DECISIONS

COMMISSION IMPLEMENTING DECISION (EU) 2019/1585

of 24 September 2019

on the establishment of traffic distribution rules pursuant to Article 19 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council for the airports Amsterdam Schiphol and Amsterdam Lelystad

(notified under document C(2019) 6816)

(Only the Dutch text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air service in the Community ([1]), and in particular Article 19(3) thereof,

After consulting the Committee referred to in Article 25(1) of Regulation (EC) No 1008/2008,

Whereas:

1. PROCEDURE

(1) Following a previous notification, subsequently withdrawn ([2]), the Netherlands authorities informed the Commission by email of 25 March 2019 ([3]), pursuant to Article 19(3) of Regulation (EC) No 1008/2008, of their intention to establish certain traffic distribution rules for the Amsterdam Schiphol and Amsterdam Lelystad airports in the Netherlands (referred hereafter as Schiphol Airport or Schiphol, or Lelystad Airport or Lelystad, respectively) by adopting the Draft Ministerial Decree and the Draft Order of the Minister for Infrastructure and Water. By email of 29 March 2019 ([4]), the Netherlands authorities submitted an amended version of the Draft Ministerial Decree and the Draft Order of the Minister for Infrastructure and Water ([5]), together with the other elements already contained in the notification of 25 March 2019.

(2) The information thus submitted by the Netherlands authorities included as annexes four studies: (1) Capacity demand at Schiphol in 2023; (2) Capacity demand at Schiphol in 2030; (3) Secondary trading at Schiphol ([6]) and (4) Airline split operations.

(3) The Commission published a summary of the intended traffic distribution rules in the *Official Journal of the European Union* on 12 April 2019 ([7]) and invited interested parties to submit comments.

(4) By letters of 3 July 2019 ([8]) and 11 July 2019 ([9]), the Netherland authorities submitted an amendment to the notification, intended to take account of concerns raised by the Commission services. By the same letter dated 11 July 2019 as well as by email dated 16 July 2019 ([10]), the Netherlands authorities notified further factual elements relevant to the notification, regarding the accessibility of the airports, as well as those authorities' intentions regarding the timeframe within which Lelystad airport would open to commercial operations.

([1]) OJ L 293, 31.10.2008, p. 3.
([2]) On 12 July 2018, the Netherlands authorities notified the Commission a first set of traffic distribution rules for the Schiphol and Lelystad airports. That notification has been withdrawn by the Netherlands authorities on 4 December 2018.
([3]) Registered under Ares (2019)2057632
([4]) Registered under Ares (2019)2256246.
([5]) Aanmelding verkeersverdelingsregel voor de Nederlandse luchthavens Lelystad Airport en Schiphol.
([6]) The three studies have been conducted by the consultant Seo Amsterdam Economics.
([7]) OJ C 136, 12.4.2019, p. 26.
([8]) Registered under Ares (2019)4236859
([9]) Registered under Ares (2019)4595066.
([10]) Registered under Ares (2019) 4595552.

2. DESCRIPTION OF THE MEASURE AND OBJECTIVE SET OUT BY THE NETHERLANDS AUTHORITIES

2.1. Description of the measure

(5) The draft TDR for distributing traffic between Schiphol and Lelystad airports consists of the following elements:

(a) Lelystad Airport, which the Netherlands government plans to open to commercial operations before end 2020, will be designated as a coordinated airport within the meaning of the Council Regulation (EEC) No 95/93 ([11]) (hereinafter the 'Slot Regulation') as from the entry into force of the Ministerial Decree. Lelystad Airport.

(b) Without prejudice to the Slot Regulation, an air carrier obtains priority to require slots at Lelystad Airport to take off or land in so far as that air carrier:

— Has transferred historical slots at Schiphol Airport to another air carrier or returned it to the slot coordinator; or

— Commits to henceforth use historical slots at Schiphol Airport to operate transfer flights.

(c) The rule described in point (b) above applies only to slots at Schiphol Airport that were used in the previous corresponding scheduling period or in at least three of the four previous corresponding scheduling periods to conduct for point-to-point flights.

(6) 'Transfer flights' and 'point-to-point flights' are to be defined by an Order of the Minister for Infrastructure and Water. In addition, rules should be laid down concerning the criteria to be met by these flights. The flights should be classified every two years according to those criteria, and any new classification should be announced at least one year prior to its entry into force. A draft Order based on this empowerment forms part of the notified measure [cf. recitals 13 to 21 below].

(7) The draft TDR does not require that the days and times of the capacity used at Lelystad Airport, on the one hand, and of the relevant slots at Schiphol Airport, on the other hand, transferred, returned or put to a different use according to the rule described in recital 5(b) above need to correspond.

(8) An air carrier that relies on Article 2(2) of the draft Decree [i.e. the rule described in recital 5(b) above] must inform the Minister, the slot coordinator and, where applicable, the recipient air carrier thereof, stating which slots at Schiphol Airport are concerned. When informing the Minister, the air carrier must demonstrate that the requirements described in Article 2(5) of the draft Decree [recital 5(c) above] are met.

(9) Under Article 3(1) of the draft Decree historical slots covered by its Article 2(2) [described in recital 5(b) above] are to be used exclusively for transfer flights.

(10) Paragraphs 2, 3 and 4 of Article 3 of the draft Ministerial Decree add the following provisions:

'(2) During the period of application of this decree, an air carrier holding historical slots referred to in paragraph 1 must serve at least the same number of transfer flights as in the corresponding scheduling period before having obtained those slots, following their transfer under Article 2(2)(a), or before the application of Article 2(2)(b) to those slots, as the case may be, increased by a number equal to the number of those slots.

By derogation from the first subparagraph, and under the conditions set out in paragraph 3, such carrier may decrease the number of transfer flights in case the overall number of slots it holds decreases.

(3) An air carrier holding historical slots referred to in paragraph 1, and without prejudice to that paragraph, may at no time decrease the proportion of transfer flights among all flights operated thanks to other slots at Schiphol Airport, vis-à-vis the proportion that existed before the carrier had obtained the historical slots in question, following their transfer under Article 2(2)(a), or before the application of Article 2(2)(b) to those slots, as the case may be.

([11]) Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p. 1).

(4) Where slots at Schiphol Airport are held by more than one company within a given set consisting of

— a parent company and all its subsidiary companies or, otherwise,

— all subsidiaries of the same parent company,

each such set of companies shall be considered as a single air carrier for the purposes of paragraphs 2 and 3.'

(11) According to Article 2(3) and (4) of the draft Ministerial Decree the priority referred to in Article 2(2) thereof [recital 5(b) above] applies to two tranches of slots at Lelystad airport, namely up to and including 10 000 slots and from 10 001 to 25 000 slots.

(12) According to its Article 7, the Decree enters into force on a date to be stipulated by Royal decision, with the exception of Article 2(4), which enters into force with effect from the day on which the European Commission approves this particular paragraph pursuant to a separate submission pursuant to Article 19, paragraph 3, of Regulation (EC) No 1008/2008 and has published its decision in the *Official Journal of the European Union*.

(13) The draft Order of the Minister defines 'transfer flights' by reference to each flight's destination. The criteria are the following:

— an average transfer percentage of all flights from Schiphol Airport of at least 10 %, measured over the five calendar years prior to the publication of the classification and more than ten flights per year in the three years prior to the publication of the classification, or,

— destinations in areas defined in Article 1, paragraph 1 of the 'Aanwijzingsregeling risicovluchten', which designates the so called 'risk flights' that require customs control.

(14) Annex 1 to the draft Order lists the destinations corresponding to those criteria.

(15) In accordance with Article 1(3) of the draft Order, a destination not included in Annex 1 will be regarded as a 'transfer destination' for a requested period, up to a maximum of 5 years, if an airline can substantiate to the Minister *ex ante* that the destination will be served by its flights with an average transfer percentage of at least 10 % for the requested number of seasons.

(16) Under Article 1(4) of the draft Order, an airline can, in any case, meet the requirement set in paragraph 3 by demonstrating that a destination is being served by flights with an average transfer percentage of at least 10 % measured over the five calendar years preceding the request referred to in paragraph 3, at an airport within the European Union.

(17) Destinations which will be regarded as a transfer destination pursuant to paragraph 3, will be published in the Government Gazette.

(18) The draft Order of the Minister lists as well, in Annex 2, the destinations designated as 'point-to-point flights' on the basis of the following criteria:

— an average transfer percentage of all flights from Schiphol Airport of less than 10 %, measured over the five calendar years prior to the publication of the classification;

— more than ten flights per year in the three years prior to the publication of the classification.

(19) Article 3 of the draft Order concerns rules regarding the assessment of evidence of the transfer percentage relevant to the application of the Order.

(20) According to Article 3(1), any verifiable data pertaining to the transfer percentage of flights and destinations can be submitted to the Minister and will be taken into account when designating flights as either transfer or point-to-point flights.

(21) Article 3(2) stipulates that, in any case, with regard to the data referred to in paragraph 1, passengers arriving at Schiphol Airport and departing, within 24 hours after arrival, to another destination than where the previous flight originated, will be regarded as transfer passengers.

2.2. **Objective of the measure set out by the Netherlands authorities**

(22) According to the Netherlands authorities, the objective of the draft TDR is to privilege transfer flights when it comes to the allocation of capacity at Schiphol Airport. The extensive network of intercontinental destinations could not be served if Schiphol were not a continental and intercontinental hub. The two functions, serving intercontinental destinations and operating in a European network for transfer passengers, are inseparable and together form Schiphol's continental and intercontinental hub function.

(23) Background to this objective is the limit of 500 000 movements per year at Schiphol airport until end of 2020, established in the 'Alders Agreement'. That agreement was reached in 2008 between the parties concerned (i.e. aviation industry, public authorities and residents). It seeks to reach a balance between the growth of the aviation sector and viability and environmental safety and sustainability.

(24) The limit of 500 000 movements per year at Schiphol Airport was already reached in 2018. As a consequence, the Netherlands authorities take the view that capacity available to transfer traffic at Schiphol airport can only be increased by a distributing traffic between that airport and Lelystad airport, the latter being capable of accommodating traffic that does not need conditions and facilities such as those available at Schiphol Airport.

(25) To this effect, Lelystad Airport would accommodate point-to-point traffic coming from Schiphol Airport, thus enhancing the transfer function of the latter airport.

(26) The draft TDR does not force air carriers to relocate their flights from Schiphol, but rather relies on incentives for relocation of point to point traffic.

(27) According to the Netherlands authorities, the notified measure has to be seen against the high economic and strategic importance of maintaining major hubs in the Union. According to the Netherlands authorities, Schiphol Airport is one of the largest hubs in the North-western part of the Union, and a major pillar for the economy and connectivity of the Netherlands. In 2017, 48,6 million passengers from European cities travelled from/to Schiphol Airport, and 31 % of them transferred to another flight at Schiphol. In addition, 19,7 million non-European passengers travelled from/to Schiphol. Of those passengers, approximately 60 % were transfer passengers. The Netherlands authorities refer to the importance recognised by the European Commission to the existence of major hubs on EU territory in its external aviation policy ([12]).

(28) The Netherlands authorities consider that a European route network from Schiphol serving continental and intercontinental destinations is essential to retain and develop this strong EU hub. They believe that Schiphol's hub function is a vital public interest that must be maintained and strengthened ([13]). Doing so is important given the hub's vulnerability to a decline in the continental and intercontinental route network.

(29) According to the Netherland's authorities, this vulnerability is due more specifically to the fact that the domestic market, in terms of passengers residing in the Netherlands, for intercontinental and transfer traffic is small. Secondly, a specialised infrastructure is needed for carriers carrying out intercontinental and transfer traffic, for which in certain situations, such as risk flights, no other reasonable alternative exists in another airport situated in the Netherlands. Thirdly, the Netherlands authorities argue that if the airport were to lose its hub function, seat capacity and frequencies would suffer for years.

(30) The Netherlands authorities also refer to the comprehensive package of measures that has been adopted to implement the so-called 'balanced approach' established by Regulation (EU) No 598/2014 of the European Parliament and of the Council ([14]). Those measures, the Netherlands authorities explain, are reflected in the 2008 'Alders Agreement', referred to above, and were reaffirmed in the White Paper on Dutch Aviation (2009), in the Schiphol Action Agenda (2016) and in the Coalition Agreement (2017).

(31) As mentioned above, the threshold of 500 000 aircraft movements at Schiphol has already been met in 2018. Moreover, according to the Netherlands authority, capacity available at Eindhoven Airport has been quickly absorbed by additional traffic not transferred from Schiphol Airport. There have been insufficient incentives for air carriers moving to Eindhoven to return on their own initiative their Schiphol slots to the slot coordinator.

([12]) The EU's External Aviation Policy — Addressing Future Challenges, COM(2012) 556 final of 27 September 2012.
([13]) Schiphol Action Agenda (2016).
([14]) Regulation (EU) No 598/2014 of the European Parliament and of the Council of 16 April 2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC (OJ L 173, 12.6.2014, p. 65).

(32) Against this background, the Netherlands authorities consider necessary to further develop and implement the package of measures. This implementation is structured around a number of elements, namely: (a) long-term vision of air transport; (b) safety measure; (c) air space measures; (d) operational measures; (e) nuisance abatement measures; (f) sustainability measures and (g) selectivity measures.

(33) The TDR forms part of a wider plan of developing Lelystad Airport with a maximum capacity of 45 000 yearly aircraft movements. This capacity will be reached in two stages: the first stage will be at 25 000 yearly movements, to be reached around 2033. At the opening of Lelystad Airport in 2020, the airport will accommodate a yearly maximum of 4 000 take-offs and landings. This number is expected to rise to a maximum of 7 000 in 2021 and to 10 000 in 2022. The second stage will allow for growth up to 45 000 yearly movements to be reached until 2043.

2.3. **Observations of the Netherlands authorities on the compatibility of the draft TDR with Article 19 of Regulation (EC) No 1008/2008 and with the Slot Regulation**

(34) The Netherlands authorities consider that the requirements set out in Article 19 of Regulation (EC) No 1008/2008 are met.

(35) The Netherlands authorities carried out an internet based consultation on the draft TDR from 16 January to 6 February 2019. The explanatory memorandum and relevant studies were also made public for the benefit of the stakeholders. The main concerns regarding the draft TDR resulting from the consultation were: (a) their proportionality in relation to the limited capacity at Lelystad Airport restricting the air carriers' business opportunities, (b) their possible discriminatory impact regarding the type of traffic and the identity of air carriers, and (c) the distribution of market forces.

(36) The Netherlands authorities stress that, further to the stakeholder consultation they revised the draft TDR in a number of areas: (a) the introduction of an 'anti-misuse provision', to ensure that the objective of increasing international connectivity is met; (b) the specific treatment of 'risk flights', i.e. flights from certain destinations requiring a full customs control upon arrival in the Netherlands and which must consequently be accommodated at Schiphol Airport; and (c) clarifications regarding the information needed to substantiate the transfer share of a new destination.

(37) As regards accessibility and infrastructure, the Netherlands authorities consider that both airports serve Amsterdam and the Randstad conurbation, and that the distance between the two airports is 57 km by A6 motorway and can be covered within 90 minutes. The two airports are also linked by public transport. The journey time by train between Lelystad Central Station and Amsterdam Central Station is 38 minutes, and that between Lelystad Central Station and Schiphol is 42 minutes. The journey from Lelystad Central Station to Lelystad Airport takes 15 minutes by bus. A shuttle bus service between Lelystad Central Station and Lelystad Airport with a journey time of 10 minutes will be introduced when Lelystad Airport is opened. Depending on the airport's flight schedules, the shuttle bus will depart at intervals of 30 minutes. Furthermore, it has already been decided to widen the A6 motorway to Lelystad Airport from two to three lanes and build an exit to the airport as from 2021.

(38) The Netherlands authorities indicate that Lelystad Airport offers the necessary services and is suitable for handling ICAO/EASA CAT C traffic ([15]). In addition, four parking positions are available. Air traffic control will be ensured by LVNL. The airport will provide ground handling and passenger handling services. The airport will not be open for night flights, and no facilities have been planned for cargo flight operations and intercontinental flights with 'wide-body' aircraft.

(39) The Netherlands authorities consider that the draft TDR does not unduly prejudice commercial opportunities, since, in particular, air carriers are under no obligation to relocate their operation from Schiphol to Lelystad. Moreover, all destinations may be served from Lelystad Airport, and the 6.00 to 23.00 timetable (local time) allows flexibility to use the entire period.

([15]) As the runway will be 45 metres wide, the airport will be suitable for special aircraft such as the Boeing 737 and Airbus A320 and A321.

(40) According to the Netherlands authorities, the draft TDR provides for the possibility for air carriers to develop new routes. When an air carrier can substantiate that it will serve a new destination from Schiphol Airport with flights with a share of at least 10 % of transfer passenger, such a destination will be deemed part of the list of transfer destination.

(41) The Netherlands authorities submit the study conducted Seo Amsterdam Economics, a consultant. The study is intended to assist the Netherlands authorities in establishing the most appropriate threshold for defining a flight as a transfer flight, so as to achieve a balance between the objective of minimising the impact on the market and maximising the effectiveness of the rule. The analysis includes the total number of destinations and aircraft movements, aircrafts movements and routes affected in respect of each airline currently operating from Schiphol airport. The study examines the effects of different thresholds on the achievement of the objective of the measure and possibility for the various air carriers to make use of it for the purposes of obtaining priority at Lelystad Airport.

(42) With regard to new entrants, the criteria of the Slot Regulation will apply from the opening of Lelystad Airport for commercial traffic, it being understood that Lelystad Airport will be a coordinated airport as from that moment. Without prejudice to the application of those criteria, the draft TDR establishes a priority in the allocation of slots at Lelystad Airport for carriers having made use of Article 2(2) of the Decree.

(43) The draft TDR do not entail any direct or indirect discrimination between air carriers on grounds of nationality and identity or between destinations. The draft TDR are based on objective criteria, and all air carriers serving a specific destination are treated equally, without discrimination. The draft TDR do not oblige air carriers to move flights from Schiphol Airport to Lelystad Airport.

(44) The Netherlands authorities indicate that the difference between destinations does not per se entail any discrimination. The difference can be objectively justified, on the basis of the legitimate aims of the network quality and promotion of Schiphol's hub functions.

(45) The Netherlands authorities consider that the draft TDR is proportionate. Lelystad Airport will be a coordinated airport as from its opening to commercial operations and The priority set out in the TDR will be applied after application of the priority criteria of the Slot Regulation. Once Lelystad airport will have reached a level of 10 000 flight movements per year, an evaluation of the TDR will be conducted to assess its impacts. The priority rule would be extended to a further tranch of 15 000 flight movements (and hence to a total of 25 000 flight movements per year) only if such extension is approved by the Commission.

(46) The Netherlands authorities consider that the notified rules contain safeguards that ensure that the TDR achieves its objectives in future.

(47) According to the Netherlands authorities, the measure does not go beyond what is necessary to achieve the objective set, since the rule only applies to Schiphol's capacity obtained through this measure, and not to any other newly/recently available capacity at Schiphol Airport.

(48) According to the Netherlands authorities, transparency of the draft TDR is ensured by the legal form chosen, that is a Ministerial Decree and an Order of the Minister for Infrastructure and Water.

(49) Finally, the Netherlands authorities conclude that the draft TDR is not incompatible with Regulations (EEC) No 95/93 and (EC) No 1008/2008. The Slot Regulation would be respected in full. The fact that a TDR can intervene in the way in which slots are used is apparent from previous Commission decisions.

3. **OBSERVATIONS SUBMITTED TO THE COMMISSION BY INTERESTED PARTIES**

(50) In response to the publication of a summary of the intended amendments in the *Official Journal of the European Union*, the Commission received comments from 10 citizens and 5 air carriers and 1 airport as interested parties, most of which wished to remain anonymous.

(51) Most of the interested parties claimed that the measure is discriminatory: the draft TDR is based on a fundamental distinction between 'transfer flights' and 'point-to-point flights'. The threshold of 10 % of transfer passengers is not based on objective criteria, and it only takes into account information on transfer passengers provided by the airport. The interested parties raised the difficulty to provide data to justify the percentage of transfer passengers and the lack of criteria provided by the Netherlands authorities on how to demonstrate that percentage, which rends the measure inapplicable.

(52) Moreover, interested parties claim that the draft TDR has discriminatory effects in relation to air carriers, as it is only KLM Group ([16]), its SkyTeam Airline's alliance ([17]) and codeshare partners that will benefit from the draft TDR due to the distinction between destinations. The definition of 'transfer flight' corresponds to almost 86 % of the KLM Group destinations. By fixing these rules certain business models, like low cost and holidays model, are limited in their possibilities of business growth. Interested parties therefore consider that the draft TDR is not objective and proportionate, and goes beyond what is required to attain a potentially legitimate objective.

(53) Interested parties also claim that the draft TDR has discriminatory effects in relation to destinations, since it is *de facto* benefiting KLM group destinations, which will be able to grow from Schiphol Airport and from Lelystad Airport. However, as almost 86 % ([18]), of KLM Group destinations are designated as 'transfer flights', they will be able to grow further on these routes, and open new routes. Further, the draft TDR results in practice in a situation in which air carriers will need to compete with KLM Group/Sky Team on those destinations where the position of KLM Group/SkyTeam is the strongest because of feeder traffic at Schiphol Airport.

(54) Interested parties also consider that the conditions of Article 19 of Regulation (EC) No 1008/2008 have not been fulfilled. The airports regulated by the draft TDR do not serve the same conurbation, as according to interested parties: '(i) there are large open agricultural and nature areas (Natura 2000) between Amsterdam and Lelystad, and it is therefore, not a continuous built-up area; (ii) with almost 80 000 inhabitants, Lelystad is too big to form part of an agglomeration'. At administrative level, both cities are only covered by the same government at national level.

(55) In addition, it is argued that Lelystad Airport does not currently satisfy the requirements in relation to an adequate transport infrastructure and public transport services, specifically at certain time periods of the day (6.00 and 23.00) where no sufficient public transport connections exist. Moreover, at peak hours, the transfer between the two airports requires more than 90 minutes. The limitation of the number of movements at Lelystad Airport (4 000 in 2020) and the fact that the airport is not open to air carriers specialised in point-to-point traffic that currently are not holding slots at Schiphol Airport, prejudices their commercial opportunities.

(56) Some interested parties argue that the draft TDR is contrary to the Slot Regulation since this regulation allows only to grant priorities in the allocation of slots through local rules, and TDR cannot create priorities. Moreover, the Slot Regulation does not allow slots to be linked to destinations.

(57) Most interested parties refer to the noise impact that the further development of Lelystad Airport will have, as the air space of the Netherlands is full and because of the need to avoid that air traffic from one airport interfere with traffic from the other. Interested parties impute this situation to the delay taken by the Netherlands authorities to reclassify the airspace. There is therefore a constraint for flights to Lelystad Airport that must be underflown, consequently increasing the noise levels. Besides, the economic importance of the hub function of Schiphol Airport is questioned, by reference to the Environmental and Infrastructure Councils' report.

(58) Moreover, interested parties refer to the impact of large aircrafts on protected sites (wild species, in particular birds), and the responsibility of the Netherlands authorities to avoid measures that deteriorate the conditions in natural habitats.

([16]) The KLM Group includes the wholly owned subsidiaries Transavia and Martinair. In 2004 KLM merged with Air France.
([17]) SkyTeam is an air carriers alliance that currently has 20 Members gives access to 1 074 destinations worldwide.
([18]) The KLM Group has more than 55 % of the total yearly slots at Schiphol. Figures available from Airport Coordination Netherlands (Slot Coordinator).

(59) Most of the interested parties consider that the draft TDR has a significant impact in the field of environmental sustainability. On the basis of an Environmental Impact Assessment (EIA) conducted in 2014, the Netherlands authorities granted a permit for constructing and then operating Lelystad Airport. However, certain data necessary for the calculation of the possible impacts were wrong (such as aircraft type and associated noise levels).

(60) The Commission has not received any comment from interested parties expressing their support to the draft TDR.

4. THE TERMS OF ARTICLE 19 OF THE REGULATION (EC) No 1008/2008

(61) Article 19(1) of the Regulation (EC) No 1008/2008 provides that the exercise of traffic rights should be subject to published Union, national, regional and local rules relating to safety, security, the protection of the environment and the allocation of slots.

(62) Article 19(2) provides that a Member State, after consultation with interested parties, may regulate, without discrimination among destinations inside the Union and on grounds of nationality or identity of air carriers, the distribution of air traffic between airports satisfying the following conditions:

(a) the airports serve the same city or conurbation;

(b) the airports are served by adequate transport infrastructure providing, to the extent possible, a direct connection making it possible to arrive at the airport within 90 minutes including, where necessary on a cross-border basis;

(c) the airports are linked to one another and to the city or conurbation they serve by frequent, reliable and efficient public transport services; and

(d) the airports offer necessary services to air carriers, and do not unduly prejudice their commercial opportunities.

(63) The distribution of air traffic between the airports concerned shall respect the principles of proportionality and transparency, and shall be based on objective criteria.

(64) Article 19(3) of the Regulation (EC) No 1008/2008 provides that a Member State concerned shall inform the Commission of its intention to regulate the distribution of air traffic or to change an existing traffic distribution rule. It also provides that the Commission shall examine the application of paragraphs 1 and 2 of Article and, within six months of receipt of the information from the Member State, and after having consulted asked the Committee referred to in Article 25 of the Regulation shall decide whether the Member State may apply the measures. According to the same provision, the Commission shall publish its decision in the *Official Journal of the European Union* and the measures shall not be applied before the publication of the Commission's approval.

5. COMMMISSION ASSESSMENT

5.1. Procedural requirement: consultation of interested parties

(65) In accordance with Article 19(2) of Regulation (EC) No 1008/2008, the adoption of a decision distributing air traffic between airports requires a prior 'consultation with interested parties'. The Netherland authorities have published the draft TDR with the possibility for interested parties, including air carriers and airports concerned, to state their views between 16 January to 6 February 2019. Subsequent amendments to the draft text, made with a view to its notification to the Commission, are confined to taking into account certain concerns raised by stakeholders.

(66) It follows that the Netherlands Authorities have fulfilled the requirement of a prior consultation with interested parties.

5.2. Substantive requirements

5.2.1. *Eligibility of Schiphol and Lelystad Airports for traffic distribution under Article 19(2) of Regulation (EC) No 1008/2008*

(67) In its first subparagraph, Article 19(2) of Regulation (EC) No 1008/2008 establishes a number of requirements for a set of airports to be eligible for traffic distribution.

(68) As regards point (a) of Article 19(2), first subparagraph, of Regulation (EC) No 1008/2008, the Netherlands authorities state that the airports serve the Randstad conurbation. According to Article 2(22) of that Regulation, 'conurbation' means an urban area comprising a number of cities or towns which, through population growth and expansion, have physically merged to form one continuous built up area. The Randstad conurbation is located in the central-western Netherlands and consists primarily of the four largest Dutch cities (Amsterdam, Rotterdam, The Hague and Utrecht) and their surrounding areas. It constitutes a conurbation within the meaning of the above mentioned definition and is served by the two airports. The fact that certain agriculture areas are located between the built-up area and Lelystad airport is irrelevant for the purposes of the requirement set out in point (a) of Article 19(2), first subparagraph of Regulation (EC) No 1008/2008.

(69) As regards point (b) of Article 19(2), first subparagraph, of the Regulation, the Commission notes that the airports are served by adequate transport infrastructures providing, to the extent possible, a direct connection making it possible to arrive at the airport within 90 minutes including where necessary on a cross-border basis. Both Schiphol Airoport and Lelystad Airport can be acceded from all four cities of the conurbation by road nearly entirely on motorways. According to the Netherlands authorities, the travelling time remains within 90 minutes from all four cities of the conurbation. Given the size of the conurbation, access to one airport rather than the other may be easier, depending on the initial location of the traveller. However, this fact does not exclude compliance with Article 19(2)(b) of Regulation (EC) No 1008/2008. Moreover, while under particular traffic conditions it may not be possible to reach one or the other airport within 90 minutes, uncertainties of the kind are inevitable in this context and do not prevent either the requirement of that provision, namely that such connection be provided 'to the extent possible', from being fulfilled ([19]).

(70) Equally, Schiphol airport is served by a railway connection, as is Lelystad station, from which a bus shuttle will be established to Lelystad Airport in due time (cf. subsequent recital of this Decision). By way of example, the Netherlands authorities add that the travelling time by train between Lelystad Central Station on the one hand and Amsterdam Central Station and Schiphol Airport on the other is 42 and 38 minutes respectively, whereas the bus journey between Lelystad Central Station and Lelystand Airport will take 10 minutes.

(71) In conclusion it can be retained that the requirements of point (b) of Article 19(2), first subparagraph, of Regulation (EC) No 1008/2008 are fulfilled.

(72) Point (c) of Article 19(2), first subparagraph of Regulation (EC) No 1008/2008 requires the airports concerned to be linked to one another and to Amsterdam and its conurbation by frequent, reliable and efficient public transport. The existing railway connexions allow passengers to reach Schiphol airport and Lelystad Central Station through frequent and reliable train services. As regards Lelystad Airport, fulfilment of the above mentioned requirement therefore depends only on the establishment of an appropriate bus service between Lelystad Central Station and Lelystad Airport. According to the Netherlands authorities, this service will have been established at the time of the opening of Lelystad Airport for commercial operations, whereby busses will serve the airport with thirty minutes intervals. The requirement set out in Article 19(2)(c) must therefore be considered fulfilled.

(73) In accordance with point (d) of Article 19(2), first subparagraph of Regulation (EC) No 1008/2008, the airports provide the necessary services to air carriers. In particular, Lelystad airport is suitable for handling ICAO/EASA CAT C traffic including aircrafts such as Boeing 737 and Airbus A320/321. It will be open to traffic between 6.00 to 23.00. The airport will provide for ground handling and passenger handling services, as usual for this kind of airport.

([19]) In addition, the Netherlands authorities have already decided to widen the A6 motorway to Lelystad Airport from two to three lanes and build an exit to the airport as from 2021, all of which will further facilitated the access to the airport.

(74) Similarly, the draft TDR does not unduly prejudice the air carriers' commercial opportunities, in accordance with point (d) of Article 19(2), first subparagraph of Regulation (EC) No 1008/2008. In addition to the facts set out in recital 73 above, the Commission notes that any transfer to Lelystad Airport takes place on a voluntary basis, since the draft TDR does not provide for an obligation to this effect. The slots relinquished at Schiphol Airport may continue to be used by the same air carrier or group of air carriers for a flight to a transfer destination from that airport, or indeed by another carrier if returned to the slot pool. The fact that Lelystad Airport is reserved in priority for specific traffic transferred from Schiphol airport cannot be considered as unduly prejudicing the commercial opportunities of air carriers that intend to use Lelystad airport without such transfer. This restriction lies in the nature of the present draft TDR, intended to alleviate capacity constraints at Schiphol airport through voluntary transfer of traffic to Lelystad airport ([20]). The question whether this situation is compatible, notably, with the principle of proportionality is assessed further below [cf. Section 5.2.2 of this decision].

5.2.2. *Proportionality, transparency, objective criteria and non-discrimination*

5.2.2.1. Preliminary remarks

(75) The requirements set out in in Article 19(2) of the Regulation (EC) No 1008/2008, pertaining to proportionality, transparency, the objective character of the criteria applied as well as to non-discrimination, imply that the traffic can only distributed among airports on the basis of legitimate objectives, without however limiting the Member States' choice to any more specific objective.

(76) Given the terms of Article 7 of the draft Decree, the present decision is confined to traffic distribution within the limits of 10 000 priority slots at Lelystad airport under Article 2(2) and (3) of the draft Decree.

(77) The objective invoked by the Netherlands authorities in support of their draft measure consists in enhancing the role of Schiphol Airport as one of the main hubs in the Union, in circumstances in which that airport has reached the capacity limit of 500 000 flight movements per year, established through the Alders agreement [cf. recital 24 above]. It is among those objectives that can be legitimately pursued under Article 19 of Regulation (EC) No 1008/2008. In previous decisions based on Article 8(1) of Council Regulation (EEC) No 2408/92 ([21]), i.e. Commission Decisions 95/259/EC ([22]), 98/710/EC ([23]) and 2001/163/EC ([24]) as well as in its Communication 'The EU's External Aviation Policy — Addressing Future Challenges' ([25]), the Commission has recognised the legitimacy of an active airport planning policy, as long as it complies with the general principles of EU law. Such a planning policy may have regard to a large range of factors considered by the competent authorities to have priority. The concrete measures which must be taken for the implementation of the airport planning policy may also vary between different airports. A Member State may legitimately wish to promote the development of one airport in its territory at the expense of the other airports located therein. In such a case, the imposition of restrictions on access to those other airports alone may constitute a reasonable means of pursing that objective. However, the principles of proportionality, transparency and non-discrimination set out in Article 19(2) of Regulation (EC) No 1008/2008 need to be complied with when it comes to the precise rules intended to further such legitimate objective.

([20]) For a similar situation, cf. Commission Decision 95/259/EC of 14 March 1995 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case VII/AMA/9/94 — French traffic distribution rules for the airport system of Paris) (OJ L 162, 13.7.1995, p. 25), Section VI.

([21]) Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intraCommunity air routes (OJ L 240, 24.8.1992, p. 8).

([22]) See footnote 20.

([23]) Commission Decision 98/710/EC of 16 September 1998 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case VII/AMA/11/98 — Italian traffic distribution rules for the airport system of Milan) (OJ L 337, 12.12.1998, p. 42), recital 45.

([24]) Commission Decision 2001/163/EC of 21 December 2000 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case TREN/AMA/12/00 — Italian traffic distribution rules for the airport system of Milan) (OJ L 58, 28.2.2001, p. 29), recital 45.

([25]) The EU's External Aviation Policy — Addressing Future Challenges, COM(2012) 556 final of 27 September 2012.

5.2.2.2. Proportionality, transparency and objective criteria

(78) The rules submitted by the Netherlands authorities are intended to create possibilities for replacing certain flights at Schiphol airport by other flights, better fitted to enhance Schiphol as a hub airport. To this effect, they distinguish between 'transfer flights' and 'point-to-point flights'. According to the draft TDR, a destination is listed as 'transfer flight' if, on average, at least 10 % of the passengers flying from Schiphol Airport to that destination have previously landed at Schiphol Airport, during the reference periods of five years referred to, on the condition that more than ten flights per year in the three years prior to the publication of the classification have been operated.

(79) Conversely 'point-to-point flights' are characterised by an average transfer percentage of all flights from Schiphol Airport to the destination considered of less than 10 % during the five calendar years period referred to, on condition that more than ten flights per year in the three years prior to the publication of the classification have been operated.

(80) Article 19(2) of Regulation (EC) No 1008/2008 does not exclude the setting of such thresholds to distribute the traffic among airports. The level of threshold chosen to determine whether a destination involves a critical number of passengers transferring at the airport, can in principle be capable of directing the relevant traffic to the respective airport and does not necessarily go beyond what it is required for that purpose.

(81) However, in order to ensure that such thresholds lead to proportionate results, in accordance with the second subparagraph of Article 19(2) of the Regulation (EC) No 1008/2008, they need to be based on an objective assessment, as to whether and how they achieve the aim at stake, i.e. in the present case to preserve and develop Schiphol Airport as a hub. To this effect, Member States have a degree of discretion. As different thresholds can lead to different effects, the Member State concerned must carefully examine these effects before adopting a given threshold.

(82) The study conducted by SEO Amsterdam Economics ([26]) concludes that 'a low transfer thresholds leads to a limited market distortion, while larger thresholds leads to a more selective as well as more effective outcome'. The study takes a 10 % threshold as a starting point and compares the effects of alternative thresholds. Should the TDR refer to this threshold, KLM flights would constitute point-to- point flights to a substantial extend, namely up to almost […] aircraft movements ([…] routes) annually. A very low threshold (4 % or lower) would not yield any major difference for KLM […], while especially leisure carriers would be affected to a substantial extent. Compared to a threshold of 10 %, they would lose opportunities to obtain a priority at Lelystad airport for the purpose of moving traffic there. With a transfer threshold of 8 % or lower, KLM would be affected only moderately compared to the 10 % scenario, i.e. […]. Would the threshold be set at 15 %, KLM would come under the TDR to a considerably greater extent (over […] additional aircraft movements), i.e. in absolute terms beyond all airlines whose home-base is Schiphol Airport. At a 15 % threshold, about […] % of Transavia's flights from Schiphol Airport would qualify as transfer flights, while at a very low threshold, i.e. 2 %, over […] % of Transavia's flights from Schiphol Airport would qualify, implying that the airlines serves a relatively large number of destinations with only a few destinations giving rise to transfer flights. As regards other competitors, the study shows that almost […] % of the traffic generated by Easyjet at Schiphol Airport reaches the 15 % threshold. With a threshold at this level, Tuifly and Corendon would have the least opportunities to obtain a priority at Lelystad airport for the purpose of moving traffic there, among all carriers resorting to Schiphol Airport as home-base.

(83) In view of this analysis, the Netherlands authorities were entitled to conclude that a threshold of 10 % establishes an appropriate balance. For 2 % of the current movements at Schiphol airport, it offers a possibility to move 'point to point' flights to Lelystad airport, with an ensuing replacement at Schiphol Airport by 'transfer flights'. A number of air air carriers would be able to benefit from its terms with certainty ([27]).

(84) In this respect, the threshold can be considered capable of achieving the objective set, and it would not go beyond what is necessary for that purpose.

([26]) Cf. recital 41 above.

([27]) The findings of the study are based on known destinations and do not take into account the possibilities for carriers to substantiate that other destinations equally qualify as transfer destinations. Cf. recital 90 below.

(85) As regards the other elements of the Draft TDR, it is recalled, first, that any transfer of flights from Schiphol Airport to Lelystad Airport is voluntary in nature. Second, the priority granted to the carriers concerned at Lelystad airport, intended to increase the possibility for such transfer to take place, is limited to 10 000 slots. A possible extension to 25 000 slots will be decided separately following an evaluation and will apply only upon a fresh approval from the Commission. Third, Article 3 of the Draft Decree ensures that the priority thus granted is available only to carriers contributing to the enhancement of Schiphol Airport as hub airport, ultimate objective of the draft TDR, namely thanks to the conversion of slots with a view to their exclusive use for transfer flights. Specifically, paragraphs 2 to 4 of Article 3 ensure that the TDR fulfil their objective independently from slot mobility (available under the Slot Regulation) and independently from changes in the overall number of slots held by the carrier or group of carriers concerned.

(86) All the criteria established in the draft TDR are objective and transparent.

5.2.2.3. Non-discrimination

(87) Article 19(2) of the Regulation (EC) No 1008/2008 requires that any traffic distribution rule be exempt from discrimination among destinations inside the Union and discrimination on grounds of nationality or identity of air carriers. These two prohibitions are expressions of the general principle of equal treatment. According to consistent jurisprudence of the European Court of Justice ([28]), this principle requires that comparable situations not be treated differently and different situations not be treated alike unless such treatment is objectively justified.

— **Absence of discrimination as between destinations inside the Union**

(88) The draft TDR distinguish between 'point-to-point flights' and 'transfer flights' only insofar as it concerns the faculty to transfer movements from Schiphol airport to Lelystad Airport while benefitting from a degree of priority at the latter airport. Apart from the 'risk flights' which for security reasons can only be handled at Schiphol Airport, this distinction is inseparably linked to the legitimate objective of consolidating Schiphol Airport as a hub airport. As explained above, the draft TDR are capable of contributing to this objective and do not go beyond what is necessary for those purposes, and the ensuing criteria are as such objective in nature. As a result, the distinction can be considered objectively justified and cannot be not *per se* considered discriminatory.

(89) In this context, the Commission notes that the criteria established by the Netherlands authorities for the purposes of distinguishing between the two different types of destinations ensure that all destinations that have the same effect on Schiphol Airport as a hub are treated equally.

(90) This also applies to destinations that are not included in Annex 1 of the Draft Order due to the fact that they do not reach the 10 % transfer passenger threshold on the basis of the information so far available to the Netherlands authorities. Carriers may indeed obtain the treatment of one or more of those destinations as transfer destinations on the basis of relevant data, including appropriate forecasts and including data pertaining to other European airports (cf. Article 1(3) and (4) and Article 3 of the draft order) ([29]). The terms of those rules are such that they offer the widest possibilities for carriers to substantiate their claims in this respect, including for example through the use of data concerning self-connection ([30]), or data collected by the airport.

(91) As a result, it can be concluded that the draft TDR does not display discrimination among destinations inside the Union.

— **Absence of discrimination on the grounds of nationality or identity of air carriers**

(92) The criteria defined to distinguish the destinations, which are objective in nature, having regard to the aim pursued by the measure, ensure that there is no discrimination on the grounds of nationality or identity of the air carrier. All air carriers are treated equally on the basis of the same criteria.

([28]) E.g/. judgment of 30 September 2010, *Uzonyi*, C-133/09, ECLI:EU:C:2010:563, paragraph 31.
([29]) Cf. recitals 15 and 16 above.
([30]) Through such tools, a passenger can book two successive flights and benefit from an insurance where needed, i.e. for a substitute flight or a hotel if required by delays, cancelation or rescheduling of flights. 'Dohop' (https://www.dohop.com/) and, 'Kiwi' (https://www.kiwi.com/en/pages/content/about/) are generally known suppliers.

(93) As explained in detail above, Article 3 of the draft Decree ensures that the priority granted at Lelystad Airport is available only to carriers contributing to the enhancement of Schiphol Airport as hub airport, ultimate objective of the draft TDR, namely thanks to the conversion of slots with a view to their exclusive use for transfer flights.

5.2.3. *Compliance with Union rules on the allocation of slots*

(94) According to 19(1) of Regulation (EC) No 1008/2008, the exercise of traffic rights is subject to applicable Union rules, notably, relating the allocation of slots. This matter is currently addressed in the Slot Regulation.

(95) According to the Netherlands authorities, the analysis conducted in accordance with Article 3 of the Slot Regulation shows that there will be a shortfall in the capacity at Lelystad from the moment commercial operations set in at that airport. Consequently, it will be designated as a coordinated airport in accordance with that provision.

(96) The allocation of slots at coordinated airports must comply with the other provisions of that regulation, in particular Articles 8 to 10 thereof.

(97) Article 2(2) of the draft Decree specifies that the priority provided for therein is 'without prejudice to the Slot Regulation'. As a result, as explained in the explanatory note to the Draft Decree, it will apply only in case of requests that remain conflicting following the application of the generally applicable criteria set out in that Regulation.

(98) In this regard, reference is made to Article 10(6) of the Slot Regulation. According to that provision, the priority established therein in favour of new entrants at a coordinated airport is 'without prejudice to Article 8(1) of Regulation (EEC) No 2408/92'. Article 8(1) of Regulation (EEC) No 2408/92 has been replaced by Article 19(2) of Regulation (EC) No 1008/2008, which is the current legal basis for the establishment (and Commission assessment) of traffic distribution rules. As a result, priority may be adapted in the context of traffic distribution established under Article 19(2) of Regulation (EC) No 1008/2008, provided that such adaptation is confined to what is strictly necessary to achieve the objective of the traffic distribution rules in question.

(99) In the present case, the priority rule set out in Article 2(2) of the draft Decree sets in only after the priority criteria of the Slot Regulation have been applied, and is limited to the slots so far covered by the rules, corresponding to 10 000 movements ([31]). This adaptation of priority does not go beyond what is necessary to achieve the objective of the draft TDR and is hence compatible with the Slot Regulation.

(100) Likewise, the rule set out in Article 3 of the draft Decree whereby slots that have been subject to Article 2(2) at Schiphol Airport can only be used for transfer flights is inherent in the traffic distribution and indeed a feature typical to any such distribution. It must therefore equally be considered compatible with the Slot Regulation.

5.2.4. *Compliance with other Union rules*

(101) The Commission notes that the only object of the assessment to be undertaken under Article 19 of Regulation (EC) No 1008/2008 is the national rule that 'regulate[s] the distribution of air traffic' [first subparagraph of Article 19(3)]. As regards compliance with paragraph 1 of that Article, the fact that Lelystad Airport will open for commercial operations at a certain point in time, as well as the size of this opening in terms of possible operations, are necessary premises to that traffic distribution. These elements do not form part of the distribution itself. The terms of the traffic distribution itself can have no negative incidence on compliance with Union rules on 'safety', 'security' and 'the protection of the environment' as referred to in Article 19(1) Regulation (EC) No 1008/2008. As a result, no concerns of incompatibility with this provision arise in respect of those items.

6. **CONCLUSION**

(102) In conclusion, based on an assessment of the facts and assumptions contained in the notification of the Netherlands authorities, the Commission considers that the intended traffic distribution rules are compatible with Article 19 the Regulation (EC) No 1008/2008,

([31]) As explained above (recitals 12 and 85), an extension of the number of slots concerned at Lelystad Airport will only take place after an evaluation of the regime and only following a separate Commission approval. The regime considered in this decision is confined to the above mentioned amount of 10 000 slots.

HAS ADOPTED THIS DECISION:

Sole Article

The measures provided for in the Draft Ministerial Decree and in the Draft Order of the Minister for Infrastructure and Water on the distribution of air traffic Lelystad Airport and Schiphol airport, as notified to the Commission on 29 March 2019, and amended by letters of 3 July 2019 and 11 July 2019, are hereby approved.

This Decision is addressed to the Kingdom of The Netherlands.

Done at Brussels, 24 September 2019.

For the Commission
Violeta BULC
Member of the Commission