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)

COMMISSION IMPLEMENTING DECISION (EU) 2019/1585

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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(1) Following a previous notification, subsequently withdrawn[(2)], the Netherlands authorities informed the Commission by email of 25 March 2019[(3)], pursuant to Article 19(3) of Regulation (EC) No 1008/2008, of their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.

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.

(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.