



## **Review of the Regulatory Regime for Airport Charges in Ireland**

### **Submission by the Competition and Consumer Protection Commission to Public Consultation by Department of Transport, Tourism and Sport**

#### **1. Introduction**

- 1.1 The Competition and Consumer Protection Commission (“the CCPC”) welcomes the opportunity to respond to the Department of Transport, Tourism and Sport’s consultation published on 4 July, 2016. The Department’s consultation is based on a report entitled “Review of the Regulatory Regime for Airport Charges in Ireland” dated 11 March, 2016 prepared by Indecon International Economic Consultants ( the “Indecon Report”)
- 1.2 The CCPC supports the promotion of competition in the airport sector. Competition in the provision of airport services has the potential to reduce costs, increase efficiency, reduce airfares, and increase consumer welfare.

#### **2. General Observations**

- 2.1 The CCPC supports the general approach to regulation advocated in the Indecon Report, which sets out a principles-based approach grounded in competition analysis and focused on the interests of end users rather than regulated entities.
- 2.2 The Indecon Report calls for a greater role for competition assessment in airport regulation. It endorses the importance of an independent regulator, and recommends amendments to the statutory obligations of the Commission for Aviation Regulation (“CAR”), including the addition of a specific mandate to promote competition. It also calls for changes to the appeals process, designed to strengthen the process and ensure its independence. These are all positive proposals which have the support of the CCPC.



- 2.3 The Indecon Report makes several recommendations which have a direct bearing on the CCPC. Notably it recommends that:
- The CCPC should be given responsibility for carrying out periodic assessments of the market power of Dublin Airport. (Alternatively it proposes that this function be carried out by a strengthened economic regulator)
  - Further evaluation of options for strengthening the organisational structures for airport regulation be undertaken, including the option of allocating certain functions to the CCPC.
- 2.4 With regard to the first of these recommendations, we do not believe that the CCPC is best placed to carry out periodic reviews of the market power of Dublin Airport. This type of review requires detailed sector-specific information which is only available to the sectoral regulator. We are happy to assist, if necessary, the Commission for Aviation Regulation ('CAR') where questions arise about the application of market power analysis or the principles of competition policy. We do not however have the specific sectoral expertise necessary to carry out the type of regular market assessment envisaged in the Indecon Report.
- 2.5 We have no comment to make on proposals regarding the organisational structures for airport regulation. This is ultimately a matter for the Minister to decide.



### 3. Consultation Questions and CCPC Responses

#### 3.1 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.

**Do you agree with this finding on market definition? If not, what would you propose as a more appropriate definition?**

**CCPC Response:** A move away from passenger quotas to a more competition-based form of analysis is welcome, and is supported by the CCPC. We support the use of competition principles in regulatory analysis. Detailed analysis of the market or markets within a specific airport, including defining the relevant product and geographic markets, should be carried out on a case by case basis by the Aviation Regulator.



**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?**

**CCPC Response:** The CCPC agrees that only airports which hold significant market power should be regulated. We believe that it is best to align the concept of significant market power with the competition law notion of dominance. We welcome the recognition that, as competition increases, the need for regulation reduces and can sometimes be removed. Hence, if competition in individual service elements emerge, it can be considered whether these services can be removed from the basket of regulated services. We also welcome the recognition that market power is a dynamic concept which changes over time, so that ongoing reviews are necessary to determine the appropriate level of regulation.

**Do you agree with the finding that Dublin Airport holds significant market power, which necessitates airport charges regulation for that Airport?**

**CCPC Response:** The CCPC has not carried out an assessment of the market power of Dublin Airport and cannot comment on this finding. We believe that it is for the Aviation Regulator to identify the airports, or markets within airports, that it wishes to regulate and to demonstrate that significant market power exists and is likely to persist for the period of the market review. The markets subject to regulation could cover a number of different airports or a series of different services within a specific airport. We believe that it is better to set out the test to be met in legislation rather than putting in place a regulatory regime linked to a specific airport, which cannot be readily adapted to circumstances as they evolve.

**Do you agree with Indecon's assessment of the degree of countervailing power held by airlines?**

**CCPC Response:** The CCPC cannot comment on the countervailing power held by airlines using Dublin airport. This would require a detailed and partly prospective analysis of the sector, which should be undertaken by the regulator. As noted above, the CCPC believes that research on market power should be undertaken by the regulator on the basis of general principles outlined in legislation. The assessment of countervailing buyer power is part of this, and would need to be assessed on a defined market by defined market basis.



### 3.2 Competition

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

**CCPC Response:** All possible steps should be taken to promote competition in the airport sector. This may involve unbundling some of the current services, and identifying areas within the overall package of airport services where increased competition is possible. A system of regulation whereby the regulated airport can be incentivised to promote competition on the basis of the relaxing/removal of some elements of regulation ensures that regulation is self-limiting, and only applies to those services where competition cannot be introduced.

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

**CCPC Response:** Regulation of the aviation sector is highly specialised. Setting efficient and financially sustainable price caps requires a deep sectoral knowledge. We note the suggestion that the CCPC might take on the role of carrying out periodic assessments of the market power of Dublin Airport. We do not believe that the CCPC is best placed to carry out such assessments. This type of review requires detailed sector-specific information which is only available to the sectoral regulator. We are happy to advise the Commission for Aviation Regulation ("CAR") (where questions arise about the application of market power analysis or the principles of competition policy. We do not however have the specific sectoral expertise to carry out the type of regular market assessment envisaged in the Indecon Report.



**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?**

**CCPC Response:** The CCPC welcomes any initiatives to increase competition within, and between, airports. As competition increases, there is the potential to reduce or eliminate regulation. This could take place on a service by service basis.

We note the two main options identified for increasing competition in the Irish airport sector are to introduce competition between Terminal 1 and Terminal 2 in Dublin (or any new terminal which may be built), or to develop a new airport to service the Dublin Airport catchment area. In the absence of detailed evidence on the pros and cons of these options, we are not in a position to comment on their feasibility or merits.

### 3.3 Regulatory Regime

**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?**

**CCPC Response:** It is for the Aviation Regulator to choose the most appropriate form of price cap regulation based on the objectives it has been set under legislation. In that regard, a specific legislative objective of promoting competition where feasible is welcomed by the CCPC.

### 3.4 Flexibility

**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?**

**CCPC Response:** It is very important that the regulatory regime is able to respond in a timely and flexible manner to changes in market conditions. As such, we welcome the general approach outlined in the Indecon Report.




### 3.5 Statutory objectives

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

**CCPC Response:** As long as economies of scale, economies of scope, and network effects facilitate significant market power in the provision of airport services then there is a need for a statutory basis for airport regulations. We welcome the fact that the Indecon Report embraces a flexible, dynamic model of regulation which allows for, and supports, competition.

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

**CCPC Response:** We welcome the explicit recognition in the Indecon Report that regulation is designed to promote the interests of existing and future airport users, rather than the needs of regulated entities. It is important that users are understood to encompass both airlines and passengers. In this regard, we welcome the reference to passenger interests at various stages of the Indecon Report.

We welcome the proposal to remove the statutory obligation on CAR to ensure DAA's financial viability. The interests of the regulated entity should not be a primary objective of the Regulator, but are relevant to the extent needed to meet user requirements. The CCPC supports this recommendation as it will enhance the power of CAR to effectively regulate DAA. The suggestion is in line with international and cross sectoral regulatory standards.



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

**CCPC Response:** We support the proposal to include the promotion of competition as a statutory objective of CAR. The inclusion of such an objective will provide a focus for efforts to reduce the need for regulation by actively pursuing all available opportunities to increase competition. It will provide CAR with a mandate to regulate so as to encourage an increase the number of services which are provided competitively at Dublin airport. Combined with a deliberate focus on the needs of end-users (both airlines and passengers), it will provide the best possible context for regulation of the airport sector.

### 3.6 Ministerial Direction

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

**CCPC Response:** Regulatory independence is an essential cornerstone of effective regulation. It is important that any interventions which might undermine (or be seen to undermine) such independence are kept to a minimum. In this context, the CCPC supports the proposal to limit the scope of Ministerial directions to matters of national interest. The CCPC believes that it is then for the Aviation Regulator to show in their determinations how they have taken account of these directions, in light of their statutory objectives.

**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?**

**CCPC Response:** A consultation process will enable the Minister to consider the input of all stakeholders before issuing any such direction. It would also allow the public to see the inputs that assisted the Minister in shaping any such direction. This is something that the CCPC would welcome.

### 3.7 Consultation



**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?**

**CCPC Response:** As a general principle, we support regular ongoing engagement between the airport and airport users, particularly with representatives of consumer and local business interests. We welcome the recognition that the interests of consumers and end users should be to the fore in the regulatory regime and we support any initiatives which give practical form to that intent.

While greater communication and dialogue between the airport and end users can help to inform the decisions of CAR, it is important that it does not undermine the authority and decision-making powers of the regulator. As with Ministerial directions, it is for the Aviation Regulator to decide how results of the consultation process feed into its decisions, in line with its statutory objectives.

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

**CCPC Response:** We welcome the proposal to establish a consultative group on airport charges, comprising the “airport” and airport users. Such a group should provide a forum for bringing the needs of consumers and end users to the forefront of the regulatory agenda.

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

**CCPC Response:** We welcome any initiative designed to elicit feedback from consumers/users of airport services. CAR should be free to determine how often to seek such feedback as well as the specific form it should take. It is important that the views of consumers and end users feed into the design of the regulatory regime.

### 3.8 Appeals



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

**CCPC Response:** The Indecon Report recommends that the existing appeals process under the Airport Regulation Act 2001, which involves Ministerial appointments to ad hoc appeal panels, should be abolished. The CCPC strongly supports any measures which would increase the independence of the appeals process in relation to determinations of CAR. The CCPC considers that it is of utmost importance that regulators in the State, and relevant bodies responsible for reviewing the determinations of those regulators, are independent and that any interventions which might undermine (or be seen to undermine) such independence are limited. In this context, the CCPC supports the proposal to remove Ministerial involvement in the appointment of members to appeal panels.

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

**CCPC Response:** The CCPC is supportive of Indecon's recommendation to establish a new strengthened independent appeals process in relation to airport regulation. The Indecon Report recommends the continued use of ad hoc appeals panels with the addition of, a new process for the appointment of members to such panels and enhanced powers for reviewing determinations of CAR. The CCPC considers that there might be some practical challenges to be considered in connection with the implementation of Indecon's proposals. The ad hoc nature of the Airport Appeals Panels may result in delays, since each appeal would involve convening a new panel. It may be challenging in practice to identify a sufficient number of experts with the requisite level of experience and without conflicts of interest if the requirements with respect to the composition of the panel are too prescriptive. It is not clear from the Indecon Report whether it is envisaged that the Airport Appeals Panel, which would have greater decision-making powers pursuant to the proposals, would be accountable to the Irish courts. If decisions of the Airport Appeals Panel were to be reviewable by the Irish courts, this would involve introducing another layer to the appeals process, which would likely require the parties involved (i.e. CAR and the person initiating the appeal) to dedicate additional resources to the appeals process.

Neither the CCPC nor its predecessor organisations (i.e. the Competition Authority and the National Consumer Agency) have any direct experience of their decisions being subject to an appeals panel process. However, the CCPC's general view is that a system whereby regulatory decisions are directly appealable to the High Court is preferable to an ad hoc appeals panel process. In the context of its merger review functions, the CCPC's decisions are subject to direct appeal to the High Court under section 24(1) of the Competition Act 2002.



Such appeals are heard by the judge responsible for the High Court's Competition List. The High Court has the ability in such cases to appoint an expert to assist the judge in understanding or clarifying a particular matter (e.g. an economist). The CCPC considers that the current system for merger appeals to the High Court works fairly well in practice, and that the measures referred to above have been of considerable value in facilitating High Court understanding of the complex issues arising in competition cases.

The CCPC notes that in the context of the regulation of electronic communications by the Commission for Communications Regulation (ComReg), one criticism of the former Electronic Communications Appeal Panel, established under Part 2 of the European Communities (Electronic Communications Networks and Services Framework) Regulations 2003, was that it was assembled on an ad hoc basis, which gave rise to difficulties in terms of identifying panellists with the necessary expertise but without conflicts of interest. It was argued this led to significant delays.

### 3.9 Organisational Structure

***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?***

**Response:** These are policy matters to be decided by the Ministers.



Coimisiún um  
Iomáiocht agus  
Cosaint Tarnhaltóirí

Competition and  
Consumer Protection  
Commission