

EXPLANATORY MEMORANDUM

GENERAL

1. Introduction

Schiphol Airport has grown strongly in recent years and is now one of the most important continental and intercontinental civil airports in Europe. Its extensive route network is of great importance for access to the Netherlands and a driver of jobs and international business in the country. Capacity at Schiphol, however, is scarce.

This scarcity stems from safety and operational handling requirements and the strict environmental ceiling of 500,000 flight movements to the end of 2020. The scarcity is in turn placing pressure on the route network served from Schiphol: if there is insufficient capacity for feeder traffic, the lion's share of the intercontinental flights (that consist largely of transfer passengers) cannot be operated profitably and there is a risk that these routes will be lost. A decline in network quality would have serious consequences for the Netherlands' business climate and open economy.

The scarcity is exerting intense pressure on the further development of Schiphol. A package of measures is needed to use the scarce capacity as efficiently as possible for Schiphol's continental and intercontinental hub function, which is built on transfer passengers. This can be achieved by means of the selectivity policy, with Lelystad Airport serving as the overflow airport for point-to-point traffic distributed from Schiphol. The policy will release capacity at Schiphol for traffic that contributes the most to the vital continental and intercontinental network.

This explanatory memorandum concerns the Schiphol and Lelystad Airports (Traffic Distribution) Decree which provides for traffic distribution rules as a means to implement the selectivity policy.¹ Under the traffic distribution rules:

1. capacity at Lelystad Airport is reserved with priority for non-transfer traffic distributed from Schiphol; and
2. the resultant capacity released at Schiphol is reserved exclusively for transfer traffic.

2. Background

The accommodation of traffic that strengthens the continental and intercontinental route network at Schiphol and the accommodation of non-mainport traffic at Lelystad Airport is laid down in the Alders Agreement (2008),² the aviation policy document (2009),³ the Schiphol Action Agenda (2016)⁴ and the coalition agreement (2017).⁵

At the beginning of October 2017, the House of Representatives submitted a motion asking the government to introduce legal and other instruments to prevent capacity at Lelystad Airport being made available to destinations and/or air carriers that had not been distributed from Schiphol. The coalition agreement also states that the selectivity

¹ The traffic distribution rules as a pillar of the selectivity policy are named in the Schiphol Selectivity advisory report issued by the Van der Zee committee in March 2008. This report underlies the agreement to retain and strengthen the mainport function and network quality of Schiphol Airport signed by the Minister of Transport, Public Works and Water Management, the Minister of Housing, Spatial Planning and the Environment and the Schiphol Group in 2008.

² Alders Agreement (Alders Table, 2008).

³ Aviation policy document – competitive and sustainable aviation for a strong economy, Ministry of Transport, Public Works and Water Management and the Ministry of Housing, Spatial Planning and the Environment (April 2009).

⁴ Schiphol Action Agenda, Ministry of Infrastructure and the Environment and the Ministry of Economic Affairs (April 2016).

⁵ Confidence in the Future, coalition agreement 2017-2021 (VVD, CDA, D66 and ChristenUnie (2017)).

policy would be improved by giving priority to flights that strengthen the continental and intercontinental network.

3. Schiphol Mainport

Schiphol is one of the biggest hub airports in the EU and provides both the Netherlands and northwest Europe with a highly sophisticated continental and intercontinental route network that is a pillar of the Dutch and the regional economy and connectivity. This is illustrated by the following statistics.

Schiphol Airport operates direct connections to 195 cities and 39 countries in Europe. Some 48.6 million passengers from European cities flew to or from Schiphol in 2017, and 31% of them transferred to another flight at Schiphol. More than 70% of all passengers at Schiphol are from Europe. A further 19.7 million non-European passengers flew to or from Schiphol. About 60% of these passengers were transfer passengers.

These figures illustrate the importance of Schiphol as a hub. Schiphol performs a transnational function and is an important pillar of the EU's continental and intercontinental access.

Schiphol Airport is a mainport and is vital to the national economy. The annual added value of Schiphol's mainport function to the Netherlands alone has been calculated at approximately €9 billion and the number of jobs directly or indirectly related to the airport amounts to 114,000.⁶ The mainport comprises two elements: the airport's hub function and the urban area around Schiphol.

Hub function

The extensive network of intercontinental destinations could not be served if Schiphol were not a continental and intercontinental hub. Passengers from many, mainly European, cities transfer at Schiphol to fly to an intercontinental destination, and vice versa. The two functions, serving intercontinental destinations and operating a European network for transfer passengers, are inseparable and together form Schiphol's continental and intercontinental hub function. The presence of several major hubs in the EU is of great economic and strategic importance. The European Commission recognises their vital importance in its external aviation policy,⁷ partly in view of the competition from Istanbul, Dubai and other rapidly growing hubs. The Brexit will probably only increase the importance of having strong EU hubs.

Urban area

Schiphol Airport is located in an urban area of national significance. A substantial, diverse and high quality range of services has developed in this area. Its favourable business climate is a self-reinforcing process: the increase in business strengthens the economies of scale, which in turn attract more businesses.

These two aspects of the Schiphol mainport – the hub function and the urban area – are intertwined. Demand for air connections is determined in part by the scale of economic activity and size of the population in the area around Schiphol. The Schiphol Action Agenda (2016) states that the airport itself creates an attractive location for businesses. The Zuidas office and business district in Amsterdam, a top international location, would

⁶ Directly and indirectly upstream; the downstream impact or the wider economic impact is not taken into account. Economic Importance of Mainport Schiphol. Analysis of direct and indirect relations, Decisio (2015).

⁷ The EU's External Aviation Policy - Addressing Future Challenges, COM (2012) 556 final of 27.09.2012.

not exist without a strong international airport. The flower auction houses around Aalsmeer and the road and water connections to the European hinterland are also strongly connected to Schiphol. Schiphol, the hub network and the Amsterdam metropolitan region evolved into Schiphol Mainport thanks to and with each other. Together they make up a continental and intercontinental hub for flows of people, goods, capital, information, knowledge and culture that are of great importance to the open economy and society of the Netherlands and Europe.

4. Growth and scarcity

Schiphol's development must be in harmony with its surroundings.⁸ The maximum number of annual flight movements until the end of 2020 is 500,000. Demand for flight movements at Schiphol is huge. There were 451,000 flight movements in 2015, 479,000 in 2016, 497,000 in 2017 and the ceiling of 500,000 was reached in 2018. Demand has been exceeding supply at the busiest times of the day for some time and excessive demand is placing the available capacity under extreme pressure. The projected scarcity at Schiphol in 2023 is shown in figures 1 and 2, and that in 2030 in figures 3 and 4.

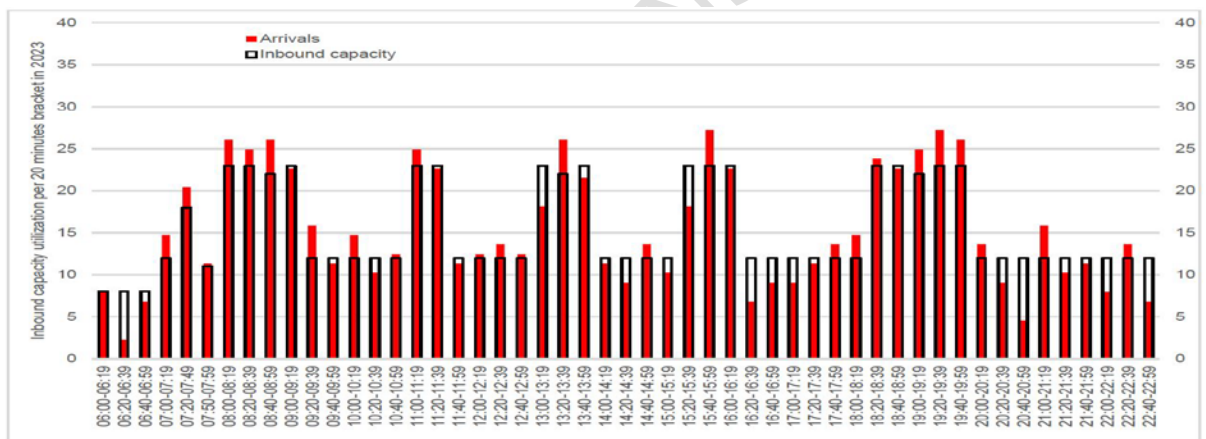


Figure 1 Arrivals compared with inbound capacity in 2023⁹

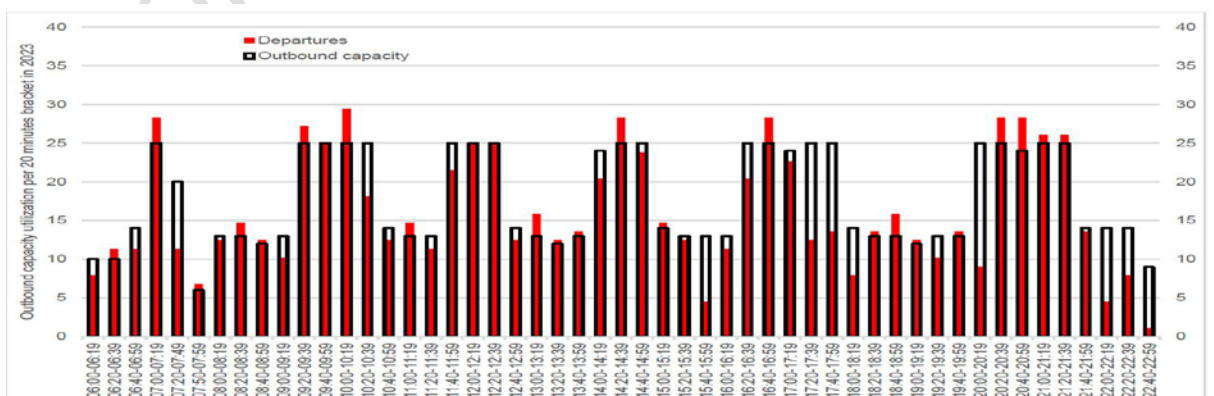


Figure 2 Departures compared with outbound capacity in 2023¹⁰

⁸ Alders Agreement (2008).

⁹ Capacity demand at Schiphol Airport 2023, SEO/To70 (2018).

¹⁰ Capacity demand at Schiphol Airport 2023, SEO/To70 (2018).

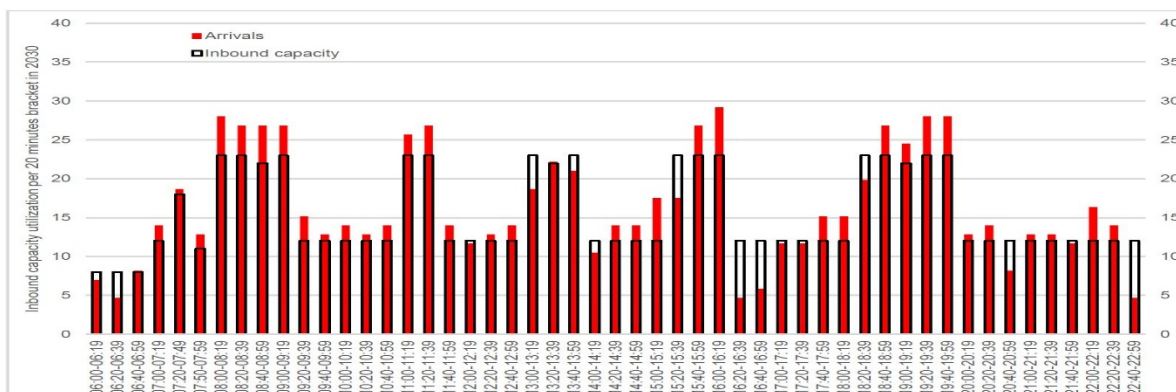


Figure 3 Arrivals compared with inbound capacity in 2030¹¹

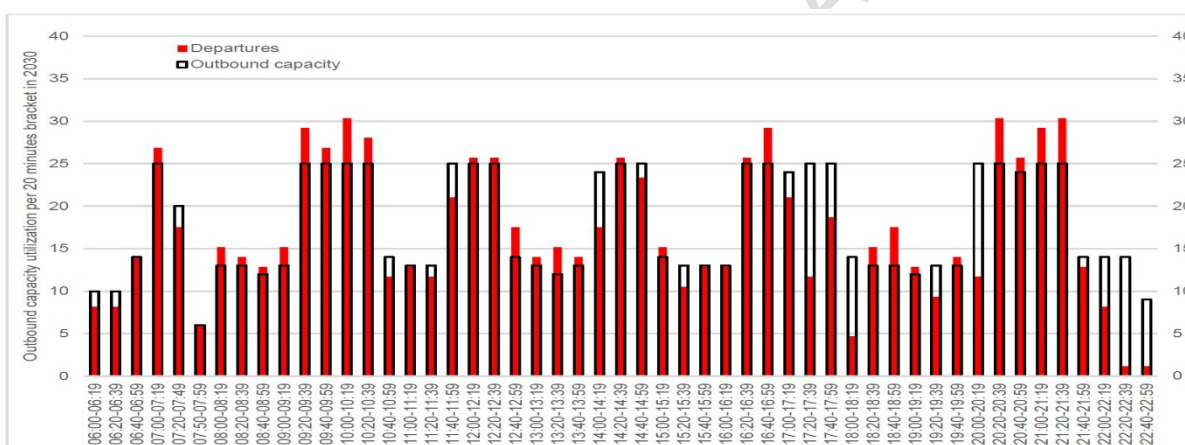


Figure 4 Departures compared with outbound capacity in 2030¹²

Given the projected increase in traffic, the scarcity at Schiphol will increase further after 2020. As already noted, the scarcity is due not only to environmental requirements but also to the limits on safety and operational traffic management capacity on the ground and in the air.

The airport's design and the air traffic control system are complex. Runway use is regulated by a preferential runway use system. Different runway combinations need to be used depending on the circumstances, chiefly wind speed and direction, but also cloud cover and visibility. The increase in the number of flight movements at Schiphol is making it harder to manage the traffic in all circumstances and to change runway combinations 'smoothly', and there is less capacity to mitigate disruptions.

The scarcity at Schiphol is also being driven by the government's ambition of making air traffic more sustainable, in part as a means to deliver on the Paris climate agreement. In practice, this will probably lead to any additional capacity at Schiphol being less than the actual capacity required to meet all the demand for flights. In this light, the traffic at Schiphol should be developed selectively, with available capacity being used wherever possible for traffic that contributes most to Schiphol's hub operation in order to ensure

¹¹ Capacity demand at Schiphol Airport 2030, SEO/To70 (2018).

¹² Capacity demand at Schiphol Airport 2030, SEO/To70 (2018).

the global connectivity of the Netherlands and the EU. This combination of limiting factors severely restricts Schiphol's ability to retain and develop its continental and intercontinental hub function.

5. Vulnerability of Schiphol's hub function

A European and global route network to feed continental and intercontinental destinations is essential to retain and further develop a strong EU hub. Schiphol's hub function is an essential public asset that must be retained and strengthened.¹³

It is important to secure the future of this public asset given the hub's vulnerability to a deterioration in the continental and intercontinental route network. Its vulnerability stems specifically from:

- a. the Netherlands' small domestic market for intercontinental and transfer traffic;
- b. this market's reliance on the physical and logistical infrastructure at Schiphol, for which there is no alternative in the Netherlands; and
- c. this market's very limited powers of recovery: if an airport loses its hub function, the negative impact on seat capacity and frequencies are felt for many years.

a. Small domestic market

The need for a European and intercontinental route network is particularly important to Schiphol on account of its small domestic market. The two functions, serving intercontinental destinations and operating a European network for transfer passengers, together form Schiphol's continental and intercontinental hub function. If there is insufficient capacity for the transfer traffic, the lion's share of the intercontinental flights (which consist largely of transfer passengers) cannot be operated profitably, which could lead to the loss of those connections.

b. Specific infrastructure

Air carriers that serve intercontinental destinations – or the associated transfer traffic – are reliant on specific airport infrastructure – both physical (e.g. runway length) and logistical (e.g. the terminal and baggage handling system) – that can be provided in the Netherlands only at Schiphol. Intercontinental and transfer traffic relies on Schiphol as there is no reasonable alternative airport in the Netherlands. Other traffic is not reliant, or is far less reliant, on Schiphol. In any decision to distribute traffic, transfer traffic will therefore have to remain at Schiphol.

c. Limited powers of recovery

The scarce capacity and limited potential for expansion at Schiphol – due to both physical and social restrictions – are putting the retention and further development of the route network under pressure. A study by SEO Amsterdam Economics (2015) found that the loss of Schiphol's hub function would lead to the loss of a large part of the route network.¹⁴ Other airports have lost their hub operation in the past.¹⁵ A worldwide analysis of airports that have 'dehubbed' found that five years after they lost their hub function, their seat capacity was on average still 20% lower than before the dehubbing.¹⁶ Schiphol's hub function should not be taken for granted. Schiphol is one of the most important hubs in Europe; in view of its extensive route network, pressure on the development of the hub operation may have a negative impact not only on the Netherlands' worldwide connectivity but also on the European Union's as a whole.

¹³ Schiphol Action Agenda (2016).

¹⁴ The Economic Importance of Schiphol's Hub Function, SEO report 2015-22, SEO (2015).

¹⁵ Capacity demand at Schiphol Airport in 2023 (SEO, 2018).

¹⁶ The Economic Importance of Schiphol's Hub Function, SEO report 2015-22, SEO (2015).

6. Package of measures

Political and public support for growth and the technical potential to increase capacity from approximately 440,000 to 500,000 flight movements have arisen in the past decade as part of an overall package of measures that can be regarded as a balanced approach within the meaning of EU Regulation 598/2014. Substantive plans for the further development of Schiphol have therefore been drawn up and a balance has been struck between the further growth of the sector and local quality of life and safety. The measures had their origin in the Alders Agreement of 2008 and were re-affirmed in the aviation policy document (2009), the Schiphol Action Agenda (2016) and the coalition agreement (2017). The measures are inseparable from each other and should be implemented as a coherent package. The package was agreed by the relevant parties: representatives of local residents, the sector, umbrella organisations and public authorities.

Measures that have already been implemented include a new standards and enforcement system to protect local residents that is less complex and easier to understand. An operational concept is also being employed which involves preferential runway use based strictly on noise levels. In addition, environmentally friendlier flight procedures and fixed flight paths have been introduced. Significant investments have also been made to reduce nuisance and improve the quality of life around Schiphol. Finally, the quality of Schiphol's network has been strengthened by the creation of additional regional capacity at Lelystad Airport (45,000 flight movements) and Eindhoven Airport (25,000 flight movements).

As Schiphol reached the upper limit of 500,000 flight movements in 2018, the package of measures based on the 2008 Alders Agreement must be further implemented and developed. This will include:

- a. long-term aviation strategy (Aviation 2020-2050 policy document),
- b. safety measures (e.g. implementation of the OVV's recommendations),
- c. airspace measures (e.g. airspace revision),
- d. operational measures (e.g. more efficient use of runways),
- e. nuisance abatement measures (e.g. half of noise reduction to benefit local residents),
- f. sustainability measures (e.g. through fees, taxes and grants),
- g. selectivity measures (e.g. through traffic distribution rules).

Taking account of all these measures, the government will take a decision on the development of Schiphol after 2020. Timely and appropriate implementation of the safety, capacity and environmental measures is a precondition for development. All relevant stakeholders will be involved through the Schiphol Local Community Council (ORS) and separate participation and consultation processes. It is clear that the sector is facing huge challenges and it cannot be simply assumed that Schiphol will meet the demand for air traffic. Selective development is vital.

7. Selectivity policy

The aviation sector has several subsectors. Each of them needs its own operational conditions and facilities to function. Owing to the physical requirements (e.g. runway length) and logistical requirements (e.g. transfer options and baggage system), intercontinental traffic and the associated transfer passengers can be handled in the Netherlands only at Schiphol.

This crucial subsector for the Dutch and European economy is under pressure from scarcity at Schiphol. The only way to accommodate the various subsectors – in line with the EU's external aviation policy – is to use the existing scarce capacity as efficiently as possible and to create additional capacity elsewhere in order to distribute the traffic selectively. This selectivity policy has created additional regional capacity in recent years to accommodate traffic that does not need the conditions and facilities at Schiphol, such as narrow-body aircraft, and flights without transfer passengers.

A central aspect of the 2008 agreements on the development of Schiphol is that Lelystad Airport will be developed as an overflow airport with a maximum capacity of 45,000 flight movements. A growth path will be applied in the first three years. Lelystad Airport will accommodate up to 4,000 take-offs and landings when it opens in 2020; this will be followed by an additional 3000 slots in 2021 and an extra 3000 slots in 2022 which will result in the possibility to accommodate a total of 10,000 flights at Lelystad Airport in 2022. Growth to the maximum capacity of 45,000 will be possible in the longer term. Lelystad Airport will be open from 06.00 to 23.00 hours local time, with regulations providing for an extension to 24.00 hours. The airport does not have the infrastructure necessary to handle cargo flights or widebody aircraft or flights from airports with 100% drug checks.

Additional capacity of 25,000 flight movements has also been agreed for Eindhoven Airport. This capacity is already almost fully utilised. Maastricht Aachen Airport and Groningen Eelde Airport still have some spare capacity to meet the demand for large commercial traffic. A decision on the possible provision of additional capacity for large commercial flights at Eindhoven Airport and Rotterdam The Hague Airport, and on what conditions, will be taken in 2019 within the framework of the Aviation 2020-2050 policy document.

The Schiphol Group's incentive policy encourages point-to-point traffic that is distributed from Schiphol to use the products, services and facilities of the regional airports. Eindhoven Airport cannot form a traffic distribution system with Schiphol because it does not meet the legal requirement that it serve the same urban agglomeration and provide the same accessibility within a given time period (as a result of which Lelystad Airport is the only alternative as an overflow airport for Schiphol). In other respects, too, the Schiphol Group's policy in the past five years of relocating non-transfer traffic to Eindhoven Airport has been ineffective. Most of the additional capacity created at Eindhoven Airport is being used for traffic that has not been distributed from Schiphol. On the one hand, the huge demand from air carriers to operate additional flights quickly absorbed the additional capacity and, on the other, the incentives were inadequate to encourage them to return their valuable historical slots at Schiphol to the slot coordinator voluntarily. The incentives to use Schiphol's capacity selectively and for transfer traffic when Schiphol had sufficient growth potential were also inadequate. Lelystad Airport will be developed specifically to relieve Schiphol of traffic that is not strictly reliant on it.

8. Traffic distribution rules

In the light of the above, rules to distribute traffic between Schiphol and Lelystad Airport are important to ensure that Lelystad Airport is used as an overflow airport for Schiphol. Lelystad Airport is accordingly being transformed into an airport for large commercial traffic. The traffic distribution rules are one of the instruments in the overall package of measures to implement the selectivity policy effectively.

In general terms, traffic distribution rules distribute air traffic between two or more airports that serve the same urban agglomeration. In the specific case of Schiphol and Lelystad Airport, the rules comprise the following two elements:

1. Lelystad Airport's capacity up to 25,000 slots will be provided with priority to traffic distributed from Schiphol. After three years an evaluation of the workings of the traffic distribution rules will be conducted. Based on this evaluation, and after approval by the European Commission, the slots between 10,000 and 25,000 at Lelystad Airport will also be distributed with priority to traffic originating from Schiphol;
2. the capacity released at Schiphol as a result of the rules will be used exclusively by transfer traffic, the definition of which is laid out in a ministerial order.

The traffic distribution rules will thus contribute to the two airports' specialisation in their respective subsectors. Lelystad Airport will serve as the overflow airport for Schiphol and accommodate point-to-point flights, that are the least reliant on Schiphol and do not support its hub function, distributed from Schiphol so that Schiphol has sufficient capacity for the traffic that contributes the most to its continental and intercontinental connectivity.

After intensive consultation between the Ministry of Infrastructure and Water Management, the aviation sector and the European Commission, traffic distribution rules consisting of the following elements were drafted:

- The rules still regard Lelystad Airport as the overflow airport for Schiphol but they do not oblige air carriers to leave Schiphol. They therefore make more allowance for the air carriers' own considerations.
- From its opening for commercial traffic Lelystad Airport will be designated as a slot coordinated airport and thus the EU Slot Regulation¹⁷ will apply.
- Lelystad Airport's capacity up to 25,000 slots will be provided with priority to traffic distributed from Schiphol. After three years an evaluation of the workings of the traffic distribution rules will be conducted. Based on this evaluation, and after approval by the European Commission, the slots between 10,000 and 25,000 at Lelystad Airport will also be distributed with priority to traffic originating from Schiphol
- An evaluation of the workings of the traffic distribution rules will be conducted within three years after the entry into force. This evaluation must report to the Dutch Parliament and the European Commission on the effectiveness, impact and proportionality of the traffic distribution rules in practice. The report will contain the results of a consultation on the aforementioned topics. Special attention shall be paid to the available market capacity and the possibility for new entrants to access the Dutch aviation market, in particular Lelystad Airport and Schiphol Airport.
- Without prejudice to the EU Slot Regulation, an air carrier will get priority to use slots at Lelystad Airport in so far as that air carrier has transferred historical slots at Schiphol Airport to another air carrier or the slot coordinator or henceforth uses historical slots at Schiphol to operate transfer flights.
- There is no limitative list with destinations to be served from Lelystad Airport.

¹⁷ Regulation (EEC) Nr. 95/93.

It is important to emphasize that the traffic distribution rules do not force air carriers to relocate their flights from Schiphol. They create the legal conditions but the market itself must implement the rules by means of the incentive policy. The rules are voluntary and rely on market forces in so far as possible.

Regarding new entrants to Lelystad Airport, the priority principle in the traffic distribution rules works complementary to the stipulations in the Slot Regulation. It does not replace these stipulations and does not go against them. Complementary to the rules from the Slot Regulation priority will be given to an air carrier that transfers historical slots at Schiphol to another air carrier or the slot coordinator or henceforth uses these slots for transfer flights. This will also apply to new entrants. The priority principle thus fully respects the elements of the Slot Regulation.

If the traffic distribution rules are not applied to create capacity for transfer traffic at Schiphol, there is a risk that the development of this subsector will come to a halt and international competitiveness will be lost. This would be contrary to the ambitions of national and EU aviation policy. The only proportionate way to create capacity for this subsector is to allocate Schiphol's scarce capacity non-discriminatorily to air carriers that serve the continental and intercontinental route network. This will be achieved, in combination with the mitigation of any disadvantages of the distribution, by creating capacity for the distributed traffic at the regional airports, as this traffic, unlike transfer traffic, can use the physical and logistical facilities of the regional airports.

9. Need for government intervention

Given the open nature, in principle, of airports, Lelystad Airport's operator does not have sufficient power to allocate capacity at Lelystad Airport in a structural manner with priority to traffic distributed from Schiphol, thus guaranteeing the functioning of Lelystad Airport as an overflow airport. Similarly, Schiphol's operator cannot reserve the capacity released at Schiphol for transfer traffic without the traffic distribution rules. The traffic distribution rules can help with the realization of this latter goal.

The traffic distribution rules are based on market forces in so far as possible. The capacity at Lelystad Airport and the capacity released at Schiphol will be regulated by means of a public law instrument and at the same time market parties will be free within the context of the traffic distribution rule to implement it as they wish. Air carriers that move from Schiphol to Lelystad Airport will do so voluntarily – the move must be initiated by the market. The Schiphol Group will be responsible for providing the right incentives to encourage air carriers to take this voluntary step.

10. Relationship with European law

Free access to the market is the underlying principle of European law. In principle, air carriers themselves must decide from which airport they offer their services. This principle is also laid down in Regulation no. 1008/2008 (the Regulation).

However, the Regulation also allows member states to regulate the distribution of air traffic between airports. Member states are free to implement an active airport policy, taking account of a large range of factors considered by the competent authorities to have priority. Strengthening Schiphol's continental and intercontinental hub function is a legitimate goal.

Nevertheless, the traffic distribution rules must satisfy the requirements laid down in the Regulation. These requirements are considered below.

Consultation

The first draft traffic distribution rules were the subject of public, internet-based consultation between 8 November 2017 and 6 December 2017, followed by a new public, internet-based consultation of the latest version of the traffic distribution rules between 17 January and 7 February 2019. All stakeholders were informed and asked to participate publicly or privately in the consultation.

Both air carriers and airports took part in the consultation.

Consultation November- December 2017

The main concerns regarding the traffic distribution rules to emerge from the consultation at the end of 2017 were: 1) their proportionality, as the limited capacity at Lelystad Airport could unduly prejudice the air carriers' commercial opportunities, 2) their possible discriminatory impact regarding the type of traffic and the identity of the air carriers, and 3) the distortion of market forces.

Consultation January – February 2019

Input from consultation will follow.

Airport preconditions

The Regulation provides a number of requirements that the airports between which traffic is distributed must satisfy:

- a. the airports must serve the same city or urban 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;
- c. the airports are linked to one another and to the city or conurbation they serve by frequent, reliable and efficient public transport services;
- d. the airports offer necessary services to air carriers and do not unduly prejudice their commercial opportunities.

Accessibility and infrastructure

Regarding the location and accessibility requirements, both Schiphol and Lelystad Airport serve Amsterdam and the Randstad conurbation. The distance from Amsterdam to Lelystad Airport via the A6 motorway is 57 kilometres. This distance can easily be travelled within the 90-minute time limit set in the Regulation. Lelystad Airport and Schiphol are connected to each other and to Amsterdam 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 every 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.

Lelystad Airport will confer with public transport companies. Schiphol and, if applicable, with air carriers to guarantee that the airport is accessible by public transport in order that passengers can reach the airport in time for the first flight of the day. The Ministry

of Infrastructure and Water Management will support this via optimization of public transport schedules.

In any case, adequate infrastructure will be in place when Lelystad Airport opens for commercial traffic and the traffic distribution rules enter into force in order for passengers to reach the airport in time for the first flight, both by public and private transport.

Necessary services

The airports must also provide the necessary services. Air Traffic Control the Netherlands (LVNL) will be responsible for air traffic control at Lelystad Airport. The airport will provide ground handling and passenger handling services. The runway will be 2,700 metres long (including the runway end safety area). Under the Lelystad Aviation Order, 2,400 metres of this total will serve as the take-off runway and 2,100 metres as the landing runway. As the runway will be 45 metres wide, the airport will be suitable for ICAO/EASA CAT C traffic and, in particular, for aircraft such as the Boeing 737 and Airbus A320 and A321. Four positions will be available for these aircraft. Air carriers will therefore be able to offer their services from Lelystad Airport. Lelystad Airport will not be open to night flights. The airport does not have the facilities necessary to handle cargo flights or widebody intercontinental flights.

No undue prejudice to commercial opportunities

To avoid undue prejudice to the air carriers' commercial opportunities, all destinations may be served from Lelystad Airport; carriers will not be restricted to just one or a handful of destinations. They may operate throughout Lelystad Airport's opening hours, i.e. from 06.00 to 23.00 hours local time, with an extension to 24.00 hours if necessary in unforeseen circumstances. The business plan drawn up for Lelystad Airport shows that the airport is suitable for point-to-point traffic. Finally, it goes without saying that the distribution of non-transfer traffic from Schiphol to Lelystad Airport will be voluntary. Air carriers themselves will decide whether operating from Lelystad Airport suits their business models.

The position of new entrants is relevant in this regard. The traffic distribution rules provide priority for the use of Lelystad Airport for traffic distributed from Schiphol. As part of the selectivity policy, Lelystad Airport will be developed under the traffic distribution rules as an overflow airport for Schiphol. It can fulfil this function by giving priority for traffic distributed from Schiphol. This measure is necessary to implement the selectivity policy. The selectivity policy was drawn up within the scope allowed to member states to pursue an active airport planning policy subject to the set priorities. This priority at Lelystad Airport for traffic from Schiphol is compatible with the wording of the Regulation, which refers only to *undue* prejudice to commercial opportunities. It can also be noted, as the Commission has stipulated in its decisions, that traffic distribution rules always entail a certain restriction on market access.¹⁸

Further regarding new entrants, any additional capacity that becomes available at Schiphol is not subject to the traffic distribution rules. Capacity that otherwise becomes available at Schiphol, for instance if carriers give up their position without moving to Lelystad Airport, will also be available to new entrants. Under the Slot Regulation, 50% of this new capacity will be allocated to new entrants so that they have access to the Dutch market and, via Schiphol, to Lelystad Airport if they wish. Air carriers can also use any additional capacity at other regional airports. On the whole, therefore, new entrants are assured of access to the Dutch market.

¹⁸ See for example, Commission Decision of 14 March 1995 (95/259/EC), L 162/25.

Non-discrimination

Traffic distribution rules may not discriminate on the grounds of the air carriers' nationality or identity or by destination.

To prevent discrimination between air carriers, the proposed traffic distribution rules are based on objective criteria that are not related to the identity or nationality of air carriers. In other words, they apply equally to all air carriers regardless of their nationality or identity. No individual or category of air carriers is exempt from this rule.

There is in any event no direct discrimination. Previous decisions by the Commission¹⁹ have considered whether traffic distribution rules are discriminatory in practice, in other words whether there is indirect discrimination. This, too, is not the case. A distinction is first made by *destination* based on the average transfer percentage of flights to a particular destination. All flights to a given destination will be classified as either point-to-point flights or transfer flights, regardless of which carrier operates the flight. All carriers that serve a particular destination will therefore be in the same position. Secondly, under the traffic distribution rules, relocation from Schiphol to Lelystad Airport is voluntary. Carriers will not be forced to move their operations. They will decide for themselves. The traffic distribution rules are therefore not more disadvantageous to some carriers than to others.

A distinction is made by destination based on objective criteria that are directly related to strengthening Schiphol's hub function. The criteria will be applied equally to each destination in pursuit of a legitimate goal: strengthening Schiphol's hub function and network quality, which is considered in detail elsewhere in this letter. Moreover, the traffic distribution rules do not contain an absolute prohibition on serving certain destinations from Schiphol. Every destination can retain its connection with Schiphol. This distinction is based on objective criteria and is non-discriminatory.

Approval of the European Commission

In addition to the material requirements, there is also the formal requirement that the European Commission must be notified of an intention to introduce traffic distribution rules. The European Commission examines whether the conditions laid down in the Regulation have been met and, if they have been, approves them. The traffic distribution rules may then be applied when its decision is published in the Official Journal of the European Union.

Financial consequences, administrative burden and compliance costs

The Schiphol and Lelystad Airports (Traffic Distribution) Decree and the ministerial order relating to it were submitted to the Dutch Advisory Board on Regulatory Burden (ATR) for comment in an earlier stage. Its advice has been incorporated in the documentation relating to the traffic distribution rules. In 2017, 37²⁰ carriers operating at Schiphol could operate from Lelystad Airport under the scope of the traffic distribution rules (not including market players that operated fewer than ten flights in 2017 that could be conducted from Lelystad Airport). The distribution of point-to-point traffic to Lelystad Airport and transfer traffic to Schiphol will be carefully monitored. After reaching 10,000 flight movements the impact of the traffic distribution rules will be evaluated. The ATR has recommended that the regulatory burden should be worked out in accordance with

¹⁹ See for example, recital 49 of Commission Decision of 21 December 2000 (2001/163/EC), L 58/29.

²⁰ The list of destinations will be updated when data over 2018 will become available.

the government-wide method to identify the impact of the regulatory burden. The impact will be analysed when the European Commission is notified.

Supervision and enforcement

Section 11.15 of the Aviation Act allows the minister to impose an order subject to enforcement action to enforce the requirements laid down by or pursuant to the Act. The General Administrative Law Act also provides for the imposition of an order subject to a penalty payment. If it is concluded that a flight contravenes the traffic distribution rules, an order can be made imposing a penalty payable on each successive contravention. The appropriate amount of the penalty will be decided on the imposition of the penalty.

An earlier draft of this decree has been submitted to the Human Environment and Transport Inspectorate (ILT). The ILT has indicated that the decree is workable and enforceable, provided there is sufficient staff capacity. Further supervision and enforcement agreements will be made with the ILT when the European Commission is notified.

Advice and consultation

As explained above, the first draft decree has been made public by means of online consultation between 8 November and 6 December 2017, whereas the latest version of the traffic distribution rules was publicly consulted between 17 January and 7 February 2019.

Entry into force

This Decree enters into force with effect from the day on which Lelystad Airport's routes for commercial traffic are published in the Aeronautical Information Publication.