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Ms Cathy Mannion
Commissioner
Commission for Aviation Regulation
3rd Floor Alexandra House
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Email: info@aviationreg.ie

By e-mail only

Re: CAR consultation on Strategic Plan 2017 – 2019

Dear Ms Mannion,

I refer to CAR's paper 2/2017 regarding the above topic.

We welcome CAR's initiative in publishing this Strategic Plan, which as CAR notes is the first plan that has been published for a number of years. We outline below our comments / suggestions on CAR's Strategic Plan, and recommend that these be adopted by CAR in order to protect users and consumers from abuses by the DAA of its monopoly power.

1) Competition at Dublin airport

Although economic regulation ought to be designed to replicate the effects of competition in cases of market failure, such as in Dublin, competition remains the preferable outcome. CAR, in its role as economic regulator for aviation in Ireland, should therefore promote and facilitate the introduction of competition in the Irish airport market, wherever possible.

In this regard, CAR is correct to list the promotion of competition as an objective in its Strategic Plan. It is important that such an objective serves not only to promote competition between airlines (as appears to be suggested on page 9 of the Strategic Plan) but also to introduce competition to constrain the DAA monopoly. As noted in Indecon's 'Review of the Regulatory Regime for Airport Charges in Ireland', "*One of the notable absences from the statutory objectives [set] for CAR is the objective to promote competition. The key to economic regulatory design is to regulate where necessary but to also examine if there are wider policy options which could be considered which would enhance competition.*" Indecon suggest a number of ways to introduce competition at DUB, including "*between Terminal 1 and Terminal 2 or any new terminal which may be built or to develop a new airport to service the Dublin Airport catchment.*"

The absence of such competition at DUB has resulted in the DAA's uncompetitive airport charges and its lamentable track record of inefficient capex (e.g., the white elephant T2, the short lived Pier C, the grandiose and over specified T1X and Pier D, etc.) and inefficient opex (e.g. SDG's 2013 report of the DAA's opex found that the DAA monopoly achieved only 10,400 passengers per staff member while other airports, such as Amsterdam, achieved over double this). This would not occur in a competitive environment. In addition, the fact that the 2014 Determination introduced a yearly decreasing price cap, yet Ryanair's payments to the DAA have mushroomed [CONFIDENTIAL] demonstrates that the DAA is focused on extracting monopoly profits from its users, rather than stimulating growth and commercial revenues as occurs at competitive airports.

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In order to ensure that the DAA monopoly is not in a position to continue abusing its market power in such a manner, CAR should support the position that the ongoing DTTAS review of economic regulation sets the promotion of competition as a statutory objective for CAR, and CAR should recommend the introduction of terminal competition at DUB as outlined by Indecon in its report.

2) <u>Reform of the Airport Charges Directive</u>

As CAR is aware, the European Commission is currently evaluating the Airport Charges Directive ("ACD") with a view to possible reform. The ACD in its current form is ineffective as it fails to replicate the effects of competition or to provide a framework for incentivising airport efficiency and competitive airport charges. In this regard, we welcome CAR's active involvement in the Thessaloniki Forum. Specifically, we appreciate the Forum's helpful clarifications regarding the definition of "*airport users*", the rights of airlines as opposed to airline associations in consultations, and how consultation between airports and airlines should occur. CAR is aware of the significant short-comings of the ACD, and it is therefore important that, as one of Europe's leading aviation economic regulators, CAR continues to play a key role in the Thessaloniki Forum, and engages with the European Commission throughout its evaluation.

3) <u>Ensure constructive airport / airline engagement & efficient costs</u>

We welcome CAR's intention to "*increase stakeholder involvement in decision making*". As CAR is aware from Ryanair's previous correspondence, the DAA's "consultations" to date have been no more than untransparent box-ticking exercises in which the DAA ignores users' input. In order to avoid a repeat of this, CAR should require the DAA to constructively engage with airport users, and to justify and agree with airport users all expenditure, capital costs, and any other item that could affect airport charges.

In the context of such constructive engagement, DAA's expenditure could be benchmarked against competitive airports, which would ensure that DAA's opex and capex is both required by airport users and efficiently incurred. CAR should only permit DAA to undertake capex / opex if it can prove that such expenditure is required, efficient and a result of constructive engagement with users.

It is concerning however that CAR claims it will "*regulate and monitor the cost-efficient provision of [the DAA monopoly's] capital projects... giving incentives for Dublin Airport to operate efficiently and sustainably to the benefit of current and future users*." The DAA should not receive any "incentives" from CAR for not abusing its market power, and for only incurring required and cost-efficient expenditure which benefits its users. If DAA does indeed operate in such an efficient manner, which would naturally reduce airport charges, it will benefit from traffic growth and increased commercial revenues.

Finally, due to airlines' scheduling timelines, CAR should require the DAA to commence their annual airport charges consultations at the latest in August of the year before the charges come into effect.

4) Prohibit pre-financing

In previous Determinations, CAR has allowed pre-financing of DAA's capex. Pre-financing does not exist in competitive environments, and CAR should ensure that in future only DAA's efficient and required capex be allowed into the RAB, and only once the relevant facility is operational. CAR should only rely on the references to "future users" insofar as the DAA can demonstrate that its capex requests in respect of such users are based on realistic assumptions.

5) Consultation on length of northern runway

A significant piece of capex such as the proposed northern runway (which CAR notes is "*the second largest project at Dublin Airport since regulation started in 2001*") should be subject to critical evaluation by airlines outside the scope of normal capex consultations. For example, in the context of London Heathrow's third runway, the UK CAA explicitly specified that "*a new runway project cannot simply be treated as "business as usual" and it will require airport-airlines engagement to be taken to a deeper and much more productive level by both sides*". This is in stark contrast to the DAA monopoly's non-engagement with airlines regarding the northern runway, the length of which was mentioned as a fait accompli (and not consulted upon) in the DAA monopoly's 196 page 'Capital Investment Programme (CIP) Proposals 2015-2019' and in its 140 page 'Dublin Airport – Regulatory Proposition 2015-2019'. In order to rectify DAA's non-engagement, which is contrary to best practice, and has resulted in an unnecessarily long and excessively costly runway, CAR should open a consultation on the length of the proposed northern runway.

6) Remove DUB's claw back of incentives

The DAA monopoly's yearly request to CAR to net off "*traffic / route incentive schemes*" from its airport charges revenues has no basis in legislation or the 2014 Determination, and in effect gives the DAA certainty that it can reclaim incentives from users 2 years after granting them (during which time the DAA benefits from the incentives in the form of traffic growth and increased commercial revenues). The correct way of treating incentive schemes would be for the DAA to consider them as non-recoverable opex. This is consistent with the behaviour of airports that operate in competitive markets (the effects of which CAR is required to replicate at DUB) that do not benefit from any automatic entitlement to claw back incentives, and instead stimulate traffic growth through incentives, with the benefits of additional traffic derived from the economies of scale and commercial revenue. CAR should therefore prevent the DAA monopoly from any future claw back of incentives.

7) Remove the 50/50 risk sharing mechanism

The 2014 Determination states that CAR will "*use a 50/50 mechanism to share the risk of over or under-spends between DAA and the users*". This principle of 50/50 "risk-sharing" does not exist in competitive markets, and is a prime example of regulatory gaming that results in over-specification and excessive prices for airport users and consumers. Airports that operate in competitive markets are incentivised to incur capex on a cost efficient basis as this leads to lower airport charges and rewards airports through passenger growth and increased non-aeronautical revenues. On the contrary, the DAA, under this 50/50 "risk-sharing" mechanism, is allowed to recover from users 50% of its inefficient expenditure and charge monopoly profit on it in order to fund the other 50% that in theory is a DAA risk. In practice, there is no risk for the DAA in this arrangement: it either spends less than the regulatory allowance and recovers from users 50% of the money it did not spend, or it spends more than the regulatory allowance and charges a monopoly profit on 50% of this overspend. CAR should therefore ensure that this 0/100 "risk-sharing" mechanism be removed from the regulatory regime, thus replicating the effects of competition at DUB.

8) Encourage bilateral agreements

Bilateral agreements between airports and airlines are a standard feature of a competitive market. Such agreements allow both airlines and airports to achieve long term visibility and security. Instead, the DAA monopoly increases the amount of airport charges it extracts from its users annually. Such behaviour is typical of a profit-maximising monopoly.

In order to put a stop to this anti-competitive behaviour, CAR should incentivise the DAA monopoly to conclude long-term agreements with its major customers. This could be achieved for example if CAR suspended economic regulation on condition that the DAA reached commercial agreements in respect of airport charges and service provision with airlines accounting for 75% or more of passenger volumes. In such a situation, annual consultations should nevertheless continue to take place and capex undertaken by the DAA should only be included in the RAB for the purposes of any subsequent determination if either (i) it is approved by airlines accounting for 75% or more of passenger volumes or, (ii) failing such approval by the airlines, is approved by CAR, as the independent supervisory authority (subject to appeal by the airlines).

9) Request amendment of the Transport Act 1982

The Transport Act 1982 requires a licensed entity to make bookings on behalf of groups (i.e., technically, a family member making a single booking for his / her entire family requires a travel agent's licence). This is an outdated requirement that fails to reflect the fact that the overwhelming majority of bookings, regularly on behalf of a group, are now made on the internet, and not through travel agents or tour operators. CAR should request the Minister for Transport & Tourism to propose an amendment to the legislation in order to remove this archaic requirement.

10) Understand the needs of passengers

CAR intends to "*examine how to better engage the passenger in the regulatory process and to ensure the service provided and the cost paid matches their expectations.*" Airlines are the best proxy for passenger expectations, whose key requirement is low fares which are made possible by low airport charges. As previously explained to CAR, "willingness-to-pay studies" are misleading as passengers' responses do not translate into reality when air fares are necessarily increased to pay for "improved" airport facilities. CAR should therefore engage directly with airlines in order to understand passengers' expectations.

11) CAR's role and powers

Past correspondence between Ryanair and CAR suggests that CAR mistakenly believed it had only limited powers and responsibilities. CAR, as the Irish independent supervisory authority as per Article 11.1 of the Airport Charges Directive, must "*ensure the correct application of the measures taken to comply with this Directive*" as listed in Articles 6.1 and 6.2 of the ACD. It is essential that CAR accepts that it has these powers and acts accordingly to ensure that the DAA does not continue to abuse its monopoly position. Implementation of the suggestions listed in this letter's above points will assist CAR in performing its role.

12) Consumer issues

CAR should remain cognisant of developing trends in relation to passenger claims. Notably, claims harvesters are increasingly common, and while they claim to act in the interest of passengers, they in fact take a significant proportion of passengers' compensation. In order to avoid such consumer harm, CAR should encourage passengers to, in the first instance, contact airlines directly when claiming compensation rather than waiving their rights to claims harvesters. Similarly, CAR should refuse to deal with claims harvesters that complain via CAR as a first option

CAR notes that "*Brexit may, in time, result in an increase in complaint volumes*". In order to avoid an unsustainable increase in complaint volumes, CAR should take action to encourage UK passengers to engage in Alternative Dispute Resolution rather than litigation.

At an EU level, CAR should encourage a revision of Regulation 261/2004, which is blocked by the dispute about the status of GIB, by urging the EU to separate the revision of this Regulation from the political issue between Spain and the UK.

Conclusion

CAR's Strategic Plan notes that that "*there are a number of areas where [CAR needs] to consider changes to the regulatory framework currently in place*." This is a unique opportunity for CAR to effect such changes in order to ensure that the effects of competition are replicated at DUB, with the resultant benefit to consumers. Should you wish to discuss our recommendations, please do not hesitate to contact me.

Yours sincerely,

Juliusz Komorek
Chief Legal & Regulatory Officer