

## **Public Consultation**

### **Independent Review of Airport Charges Regulation in Ireland**

This purpose of this document is to frame a consultation process on future policy and implementation of airport charges regulation in Ireland.

Indecon International Economic Consultants have completed an independent review of airport charges regulation in Ireland and, based on this report, the Department of Transport, Tourism and Sport is now engaging in a public consultation process to inform future policy direction.

This document should be read in conjunction with the report from Indecon which is available here.

#### **1. Introduction and Background**

Economic regulation of airport charges in Ireland essentially has two strands. Firstly, the EU Airport Charges Directive 2009/12 sets out common principles for the levying of airport charges at airports with greater than 5 million passengers per annum. The model involves direct consultation between airports and airlines on airport charges, with disputes being referred to an independent supervisory body for decision. The aims of this Directive include ensuring non-discriminatory and transparent application of airport charges. The Directive is transposed in the European Communities (Dublin Airport Charges) Regulations 2011 (SI No. 116 of 2011). Dublin is the only airport in the Republic of Ireland with greater than 5 million passengers per annum so this Directive does not apply to our other airports.

Secondly, in addition to application of the Dublin Airport Charges Regulations 2011, Dublin Airport, given its market position, is subject to more detailed economic regulation. The Commission for Aviation Regulation (CAR), under the Aviation Regulation Act, 2001 (SI No. 1 of 2001) supervises a consultation process engaged in by the airport, approves a maximum level of airport charges that may be levied through a determination process, and monitors this regime including a series of quality targets related to the charges. The price determination by CAR is subject to a statutory appeals procedure.

The regulatory regime for the setting of airport charges at Dublin Airport has been in place since 2001, with some amendment in 2004. Determinations on the level of airport charges are in place for a period of not less than four years. The latest determination was in 2014 and will remain in force until 2019, making this a five year regulatory period. In the context of these determinations, successive Ministers have considered it necessary to issue policy directions to CAR, in line with legislative provisions. However, these policy directions have, in general, given rise to objections from airport users. Furthermore, all but the most recent

CAR determination have been subject to either appeal or legal challenge. On the most recent determination in 2014, Aer Lingus, daa, and Ryanair collectively withdrew their requests to appeal, partly on the basis that the regulatory regime was to be reviewed. In addition to these issues, stakeholders have also expressed concerns around the functioning of the appeals process itself.

Given the above, the National Aviation Policy (NAP), which was published in August 2015, committed to an independent review of airport charges regulation being completed by the end of 2015. The NAP also outlined that, following consultation with impacted parties, the Department would finalise and publish its policy on airport charges regulation, and make preparations for any necessary changes to legislation during 2016.

## **2. The Independent Review of Airport Charges Regulation in Ireland**

Following a competitive tender, Indecon International Economic Consultants were awarded the contract to carry out the independent review of airport charges regulation in Ireland. The terms of reference for this work outlined that the work should comprise “a comprehensive review of the current regulatory regime and its operation, and propose clear options and recommendations for the future”.

Specifically the terms of reference stated the following:

- The review shall take account of the general principles for economic regulation contained in the Government Policy Statement of July 2013 on Sectoral Economic Regulation.
- The review will also have regard to the proposals set out in the National Aviation Policy and the requirements of the 2009 Airport Charges Directive.
- The review shall include an initial assessment of current airport market dynamics and the degree of countervailing market power exercised by those airlines.
- The appropriate scope and degree of intervention in the Irish market, if any, should be examined by reference to latest economic regulatory analyses and to relevant examples of available models worldwide, including the current Irish model.
- A key question for the review is the extent to which regulation may be necessary in order to deliver one or more key (government) policy objectives.
- The review should propose a range of clear options and recommendations for a future regulatory framework for airport charging.

Indecon completed their review in December 2015 and its report is available on the Department's website. The Department of Transport, Tourism and Sport is now initiating a public consultation on the report, with a view to developing and finalising the appropriate policy on airport charges regulation. The next section of this document poses questions based on the findings and recommendations of the Indecon report.

**Key Findings of Report and Public Consultation Questions:**

This public consultation document should be read in conjunction with Indecon's final report. The key high level findings of the report are summarised below, with questions framed around these key findings.

**Market Power**

For the purposes of airport charges regulation, Indecon concluded that the widest feasible market definition is the Republic of Ireland, while noting that a narrower definition may be relevant in some cases.

Only airports which hold significant market power should be subject to economic regulation of charges. In the context of the market defined above, and based on detailed economic analysis, Indecon find that Dublin Airport is the only airport in Ireland which is deemed to hold significant market power and as a result continued economic regulation is recommended.

Indecon find that while some degree of countervailing power rests with airlines, it is not sufficient to change the market power assessment.

<p><b><i>Do you agree with this finding on market definition? If not, what would you propose as a more appropriate definition?</i></b></p> <p><b><i>Do you concur with the view that only airports which hold significant market power should be subject to economic regulation? In what circumstances would you propose the removal of economic regulation in the airports sector, or impose it on airports which do not hold significant market power?</i></b></p> <p><b><i>Do you agree with the finding that Dublin Airport holds significant market power, which necessitates airport charges regulation for that Airport?</i></b></p> <p><b><i>Do you agree with Indecon's assessment of the degree of countervailing power held by airlines?</i></b></p>
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## **Competition**

Since the promotion of competition is a feature of best practice for regulation, Indecon recommend that the regulator and National policy makers should work to promote competition in the Irish airport sector. The promotion of competition should become a statutory objective of CAR.

Indecon suggest that periodic assessments of the market power of Dublin airport should be undertaken and if competition intensifies, consideration should be given by the Regulator to a change the approach.

Longer term options suggested to enhance competition include inter-terminal competition and the provision of new airport to serve the Dublin area. Both of these options would represent a major shift away from current stated policy as expressed in the NAP. Any such move would require policy change and would be subject to specific economic appraisal of the net benefits.

***Do you agree that there is a need to promote competition in the Irish Airport Sector? What should be done to promote it?***

***Who is best placed to carry out market power analysis in the Irish Airport Sector?***

***Are the longer term proposals to enhance competition within the airport services provision at Dublin Airport feasible and would they eliminate or reduce the need to regulate?***

## **Regulatory Regime**

Following consideration of the different types of regulatory regimes, the current regulatory regime in Ireland, and analysis of international regimes, Indecon conclude that price cap regulation with a single till mechanism, as currently used, is most appropriate for the economic regulation of airport charges at Dublin Airport.

***Do you agree with the finding that price cap regulation, with a single till is most appropriate for the economic regulation of airport charges at Dublin Airport?***

***If you disagree, what do you propose as the most appropriate approach?***

## **Flexibility**

Indecon recommend that changes within the airport regulation regime should be implemented to incentivise efficiency at Dublin Airport, to increase flexibility to changes in market conditions and to ensure capital investment proposals are warranted.

***Do you think that increased flexibilities would improve the current regulatory regime, and if so, what specific changes should be made to the regulatory regime?***

## **Statutory objectives**

Indecon recommend that a statutory basis for independent airport regulation should continue. At present, this statutory mandate is provided by the Aviation Regulation Act, 2001, (SI No. 1 of 2001) (as amended). Indecon recommend that certain amendments should be implemented to ensure that focus is on the interests of existing and future airport users. To this end, Indecon recommend removing the current statutory objective of enabling daa “to operate and develop Dublin Airport in a sustainable and financially viable manner.” (s.33 (c)) and instead making this an element to which the regulator should have regard. This would represent a change to the hierarchy of statutory goals, while continuing to recognise that the stability of service provision remains critically important to airport users. Indecon, as outlined above, also suggest the inclusion of promotion of competition as a new statutory objective.

**Is the continued statutory basis for airport regulation warranted?**

**Would you support amending the existing statutory objectives to focus more on the interests of existing and future airport users, as outlined above?**

**Do you support the proposed new statutory objective of the promotion of competition?**

## **Ministerial Direction**

At present, the Aviation Regulation Act 2001 allows the Minister for Transport, Tourism and Sport to give general policy direction to the CAR as “he or she considers appropriate to be followed by the Commission in the exercise of its functions”. Indecon recommend that the scope of any such Ministerial direction on capital investments should be restricted to issues of national importance which cannot be addressed within the existing statutory objectives.

Additionally, Indecon recommend that any proposed Ministerial Direction on capital investments should be subject to a consultation process, which will include the presentation

of a rigorous cost benefit appraisal, to be undertaken prior to the issue of any draft determination by the regulator. Indecon believe that, if planned effectively, this could be done in a manner which would not delay the regulatory process.

It is important to note here that all major capital projects costing over €20 million are required to undergo a detailed cost benefit appraisal, under the terms of the Public Spending Code, published by the Department of Public Expenditure and Reform. It is the duty of the promoting agency (in the case of Dublin Airport, daa) to undertake this appraisal.

**Do you agree with the proposal to limit the scope of Ministerial directions? How should the limitation be enforced?**

**Are you in favour of a consultation process being undertaken (including the publication of cost benefit appraisals) of any proposed Ministerial direction in respect of capital investment?**

### **Consultation**

Indecon recommends that the regulator should encourage constructive engagement and more extensive consultation between the airport and airport users, prior to the submission of proposals to the Regulator. This includes, but is not limited to, the incentivisation of bilateral negotiations and agreements between parties, with due regard being given at all times to the interests of consumers.

To encourage enhanced stakeholder consultation, Indecon also recommends the establishment of a new consultative group, comprising the airport and airport users, with an independent chair prior to the commencement of any future determinations. Indecon also favour the regulator undertaking further research to ascertain the views and preferences of passengers and cargo users on aspects of airport regulation.

**Do you agree that more engagement should be encouraged between the airport and airport users prior to the determination process? How could the regulator facilitate this?**

**What are your views on the establishment of a new consultative group on airport charges at Dublin airport?**

**Should CAR undertake research to ascertain the views of airport users? How might this research be undertaken?**

## **Appeals**

Indecon conclude that the existing appeals process, which involves the ministerial appointment to ad hoc appeals panels is not appropriate and should be abolished.

They recommend that a strengthened independent appeals process should be established with appointments made by the parties under dispute who would agree members of the Panel or failing this seek appointment to the Panel by the President of the High Court or the President of the Chartered Institute of Accountants in Ireland. The panel would have broader powers than at present, including power to confirm or set aside a determination, or to refer a determination back to the regulator and direct the regulator to make a further determination within a defined period of time.

**Do you agree with the proposal to abolish the current appeal process?**

**What are your views on the proposed new appeals structure?**

## **Organisation Structure**

In this report, Indecon have considered a number of potential options for the organisational structure of the regulatory regime for airport charges in Ireland. These options are presented on pages 75-76 of the report. Indecon have not recommended a specific model, but rather have suggested that further evaluation of the options should be undertaken. The aim of such evaluation would be to strengthen the organisational structure of the regime and provide all of the required resources to ensure a robust and appropriate regulatory framework is in place.

In this context, Action 5.2.6 of the National Aviation Policy is relevant: *“The organisational arrangements for the provision of safety and economic regulatory oversight will be restructured taking account of the review of the appropriate model for airport charges regulation”*. DTTAS views this public consultation as the first step towards this further overall evaluation. In advance of any restructuring options being pursued, further detailed consultation will be undertaken with any impacted parties.

Indecon also recommend that consideration be given to possible interim actions in the shorter run to strengthen the existing regulatory framework for CAR. Suggestions include shared expertise and services with other regulators, including the strengthening of the existing network of regulators, which operates at present under the auspices of the Department of An Taoiseach.

**Given the analysis undertaken by Indecon, what do you consider to be the most appropriate organisational structure for airport charges regulation in Ireland?**

**Given the intermittent nature of airport charges regulation, what options are available to ensure that the organisational structure has sufficient critical mass, including mergers with other regulatory entities within and outside the aviation sector?**

**What interim actions could be taken in the shorter term to strengthen the regulatory functions of CAR? How might links between CAR and other economic regulators be enhanced?**

**Responding to this consultation paper:**

Interested parties are invited to make submissions in relation to the issues identified above or any other issues which are relevant to the review. All submissions should be received, at the latest, by 17:00 on Friday, 29 July 2016. Any submissions received after this date may not be considered.

The preferred means of response is by email to: [samanthadevitt@dtas.ie](mailto:samanthadevitt@dtas.ie) but if you prefer you are welcome to respond by post to:

Ms Samantha Devitt,  
Airports Division  
Department of Transport, Tourism and Sport  
44 Kildare Street  
Dublin 2

All submissions will be considered and in line with established practice for public consultation and subject to considerations of confidentiality, submissions will be published on the Department's website and are subject to Freedom of Information legislation.

It is proposed, following the consultation process, to prepare a policy statement on airport charges for submission to Government before the end of 2016.