

Lijnden, December 6th

Input Corendon Dutch Airlines B.V. on public consultation draft traffic distribution rule

In the minutes of the sector hearing on a traffic distribution rule for Amsterdam Airport Schiphol and Lelystad Airport of 31st January 2017 it was mentioned that the government will take concerns of stakeholders on board in order to minimize the impact on the business of airlines, in particular for home carriers that strongly depend on Schiphol Airport.

In view of the above, it is very disappointing that the draft traffic distribution rule and the preparatory studies appear to neglect the detrimental effects of the draft traffic distribution rule for home base carriers such as Corendon.

We take this opportunity of the internet consultation to share our serious concerns in relation to the draft traffic distribution rule and the negative effects thereof on our business and on competition in general.

We would appreciate it if the submission of a draft distribution rule to the Commission will be accompanied by all input that will be received through the internet consultation and further, that the Commission will be informed of all of our concerns and the manner in which these might be addressed in the further drafting process.

Our main concerns in relation to the current draft traffic distribution rule can be summarized as follows:

- First, that the criteria of art. 19 Regulation 1008/2008 do not appear to have been fulfilled;
- Second, that the studies that have been performed do not take into account the negative effects of the draft traffic distribution rule on competition between air carriers operating so called holiday flights, also taking into account the special position of home base carriers as captive users of the airport;
- Third, that the introduction of a traffic distribution rule in various stages will be detrimental for home carriers presently performing rotation flights from Schiphol airport, both from an operational and commercial point of view, notably for those air carriers that do not possess and that are unable to obtain night slots at Schiphol airport.

Hereinafter, we will discuss the questions that arise from the draft traffic distribution rule under Community law.

Principles of Community law

Under Regulation 1008/2008 and the TFEU all community air carriers should be granted

access to airports in the EU. Air carriers require a level playing field with equal opportunities and without direct or indirect discrimination. These principles remain applicable if EU member states consider the introduction of a traffic distribution rule between airports.

There are still many uncertainties in relation to Lelystad airport. It will at least take a number of decades before Lelystad airport will be fully operational and capable of taking over holiday flights from Schiphol airport, which is the intention of the draft traffic distribution rule. During the first years, Lelystad will have a very limited capacity and it is uncertain whether even this limited number of flights can be handled from an operational point of view, both on the ground and in the sky.

Art. 19 Regulation 1008/2008

A draft traffic distribution rule should be compliant with art. 19 of Regulation 1008/2008.

Under art. 19 a Member State, after consultation with interested parties including the air carriers and airports concerned, may regulate, without discrimination among destinations inside the Community or 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.

Further, any decision to regulate the distribution of air traffic between the airports concerned shall respect the principles of proportionality and transparency, and shall be based on objective criteria.

Comments on the application of art. 19 Regulation 1008/2008

Based on the input received through the draft traffic distribution rule and the explanatory memorandum, it is not possible to establish that the conditions of art. 19 will be fulfilled at the time of introduction. The following questions and concerns arise from the legislative proposal.

- a) *Same city or conurbation*
 - The draft traffic distribution rule and the explanatory memoranda do not properly explain why Schiphol and Lelystad are considered to serve the same city or conurbation. Schiphol and Lelystad have a different geographical position and serve a different catchment area.
 - Further, Lelystad has a smaller catchment area as compared to Schiphol airport and it is farther away for most passengers that presently depart from Schiphol airport.

- b) *Adequate transport infrastructure*
- The draft traffic distribution rule or the explanatory memoranda do not provide any insights as to whether Lelystad airport is able to pass the test.
 - No studies have been made available on the accessibility of Lelystad airport by road (including during rush hour) and the fact that Lelystad Airport has no railway station.
 - Further, we note that the city or conurbation under a) has not been defined and that this is a requirement for performing the test under b).
- c) *Airports linked to one another and the city or conurbation*
- No studies have been made available on the accessibility of Lelystad airport by road (including during rush hour) and the fact that Lelystad Airport has no railway station.
 - Further, we note that the city or conurbation under a) has not been defined and that this is a requirement for performing the test under b).
- d) *The airports offer necessary services to air carriers and do not unduly prejudice their commercial opportunities*
- The draft traffic distribution rule and the explanatory memoranda fail to demonstrate that this requirement will be fulfilled.
 - No studies were presented on the negative effects on the commercial opportunities of home base air carriers that are forced to move their operations or parts thereof to Lelystad airport.
 - In particular, concerns arise in relation to the effects for charter carriers based at Schiphol airport and the limited possibilities to split flight rotations performed by one and the same aircraft between Lelystad and Schiphol airport, both from an operational and commercial point of view.
 - Lelystad airport has no opening hours during night time.
 - Lelystad airport has a smaller catchment area as compared to Schiphol airport and it is farther away for most passengers.

Discrimination, objective justification and proportionality

The draft traffic distribution rule appears to discriminate both in relation to destinations as well as in relation to air carriers.

Discrimination in relation to destinations

The draft traffic distribution rule clearly discriminates between destinations.

- The draft traffic distribution rule only applies to destinations with fewer than 10,000 departing business passengers annually from Schiphol airport.
- Certain (holiday) destinations cannot be served from Schiphol airport due to the lack of transfer passengers originating from these destinations;
- It is impossible to start new services or to expand existing services on holiday destinations, due to the fact that slots at Lelystad airport can only be obtained after handing back slots for Schiphol airport that were previously used for

holiday flights;

- Capital cities are not affected by the draft traffic distribution rule;
- The draft traffic distribution rule discriminates between those destinations that can be served by wide-bodies and those that can not;

Discrimination in relation to air carriers

By its effects, the draft traffic distribution rule also discriminates between air carriers. Such discrimination is not allowed, even if a draft rule is based on objective criteria that do not directly discriminate based on the nationality or identity of air carriers.

A very small number of air carriers will be in the position to continue the performance of holiday flights from Schiphol airport:

- because code share and other agreements on joint operations with the hub carrier allow them to generate the minimum required percentage of transfer passengers and consequently, allow them to rely on a rule of exception;
- because they can benefit from the fact that their fleet includes wide-bodies that are exempt from the traffic distribution rule;
- because they serve capital cities that are exempt from the traffic distribution rule.
- because of the fact that night slots are not affected by the traffic distribution rule.

The far majority of night slots are in the hands of a limited number of air carriers. These air carriers will be able to continue offering holiday flights from Schiphol airport by using their night slots for departures and arrivals in the early morning and the late evening. This possibility does not exist for those carriers that do not possess and cannot obtain night slots at Schiphol airport due to environmental capacity constraints.

Most airlines do not possess night slots at Schiphol Airport. In addition, they will not be able to benefit from (most) of the other exceptions to the draft traffic distribution rule. In practice, only one or two airlines will be able to continue serving holiday destinations from Schiphol Airport which has a huge negative impact on other air carriers both from an operational and commercial point of view.

Of all of the home base carriers at Schiphol airport, Corendon will suffer the most from the introduction of the draft traffic distribution rule. The other home base carriers will be able to plan around the traffic distribution rule or to rely on the exceptions, but Corendon does not have this possibility.

The impact of the exclusion of certain flights from the draft traffic distribution rule is severe. Based on presentations of the Ministry during the sector meeting of January 31st 2017, a number of 11.444 leisure flights is performed in the night period and a number of 5650 flights with wide-bodied aircraft. These numbers are substantial and do not even include other flights that remain unaffected, i.e. flights to capital cities and flights that benefit from the exception for transfer passengers under commercial agreements with the hub carrier.

It is evident that the draft traffic distribution rule promotes indirect discrimination between air carriers. Further, the exceptions to the draft traffic distribution rule clearly amplify these

effects, which results in a further distortion of competition. In this respect we note that the Corendon group integrates the activities of a tour operator and those of an airline. In a situation of vertical integration, a distortion of competition on the level of air carriers also has consequences for the competition between tour operators. Hence, the draft traffic distribution rule not only affects the airline activities of Corendon, but it puts the Corendon Group as a whole at a serious disadvantage, also in comparison to other tour operators.

Following on from the above, the draft traffic distribution also cannot be considered to be objectively justified and proportionate in its effects. The draft distribution rule gives rise to serious burdens for those air carriers that are affected by the draft traffic distribution rule and are unable to benefit from the exceptions under the draft traffic distribution rule.

The studies that have been performed appear to confirm that possible advantages of introduction of a traffic distribution rule for the network carrier are minimal, in particular in the years until 2023. Further, it should be taken into account that after 2020 further growth will be possible at Schiphol Airport in accordance with the Alders agreement.

Hence, it is questionable to say the least, whether creating a possibility for minimal growth at Schiphol airport for the hub carrier by means of a traffic distribution rule as per summer 2019 justifies discrimination of other air carriers. Corendon strongly believes this can not the case.

Principles of due care and (draft) studies on effects of the traffic distribution rule

The explanatory memorandum to the draft traffic distribution rule refers to the protection of so-called captive users – from the perspective of competition – as a public interest. In its capacity of a home base carrier, Corendon is a captive user of the airport. Therefore, the legitimate interests of Corendon should be protected as well.

Corendon notes that three (draft) reports were published together with the draft traffic distribution rule. It appears that none of the consultancy firms have taken the effort to invite the airlines concerned to discuss the possible negative effects of a draft traffic distribution rule and its feasibility from an operational, commercial and financial point of view.

One of the (draft) M3 studies pretends to answer the question to what extent a traffic distribution rule is practicable and feasible from the perspective of the airlines concerned. It is explanatory that only airport employees and managers were interviewed for the purpose of this study.

Corendon also notes that it appears from the M3 website that the KLM-Air France group is a regular customer of M3, which gives further rise to the question as to whether M3 is a suitable party to provide independent consultancy services on the draft traffic distribution rule.

Notwithstanding the above serious flaws in procedural due care in the preparation of the studies, the draft distribution rule appears to rely on these reports to conclude that the

preconditions for split operations at Lelystad airport can be met through the performance of so-called W-operations in the years to come (see page 9 explanatory memorandum).

Corendon strongly rejects the above conclusions. The studies that were performed do not support these conclusions. Moreover, if proper studies would have been performed into the effects of the draft traffic distribution rule for home base carriers, the studies would have concluded that the draft traffic distribution rule is not practicable and feasible for the airlines concerned, notably in the years to come with marginal capacity at Lelystad airport.

It is concluded in the M3 reports¹ that at least until 2023 Lelystad airport will not be able to perform the role of an additional or alternative base for home carriers at Schiphol airport due to capacity constraints at Lelystad airport.

Consequently, home base carriers at Schiphol airport will only be able to operate into Lelystad through the performance of W-type flights into Lelystad airport. The M3 report provides some general insights into theoretical possibilities of W-type operations and split rotations, but it was not investigated at all in these reports whether at Lelystad airport such operations are actually feasible for home base carriers from an operational and commercial point of view, in particular in the period between 2019 - 2023.

Corendon strongly rejects the conclusion that it will be possible for home base carriers, in particular Corendon itself, to split its operations between Schiphol , taking into account the limited capacity at Lelystad airport in the period 2019-2023.

Finally, the M3 report also does not take into account the consequences of certain discriminatory measures incorporated in the draft traffic distribution rule that distort competition between air carriers and affect the possibilities to perform commercially feasible W-type operations at Lelystad airport. We refer to our comments in the next section.

Notably, the following effects do not appear to have been taken into consideration in the draft distribution rule and the studies that were performed:

- the effects on airline operations and profitability resulting from a necessity to split operations and rotations between Schiphol airport and Lelystad airport, in particular during the start-up years;
- the necessity to perform additional positioning flights between Schiphol and Lelystad, for as long as all flights that are part of the same rotation cannot be accommodated at Lelystad airport due to capacity constraints;
- the necessity to transfer passengers by bus or public transport between Lelystad and Schiphol, for as long as all flights that are part of the same rotation cannot be accommodated at Lelystad airport due to capacity constraints;
- the necessity to obtain other suitable slot times at outbound stations for operating flights, if existing flight schedules and rotations need to be changed for operating W-flights into Lelystad airport;
- the negative effects on competition resulting from the privileged position of air carriers

¹ M3, draft study Split Operations (2017) and M3, draft study Practicability and Feasibility (2016).

- that remain able to serve holiday destinations from Schiphol airport by using night slots;
- the negative effects on competition for home base carriers *vis-à-vis* carriers with a home base outside the Netherlands that will not be required to split their rotation flights over Schiphol airport and Lelystad airport;
- the negative effects on competition resulting from the privileged position of the hub carrier and other air carriers serving holiday destinations from Schiphol airport under a code share or other commercial agreement with the hub carrier.
- the lack of possibilities for new and existing air carriers to increase services on holiday destinations, this in view of the fact that slots at Lelystad airport can only be obtained by giving up existing slots for holiday flights at Schiphol Airport.

Hence, the traffic distribution rule and the studies that were performed into the draft rule also appear to suffer from a serious lack of due care on the merits.

Finally, the draft traffic distribution rule overlooks that a strict prohibition to depart during certain hours at Schiphol airport will have serious effects on flight schedules in case of disruptions. These effects do not appear to have been taken into account. A strict prohibition will also affect flights that were scheduled to depart before the “forbidden hours” but were unable to depart due to disruptions at Schiphol airport or for any other reasons causing delay.

The proposed draft rule forbids the departure of delayed flights during prohibited hours. Consequently, flights that are already delayed will automatically suffer an additional delay of several hours. The prohibition clearly should not apply for flights that are delayed until the start of prohibited hours. Otherwise, the risks of delays and the impact thereof on rotations simply become unacceptable both from an operational and commercial point of view. Such risks cannot be taken away by moving flights to Lelystad airport, because its limited capacity in the years to come does not allow for such transfer.

Timing of introduction of the traffic distribution rule and legal certainty

Both for practical reasons and in view of the principle of legal certainty, air carriers should be allowed ample time to prepare for moving part of their flights from Schiphol airport to Lelystad airport after adoption of a traffic distribution rule and the actual entering into force thereof.

Moving flights to Lelystad airport requires substantial planning of flights and rotations, as well as negotiations on alternative slots at outbound stations and other arrangements that need to be made. Therefore, it will not be possible to make all necessary arrangements for summer 2019 if a draft traffic distribution rule will only be adopted in accordance with current timeline.

Even if the draft traffic distribution rule will be adopted in 2018, it still remains unclear whether the rules will actually enter into force. The draft rule stipulates that the rule will only enter into force if the market based approach of Schiphol airport does not appear to work. This criterion is rather vague and there does not appear to be a due date for taking the decision. This could mean that only on March 31st, 2019, it will be decided that the rule

enters into force on the next day.

Furthermore, Corendon is concerned about the effects of introduction of a traffic distribution rule on air carriers that already applied for slots at Lelystad airport under the assumption that a market based approach may work and that a traffic distribution rule will not be necessary. It appears that this possibility has not been taken into account. This adds to the confusion and it stands in the way of exploring possibilities to start operations at Lelystad airport on a voluntary basis.

Conclusion

In view of all of the above we request you to reconsider the draft traffic distribution rule. We suggest that further studies shall be performed by an independent organization and that the airlines concerned will actually be invited to participate in these studies. Finally, we request you to grant us the opportunity to comment to any future amendments, before submitting a draft traffic distribution rule to the Commission.