022	2023	2024	Average
Price cap per Passenger	€7.50	€7.50	€7.88	€8.12	€8.32	€7.87

Within the period of the Determination, these price caps can change for various reasons, details of which are set out in the Determination.

## LEGAL ISSUES

3. Section 33 of the Aviation Regulation Act (“**the 2001 Act**”) (as substituted by section 22 of the State Airports Act, 2004) provides: -

*“(1) In making a determination the objectives of the Commission are as follows: -*

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

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

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

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

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

- (b) *the level of investment in airport facilities at Dublin Airport, in line with safety requirements and commercial operations in order to meet the needs of current and prospective users of Dublin Airport,*
- (c) *the level of operational income of Dublin Airport Authority from Dublin Airport, and the level of income of Dublin Airport Authority from any arrangements entered into by it for the purposes of the restructuring under the State Airports Act 2004,*
- (d) *costs or liabilities for which Dublin Airport Authority is responsible,*
- (e) *the level and quality of services offered at Dublin Airport by Dublin Airport Authority and the reasonable interests of the current and prospective users of these services,*
- (f) *policy statements, published by or on behalf of the Government or a Minister of the Government and notified to the Commission by the Minister, in relation to the economic and social development of the State,*
- (g) *the cost competitiveness of airport services at Dublin Airport,*
- (h) *imposing the minimum restrictions at Dublin Airport Authority consistent with the functions of the Commission, and*
- (i) *such national and international obligations as are relevant to the functions of the Commission and Dublin Airport Authority.”*

4. Section 40 of the 2001 Act provides: -

*“(2) The Minister shall, upon a request in writing from a person to whom this Section applies who is aggrieved by a determination under Section 32(2) or 35(2), establish a panel (“appeal panel”) to consider an appeal by that person against the determination.*

.....

*(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 33 or 36 there are sufficient grounds for doing so, refer the decision in relation to the determination back to the Commission for review.*

*(6) An appeal panel shall notify the person who made the request under subsection (2) of its Decision under subsection (5).”*

5. The Minister for Transport received requests from two parties aggrieved by the Determination, (one being Ryanair and the other being daa). On the 4<sup>th</sup> February 2020 the Minister for Transport established an Appeal Panel (“**the Panel**”) to consider those appeals. The members of the Panel are Mr. Eoin McCullough S.C. (Chairman), Ms. Hannah Nixon, and Mr. Andrew Charlton.
  
6. As pointed out above, Section 40(4) of the 2001 Act provides that an appeal panel shall determine its own procedure. The Panel determined that the following procedures were appropriate: -
  - (i) There is considerable overlap between each of the two appeals. The Panel therefore decided that it was appropriate to hear each of the two appeals together, but at the conclusion of the process to produce a separate determination in respect of each of the two appeals.
  - (ii) Each of Ryanair and the daa was invited to produce detailed written submissions.
  - (iii) Each of Ryanair, the daa and the CAR was invited to produce such written submissions as they wished to make in response to the initial written submissions by Ryanair and the daa.
  - (iv) Aer Lingus applied to the Panel to be permitted to participate. Having consulted with the other participants, the Panel granted Aer Lingus the right to participate. Aer Lingus was therefore also invited to make a written submission in response to the initial written submissions by Ryanair and the daa. Ryanair, the daa and the CAR and Aer Lingus are hereafter referred to collectively as “**the Participants**”.
  - (v) The Panel, having considered the written submissions, determined that it would hold an oral hearing. Because of the restrictions following from the public health emergency caused by Covid-19, it was not possible to convene an oral hearing in the usual way. Accordingly, the oral hearing was convened by way of videoconference, which took place on 6

and 7 April 2020. Each of the daa, Ryanair, CAR and Aer Lingus participated in the oral hearing. A stenographer kept a record of the hearing.

7. It follows from section 40(5) of the 2001 Act that the Panel may not substitute its own view for the view of the Commission. It does not have the power to reject the Determination or amend it in any respect. It may only refer the decision in relation to the Determination back to the Commission for review when it considers that there are sufficient grounds for doing so by reference to the provisions of section 33.
8. The Panel asked each of the participants to address the nature and standard of the appeal to the Panel.
9. daa submitted that the appeal was on the merits. The Panel is obliged to look at the merits of the grounds of appeal brought before it. Where it is satisfied that there is merit in the arguments being presented, then the duty of the Panel is to refer the relevant matter to the Commission for its review. It submitted that each flaw could be considered individually, with errors also to be considered cumulatively where applicable.
10. Ryanair submitted that the appropriate approach is that set out in the decision of the Appeal Panel in 2009. The 2009 Appeal Panel determined that: -
  - (a) If the Panel was not satisfied that the Commission had properly considered the matters referred to at section 33, it would refer the Determination back to the Commission for further consideration.
  - (b) If the Panel was satisfied that the Commission had considered the matters referred to at section 33 but was satisfied that there were sufficient grounds to do so, it would refer the Determination back to the Commission for further consideration.

Ryanair referred to the decision of O'Sullivan J. in *Aer Rianta v. The Commissioner for Aviation Regulation* (unreported, O'Sullivan J., 16<sup>th</sup> January 2003). It was submitted that O'Sullivan J. determined first that the jurisdiction of the Panel was one for the correction of errors, and secondly that the Panel could make recommendations which must be considered by the Commission.

It was submitted that the Panel was not obliged to show any deference to the views of the Commission. The question is not whether the Commission acted irrationally or unreasonably, but rather whether the Panel as an expert group takes a different view from that taken by the Commission. If the view of the Panel on the merits is different from that taken by the Commission, then it should exercise its power to refer the decision back to the Commission.

11. Aer Lingus submitted that, if the Panel was not satisfied that the Commission had properly considered the matters referred to at section 33, then it should refer the Determination back to the Commission for further consideration. That was in accordance with the first part of the decision of the Appeal Panel in 2010. The second part of the decision of the Appeal Panel in 2010 stated simply that if the Panel was satisfied that the Commission had considered the matters referred to at section 33, but was satisfied that “there were sufficient grounds to do so”, it would refer the Determination back to the Commission for further consideration. Aer Lingus submitted that “sufficient grounds” should be more than a mere difference of opinion with the conclusion reached by the Commission, and that as a minimum the Panel should be able to point to some objective standard which the Commission had failed to follow. The standard however was not one of manifest error, or any other standard akin to that applied in judicial review.
12. The Commission submitted that the correct test is that of whether, taking the adjudicative process as a whole, on the balance of probabilities the Panel believes that there is merit in the claim of an appellant that the Commission’s decision on the point in question should be revisited by the Commission with a view to varying the decision in the manner claimed. Some examples of what might constitute a sufficient ground within the meaning of section 40 were proposed: -
  - (a) Where there is a clear error such as a mathematical error or a misstatement of a sum of expenditure or cost, or an error in relation to the application of a financial modelling methodology.
  - (b) Where the reasoning of the Commission on a point is logically incoherent.

- (c) Where there has been an omission on the part of the Commission to take into consideration a fact that was before it.
- (d) Where the Commission has clearly misunderstood a representation made by one of the appellants.
- (e) Where the Panel believes that there is merit in the argument that the weight accorded by the Commission to a representation made by an appellant was incorrect having regard to the evidence. It was submitted that the Panel is a panel of experts and is entitled to draw on its own expertise and knowledge to look afresh at the decisions of the Commission.

A distinction was drawn between the nature of judicial review and the nature of an appeal to the Panel. The test on this appeal is not one of manifest error or serious error, but simply a test of error. Issues of process, such as an alleged lack of consultation, fell to be considered exclusively as part of a judicial review, and therefore were not appropriate to be considered as part of an appeal to the Panel.

13. In response, Ryanair said that it did not ask the Panel to interfere with the decision of the Commission on the grounds of procedural error, such as lack of consultation. Ryanair's challenge was substantive and not procedural in nature, although it maintained that absence of sufficient consultation could constitute an error. Ryanair agreed with the Commission that simple error was enough, and that there was no requirement to afford deference to the assessment of the Commission. Ryanair submitted that its points of appeal fell easily within some of the categories to which the Commission had pointed as being examples of circumstances in which the Panel could uphold an appeal.
14. The Panel determined that: -
  - (a) If the Panel was not satisfied that the Commission had considered the matters referred to at section 33 it would refer the Determination back to the Commission for further consideration.

- (b) If the Panel was satisfied that the Commission had considered the matters referred to at section 33 but it was satisfied that there were sufficient grounds to refer that consideration back to the Commission, it would refer the Determination back to the Commission for further consideration. In all other events, it would uphold the Determination.
- (c) In deciding whether there were such sufficient grounds, the Panel would reach its decision on the merits. It would therefore be necessary to identify an error on the part of the Commission. The Commission must however be given a margin of appreciation. There are many issues on which judgement calls must be made, and where making the call one way or the other is not erroneous.
15. Because this is an appeal on the merits, procedural concerns would not generally constitute sufficient grounds to refer a decision back to the Commission. The Panel did not dismiss the possibility that lack of consultation might constitute an error for its purposes, but it bore in mind that issues of lack of consultation go more to process than to the merits and that the appeal to the Panel is not a judicial review. To some degree, the process before the Panel itself could assist in remedying any perceived difficulties in the consultation process.
16. The statutory requirement under section 32(17) of the 2001 Act is that the Commission should give notice of its intention to make a determination, and that it should specify the period within which representations with respect to the proposed determination may be made by members of the public. These obligations were clearly fulfilled and exceeded by the Commission. In its submission of the 16<sup>th</sup> March 2020, the Commission set out the consultation process that it followed. In April 2018 it published an Issues Paper on which it sought representations. It received and published those representations in July 2018. It then embarked on an extensive consultation process with users and stakeholders, including Ryanair, and with its Passenger Advisory Group. It published a Draft Determination in May 2019, informed with five draft reports from external consultants. It consulted again with the Passenger Advisory Group. It received and published responses from 38 stakeholders in July 2019. It offered each person who had made a submission the opportunity to meet, and a number of such meetings took place in July and August 2019. It held

workshops with Dublin Airport in July to October 2019. Finally, it published the Determination on 24<sup>th</sup> October 2019. There is no requirement, whether under the Act or otherwise, to give notice of every single detailed adjustment from the Draft Determination that the Commission might have in mind to make.

17. The Panel also asked the participants for submissions on what approach it should take to evidence that was not before the Commission, and to events occurring after the date of the Determination. That was a particularly acute issue for the Panel because the onset of the Covid-19 pandemic post-dated the Determination. The consequences of that pandemic are likely to continue to be particularly severe for airlines and airports. Section 32(14) of the 2001 Act provides for the Commission, under certain circumstances, to review and amend a determination.
18. The Commission submitted that the Panel should consider only events and evidence which were before the Commission when making its Determination. It pointed out that Covid-19 is having a significant impact on the aviation industry and is changing many of the underlying assumptions of the Determination, and that the impact of this would be best dealt with in a future review under section 32(14).
19. daa submitted that it was appropriate for the Panel to focus on events that occurred before the date of the Determination but suggested that reference could be made to later events when they clearly and distinctly implied that previous judgments and conclusions capable of having significant effects could no longer be reasonably sustained. While daa submitted that it would not be appropriate for the Panel to rely on evidence that was not before the Commission as the basis for its decision, it suggested that the Panel can and should have the ability to take into account evidence of material significance which demonstrates that judgements made can no longer be reasonably sustainable. It suggested that the Panel for that purpose could look at outturns and other findings that further support existing evidence previously presented to the Commission.
20. Ryanair submitted that events occurring after the Determination should be considered (if at all) in a review under section 32(14), and not by the Panel. It suggested that in particular, events related to Covid-19 would be matters for

the Commission to consider in the first instance. Ryanair agreed that the Panel should consider only evidence which was before the Commission when making the Determination.

21. Aer Lingus submitted that it was appropriate for the Panel to make its decision on the basis of the facts as they stood at the time of the Determination. In particular, it suggested that the scale of the impact of Covid-19 is such that an interim review will inevitably be required, and that that was the appropriate forum for the detailed review of the impact of events which have occurred since the Determination.
22. In the circumstances, the Panel concluded that it would be appropriate for it to have regard only to material which was before the Commission when it made the Determination, and not to subsequently procured materials or subsequent events. That was of particular importance for the purpose of these appeals, given the likely impact of Covid-19 on many of the assumptions underlying the Determination. The impact of events subsequent to the Determination was therefore deemed by the Panel to be a matter exclusively for review under section 32(14) of the 2001 Act, if there is such a review.
23. The Panel likewise determined that it would have regard only to material which was before the Commission when it made the Determination, and not to subsequently procured materials. The structure of the Act requires all issues to be considered in the first instance by the Commission. It would be inconsistent with that structure if the Panel could consider evidence that had not been before the Commission.

## **RYANAIR'S GROUNDS OF APPEAL**

24. Ryanair set out its grounds of appeal in its letter to the Minister of the 17<sup>th</sup> January 2020. It then provided written submissions dated the 2<sup>nd</sup> March 2020. The Commission provided a written submission dated the 16<sup>th</sup> March 2020, and daa and Aer Lingus provided written submissions both dated the 19<sup>th</sup> March 2020. Ryanair provided further written submissions dated 19<sup>th</sup> March 2020 which, although primarily responding to daa's grounds of appeal, did provide some material in relation to its own grounds of appeal. Ryanair, daa, the

Commission and Aer Lingus all made further oral submissions in the course of the hearing that took place on the 6<sup>th</sup> and 7<sup>th</sup> April 2020.

25. Ryanair's appeal to the Panel can be broken down as follows:-

Operating Expenditure ("**Opex**")

- Ground 1A The Commission's recognition of the operational inefficiency of Dublin Airport
- Ground 1B The Commission's failure to address inefficiencies in the Determination
- Ground 1C Ryanair's position on Opex efficiencies
- Ground 1D The Commission's failure to achieve the statutory objectives

Although this structure of Ground 1A to Ground 1D was used by Ryanair in its oral submissions, there is in fact a great deal of overlap between them. The Panel did not see them as being separate grounds of appeal, and they are not treated as such when they are considered.

Capital Expenditure ("**Capex**")

- Ground 2A Efficiency of scale of capacity allowed
- Ground 2B The failure of the Commission's Capex uncertainty mechanisms to protect the interests of users

Financeability and the Cost of Capital

- Ground 3A Financeability
- Ground 3B Cost of capital

**OPERATING EXPENDITURE**

***Ryanair's submissions***

26. Ryanair's appeal grounds 1A to 1D can be taken together, because there is a considerable overlap between them. In essence, the case made by Ryanair is that the Commission has previously recognised inefficiency at Dublin Airport,

and indeed recognises in the Determination and the process that preceded it that Dublin Airport is still not efficient in terms of Opex. Despite these findings, the Commission allowed in its Final Determination for even greater Opex than had been suggested in the Draft Determination. Ryanair complains that the Commission provided no proper justification for increasing the airport's Opex allowances. Furthermore, Ryanair complains that the Commission adjusted the period allowed to achieve the efficiencies that had been identified by its consultants CEPA and Taylor Airey from a period of two years to one of five years. It suggests that no justification is provided in the Final Determination for allowing Dublin Airport more time to achieve identified efficiencies.

27. At paragraph 63 of its written Submissions of the 2<sup>nd</sup> March 2020, Ryanair asked that the Panel should:-

(a) Uphold this ground of appeal;

(b) Refer the decision back to the Commission to enable Ryanair and other stakeholders to be properly consulted on its rationale for such a major change in the Opex allowance;

(c) Recommend that the Commission adopt an efficient level of Opex from the start of the price control period having regard to its past determinations. This would permit, based as a minimum on the original advice of CEPA and Taylor Airey, a two-year glidepath to achieving efficient Opex, or preferably rebase the level of Opex immediately to the target set in the 2014 Determination, i.e. based on a starting position of €7.32 in 2016.

28. Thus, there are two alleged errors on the part of the Commission that fall for consideration. First, it is suggested that the Commission erred in permitting excessive Opex to enter the baseline, and in particular in permitting an additional €118.9m Opex in the Final Determination above that permitted in the Draft Determination. It is said that the opening level of Opex ought to be adjusted to reflect the need for Dublin Airport to achieve greater efficiency. Ryanair complained that the decision to use the latest expected 2019 figures as a baseline permits levels of Opex that are substantially in excess even of those that are claimed to be justified on the basis of the work of CEPA and

Taylor Airey. Secondly, it is said that the Commission erred in allowing a significantly longer glidepath for the attainment of an efficient level of Opex compared with that assumed in the Draft Determination, without providing any justification.

29. Ryanair submitted that the Commission's approach to Opex failed in relation to each of its statutory objectives. It suggested that the airport is not operating efficiently, contrary to section 33(1)(a), "to facilitate the efficient and economic development and operation of Dublin Airport which meets the requirements of current and prospective users of Dublin Airport." It suggested that the position is not acceptable to users who continue to have to pay for inefficient costs through charges, contrary to section 33(1)(b), "to protect the reasonable interests of current and prospective users of Dublin Airport in relation to Dublin Airport." It suggested that it would be unsustainable for daa to continue to run these costs in a competitive market, contrary to section 33(1)(c), "to enable daa to operate and develop Dublin Airport in a sustainable and financially viable manner."

#### ***The Commission's submissions***

30. As to the first point, the Commission retained CEPA and Taylor Airey to report on an efficient Opex baseline from which to project costs for the price control period. The Commission accepted that this was not designed to establish the absolute efficient level of Opex for an unconstrained airport operator in the Dublin region. Rather, it was designed to establish a reasonable level of efficiency for Dublin Airport to achieve, given the constraints under which it operates.
31. A further reason for the increase in Opex in the Final Determination was the decision of the Commission to use the latest expected 2019 figures as a baseline. In the Draft determination, 2018 actual Opex uplifted to allow for increased staff costs had been used to arrive at a 2020 allowance. There remains a difference between the revised CEPA 2020 figure on the one hand, and the latest expected 2019 figure on the other hand. As the Commission acknowledges, the 2019 baseline figure was substantially higher than the revised CEPA 2020 figure.

32. The decision of the Commission is explained at 6.26 to 6.28 of the Determination. The Commission stated that the revised CEPA figure was likely not to be achievable without compromising service standards, which was not in the interest of airport users, and would not be consistent with the approach of the Commission to the Quality of Service targets. In oral submissions, it was pointed out that use of the 2019 figures created a more realistic picture of what the actual costs and revenues of the airport were.

***Other submissions***

33. Aer Lingus submitted that the Opex efficiencies laid out in the Final Determination are appropriate. It agreed with the approach of the Commission in allowing daa time to deliver efficiencies, and it suggested that the glidepath approach was prudent. Overall, it supported the Opex targets set out in the Final Determination.
34. daa disagreed that the Final Determination permitted it to continue to operate at an inefficient level of Opex for the duration of the regulatory period. While it had reservations about the Commission's operating cost targets, it had accepted them. It nevertheless contended that, because Opex of about €100m was disallowed in the Final Determination, it was imperative that the Commission should provide a glidepath to enable it to meet the operating cost target by 2024. It disagreed with Ryanair's claim that Dublin Airport had excessive operational costs. It pointed out that it was competitive by reference to others in similar markets. daa pointed out that, while a glidepath had been included, no provision had been made by the Commission for associated restructuring costs.
35. daa challenged Ryanair's assertion that the Commission had offered no justification for increasing the glidepath. It pointed out that the use of a glidepath is a recognised regulatory tool, and that it was validated by regulatory precedent, including the Commission's previous determinations. It expressed the view that the two-year glidepath in the Draft Determination was insufficient, and it said that the Commission recognised in the Final Determination at 6.28 that the level of efficiency savings which its consultants identified required a more extensive glidepath.

36. daa suggested that the Panel should not take account of alleged failures in the Commission's approach in previous determinations, because such considerations are irrelevant and beyond the scope of the Panel's jurisdiction, which it said should be limited to reviewing the Commission's approach to operating costs in the Final Determination. It also disputed Ryanair's contentions in respect of the meaning and effect of past determinations.
37. daa took detailed issue with Ryanair's contentions in respect of the allegedly excessive cost of staff, the savings to be achieved from outsourcing, and the allegedly excessive cost of absence.
38. daa disagreed with Ryanair's contentions regarding the Commission's statutory objectives. This assertion was said to be based on a mischaracterisation of each of the Commission's statutory objectives under section 33(1). The objective under section 33(1)(a) involves both an efficiency element and a commercial element, the latter of which is designed to ensure that Dublin Airport is developed and operated in a profitable manner to allow it to reinvest in infrastructure and services. The objective under section 33(1)(b) requires the Commission to carry out a careful balancing exercise. The objective under section 33(1)(c) involves an obligation on the Commission to enable daa to operate and develop Dublin airport in both a "sustainable" and a "financially viable" manner.

#### ***The Panel's consideration***

39. The Commission retained CEPA and Taylor Airey to report on an efficient Opex baseline from which to project costs for the price control period. This was designed to establish a reasonable level of efficiency for Dublin Airport to achieve, given the constraints under which it operates. The Panel concluded that this was a reasonable starting point for the Commission in assessing the appropriate level of Opex. The reality is that Dublin Airport does operate under certain constraints, such as existing pay progression agreements, pre 2010 contracts, and various work practices that form part of union agreements. It would not be reasonable to set the efficient level of Opex without taking account of these real constraints. 80% of the difference between the Opex allowed in the Draft Determination and the Final Determination is accounted for by adjustments made by CEPA to their forecasts on the basis of consultation submissions. The Panel did not think that there was any error in this approach.

40. Furthermore, the Panel thought that it was reasonable to allow time for Dublin Airport to achieve the level of efficiencies identified by the Commission and its advisors. It accepted that too immediate a reduction ran the risk of adversely affecting service standards. It was not an error therefore to have used the latest expected 2019 figures as a starting point, because that represents a realistic picture of actual costs and revenue.
41. That however raises the second point, namely the time allowed to Dublin Airport to achieve the appropriate levels of efficiency. This is explained at paragraph 6.28 of the Final Determination, in the following terms :-

“6.28. We have therefore concluded that a further adjustment towards achievability within this building block is required, relative to the CEPA finalised figures. We have decided to use the latest expected 2019 figure as a baseline. We run a smooth glidepath from this figure to the CEPA 2024 figure, excluding CIP related cost uplifts. The CIP uplifts do not relate to the current operation and thus are excluded from the glidepath. We then add the CIP uplifts back in. We are therefore giving Dublin Airport five years to achieve the level of efficiencies identified by CEPA.”

Ryanair complained that no justification was provided for this decision. In its written submissions, the Commission stated that the decision was not one based on the advice of CEPA but was rather one determined by the Commission itself. It did not really add to the reasoning set out in the Determination. In oral submissions, the Commission pointed out that it was predicting growth in Opex in the period, so that the Opex in the final year was higher than the Opex in 2019. That followed from the Commission’s prediction of growth in passenger numbers, and because the increased Capex anticipated during the period would also have associated Opex for which allowance was made. There was therefore an upward trend between 2019 and 2024. If one was to follow the CEPA advice, one would have an initial dip in the Opex, which would then build back up to the same final point as the Commission allowed in 2024. It was then said:-

“So, the idea of the glide path was to increase the achievability for Dublin Airport to meet our efficiency targets. And if you think about what we are asking them to do – so we have laid out a number of efficiencies in our Opex report and so we are asking them to change the workday in some ways. So, it may be to change their work practices, it may be to change the number of staff they have doing a

particular role. But if we are in an environment where Opex is actually growing, so because you are a growing business, it is easier to do that, to make those changes in a growth environment than it is in an environment which would involve the reduction in staff numbers or the reduction in wages to achieve the more efficient Opex.”

It was added that the glidepath gave Dublin Airport a reasonable level of achievability to getting to the final target. It was pointed out that the glidepath had been extended only from two years in the draft Determination to four years in the Final Determination, because the fifth year was the year of efficient Opex as calculated by CEPA.

42. It appears that the Commission had, on both the previous price determinations, taken the view that Dublin Airport was operating at less than full efficiency. It had therefore already been allowed considerable time to move to achieve the necessary savings. While it has been suggested that the Panel should not consider the Commission’s approach in previous determinations, the Panel cannot ignore the question of whether time has already been allowed to achieve efficiencies. The Panel did not regard the decision to alter the glidepath from two years to four years as having been properly explained to it by the Commission, or at least as having been explained on a fully reasoned basis. Nor did daa really explain to the Panel why it needed four years rather than two to achieve the desired level of efficiency. It appreciates that it may be easier for daa to achieve the necessary Opex reductions over a longer period, and in particular that it might be easier to do so in a period of time in which Opex is rising in any event for other reasons. However, the decision to allow four years for this purpose should be capable of a more scientific financial analysis. Thus, the Panel was not convinced that the more efficient CEPA figure could not have been attained over a shorter period, and it was not convinced that the Commission had subjected that possibility to rigorous analysis. The failure fully to consider this possibility, or at least to provide the Panel with more convincing reasoning for the decision, was seen by the Panel as an error on the part of the Commission.
43. Accordingly, on this aspect of the Ryanair appeal, the Panel has decided that sufficient grounds have been established to refer the Commission’s decision to increase the glidepath from two years to four years back for review. In respect of the other issues raised by Ryanair in respect of Opex, the Panel has decided

that sufficient grounds have not been established to refer the Commission's decision back for review. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

## **GROUND 2A: ALLOWING INEFFICIENT CAPITAL EXPENDITURE**

### ***Ryanair's submissions***

44. Ryanair submitted that, for previous such appeals, the Panel had taken the view that the Commission must properly assess the appropriate size of assets to be admitted to the RAB by reference to the needs of the airport and users, and that the risk of oversizing in relation to the calculation of Capex is one which "should be borne by the daa and not by current or prospective users....[which would be] contrary to section 33(1)(b) of the Act." It submitted also that previous Panels have considered that oversizing "does not facilitate the efficient and economic development of Dublin Airport and might give rise to a risk to the financial viability of the daa, contrary to section 33(1)(a) and (c) of the 2001 Act." In summary, Ryanair submitted that the Commission erred in relation to the efficiency of scale of capacity that it permitted to enter the RAB, and that it failed to take adequate account of the substantial planning risks to daa's ability to deliver these projects within the timescale at the scale proposed.
45. More specifically, Ryanair submitted first that the Commission asked the wrong question of its consultant, Helios. It suggested that Helios was asked to assess whether the developments being proposed by daa were sufficient to handle 40 million passengers per annum rather than whether they were efficiently scoped to handle 40m passengers. It suggested that Helios considered a profile of activity on a "busy day" with higher peaks of passenger demand than would be consistent with an airport operating at 40m passengers. It said that this meant that Helios was assessing the scope for facilities that would, in practice, be designed to handle more than 40m passengers. Overall, it suggested that the Helios report demonstrated that full implementation of the capacity projects

proposed by daa would result in a terminal with capacity substantially more than 40m passengers.

46. Secondly, Ryanair pointed out the restrictions on planning at Dublin Airport. The present planning permission has a 32m passengers limit on the Eastern Campus, due to surface access limitations. Prior to the Final Determination, a consultation draft of the Fingal Local Area Plan (LAP) was published. This refers to a 40m passengers target by 2030 at the Eastern Campus, but that is subject to conditions, including the provision of appropriate infrastructure and of surface access. These include works to be delivered by others, including road improvements and Metrolink. Ryanair suggested that there is therefore uncertainty as to the extent to which the target of 40m passengers can be achieved or would be permitted over the timescale proposed by daa. According to Ryanair, this gives rise to considerable uncertainty as to whether investment in upgrading facilities at Dublin Airport would be premature.

#### ***The Commission's submissions***

47. The Commission submitted that Ryanair's concerns about the Helios report had been addressed adequately in the Draft Determination and the Final Determination. At paragraph 9.38 of the Draft Determination, the Commission had concluded that the results produced by Helios allowed the Commission to consider whether the capacity projects would allow for 40m passengers at an appropriate level of service, and whether the developments were appropriately sized in order to do so. At 9.48 of the Final Determination, the Commission concluded that it had no reason to believe that the summer 2018 level of "peakiness" did not strike an appropriate balance between efficient use of infrastructure through coordinating demand away from peaks relative to airlines not obtaining slots at or near requested times. At paragraphs 9.49 to 9.51, the Commission said that it had addressed the facilities that Ryanair suggested were over-scoped on the basis of the Helios results. Individual projects were then addressed at Appendix 1.
48. In addition, the Commission pointed out that the capital investment programme (CIP) was developed in consultation with airport users. Different users of the airport facilities have different requirements of them. Many airlines that use, or

might use, Dublin Airport will be attracted by facilities that are of less importance to Ryanair. Ryanair, in its oral submissions had accepted that there was an obligation on daa to address the concerns of all its users and to consider more general national interests. Whilst there were a range of views on the CIP and what is the appropriate scope of Capex, the airport's users generally supported the CIP. The Commission, furthermore, noted that Capex of this nature tends to be "lumpy" in nature.

49. In respect of planning, the Commission pointed out that the CIP was developed on the basis that daa would address the planning issues. However, the Commission recognised that there are risks around planning to the timing of Capex delivery. Planning risk is one of the reasons the Commission introduced the reprofiling triggers.

#### ***Other submissions***

50. daa disagreed with the contention that there was an overstatement of the required level of Capex. It said that the capital programme had been the subject of extensive consultation, and that it had been independently assessed by both Steer and Helios. daa addressed the details of the alleged capital overspends, and disputed Ryanair's contentions in respect of each of them.
51. daa said that it had carried out a detailed analysis of capacity, and had consulted with stakeholders, to define the suite of projects required to address capacity deficiencies. It suggested that development to 40m passengers was necessary to provide the next sequential increase in capacity, and it pointed out that the nature of infrastructure development is such that it cannot be built on an incremental basis to mirror annual demand. While it accepted that there is planning risk, it was working to resolve the planning issues. It submitted that design and tendering should proceed in parallel so that infrastructure can be developed once permits are in place.

#### ***The Panel's consideration***

52. The Panel considered that the approach of the Commission to determining the size of the Capex allowance for the control period was reasonable. The Helios study allowed the Commission to consider whether the projects would allow for

40m passengers. Helios was not asked to design the most efficient airport to deliver 40m passengers, but rather to check whether the Dublin Airport design would be able to handle 40m passengers. The explanation set out in the Final Determination, and given to the Panel, of the way in which the Helios study was used is reasonable and appropriate. In particular, the Panel notes that the Commission specifically took into consideration both the views of stakeholders and the difficulty of tailoring capital projects precisely to meet passenger number forecasts due to their fundamentally indivisible or “lumpy” nature. The Commission itself assessed the need for each project and its likely benefit for users of Dublin Airport, both present and future. Adequate details in that regard are set out in Appendix 1 of the Final Determination. The Panel also accepted that it was appropriate for the Commission to proceed on the basis that Dublin Airport would address the planning issues. It notes, as stated at 9.70 and 9.71 of the Final Determination, that the reprofiling triggers have been introduced to address (inter alia) planning risk.

53. The decision that the entire CIP should be allowed to enter the regulatory asset base (RAB) in the 2020-24 regulatory period does not therefore seem to the Panel to be erroneous. The Commission clarified in its oral submission that the timing of the allowances entering the RAB is based on daa’s investment plans, and that it provides funding “just in time”.
  
54. The Panel also accepted that it was appropriate for the Commission to proceed on the basis that daa would address the planning issues. It notes, as stated at 9.70 and 9.71 of the Final Determination, that the Commission has put in place mechanisms, in particular the StageGate process and the trigger mechanisms, to mitigate the risks that either a project is subsequently found to be wrongly scoped or that a project is significantly delayed, including as a result of planning risks. Notwithstanding the views of the previous Panel, this Panel did not feel it inappropriate to admit the entirety of the development for which the CIP 2020 provided, in view of the general support for that programme, the Commission’s assessment of each part of it as being for the benefit of users, and the necessarily “lumpy” or modular nature of such development. Furthermore, the Commission has properly assessed the appropriate size of the assets to be admitted to the RAB by reference to the needs of the airport and its users, and the protective mechanisms introduced by the Commission are sufficient and

proportionate to ensure that the risk of oversizing is not inappropriately borne by current or prospective users.

55. Ryanair requested that the Panel should uphold this ground of appeal, and that it should refer the Determination back to the Commission in respect of the efficiency of Capex allowed relative to the 40m passenger target and the associated planning risks. In all the circumstances, the Panel concludes that this ground of appeal does not give rise to sufficient grounds to refer the Commission's decision back for review. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

## **GROUND 2B: THE MECHANISMS TO PROTECT THE INTERESTS OF USERS**

### ***Ryanair's submissions***

56. Ryanair submitted that the Commission's suggested mechanisms to protect the interests of users were inadequate. It was submitted in particular that these mechanisms failed to adhere to regulatory practice, that they were inconsistent with past decisions, and that they resulted in users paying prematurely for Capex that may never be spent or for which expenditure may be deferred beyond the regulatory period.
57. In its submissions, Ryanair suggested that triggered costs are normally added to the price cap when the relevant conditions are reached. It noted that this had been the practice at Dublin Airport with Terminal 2 and the North Runway. It referred also to the model followed in the case of the current regulation of Heathrow. It said that the UK CAA had recently recognised the potential flaws of allowing Capex in advance, as proposed by the Commission, when considering the issues surrounding major Capex at Heathrow to support the provision of a third runway.
58. Ryanair suggested that it was a breach of the Commission's objectives under section 33(1)(a) and (b) of the 2001 Act to allow Capex to enter the RAB in advance, potentially making current users pay, when the Commission knows that the spend may be inefficient. Ryanair pointed out that if elements of the

CIP are postponed, or if planning consent to increase up to 40m passengers is delayed, or if the StageGate process confirms that projects have been over-scoped, over-costed or are not required, then current users would already be paying for those facilities. Ryanair noted that the total sum of the reprofiling triggers proposed by the Commission is €1.34bn in year 5 of the regulatory period. The use of the reprofiling triggers may result in a reduction in the price in future years, but it was suggested that current users will already have contributed to the cost. Ryanair suggested that the correct approach was to deduct the total covered by the reprofiling triggers from the initial price cap, and then allow remuneration to be triggered when projects proceed. Ryanair pointed out that the Commission had put 68% of the total allowed Capex into the StageGate process for further scrutiny, but that the StageGate process does not provide for within-period price cap adjustments. The only potential adjustments envisaged are related to the eight specified projects subject to the reprofiling trigger. Ryanair suggested that a material portion of capital costs should not be allowed into the price cap until a project has been agreed through the StageGate process.

### ***The Commission's submissions***

59. The Commission in its submissions pointed out that it had not introduced retrospective efficiency reviews: rather, the allowances for a StageGate project were still set out on an ex ante basis, but timing of the allowance is being set at StageGate 1 and is now linked to the individual project being ready for progression. The Commission said that it was incorrect to say that full Capex enters immediately into the RAB. Rather, capital costs associated with new Capex enter into the price in incremental fifths over the regulatory period. Accordingly, full remuneration cannot occur until 2024.
60. The Commission said that it shared the concerns raised by a range of respondents in relation to the lack of a mechanism in the Draft Determination to deal with a scenario where daa does not proceed with elements of the CIP 2020 or delays elements substantially. The reprofiling triggers were introduced in the Final Determination to partly mitigate this risk. The Commission pointed out that the reasons for its use of reprofiling triggers was set out at paragraph 9.70, 9.71 and 9.76 of the Final Determination. Ultimately, the reason was to

prevent users paying for the associated infrastructure if it was not being delivered.

### ***Other submissions***

61. daa suggested that the use of price triggers to allow capital investment to enter the RAB is not practical or advisable in the case of a broad capital investment programme. It rejected Ryanair's contention that the Commission's approach results in current users pre-funding investment projects which may be delivered at a substantially later date or on a substantially different scale. It said that the smoothing of capital investment into the RAB over the course of the regulatory period allows for a more gradual price path adjustment for airport users. daa submitted that the roll forward rules and the introduction of the StageGate process provide strong safeguards to ensure that users are not penalised by a change in the scale or timing of capital investment.
62. daa agreed with Ryanair that the reprofiling triggers are not fit for purpose. It suggested that there was inadequate consultation prior to their introduction, and that they do not take account of mitigating circumstances which could account for why a capital expenditure product had not been progressed as intended. On the other hand, daa supported the StageGate process, on the basis that it will ensure that appropriate infrastructure capacity is delivered in a timely and efficient manner.

### ***The Panel's consideration***

63. The Panel considered that no error had been demonstrated on the part of the Commission in the mechanisms that it had introduced to protect the interests of users. The Panel did not regard the question of whether the Commission had followed the practice in respect of Heathrow, or used otherwise by the UK CAA, or used on previous occasions, as being particularly relevant. While the Commission accepted that the approach to time profiling led to a significant degree of prefunding, it considered that prefunding of infrastructure needs to be considered on a case-by-case basis, and that it was justified here to ensure that it provided daa with a financially viable regulatory settlement. It considered that the clear need for capacity expansion justified this approach. The Panel has not seen anything to convince it that this decision was incorrect.

64. The Panel agreed, as suggested by the Commission, that the introduction of the reprofiling triggers was a reasonable balance of the statutory objectives of the Commission. It allows for daa on the one hand to develop the airport in a way which is in the interest of airport users, while on the other hand seeking to ensure that the timing of remuneration does not become entirely misaligned with the programme.
65. Ryanair had requested the Panel to uphold this ground of appeal, and to recommend that the Commission adopt an approach to the StageGate process consistent with regulatory practice elsewhere in ensuring that Capex does not enter the RAB where there is a substantial level of cost uncertainty and where users have not been fully consulted in respect of scope, timing and costs through a constructive engagement process. In the circumstances, the Panel concluded that this ground of appeal did not give rise to sufficient grounds to refer the Commission's decision back for review. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

### **GROUND 3A: FINANCEABILITY**

#### ***Ryanair's submissions***

66. The fundamental point made by Ryanair under this heading was that the need for any financeability adjustment in the price control is driven by the scale of Capex proposed during the regulatory period. If, as Ryanair contends in ground 2A of its appeal, the Capex allowance should properly be reduced, there would simply be no need for any financeability adjustment. Ryanair suggested that the assumption that the full amount of the CIP would be funded during the five-year period had led the Commission to strain the financeability adjustment. Essentially, it assumed that an unnecessarily high level of new debt is required. In summary, Ryanair suggested that in making a financeability adjustment and bringing forward €109m depreciation, the Commission had adopted a determination which prioritises the funding of the capital programme to benefit future users, over the interests of current users who will end up paying more than they should during the next five years.

67. Secondly, Ryanair submitted that even if it was legitimate for the Commission to allow the full amount of Capex to enter the RAB over the regulatory period, the advice that the Commission had received from its consultant, Centrus, did not identify that a financeability adjustment was necessarily required. It was suggested also that Centrus had recommended a review of financeability mid-way through the regulatory period, rather than simply making an upfront adjustment as the Commission had done.
68. Under this heading, Ryanair raised the issue of the treatment of dividend policy within the financeability assessment. It suggested that the assumption that there would be a dividend issue as a matter of course weakens the financial ratios in the base case, and therefore increases the need for a financeability adjustment. It is suggested that the assumption that the State cannot inject equity means that Dublin Airport is treated differently to its peers. In the ordinary course of events, owners are expected to forego dividends in some years to maintain financeability, and/or to inject additional equity. In response to the suggestion that the financeability adjustment was based on the downside case, and that the downside case involved making no allowance for dividends, Ryanair questioned why the Commission saw fit to make a financeability adjustment in circumstances where the requirement for one was not indicated as necessary in its baseline case.

### ***The Commission's submissions***

69. The Commission made two preliminary points about the financeability adjustment. The first was daa's inability to raise equity. The second relates to the size of the investment programme.
70. The Commission agreed that the need for a financeability adjustment is driven predominately by daa's inability to raise equity, otherwise than by retaining earnings. This is because daa is state-owned and the Irish government has a policy of not providing additional equity to daa. The investment plan must therefore be funded largely through debt. The Commission clarified in its oral evidence that it had used actual retained earnings in assessing the need to raise debt.

71. The Commission explained why it had decided that the full amount of the CIP should enter the RAB over the regulatory period. It had assumed that the programme will be delivered during the five-year regulatory period. While there are risks around this and while it may take longer than five years, it does not follow that the relevant debt can be raised over a longer period. The Commission said that the debt needs to be in place before one embarks on capital investment. The Commission said that it was correct that the final €400 million of capital investment drove the financial viability adjustment. However, because the Commission believes that the investment is in the interests of both current and future airport users, it followed that both Capex and the associated financeability adjustment was also warranted.
72. At the stage of the Draft Determination, the Commission had conducted its financeability assessment in-house. A number of parties asked the Commission to take a more market-based approach to analyse financial viability. The Commission asked Centrus to report. Centrus concluded that if daa were to go to market at the time of writing the report, it would be in a position to raise debt with multiples of six times debt to EBITDA. However, Centrus also reported that, to increase confidence, the Commission should consider enabling a path to achieving net debt to EBITDA of less than five times. To achieve that, Centrus carried out the relevant downside sensitivity scenario analysis. While the Commission accepted that, absent downside scenarios, one would not need a financial viability adjustment or one might need a less significant one, it was of the view that one does need to look at downsides in order to assess financial viability.
73. As to dividends, the Commission assumed that they would be paid in the base case. However, when it assessed reasonable downside scenarios, which ultimately drove the financial viability adjustment, no dividends were assumed to be paid. Accordingly, since the Commission assumed no dividends in estimating the financial viability adjustment, that consideration should have no impact on the ultimate Determination.

#### ***Other submissions***

74. daa submitted that the Commission is required to maintain a longer-term view of the development of airport infrastructure than is reflected in the simple

“building blocks” approach that it follows. daa believed that the determination should allow for adequate funding of the proposed development at Dublin Airport. It noted that while the financial viability adjustment brought Dublin Airport’s net debt/equity to 4.9x without the payment of dividends, the inclusion of dividend payments increased leverage to 5.4x in 2024. The latter brought it outside the range advised by Centrus. The former left its financeability at serious risk in the event of any financial or economic downturn. It pointed out that the financeability adjustment is related to allowing Dublin Airport to fund its business, and that this occurs in advance of the delivery programme. As such, it is based on the expected spend profile rather than the outturns. Overall, any adverse change would have a detrimental impact on its ability to operate and deliver on its approved capital development.

### ***The Panel’s consideration***

75. The Panel did not consider that the Commission had made an error in the financial viability adjustment. The Panel has already addressed the question of whether there was any error in allowing the full amount of CIP 2020 to be entered into the RAB over the regulatory period. It does not believe that the Commission was wrong to make that decision. The Panel accepted also that, while it did not necessarily follow that the entire programme would be carried out over the regulatory period, debt would nevertheless need to be raised in advance of spending. While daa is undoubtedly different from other companies in that it cannot raise equity, that is simply a reality of Ireland’s public policy. It would be wrong to ignore it. As the Commission explained, the financeability adjustment was driven by the assessment of reasonable downside scenarios, under which the Commission assumed that no dividends would be paid. The Panel concluded that, if the Centrus report is properly read, it provides support for the financeability adjustment made by the Commission. In particular, Centrus pointed out that to increase confidence that Dublin Airport would be able to raise the full requirement of new debt, the Commission could consider enabling a path to daa achieving a net debt/EBITDA of less than five. While Centrus did suggest the possibility of a review of the financeability midway through the period, the Commission considered that such an approach could introduce significant potential negative unintended incentives. It therefore preferred the financeability adjustment approach it subsequently adopted. The

Panel cannot and does not conclude that any of this advice, or the decisions of the Commission made on foot of that advice, was erroneous.

76. Ryanair asked the Panel to uphold this ground of appeal and to refer the financeability adjustment back to the Commission with a recommendation that no such adjustment is required. The Panel concluded that this ground of appeal did not give rise to sufficient grounds to refer the Commission's decision back for review. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

### **GROUND 3B: COST OF CAPITAL**

#### ***Ryanair's submissions***

77. Ryanair's appeal on this ground raises a number of detailed points. In summary, Ryanair considers the weighted average cost of capital (WACC) to be overestimated. It states in its submission that the combined effect of various errors made by the Commission have contributed to a further overstatement of the WACC by around 22 basis points above that proposed in the Draft Determination, which Ryanair already considered excessive.
78. Ryanair made detailed submissions in respect of the following component parts of the WACC:-
- (a) Beta – Local v. European Index.
  - (b) Airport Comparators.
  - (c) Dublin Airport Business Risk.
  - (d) Total Market Return (“**TMR**”) and Equity Risk Premium (“**ERP**”).
  - (e) Forward Rates.
  - (f) Aiming Up.

Overall, Ryanair submitted that the estimate of WACC made by the Commission on advice from Swiss Economics is too high and is infected by a number of flaws leading to over-estimation. A theme throughout the submissions by Ryanair was that the Commission had used inconsistent data sets.

79. On the question of the appropriate basis for setting the Beta, Ryanair pointed out that in the Draft Determination the Commission had concurred with Ryanair's view that the appropriate basis for setting the Beta would be a local index as most representative of daa's market position. It pointed out that this was changed in the Final Determination, where the decision was made to move from using local stockmarket indices as a proxy for market returns to a regional stockmarket index (i.e. the STOXX Europe 600 Index) for most airports. Ryanair submitted that this was wrong, because the strict definition of Beta is the relative volatility of a stock compared to the volatility observed in the market in which it operates. It submitted that using a European index to source the volatility observed in a given country is erroneous, and therefore overstates the Beta.
80. As to airport comparators, Ryanair said that it had pointed out in response to the Draft Determination that the Betas for Heathrow and Gatwick were estimated in 2014, based on earlier data including years immediately following the global recession where stocks were inevitably more volatile, and that the use of values for these airports in comparison to Dublin were therefore inappropriate.
81. As to the Dublin Airport business risk issue, Ryanair submitted that in response to the Draft Determination it had highlighted certain improvements in Dublin Airport's business risk, by showing that it had an improved profitability, a more diversified route network, and a stronger correlation to GDP growth compared to its peer airports. It suggested that this should lead to a lower adjustment to the asset Beta, owing to the improvement in the business risk. Swiss Economics had rejected this point in its final report to the Commission, saying that the extent of any reduction is unlikely to exceed the reduction in asset Betas compared to the 2014 Determination that was implied by Swiss Economics final report. Ryanair continued to disagree with this, suggesting that GDP risk is not one specific to airports or Dublin Airport in particular, and to the

extent that it exists, it is captured on the basis Beta without the need for upward adjustment.

82. As to TMR and ERP, Ryanair submitted that the ERP estimated by Swiss Economics does not reflect a consistent timeframe, because the estimated TMR uses more long-term returns compared to the short term estimated risk free rate (“RFR”). It suggested that this means that longer term higher equity returns are being compared against the more recent and lower RFR, to yield a higher ERP than is in practice reasonable. In response to comments made by Ryanair to the same effect following the Draft Determination, Swiss Economics explained that they assumed that the ERP is fixed throughout, and that a rising ERP in response to a drop in RFR is not incorrect. Swiss Economics set out literature with conclusions demonstrating a negative co-movement between these two variables. Ryanair disagreed with Swiss Economics, saying that there must logically be a positive relationship between the RFR and the ERP. It said that it provided estimates of both short term and long-term ERP, by taking into account both the short and long term RFRs and TMRs, which produced a lower ERP at 5.6% as opposed to the estimate of Swiss Economics of 6.99%. In essence, Ryanair continued to submit that the Commission inappropriately derived the estimate of ERP from inconsistent time series, and consequently set too high a value.
83. As to forward rates, Ryanair suggested that it was wrong to use forward yields to estimate the forward rates from the risk-free rate and the cost of new debt. It suggested that market expectations do not predict the future. It repeated the submission that it made in response to the Draft Determination that Swiss Economics should have reviewed the ECB’s forecast interest rates and used that as the basis for estimating forward yields. In essence, it suggested that the Commission had erred in the use of expectations to forecast future interest rates. It should instead have used an appropriate methodology as a basis for assessing whether an upward trend is evident or not, given the current macroeconomic conditions in the EU.
84. As to the aiming up allowance, Ryanair submitted that it had been wrong to apply the aiming up allowance to the entirety of the RAB, and not simply the new investments. Ryanair made that point in response to the Draft Determination, and Swiss Economics did not think it advisable to make any

change, citing other regulatory precedents in Ireland which applied the aiming up allowance to the entire of the RAB. Ryanair suggested that this is not acceptable, when it is to the detriment of the interests of users.

85. Ryanair submitted that the aiming up adjustment was in any event unnecessary. It referred to what it said were upward adjustments to the cost of debt and other components of the WACC where it suggested that the Commission had erred on the high side in all cases. It suggested that, furthermore, over and above the effect of the WACC, there was also aiming up in the Final Determination in the form of financeability adjustments, Opex allowances and overestimated Capex requirements. While Ryanair recognised that some aiming up may be required to incentivise new investments, it submitted that should be related to efficiency of that investment and the efficiency of the operation overall. The error of the Commission was consistently on the high side, with the effect it was submitted that the Commission has prioritised the incentivisation of new investment over the legitimate interests of current users.

#### ***The Commission's submissions***

86. On the Asset Beta point, the Commission referred to the Swiss Economics' final report, where they recommended changing the approach of using local indices to the use of a European index. Swiss Economics suggested that this was because the use of a European index is consistent with other cost of capital components, and because it is more likely to reflect the investment portfolio of a typical diversified airport investor. The Commission pointed out also that a sensitivity analysis had been carried out by Swiss Economics, which showed that the difference between using local indices and the European index is small.
87. Swiss Economics had also explained the inclusion of Heathrow and Gatwick. The former was comparable in terms of regulatory environment, while the latter (together with other airports) was most comparable in terms of demand structure. That caused Swiss Economics to include their Betas, albeit with a lower rate because they are not publicly listed. Again, a sensitivity analysis showed that the estimate of asset Beta was not sensitive to whether other regulatory assets Betas are included in the assessment or not.

88. The Swiss Economics final report suggested that a high correlation in GDP growth and traffic growth may point towards an increased Beta rather than a decreased Beta, because daa's profits were more strongly linked with the Irish stockmarket, which translates into greater undiversifiable risk.
89. As to TMR and ERP, the Commission referred to the Swiss Economics final report, which stated the assumptions that it had made. It expected the TMR to be constant over time, and that RFR and ERP are inversely correlated. The Swiss Economics report at section 4.2 summarised a range of literature and other evidence to support these assumptions. Based on that evidence, Swiss Economics had concluded that the recent decrease in the RFR implies an increase in the ERP.
90. As to whether market expectations are reflected in forward rates, the Commission referred to the Swiss Economics final report, where it suggested that forward rates do reflect market expectations on macroeconomic conditions, sovereign credit ratings and Central Bank base rates. It said that Swiss Economics did review the forecast interest rates of the ECB, the Bank of England and the US Federal Reserve. Based on those forecast rates, Swiss Economics had concluded that no further adjustment was necessary for forecasting the RFR than the estimated forward rates.
91. Finally, on the aiming up allowance, the Commission pointed out that Swiss Economics had justified aiming up for all investments, because of the considerable investment needs of daa over the next regulatory period, regulatory precedent in Ireland, and the negative effects in the economy of under-investment in airport infrastructure. The Commission clarified that no upward adjustments had been made to the individual cost of capital components, as the components that feed in the overall cost of capital are the mid-point estimates.

***Other submissions***

92. On the issue of whether a local or European index should be used for setting the Beta, daa in essence agreed with the position that the Commission had adopted, and pointed to evidence that it had provided in support of this position in its response to the 2019 Draft Determination.

93. daa submitted that the Beta values for Heathrow and Gatwick are dated, and therefore should not be used. It agreed with Ryanair that less weight should be placed on regulatory decisions and greater weight on empirical analysis. However, it believed that this approach supported its Beta recommendation of at least 0.6.
94. daa said that it agreed with the Commission that higher correlation with GDP translates into higher Beta risk. It suggested that the Beta risk had in fact increased since the last review, as demonstrated by increasing comparator Betas, and other factors specific to Dublin Airport such as large capital expenditure and higher operational leverage.
95. On TMR, daa agreed with the underlying assumption made by Swiss Economics of a fixed TMR, the consequence of which is that the ERP and RFR must move in opposite directions. It said that the estimation of TMR based on long-run data is the underlying approach of all UK economic regulators at recent price controls.
96. Again, daa agreed with Swiss Economics that forward rates provide the best market implied expectation of the change in RFR and the cost of debt for Dublin Airport. It suggested that using RFR evidence from forward curve is consistent with the underlying approach of UK regulators. It submitted indeed that Swiss Economics had understated Dublin Airport's expected cost of new debt.
97. daa expressed disagreement with Ryanair's assertion that an aiming up adjustment had already been applied via (inter alia) an overstatement of the asset Beta and cost of debt. It submitted that the Commission had in fact underestimated Dublin Airport's asset Beta and cost of debt. It submitted that there are strong theoretical grounds for aiming up, and that it was supported by regulatory precedent.

#### ***The Panel's consideration***

98. Overall, the Panel concluded that there was no error in the approach of the Commission on these issues. The Commission had carefully considered all of the submissions made to it on the Draft Determination and had taken the detailed advice of Swiss Economics which is encompassed in its Final Report.

There were no doubt various judgment calls that had to be made, but a reasonable margin of discretion must be allowed to the Commission in making those calls. The fact that it acted largely on expert advice was also relevant, although not determinative. The Panel was not convinced that there was any error in principle in the data sets that were used by Swiss Economics and the Commission. In particular, it did not see that there was any inconsistency in the data sets used. In any event, in respect of each data set used, there was a reasonable and logical explanation, with which the Panel does not disagree.

99. Dealing briefly with the details of each of the issues raised by Ryanair:-
- (a) The Panel did not believe that it was wrong to use a European index as opposed to local indices. As Swiss Economics pointed out, the use of a European index is consistent with other cost of capital components, and in any event may be more likely to reflect the investment portfolio of a typical diversified airport investor.
  - (b) The Panel accepted that Heathrow and Gatwick are to some degree comparable with Dublin Airport, and therefore accepted the reason for their inclusion (albeit with a lower weight) in assessing the Beta.
  - (c) The Panel also accepted that there is evidence to support the proposition that high correlation of GDP growth and traffic growth may point towards an increased Beta rather than a decreased Beta, for the reasons given by Swiss Economics.
  - (d) On TMR and ERP, the Panel accepted that there is evidence to support the assumptions upon which Swiss Economics relied. It cannot regard those assumptions as being mistaken.
  - (e) The Panel accepts that it was reasonable to use forward rates to forecast bond rates. The point of view expressed in that regard by Swiss Economics is reasonable and cannot be regarded as mistaken. It was not wrong to conclude that no further adjustment was necessary for forecasting the RFR than the estimated forward rates.
  - (f) The Panel noted the views of Swiss Economics as to why it was appropriate to apply an aiming up allowance to all investments, as stated above. The

Panel does not believe that those views were mistaken. The Panel also accepted that upward adjustments have not been made to the individual cost of capital components. It is clear that the components that feed into the overall costs of capital are, in each case, mid-point estimates.

100. While the Panel noted that the estimated WACC had been increased first by an aiming up allowance, and secondly by the financeability adjustment, it did not regard those adjustments as having been made incorrectly. It noted in particular the points that had been made as to the practical unavailability to daa of equity investment, and the need for a financeability adjustment to be made in light of the very large capital programme. To the Panel, these were convincing points.
101. Ryanair asked the Panel to uphold this ground of appeal and to refer the cost of capital back to the Commission with a recommendation to ensure that consistent data sets are used. The Panel concluded that this ground of appeal did not give rise to sufficient grounds to refer the Commission's decision back for review. The Panel did not think that this ground of appeal gave rise to any reason to believe that the Commission had not properly considered the matters referred to at section 33.

## **CONCLUSION**

102. The Panel emphasises that its decision was based on the facts as they stood at the time of the Commission's Final Determination. This is the approach that is mandated by the legislation. The decision therefore does not take account of events after the 24<sup>th</sup> October 2019, and in particular does not take account of the consequences of the Covid-19 pandemic. That is of importance for the purpose of this appeal, given the likely impact of Covid-19 on many of the assumptions underlying the Commission's Determination. The impact of events subsequent to that Determination is a matter exclusively for review under section 32(14) of the 2001 Act, if there is such a review.
103. In the circumstances, with one exception, the Panel did not find that the grounds of appeal raised by Ryanair gave rise to sufficient grounds to refer the Commission's decision back for review.

104. The exception is in respect of one aspect of Ryanair's Ground 1. The failure fully to consider the possibility that more efficient levels of Opex could be achieved more quickly, or at least to provide the Panel with more convincing reasoning for the decision, was seen by the Panel as an error on the part of the Commission. The Panel therefore decided that sufficient grounds had been established to refer back for review the Commission's decision to increase the glidepath from two years to four years.

Eoin McCullough

Hannah Nixon

Andrew Charlton

4 May 2020