

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Complaint of)		
)		
JetBlue Airways Corporation)	Dockets	DOT-OST-2023-0028
)		DOT-OST-2023-_____
against)		
)		
The Kingdom of the Netherlands)		
and)		
The European Union)		
)		
under the International Air Transportation Fair)		
Competitive Practices Act of 1978, as amended)		
)		

COMPLAINT OF JETBLUE AIRWAYS CORPORATION

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JetBlue Airways Corporation (JetBlue) files this complaint against the Government of the Netherlands (the Dutch Government) and the European Union under the International Air Transportation Fair Competitive Practices Act, as amended, 49 U.S.C. § 41310 (IATF CPA). JetBlue joined, and continues to support, the Complaint of Airlines for America (A4A) filed on September 22, 2023 in Docket DOT-OST-2023-0148, but hereby submits its own Complaint for two reasons: 1) JetBlue is uniquely situated among U.S. carriers because it faces actual expulsion from Amsterdam Airport Schiphol (AMS) at the end of the Winter 2023/2024 scheduling season; and 2) the imminence of that expulsion threat necessitates the Department’s more immediate imposition of targeted and impactful countermeasures.

I. Introduction

The Dutch Government is poised to eject JetBlue, a new entrant in the U.S.-Netherlands air services market, from AMS in furtherance of a noise mitigation regulatory scheme (the Experimental Regulation) that will drastically reduce airport capacity, without regard for legally binding procedures or any provision whatsoever for new entrant access. In so doing, the Dutch Government stands in flagrant violation of the U.S.-EU Air Transport Agreement (the Agreement).¹

The Department has told the Dutch Ministry of Infrastructure and Water Management (MIWM) that implementation of the Experimental Regulation will violate the Agreement, and urged the MIWM to suspend implementation. Rather than heed this request, the Dutch Government has “doubled down” on the Experimental Regulation, announcing on September 1, 2023, that, effective with the Summer 2024 IATA scheduling season, which begins on March 31, 2024 (Phase 1), AMS operations will be capped at 460,000 annually – an 8% reduction in the airport’s current annual cap. Thereafter, effective with the Winter 2024/2025 scheduling season, which begins on October 27, 2024 (Phase 2), the cap will be further reduced to 452,000, nearly 10% *below* the airport’s pre-Covid level of operations.²

Phase 1 implementation will involve the confiscation of carriers’ historic slots at AMS. JetBlue only just began its low-fare service at AMS (from New York’s JFK International Airport) on August 29, 2023, with a second daily flight (from Boston) on September 20, 2023. JetBlue operates its AMS service with new Airbus A321LR aircraft, which offer approximately

¹ The European Union has been named as a respondent in this Complaint because it is a party to the Agreement and is responsible for ensuring that the Dutch Government adheres to the Agreement as well as various EU laws discussed herein.

² Toby Sterling, “Dutch government presses ahead with Schiphol flight cap as airlines protest,” Reuters (Sept. 1, 2023).

30% improved efficiency and lower emissions than typical widebody aircraft operating in the U.S.-Amsterdam market.³

Before JetBlue commenced AMS service, Airport Coordination Netherlands (ACNL), the slot coordinator for AMS, had advised JetBlue that no slots were available to enable JetBlue's entry, but after JetBlue submitted a complaint to the Department under the IATF CPA in February 2023, ACNL allocated two slot pairs to JetBlue for the Summer 2023 scheduling season and two slot pairs for the Winter 2023/2024 scheduling season.⁴ Based on communications with ACNL, JetBlue reasonably expects that it will not be allocated any slots at all for the Summer 2024 scheduling season, notwithstanding the significant economic investment JetBlue has made in its AMS service and the "open skies" traffic rights available to JetBlue (and other U.S. carriers) under the Agreement. The harm caused by JetBlue's eviction from AMS will be felt not only by JetBlue, but also its customers and U.S. consumers generally because new entry by U.S. low-fare carriers is a rare event in U.S.-Europe markets and JetBlue's entry into AMS has provided consumers a new, high-quality competitive service option and substantially lower fares.

As will be explained herein, the Dutch Government is aggressively executing on its plan to reduce – and in JetBlue's case eliminate – carrier operations at AMS over the strong objections of the Department, international airlines (from the U.S., EU and elsewhere), and industry trade associations. The situation cannot be allowed to stand. The Dutch Government's action is precisely the type of "unjustifiable or unreasonable restriction on access" that the

³ Based on JetBlue's analysis of its aircraft flight performance data and publicly available information.

⁴ The Winter 2023/2024 slots are eligible for historic status. However, the Summer 2023 slots currently lack historic status because they were allocated on an *ad hoc* basis. As will be explained herein, ACNL has the discretion to re-categorize the Summer 2023 slots as historic status eligible.

IATFCPA is intended to remedy. The time has come for the Department to take immediate and decisive responsive action.

II. History of the Case

This is the second complaint that JetBlue has filed against the Dutch Government under the IATFCPA in response to access restrictions at AMS. The first, filed on February 14, 2023, was voluntarily withdrawn by JetBlue without prejudice on June 5, 2023, after ACNL notified JetBlue that it would receive historic-eligible slots for the Winter 2023/2024 scheduling season to support AMS service from each of New York City (JFK) and Boston (BOS).⁵ In its withdrawal letter, JetBlue noted that its receipt of the Winter 2023/2024 slots was only a partial solution. More specifically, ACNL advised that (i) JetBlue’s Summer 2023 slots, which were allocated on an *ad hoc* basis (the slots with which JetBlue currently operates service at AMS) are not eligible for historic status, and (ii) JetBlue could not be assured *any slots* for the Summer 2024 scheduling season.⁶

JetBlue’s June 5th withdrawal letter also noted that JetBlue did not receive an adequate explanation from ACNL as to why the Summer 2023 slots are not eligible for historic status.⁷ ACNL’s position that they are not so eligible is dubious. Although section 8.7.1(d) of the IATA Worldwide Airport Slot Guidelines (WASG), the slot management system that ACNL purports to follow, states that “[s]lots allocated on an ad hoc basis are not eligible for historic

⁵ JetBlue understands that the Summer 2023 scheduling season slots it currently uses for its AMS service, which are not eligible for historic status, were allocated from a pool of slots that ACNL had previously removed from the airport’s capacity, including slots made available through FlyBe’s bankruptcy and cessation of service.

⁶ JetBlue hereby incorporates by reference all pleadings and correspondence it caused to be filed in Docket DOT-OST-2023-0028 prior to the date hereof.

⁷ The lack of historic eligibility for JetBlue’s Summer 2023 slots is now highly relevant given that JetBlue will not merely be facing a *reduction* in service levels at AMS for the Summer 2024 scheduling season, but rather a complete eviction from the U.S.-Amsterdam air services market. This is yet another example of the Dutch Government’s unjustifiable and unreasonable differential treatment of new entrants.

precedence,” the provision continues, “slots requested as a series but initially allocated on an ad hoc basis, which form a series by the end of the season, *may be eligible for historic precedence*” (emphasis added). WASG section 1.7.2(e) defines a ‘series of slots’ as “at least 5 slots allocated for the same or approximately same time on the same day-of-the-week, distributed regularly in the same season” (a definition that applies to JetBlue’s service). In other words, JetBlue’s Summer 2023 slots are not eligible for historic status *only because ACNL says so*, even though the WASG provides ACNL with complete discretion to re-categorize the slots as eligible for historic status.

Given that JetBlue could not know, by the statutory deadline for the Department to act under the IATFCPA, whether it would receive the slots necessary to maintain service during the Summer 2024 scheduling season, JetBlue felt compelled to withdraw its first Complaint, but stated that such withdrawal “should not be construed as an indication of no remaining issues at AMS warranting Department involvement.”⁸ Indeed, in terminating the proceeding on June 27, 2023, the Department emphasized its continuing concern over issues raised in JetBlue’s first complaint, vowing to “continue intergovernmental discussions with the government of the Netherlands.”⁹ The Department, true to its word, has continued to communicate its position to the Dutch Government that implementation of the Experimental Regulation would violate the Dutch Government’s obligations to the United States under the Agreement. Unfortunately, however, it has become clear that well-intentioned intergovernmental admonitions about bilateral obligations will not be sufficient to prevent unilateral and illegal action by the Dutch authorities to expel JetBlue from AMS.

⁸ Letter of JetBlue, DOT-OST-2023-0028-0024 (June 5, 2023).

⁹ Order 2023-6-21, at n.1.

On July 7, 2023, the Amsterdam Court of Appeal ruled in favor of the Dutch Government in its emergency appeal from an April 5, 2023, decision of the Noord-Holland Court.¹⁰ That earlier decision had effectively prohibited implementation of the Experimental Regulation on the grounds that the Dutch Government failed to adhere to the Balanced Approach under European Community law.¹¹ The Dutch Government’s successful appeal paved the way for the reinstatement of the Experimental Regulation.

By letter dated August 18, 2023, the Department explained to the MIWM the reasons why it was “deeply troubled” by the Amsterdam Court of Appeal’s decision as it relates to the Dutch Government’s legal commitments under the Agreement.¹² The Department made clear its position that the Dutch Government had failed to follow the requisite Balanced Approach, and that such failure violates Article 15 of the Agreement. In light of that violation, as well as plans by airlines and their trade associations to appeal the Amsterdam Court of Appeal’s decision to the Supreme Court of the Netherlands, the Department urged the Dutch Government to suspend implementation of the Experimental Regulation.

The Department’s August 18th letter also took pains to express serious concerns over new entrant access at AMS under Phase 1 of the Experimental Regulation, noting that the Department remains “highly skeptical that AMS will accommodate new entrants under such circumstances.”

The Department continued, “[a]ny indication that the Government of the Netherlands has

¹⁰ Christine Boynton, “Appeals Court Overturns Dutch Ruling, Schiphol Cap Can Proceed,” Aviation Week Network (July 7, 2023).

¹¹ The Balanced Approach is based on ICAO Doc. 9829, titled “Guidance on the Balanced Approach to Aircraft Noise Management,” and has been adopted by the European Union pursuant to Regulation (EU) No. 598/2014 (Apr. 16, 2014).

¹² Letter from Cindy A. Baraban, Deputy Ass’t Sec. for Aviation & International Affairs, U.S. Dep’t of Transp., to Jan Hendrik Dronkers, Secretary General, Ministry of Infrastructure & Water Management, The Netherlands (Aug. 18, 2023), attached as Exhibit A hereto.

precluded open entry at AMS would jeopardize the predicate on which the Department grants antitrust immunity to multiple joint ventures operating in the U.S.-Amsterdam market.”¹³

Notwithstanding the Department’s well-founded concerns, the Dutch Government proceeded anyway. On September 1, 2023, without even providing any formal written response to the Department’s August 18th letter, the MIWM announced it was moving ahead with the Experimental Regulation, which it has characterized as “temporary” in nature.¹⁴ Concurrent with its announcement that it was moving forward with the Experimental Regulation, the Dutch Government submitted its proposed longer-term Phase 2 “Balanced Approach” plan for aircraft noise mitigation to the European Commission for review. Thereafter, on September 11, 2023, the MIWM published the Experimental Regulation in final form.¹⁵

Phase 1 of the Experimental Regulation enters into force on March 31, 2024, and continues in effect until at least October 31, 2024.¹⁶ During that period, the level of annual

¹³ The Department previously expressed similar new entrant-related concerns to the Dutch Government. *See* Letter from Carol A. Peterson, Ass’t Sec. for Aviation & International Affairs, U.S. Dep’t of Transp., to Jan Hendrik Dronkers, Secretary General, Ministry of Infrastructure & Water Management, The Netherlands, and Henrick Hololei, Director General, Directorate for Mobility and Transport, European Comm’n (Jan. 24, 2023) A copy of this letter is contained at Appendix B to the Answer of A4A filed in response to JetBlue’s first complaint. *See* DOT-OST-2023-0028-0006 (Mar. 8, 2023).

¹⁴ *See* Letter from Minister of the MIWM to The Speaker of the House of Representatives of the States General for the Netherlands, “Termination of anticipatory enforcement and start of notification phase balanced approach procedure Main Line Decisions Schiphol” (Sept. 1, 2023). Underscoring the Dutch Government’s decision to double down on its Experimental Regulation implementation are widely reported comments by the Minister of the MIWM that the government is willing to “take the risk” of retaliation from the DOT, whether under the IATFCPA or otherwise. *See* Alex Lennane, “Schiphol closer to slot reduction as Dutch government ‘gambles’ with economy,” *The Loadstar* (Sept. 12, 2023).

¹⁵ *Government Gazette* 2023, Kingdom of the Netherlands, No. 24537 (Sept. 11, 2023). The Dutch Government’s actions earlier this month are especially perplexing given that a demissionary, *i.e.*, caretaker, cabinet, has been in place on a provisional basis since the Dutch ruling coalition’s collapse on July 7, 2023, pending the outcome of national elections on November 22, 2023. Given the controversy surrounding the Experimental Regulation, the decision to proceed with implementation before the installation of a new cabinet (with a mandate from the electorate) surprised many, including the Department, JetBlue, A4A and IATA.

¹⁶ In reality, since at least 2022 the Dutch Government has been steadily decreasing capacity at AMS, under its “Incremental Recovery” policy, involving the retirement of historic slots that are returned to the pool when carriers discontinue service at the airport, rather than making such slots available for re-allocation to new entrants as historic-eligible slots. JetBlue estimates that a total of 16,000 annual movements have been eliminated at AMS due to the Incremental Recovery policy, translating into 28 daily departures during the summer scheduling season and 14

aircraft movements will be capped at 460,000, of which no more than 32,000 may be conducted at night. This reduction will be accomplished through a confiscation of historic slots which, under a “Policy Rule” adopted by ACNL, will be placed on a waiting list and assigned priority over *any* slot requests that are not based on historical rights.¹⁷

Given that the level of incumbents’ scheduled operations with historic slots vastly exceeds the Experimental Regulation’s annual cap, it follows that prioritizing such slots over other requests will result in no *new entrant* slots being available for allocation beginning with the Summer 2024 scheduling season.¹⁸ Indeed, ACNL’s current working procedures assume that the number of historic slots will exceed the seasonal capacity declaration for the Summer 2024 scheduling season by 12,414 slots.¹⁹

Although A4A and the International Air Transport Association (IATA), on behalf of their impacted members, have sought and obtained from the Supreme Court of the Netherlands expedited review of the Court of Appeal’s July 7th decision, the procedural schedule adopted by the Supreme Court for the case provides for multiple rounds of pleadings from the parties

daily departures during the winter scheduling season. This policy has also exacerbated the new entrant access problem at AMS.

¹⁷ ACNL, “Policy Rule: Slot allocation in case of exceedance of historic rights” (Sept. 7, 2023), at paragraph 23, attached as Exhibit C hereto. The Policy Rule was adopted and finalized to specifically address how ACNL will implement the Dutch Government’s reduction in AMS capacity under the Experimental Regulation. JetBlue has previously detailed how the Policy Rule exacerbates, rather than resolves, challenges faced by new entrants at AMS. *See* Complaint of JetBlue, DOT-OST-2023-0028-001 (Feb. 14, 2023), at 11-12.

¹⁸ Remarkably, although the scheme has been presented as a noise mitigation strategy, the Dutch Government has cited the need to reduce aircraft greenhouse gas emissions as a motivating factor. *See* Toby Sterling, “Dutch government presses ahead with Schiphol flight cap as airlines protest,” Reuters (Sept. 1, 2023); Lottie Limb, “Get used to it’, environmental groups tell aviation industry fighting flight cuts at Schiphol,” euronews.com (Sept. 6, 2023). However, nearly all international flights impacted by the Experimental Regulation will be subject to the ICAO’s Carbon Offsetting and Reduction Scheme for International Aviation, as set forth in Resolution A40/19 from the 39th Assembly of the ICAO, including annual baselines, offsetting requirements, and growth factors. These targets and their related implementation schedules were painstakingly negotiated among ICAO Contracting States, including the Netherlands.

¹⁹ ACNL, “Drafting Working Procedure Slot Allocation S24 Exceedance of Historic Rights” (Sept. 8, 2023). *See also* ACNL, “Working Procedure Slot Allocation S24” (Sept. 5, 2023) (further detailing procedures for the elimination of historic status for slots that exceed the capacity declaration under the Experimental Regulation).

through December 22, 2023. As a consequence, there is a strong likelihood that the Supreme Court will not even issue a decision until the second quarter of 2024, potentially *after* the Experimental Regulation takes effect but long after ACNL has implemented the Experimental Regulation in advance of the start of the Summer 2024 scheduling season in March 2024. Additionally, although A4A and IATA on behalf of their respective members recently petitioned the European Commission to initiate a review of the Experimental Regulation under EU law, and the Commission now appears inclined to do so, the time required to complete that process and its resulting consequences for all parties concerned remain uncertain.²⁰

Thus, absent urgent and decisive intervention by the Department, JetBlue will not be able to continue to serve AMS on a year-round basis after March 31, 2024, as the only summer slots it currently holds are temporary and *ad hoc* in nature.²¹ Indeed, during a meeting between representatives of JetBlue and ACNL held in the Netherlands on September 1, 2023, ACNL confirmed to JetBlue that if Phase 1 is implemented, there is a near mathematical certainty that no slots will be available for JetBlue's service during the Summer 2024 scheduling season.

The harm to U.S. carriers with operations at AMS is immediate. Under the established IATA calendar of coordination activities, airlines have until October 5, 2023, to submit their initial requests for AMS slots for the Summer 2024 scheduling season. No later than November 2, 2023, ACNL will publish its allocation results, reflecting a drastic reduction in authorized

²⁰ See Letter from Keith Glatz, A4A Senior VP of Int'l Affairs and Rafael Schwartzman, IATA Regional VP – Europe, to Adina Vălean, European Commissioner for Transport (Sept. 12, 2023), attached as Exhibit D hereto. See also Helen Massy-Beresford, "Airlines Decry Schiphol Slot Cuts as Flight Cap Plans Advance," Aviation Weekly Network (Sept. 14, 2023) (quoting EC spokesperson as stating, "The Commission will now carry out an in-depth assessment into the compatibility of the Dutch measures with EU law.")

²¹ JetBlue again reiterates its strong legal objection as to why its Summer 2023 slots it received in 2023, and with which it is operating service at AMS today, are not considered historic-eligible slots by ACNL. As discussed *supra*, WASG section 8.7.1(d) provides ACNL with discretion to re-categorize *ad hoc* slots as eligible for historic status. This is yet another example of the unjustifiable and unreasonable restriction on access that the Dutch Government has permitted to continue.

operations. Thus, within weeks from today, airlines may have no choice but to begin canceling AMS flying for 2024 and subjecting passengers to the disruption of itinerary changes.

III. The Dutch Government's Actions Violate the U.S.-EU Air Transport Agreement

Under Paragraphs (3) and (4) of Article 15 of the Agreement, the Dutch Government is required to adhere to the Balanced Approach in connection with its adoption and implementation of the Experimental Regulation. The Balanced Approach provides that noise-based operating restrictions *should be imposed as a last resort*, and only after pursuing noise reduction at its source, noise abatement operational procedures and land-management options.²²

The Department correctly concluded in its August 18th letter to the MIWM that implementation of Phase 1 violates Article 15 of the Agreement because the Dutch Government failed to adhere to the Balanced Approach. There is no need for JetBlue to reiterate in this Complaint the Department's finding. To be clear, however, the Dutch Government's violation of the Agreement is not confined solely to its failure to follow the Balanced Approach.

Article 15(5) of the Agreement requires that when an authority imposes mandatory noise-based operating restrictions at an airport, such restrictions be "not more restrictive than necessary in order to achieve the environmental objective established for a specific airport." The Experimental Regulation, by requiring across-the-board reductions in flying, violates that requirement. For example, the Dutch Government failed to consider or incorporate into the Experimental Regulation any provision for a nighttime curfew, which would have been a materially less "restrictive" way to achieve operating reductions, thereby potentially avoiding

²² Considerable doubt surrounds the quality, timeliness and relevance of the data relied upon by the Dutch Government for the Experimental Regulation. For example, JetBlue understands that the Phase 1 restrictions are based, in part, on a 2014 aircraft noise analysis, which predates the entry into revenue services of the Airbus A321LR aircraft – the same aircraft type (and the only aircraft type) that JetBlue uses to serve AMS.

some of the Experimental Regulation’s most draconian and unfair outcomes such as the elimination of all JetBlue services at AMS.²³

In addition, Article 15(1) requires not only that the Experimental Regulation be applied in accordance with the Balanced Approach, but also that it be applied in accordance with Article 2 of the Agreement, which in turn obligates the Netherlands to “allow a fair and equal opportunity for” JetBlue “to compete in providing international air transportation.” Additionally, Paragraph 5, sub-paragraph (c) requires that any operating restrictions imposed under the Experimental Regulation be “non-discriminatory.”

Ejecting a U.S. carrier from the U.S.-Amsterdam air services market by failing to make *any* slots available for the upcoming scheduling season is a clear denial of an opportunity to compete.²⁴ For the better part of a year, the Dutch Government has utterly failed to provide any – much less a credible – explanation to either JetBlue or the Department for how new entrant access to AMS will be assured once the airport’s annual capacity is reduced to the levels called for under the Experimental Regulation.²⁵

Indeed, by letter dated January 24, 2023, the Department requested the MIWM and the European Commission’s Directorate for Mobility and Transport (DG MOVE) to provide

²³ See Charles Alcock & Cathy Buyck, “Dutch Government May Back Down on Schiphol Private Jet Ban,” AINonline (Sept. 1, 2023) (reporting on the Dutch Government’s decrease in the cap on annual flight movements while declining to ban private jets or impose a nighttime curfew, thereby deviating from the approach proposed by the Royal Schiphol Group); *see also* “Schiphol to be quieter, cleaner and better: night closure, ban on private jets and people first,” Royal Schiphol Group (Apr. 4, 2023) (“Schiphol wants no aircraft to take off between 00:00 and 06:00 and none to land between 00:00 and 05:00, ... and the noisiest aircraft will no longer be welcome. This will lead to a reduction in the number of people experiencing noise nuisance.”).

²⁴ As set forth in JetBlue’s first Complaint, the failure to provide operating authorization to an airline that is otherwise qualified to provide the transportation authorized under the Agreement also constitutes a violation of Article 4 therein, which obligates the Netherlands, upon the receipt of an application from a U.S. carrier, to grant required approvals “with minimum procedural delay.” *See* Complaint of JetBlue, DOT-OST-2023-0028-001 (Feb. 14, 2023), at 3.

²⁵ More recently, during an in-person meeting in the Netherlands between representatives of JetBlue and the MIWM held on August 31, 2023, the MIWM was unable to provide a clear explanation of how new entrants will be accommodated at AMS upon the effectiveness of the Experimental Regulation.

information on “the possible adverse effects of the [capacity reduction scheme] on the exercise of rights contained in the Agreement and the mitigating steps [the Dutch Government] plans to take to address any such adverse effects.” In that letter, the Department specifically referred to the difficulties that JetBlue had faced securing initial access to AMS.²⁶ JetBlue understands that, as of the date hereof, neither the Dutch Government nor DG MOVE has provided the Department with the requested information.²⁷

Additionally, by letter dated May 5, 2023, on which the Department was copied, JetBlue conveyed its strong objections to the Royal Schiphol Group concerning the manner in which the airport’s “Incremental Recovery” plan exacerbated new entrant access problems at AMS, casting doubt on JetBlue’s ability to continue serving the airport into the Winter 2023/2024 scheduling season.²⁸ In its response, the Royal Schiphol Group provided no information on any rules, policies or practices addressing the accommodation of new entrants under the Incremental Recovery plan, assuming (wrongly) that JetBlue’s concerns had been adequately addressed

²⁶ Letter from Carol A. Petsonk, Ass’t Sec. for Aviation & International Affairs, U.S. Dep’t of Transp., to Jan Hendrik Dronkers, Secretary General, Ministry of Infrastructure & Water Management, The Netherlands, and Henrick Hololei, Director General, Directorate for Mobility and Transport, European Comm’n (Jan. 24, 2023). A copy of this letter is contained at Appendix B to the Answer of A4A filed in response to JetBlue’s first complaint. *See* DOT-OST-2023-0028-0006 (Mar. 8, 2023).

²⁷ Although the MIWM on February 9, 2023, responded to the Department’s January 24th letter, the MIWM’s response completely failed to address how new entrant access to AMS would be assured under the Experimental Regulation or (Phase 2) Balanced Approach, or how the overall scheme would be carried out in a manner consistent with the Agreement. *See* Letter from Jan Hendrik Dronkers, Secretary General, Ministry of Infrastructure & Water Management, The Netherlands, to Carol A. Petsonk, Ass’t Sec. for Aviation & International Affairs, U.S. Dep’t of Transp. (Feb. 9, 2023) (included as Exhibit 5 to the Consolidated Reply of JetBlue, DOT-OST-2023-0028-0013 (March 21, 2023)). For its part, DG MOVE responded to the Department’s January 24th letter with a perfunctory one-page letter on March 6, 2023, maintaining that the Agreement does not guarantee slots, expressing comfort that the Dutch Government has “a clear commitment to following” EU law and assuring the Department that the “Commission will, as always, continue to ensure EU law is upheld.” *See* Letter from Henrick Hololei, Director General, Directorate for Mobility and Transport, European Comm’n, to Carol A. Petsonk, Ass’t Sec. for Aviation & International Affairs, U.S. Dep’t of Transp. (Mar. 6, 2023), attached as Exhibit B hereto.

²⁸ Letter from Robert Land, Senior Vice President, Government Affairs and Associate General Counsel, JetBlue Airways Corp., to Ruud Sondag, Chief Executive Officer, Royal Schiphol Group (May 5, 2023), attached as Exhibit E hereto.

through the then-recent allocation, to JetBlue, of Winter 2023/2024 slots eligible for historic status, and directing JetBlue to ACNL for any further questions regarding capacity decisions at AMS.²⁹

More recently, by letter dated August 11, 2023, on which the Department was once again copied, JetBlue emphasized to the MIWM its grave concerns about JetBlue's ability to maintain AMS service during the Summer 2024 scheduling season, given the lack of any historic eligibility for its Summer 2023 slots.³⁰ In that letter, JetBlue once again explained why capacity decisions at AMS since at least 2021 posed a unique threat to new entrant carriers, and implored the Dutch Government to proceed in a manner consistent with binding legal requirements, including the Agreement and the Balanced Approach, and to adhere to the WASG, in particular provisions therein addressing the allocation of historic slots returned to the pool due to a carrier's cessation of service.

By letter dated September 25, 2023, the MIWM responded to JetBlue's August 11th letter.³¹ The MIWM's September 25th letter does not address JetBlue's concerns. It claims that slot reductions will be handled in a "fair, transparent and non-discriminatory manner" and that "[c]entral" to this approach is "the proportionality principle, which means that slot reductions are spread equally among all airlines holding historic slots at Schiphol."³² This statement completely

²⁹ Letter from Ruud Sondag, Chief Executive Officer, Royal Schiphol Group, to Robert Land, Senior Vice President, Government Affairs and Associate General Counsel, JetBlue Airways Corp. (June 1, 2023), attached as Exhibit F hereto.

³⁰ Letter from Robert Land, Senior Vice President, Government Affairs and Associate General Counsel, JetBlue Airways Corp., to Lisanne van Houten, Coordinating Policy Officer DGLM, Ministry of Infrastructure & Water Management, The Netherlands (Aug. 11, 2023), attached as Exhibit G hereto.

³¹ Letter from Henri van Faassen, Acting Director General for Civil Aviation, Ministry of Infrastructure and Water Management, to Robert C. Land, Senior Vice President, Government Affairs and Associate General Counsel, JetBlue Airways Corp. (Sept. 25, 2023), attached as Exhibit H hereto.

³² *Id.* at 2.

fails to acknowledge that the Experimental Regulation’s effect will be JetBlue’s eviction from AMS, which is not a “proportional” outcome relative to reductions in slots for other carriers (Dutch and non-Dutch) with longer-established and more substantial existing operations at the airport.

The MIWM’s September 25th letter continues: “once the Phase 1 and Phase 2 measures have been realized, slot allocation procedures will *normalize* and new entrants *may* have improved access.”³³ This statement essentially constitutes the MIWM’s admission of discrimination against (and non-“proportional” treatment of) JetBlue because it is not “normal” to evict a carrier from an airport shortly after it has begun service there. On the contrary, this is unprecedented in the context of a duly authorized U.S. carrier seeking to exercise traffic rights under a U.S. open skies agreement. The Dutch Government cannot pretend that it is complying with its legal obligations under the Agreement when it informs JetBlue and any other potential “new entrant” that they will be shut out of the airport (*i.e.*, they will have no “market access” at all) for the foreseeable future, but that “market access” may “improve” for them at some unspecified future date.³⁴

As JetBlue has previously detailed, the problem of new entrant access at AMS is compounded by the absence of any functional secondary market for slots, made even worse by ACNL’s unreasonable interpretation of the EU Slot Regulation which uniquely punishes unaligned carriers such as JetBlue.³⁵ Implementation of the Experimental Regulation has a

³³ *Id.* (emphasis added).

³⁴ In addition, under the Policy Rule, any previously withdrawn historic slots will have precedence over any slot requests not based on historical rights. Thus, it is entirely unclear how new entrant access will be accommodated “once the Phase 1 and Phase 2 measures have been realized.”

³⁵ Complaint of JetBlue, DOT-OST-2023-0028-0001 (Feb. 14, 2023), at 13-14. During an in-person meeting in the Netherlands between representatives of JetBlue and ACNL held on September 1, 2023, JetBlue once again proposed as a solution, and ACNL once again rejected, the leasing of slots by JetBlue from a codeshare or interline partner at AMS during the Summer 2024 scheduling season. As detailed in JetBlue’s first complaint, ACNL continues to

disproportionate impact and discriminatory effect on new entrant carriers such as JetBlue – the only U.S. low-cost carrier operating in the transatlantic market.

The importance of preserving new entrant access to AMS is vital where, as here, the Department has granted broad antitrust immunity to multiple alliances to coordinate their prices and service offerings in the transatlantic market, including between the United States and the Netherlands. Indeed, the Blue Skies alliance, of which KLM is a member, holds a nearly 85% share of capacity between the United States and the Netherlands (one of the highest country-pair concentrations in the transatlantic market).³⁶ Further, prior to JetBlue’s entrance into the New York (JFK)-AMS and Boston-AMS markets, the Blue Skies alliance faced no nonstop competition on more than 75% of the unique U.S.-AMS routes it served.³⁷ The Department’s decades-long policy is to not even consider an application for antitrust immunity unless an “open skies” air services agreement is in effect between the U.S. and the foreign air carrier applicant’s homeland, with conditions in place for new entry to be timely, likely, and sufficient to counter competitive harm that might otherwise result from immunized coordination: “Given the mere possibility of competitive harm ... it is critical that the [immunized alliance] operate within a liberalized regulatory framework that enhances competition and *promotes new entry*.”³⁸ The Dutch Government’s planned implementation of Phase 1 essentially eliminates the conditions for

unreasonably interpret the EU Slot Regulation (Council Regulation (EEC) No. 95/93) as prohibiting such an arrangement (which is incorrect as a matter of law). Complaint of JetBlue, DOT-OST-2023-0028-001 (Feb. 14, 2023) at 5-6. This ACNL interpretation by itself constitutes unreasonable and unjustifiable discrimination against a U.S. new entrant carrier such as JetBlue, given that the FAA allows airline alliance partners to utilize each other’s slot holdings to optimize the timing of their operations at slot-controlled JFK.

³⁶ Cirium Diio Mi schedule data, calendar year 2023 as of Sept. 18, 2023; measured by ASMs.

³⁷ Cirium Diio Mi schedule data, calendar year 2023 as of Sept. 18, 2023. U.S.-AMS nonstop routes served only by the Blue Skies alliance (prior to JetBlue entry into JFK and BOS) included ATL, AUS, BOS, DTW, JFK, LAS, LAX, MCO, MIA, MSP, PDX, SEA, and SLC.

³⁸ Order 2008-4-17 (Apr. 9, 2008), at 13.

new entry at AMS. This, in turn, removes the essential predicate that the Department determined was in place when it immunized cooperation between the Netherlands' principal flag carrier, KLM, and its Blue Skies alliance partners.

The need for the Department to take immediate action under the IATFCPA is heightened due to the fact that JetBlue – and other U.S. carriers with operations at AMS – *are selling tickets now* for travel during the Summer 2024 scheduling season. The economic impacts to such U.S. carriers – and the disruptions to their customers – will be serious. For JetBlue, which is uniquely threatened by the planned implementation of the Experimental Regulation because it holds only *ad hoc* allocated Summer 2023 slots, the result will be involuntary expulsion from the market, resulting in the elimination of very significant savings for thousands of customers who have benefitted from JetBlue's low fares and award-winning service.

In short, the Experimental Regulation not only disregards the requirements of the Balanced Approach, but also does not provide any pathway, from March 31, 2024, onward, for JetBlue – the *only* U.S. low-cost carrier that competes in the transatlantic market – to maintain its services at AMS. The Experimental Regulation also effectively forecloses future access by any U.S. new entrant carrier that is not a member of an immunized joint venture.³⁹ The Dutch Government's violation of Article 15 and the denial of market participation opportunities for U.S. carriers are *per se* unjustifiable and unreasonable restrictions on access under the IATFCPA, requiring immediate Department intervention.

IV. The Department Must Take Proportionate Countermeasures Now

Ensuring U.S. carriers are able to operate services that are bilaterally guaranteed is a fundamental part of the Department's mission to promote competitive market opportunities for

³⁹ Complaint of JetBlue, DOT-OST-2023-0028 (February 14, 2023) at 5.

the airline industry. Congress enshrined this principle into federal law when it passed the IATF CPA, providing the Department with the means to forcefully respond when a foreign government stands in breach of its bilateral obligations, especially where such conduct unjustifiably or unreasonably restricts U.S. carriers' market access. Indeed, the Department has long viewed the denial of a U.S. carrier's right to operate services provided for under an air services agreement "as a most serious violation," consistently warranting the imposition of countermeasures under the IATF CPA.⁴⁰ Given the prospect of JetBlue's expulsion from AMS at the end of the Winter 2023/2024 scheduling season, it is imperative that the Department take decisive action to bring the Dutch Government, which appears indifferent to new entrant access at AMS, into compliance with the Agreement.

The situation is rendered all the more urgent for two reasons. First, JetBlue and other U.S. carriers are selling AMS flights for the Summer 2024 scheduling season *now* due to leisure-driven consumer booking curves in the market. The longer the situation continues unabated, the greater the potential adverse impacts on JetBlue and other U.S. carriers and their passengers if the Experimental Regulation is implemented as planned.

Second, as noted above, the grant of antitrust immunity to the Netherlands' principal flag carrier, KLM, was predicated on the existence of open access to AMS by new entrants, as assured under the Agreement.⁴¹ The Dutch Government's September 1, 2023, announcement regarding implementation of the Experimental Regulations effectively constituted public notice of its decision to unilaterally eliminate that predicate, effective March 31, 2024. Immediate

⁴⁰ Order 93-11-2 (Nov. 8, 1993), at 7. *See also* Order 94-6-4 (June 2, 1994); Order 93-5-13 (May 7, 1993).

⁴¹ Letter from Cindy A. Baraban, Deputy Ass't Sec. for Aviation & International Affairs, U.S. Dep't of Transp., to Jan Hendrik Dronkers, Secretary General, Ministry of Infrastructure & Water Management, The Netherlands (Aug. 18, 2023), at 3, attached as Exhibit A hereto.

Department intervention is warranted to ensure the market remains competitive and open to services by JetBlue and other U.S. carriers that deliver the benefits to consumers the U.S.

Government successfully negotiated to secure in the Agreement.

Since JetBlue inaugurated operations at AMS, it has had a demonstrably pro-competitive effect on the market, delivering precisely the type of consumer benefits that the Department's decades-long open skies policy is designed to achieve. For example, immediately before JetBlue's Boston-AMS flights went out for sale, the lowest U.S. point of sale walkup roundtrip fare offered by the dominant immunized alliance in the market stood at \$3,070 (economy) and \$10,800 (business). JetBlue's walkup roundtrip economy fares are 58% lower (at \$1,270), and its walkup business roundtrip fares are 47% lower (at \$5,700), than the equivalent fares offered by that immunized alliance prior to JetBlue's entry.⁴² Meanwhile, JetBlue's restricted business class roundtrip fares (requiring a Saturday night stayover) are 64% lower than what these competitors were offering in the market before JetBlue's flights went out for sale. Additionally, competitors have matched JetBlue's walkup economy and restricted business class fares, resulting in a cascading "JetBlue effect" in the U.S.-Amsterdam market.

Make no mistake: if JetBlue is ejected from AMS due to conduct of the Dutch Government that amounts to an unjustifiable and unreasonable access restriction, consumers will be faced with fewer choices, less competition and much higher average fares. When, as here, U.S. carrier operations are impeded by a foreign government's failure to adhere to its bilaterally imposed undertakings, the Department has not hesitated to take swift action, as illustrated by the recent suspension of the procedural schedule in the Allegiant/Viva Aerobus antitrust immunity

⁴² The New York-AMS market experienced strikingly similar fare reductions when JetBlue began serving that route. Specifically, immediately after JetBlue's entry, its U.S. point of sale economy class walkup nonstop roundtrip fare was 59% lower than that of incumbents, while JetBlue's U.S. point of sale nonstop business class walkup fare was 48% lower.

case.⁴³ The consequences of Department inaction could be even greater than the immediate harm to JetBlue and other U.S. carriers at AMS. Since the United States' landmark first open skies agreement with the Netherlands in 1992, the United States has secured liberalized/open skies agreements with 132 countries (in addition to numerous other non-open-skies bilateral agreements). If the Dutch Government is able to impose the Experimental Regulation and evict JetBlue from AMS, other governments may decide to follow the Dutch Government's lead by unilaterally withholding from U.S. carriers bilaterally negotiated market access (whether due to domestic political considerations, market protectionism or for any other reason), having surmised that the risk of U.S. Government retaliation is low or non-existent.

As described below, the Department should immediately take a number of actions under its regulations and the IATFCPA, including meaningful countermeasures, in response to the Dutch Government's violation of the Agreement and the unjustifiable and unreasonable restrictions that implementation of the Experimental Regulation will place on U.S. carrier access to the AMS air services market, in particular new entrants:

A. DOT Requirement for Dutch Carriers to File Schedules.

The Department should impose schedule filing requirements under 14 C.F.R. Part 213 on Netherlands-flag carriers serving the United States. This will enable the Department to “determine whether the operation of services contained in those schedules, or any part thereof, ‘may be contrary to applicable law or adversely affect the public interest.’”⁴⁴ The Department has imposed such a schedule filing requirement in numerous other cases where, as here, a foreign government has “impaired the operating rights of U.S. carriers and denied them the fair and

⁴³ DOT Notice in Docket DOT-OST-2021-0152 (July 31, 2023).

⁴⁴ See Order 2020-5-4 at 3 (May 22, 2020) (Docket DOT-OST-2020-0052) (imposing schedule filing requirements on Chinese carriers).

equal opportunity to exercise their operating rights under [an applicable bilateral air transport] agreement,” thereby violating such an agreement.⁴⁵

Foreign air carriers of the Netherlands have long benefited from unimpeded access to the transatlantic air services market. For example, KLM, the Netherlands’ *de facto* flag carrier, freely operates nonstop service from AMS to JFK, the only slot-controlled international airport in the United States, and many other U.S. airports.⁴⁶ At JFK, KLM does so with slots created and overseen by the U.S. Government. KLM currently has the equivalent of 865 annual roundtrip flights scheduled for JFK, and has increased its overall U.S. service to essentially its pre-pandemic level of operations.⁴⁷ The imposition of a schedule filing requirement is not in itself truly a countermeasure because it would do no more than impose a limited additional regulatory burden on the affected carriers. It would, however, send an immediate message to the Dutch carriers and their government that the Department is ready to act in defense of U.S. carriers’ bilateral rights while also providing a reference point for impactful and proportional countermeasures, as described below.

B. DOT-Mandated Reductions in Dutch Carriers’ Scheduled Services to the U.S.

The Department, using schedule information filed under Part 213, could then determine the amount of reductions in scheduled service to the U.S. (including at slot-controlled JFK) by Dutch carriers that would be commensurate with the forced reductions facing U.S. carriers at

⁴⁵ See Order 2021-5-10 (May 17, 2021) (Docket DOT-OST-2021-0061) (imposing schedule filing requirements on Aerolineas Argentinas); Order 2021-2-5 (Feb. 19, 2021) (Docket DOT-OST-2021-0021, 2007-0095) (imposing schedule filing requirements on EI AL); Order 2020-5-4 at 3 (May 22, 2020) (Docket DOT-OST-2020-0052) (imposing schedule filing requirements on Chinese carriers); Order 2002-3-18 (Mar. 20, 2002) (Docket DOT-OST-2002-11890) (imposing schedule filing requirements on Japanese carriers).

⁴⁶ For 2023, KLM offers nonstop scheduled service to 13 U.S. airports. Cirium Diio Mi schedule data, calendar year 2023 as of Sept. 18, 2023.

⁴⁷ KLM has scheduled the annual equivalent of 4,112 roundtrip flights at 13 U.S. gateways for 2023, compared to 4,222 roundtrip flights serving 12 U.S. gateways in 2019. Cirium Diio Mi schedule data, calendar year 2023 as of Sept. 18, 2023.

AMS under the Experimental Regulation and issue an order requiring such reductions.⁴⁸ Unless the Dutch Government changes course, the Department should be prepared to immediately require such proportional reductions in Dutch carriers' scheduled services to the United States.⁴⁹

C. DOT-Imposed Limitation on Scope of Grants of Antitrust Immunity.

As the Department warned just last month, “[a]ny indication that the Government of the Netherlands has precluded open entry at AMS would jeopardize the predicate on which the Department grants antitrust immunity to multiple joint ventures operating in the U.S.-AMS market.”⁵⁰ If the Dutch Government fails to ensure JetBlue’s continued access to AMS, the “predicate” for antitrust immunity will no longer be merely “jeopardized,” but rather eradicated. Under such circumstances, in order for the Department to uphold its policy predicate for granting antitrust immunity, it would have to consider imposing a limitation on the immunity granted to the Blue Skies alliance, carving out U.S.-AMS markets, until the Dutch Government satisfactorily restores the “predicate” necessary for the limitation’s removal. DOT should also consider requiring KLM, as a condition of continuing to enjoy the extraordinary privilege of immunity from U.S. antitrust laws, to provide at least two slot pairs for the Summer 2024 scheduling season to JetBlue, which would allow JetBlue to maintain the very modest level of service it has invested so substantially to establish.⁵¹

⁴⁸ See Order 2020-6-1 (June 3, 2020) (Docket DOT-OST-0052) (DOT, having required Chinese carriers to file schedules under Part 213, issued an order “disapproving” those schedules, thereby suspending Chinese carriers’ scheduled passenger services to the U.S. pending the Chinese government’s restoration of U.S. carriers’ traffic rights “to the full extent” permitted under the U.S.-China bilateral air transport agreement).

⁴⁹ Of course, any required reduction in U.S. services by KLM would not in fact be “proportional” to the total exclusion of JetBlue from AMS.

⁵⁰ Letter from Cindy A. Baraban, Deputy Ass’t Sec. for Aviation & International Affairs, U.S. Dep’t of Transp., to Jan Hendrik Dronkers, Secretary General, Ministry of Infrastructure & Water Management, The Netherlands (Aug. 18, 2023), at 3, attached as Exhibit A hereto.

⁵¹ See Complaint of JetBlue Airways Corp., DOT-OST-2023-0028-001 (Feb. 14, 2023) at 15-18.

JetBlue does not suggest these countermeasures lightly. JetBlue had sincerely wished for this situation to be resolved without the need to re-file a complaint under the IATFPCA. We have great respect for KLM's pioneering history as the world's longest-operating airline, and its role in fostering Open Skies, which has benefited millions of people and contributed to a more interconnected world.⁵² Unfortunately, KLM's homeland government has abdicated this proud history, thereby violating the Agreement. As a result, carriers, their customers, and communities around the world will suffer, but KLM will be able to maintain its dominant share of AMS slots and its existing U.S. flying levels, whereas JetBlue faces expulsion from AMS, and other U.S. carriers will be forced to implement immediate schedule reductions at AMS. JetBlue is hopeful, however, that the Department will exercise leadership, using the tools that Congress gave to it under the IATFPCA, to ensure that competition in the transatlantic market generally and the U.S.-Netherlands market specifically remains vibrant, as KLM has long advocated.

V. Conclusion

Action by the Department under 49 U.S.C. § 41310(c)(1) is warranted to eliminate the conduct described herein and bring the Dutch Government and the European Union into compliance with the Agreement. In light of the effective date for Phase 1 of the Experimental Regulation, JetBlue urges such action to be taken expeditiously, potentially including any of the countermeasures described in this Complaint that the Department deems necessary and appropriate to bring an end to this situation. JetBlue emphasizes that it hopes the Dutch

⁵² KLM's website includes a page dedicated to the history of its efforts to serve the New York-Amsterdam market: "It was a long-cherished dream of KLM's first president, Albert Plesman, to start scheduled service between Amsterdam and New York. Airlines in the US had developed a degree of protectionism – to put it mildly – and they were not about to welcome an outsider like KLM with open arms. Finally, with the help of some serious diplomatic talent, the Netherlands and the US managed to hammer out a bilateral civil aviation agreement thereby allowing KLM to fly the Amsterdam-New York route." <https://blog.klm.com/70-years-to-new-york-the-big-apple-of-klms-eye/>. It is ironic that 75 years after KLM launched service to New York, overcoming the protectionism of the post-World War II era, JetBlue, New York's hometown carrier, is facing expulsion from Amsterdam.

Government will take the action necessary to avoid countermeasures. Although JetBlue faces the most severe consequences of all U.S. carriers (expulsion from AMS rather than a reduction in the number of flights it can operate at the airport), given JetBlue's very modest schedule of AMS flights and related slot needs, any adverse impact can be immediately avoided if the Dutch authorities simply recategorize the slots JetBlue has received for the Summer 2023 scheduling season as historic and confirm JetBlue's right to continue to use those slots during the Summer 2024 scheduling season and thereafter.⁵³

The Netherlands is justifiably proud of its position as the United States' first open skies agreement partner. It is therefore ironic (bitterly so for JetBlue) that the same "open skies" partner is now set to tarnish that historic achievement and violate its legally binding commitment to open skies by evicting JetBlue from AMS, a new entrant U.S. carrier that, operating lower-emissions A321LR aircraft, has injected new price and service competition into U.S.-Netherlands markets.

Respectfully submitted,



Robert C. Land
Senior Vice President, Government Affairs
and Associate General Counsel

September 28, 2023

⁵³ As noted *supra*, ACNL has discretion under the WASG to re-categorize JetBlue's Summer 2023 slots as historic-eligible.

EXHIBITS

Exhibit A

Letter from Cindy A. Baraban, Deputy Ass't Sec. for Aviation & International Affairs, U.S. Dep't of Transp., to Jan Hendrik Dronkers, Secretary General, Ministry of Infrastructure & Water Management, The Netherlands (Aug. 18, 2023).



U.S. Department
of Transportation

Office of the Secretary
of Transportation

1200 New Jersey Avenue, S.E.
Washington, DC 20590

August 18, 2023

Jan Hendrik Dronkers
Secretary-General
Ministry of Infrastructure and Water Management
Rijnstraat 8
The Hague 2515 XP
The Netherlands

Delivered via email:
janhendrik.dronkers@minienw.nl

Dear Secretary-General Dronkers,

Thank you for your response dated May 10. Our ongoing correspondence and interaction on this issue has helped us to stay current with the multiple facets of your government's proposal to reconsider capacity levels at Amsterdam Airport Schiphol (AMS). We were grateful for the participation of the Ministry of Infrastructure and Water Management (IW) at the 25th U.S.-EU Joint Committee, held in Washington on July 13, and for the opportunity to discuss our concerns about operational restrictions at AMS with your staff directly.

During the plenary session of the Joint Committee, IW staff provided an overview of the July 7 Amsterdam Appellate Court ruling with respect to the Dutch Government's appeal of the April 5 Noord-Holland Court decision that, *inter alia*, prohibited the Netherlands from implementing the Experimental Regulation without first following the Balanced Approach procedure provided for in EC 598/2014.¹ IW also explained how the collapse of the ruling coalition on July 7 might affect the government's plans; specifically, the IW representatives indicated the Dutch Parliament intends to produce a list of controversial topics on September 12 that will not be advanced before installation of a new government.

Amsterdam Appellate Court Ruling

As conveyed by the U.S. delegation during the Joint Committee, we wish to reiterate our surprise at the July 7 Amsterdam Appellate Court ruling (the ruling). The Department analyzed the full decision, and we are concerned with the Appellate Court's explanatory language in its review of the case, particularly as it concerns its interpretation of the Netherlands' commitments under the U.S.-EU Air Transport Agreement (the Agreement).

In Paragraph 4.19 of the ruling, the Appellate Court questions whether the Phase 1 draft Experimental Regulation fits into the definition of "operating restriction" under EC 598/2014² by stating:

¹ Paragraph 5.10. of the Noord-Holland Court ruling.

² Article 2(6) "'operating restriction' means a noise-related action that limits access to or reduces the operational capacity of an airport, including operating restrictions aimed at the withdrawal from operations of marginally compliant aircraft at specific airports as well as operating restrictions of a partial nature, which for example apply for an identified period of time during the day or only for certain runways at the airport."

“In the court’s view, an experimentation scheme such as the proposed Experimentation Scheme, the duration of which is only one year, cannot be regarded as an operating restriction within the meaning of the Noise Regulation.³ The Court of Appeal leaves open the question of whether an Experimental Regulation as intended on balance and in fact ‘reduces’ access to or restricts the operational capacity of an airport within the meaning of Article 2(6) of the Noise Regulation. The Court of Appeal is not in a position to give an opinion on this question in the context of this interlocutory application.”

The Department finds it puzzling that the court refused to take a position on whether the Experimental Regulation reduces access, as we have seen numerous IW documents that point to the Phase 1 Experimental Regulation as yielding a reduction of 40,000 movements in yearly capacity. In fact, the draft Experimental Regulation itself, which IW produced in January/February 2023, points to the planned reduction⁴ of the AMS operational capacity to a maximum of 460,000 aircraft movements in Article 6.⁵ If the final version of the Experimental Regulation retains the proposed operational capacity reduction at AMS, then, per the Appellate court’s same reasoning, the Experimental Regulation would fit into the definition of “operating restriction” under EC 598/2014 and is subject to the Balanced Approach.

Consistent with our previous communications to IW, the Department also disagrees with the Appellate Court’s view in Paragraph 4.21 of the ruling that the use of the NNHS⁶ in the Experimental Regulation does not determine the existence of a new operating restriction – in reference to Article 14 of EC 598/2014.

Paragraph 4.22 of the Appellate Court ruling states that:

“[t]o the extent that IATA et al. have also relied on Standard 5.1 and 5.2 of Annex 16, Volume I, Part V to the Chicago Convention and other parts of that Convention and the Open Skies Agreement,⁷ the Court observes that this is only a one-year experiment. Irrespective of whether IATA et al. can rely on these treaty provisions, it can be assumed that the State is aware of its responsibilities vis-à-vis its treaty partners and will therefore take them into account in a further amendment of the LVB. In the meantime, it is generally accepted that temporary measures that may or may not be taken occasionally in aviation (such as in times of pandemic, natural phenomena, etc.) should not be quickly interpreted as treaty violations.”

The Appellate Court cites the temporary nature of the Experimental Regulation in several instances⁸ in the ruling as a justification for exemption from obligations established by the Agreement and EC 598/2014. The Department is deeply troubled by this position. The Appellate Court did not cite a legal basis or present a valid legal argument dictating that a temporary measure exempts the Netherlands from its obligations under the Agreement or EC 598/2014, particularly where the purported “temporary measure” in question is simply the first phase of a longer-term measure. For its part, the United States will not exempt the Netherlands from its

³ I.e., EC 598/2014, also known as the Balanced Approach regulation.

⁴ The 2008 Air Traffic Decree (LVB) set the maximum number of aircraft movements at Schiphol at 480,000 per year. From 2015, the Netherlands ceased enforcement of the 2008 LVB and allowed a 500,000 maximum number of aircraft movements in accordance with the 2015 Preferential Runway Use policy. The current 500,000 aircraft movements figure is also alluded to in multiple instances in the June 24, 2022, IW letter to the President of the House of Representatives.

⁵ January 2023 IW Phase 1 Draft Experimental Regulation, at 4. Also referenced in Paragraph 3.18 of the ruling.

⁶ New Standards and Enforcement System, also known as the Preferential Runway Use policy.

⁷ The EU-U.S. Open Skies Agreement, per Paragraph 4.9 of the ruling.

⁸ Paragraphs 4.19, 4.21, and 4.22 of the ruling.

commitment to the Balanced Approach under Article 15.4 of the Agreement on the basis that the Experimental Regulation is somehow temporary.

In light of our concerns with the Appellate Court ruling and in connection with our previous communications, the Department maintains that if the Phase 1 Experimental Regulation is implemented without following the Balanced Approach principle, we would consider the Government of the Netherlands as not acting in accordance with Articles 15.3 and 15.4 of the Agreement. Furthermore, we would expect that the European Commission would take the appropriate action to address the Netherlands' nonconformance with Article 5.3(d) of EC 598/2014.

Phase 1 Next Steps

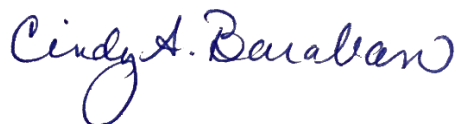
On July 25, a group of airlines and airline industry associations announced they will institute cassation proceedings against the Amsterdam Appellate Court ruling issued on July 7.⁹ Given the significant questions raised by the Appellate Court's ruling and the expected cassation proceedings, we ask IW to suspend the implementation of Phase 1 Experimental Regulation as soon as possible. The significant questions to be addressed by the Supreme Court, which include questions concerning the Netherlands' international obligations, will not be resolved in time for the Experimental Regulation to be implemented by September 28 when the Royal Schiphol Group must determine the capacity at AMS for the Summer 2024 traffic season. In consideration of this timing challenge and the Department's position that implementation of the Experimental Regulation without following the Balanced Approach represents a breach of the Agreement, we also ask that IW recommend to the States General of the Netherlands that Phase 1 and the Experimental Regulation be included in the list of controversial topics that will be issued on September 12.

Air Transport Consideration

The Department also wishes to restate our concerns about market access for U.S. carriers at AMS in the event of operational restrictions. As Phase 1 and Phase 2 would result in the permanent confiscation of historic slot rights held by U.S. carriers at AMS, we remain highly skeptical that AMS will accommodate new entrants under such circumstances. We are concerned therefore about the lack of opportunities for future growth and competition in the U.S.-Netherlands air transport market during any intervening period between the start of Phase 1 and Phase 3. Any indication that the Government of the Netherlands has precluded open entry at AMS would jeopardize the predicate on which the Department grants antitrust immunity to multiple joint ventures operating in the U.S.-AMS market. In this context, we once again request the information we have sought previously pursuant to Article 15.2 of the Agreement. We kindly request this information no later than September 8.

Thank you for your attention to our concerns, and I look forward to your response.

Sincerely,



Cindy A. Baraban
Deputy Assistant Secretary
for Aviation and International Affairs
U.S. Department of Transportation

⁹ <https://news.klm.com/aviation-sector-will-institute-cassation-proceedings/>

CC: Heidi Gomez, Ryan Long, Andrew Moffat (U.S. Department of State)
Eugene Alford, Caroline Kaufman (U.S. Department of Commerce)
Ruth Clabbers, Henri van Faassen, Heleen Groot, Lisanne van Houten, Elisabet Molenaar, Maarten Jenniskens,
Jeroen Mauritz, Janneke Kolk (IW)
Hugo Thomassen (Airport Coordination Netherlands)
Patricia Vitalis, Joery Strijtveen (Royal Schiphol Group)
Lieske Streefkerk-Arts, Lilian van Ek (Embassy of the Kingdom of the Netherlands)
Filip Cornelis, Carlos Bermejo, Georg Hasslinger (DG MOVE)

Exhibit B

Letter from Henrick Hololei, Director General, Directorate for Mobility and Transport, European Comm'n, to Carol A. Peterson, Ass't Sec. for Aviation & International Affairs, U.S. Dep't of Transp. (Mar. 6, 2023).



EUROPEAN COMMISSION
Directorate-General for Mobility and Transport

The Director General

Brussels,
MOVE/DDG2/E2/GH/mcf/Ares(2023)s_2083074

Ms Carol A. (Annie) Petsonk
Assistant Secretary for Aviation and
International Affairs
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590

Dear Assistant Secretary Petsonk,

Thank you for your detailed letter of 24 January 2023, in which you raise concerns about the reduction of yearly aircraft movements at Amsterdam Schiphol airport.

I fully share your view that encouraging competition, including from new market entrants, is a fundamental principle that governs the transatlantic air transport market, and delivers benefits to both our citizens and economies. However, I think it is important to clarify that the exercise the traffic rights under the EU-US Air Transport Agreement does not guarantee slots at a slot-coordinated airport. These are two separate issues and we understand this is the case in most, if not all, aviation agreements. The EU Slot Regulation guarantees that this is done in a transparent and non-discriminatory way.

I welcome that Secretary-General Dronkers from the Dutch Ministry of Infrastructure and Water Management has already sent you a comprehensive reply, in which he underlined the clear commitment to follow the legal obligations of Regulation 598/2014 which transposes the Balanced Approach to EU law. I cannot comment further on the EU law dimension of the decision of the Dutch government at this stage but I can assure you that the European Commission will, as always, continue to ensure that EU law is upheld.

Please be assured that the Commission attaches great importance to the compliance with all obligations under the EU-US Air Transport Agreement. My team and I will continue to closely monitor the file and stand ready to take all necessary steps.

Yours sincerely,

Henrik HOLOLEI

c.c.: Mr Jan Hendrik Dronkers, Secretary-General, Ministry of Infrastructure and Water Management, Netherlands

Exhibit C

ACNL, “Policy Rule: Slot allocation in case of exceedance of historic rights,” (Sept. 7, 2023).

Policy Rule

Slot allocation in case of exceedance of historic rights

Author: Airport Coordination Netherlands (ACNL)
Date: 7 September 2023
Status & Version: Final, version 1.0
Effective: as of IATA Northern Summer season 2024 (S24)

Airport Coordination Netherlands (ACNL) is an independent governing body by public law. In the Dutch “Wet Luchtvaart” (Law on Aviation) designated as the independent coordinator for slot coordinated airports in the Netherlands. ACNL is responsible for slot allocation and slot monitoring at Amsterdam Airport Schiphol (AMS), Rotterdam The Hague Airport (RTM) and Eindhoven Airport (EIN). In order to make optimal use of the airport capacity our mission is to deliver slot coordination and monitoring services in a neutral, non-discriminatory and transparent way.

ACNL is publishing following policy rule according to article 1:3 (4) in conjunction with article 4:81 of the Dutch “Algemene wet bestuursrecht” (General Administrative Law Act). The abbreviation in Dutch is ‘Awb’.

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- Introduction 3**
- Relevant legislation & guidelines 4**
- Policy with respect to exceedance of historic rights 6**
- Process 8**

Introduction

How does slot allocation under the Slot Regulation take place?

1. The airport managing bodies determine the coordination parameters for slot allocation. In the Netherlands it is common that, the number of slots available for allocation constitutes one of the coordination parameters.
2. ACNL has the legal task of allocating slots in the Netherlands. As slot coordinator, ACNL allocates slots to airlines within the coordination parameters based on the priority rules in the Slot Regulation. These priority rules provide that when an air carrier has operated scheduled and programmed non-scheduled air services for at least 80%, the air carrier concerned is entitled to request the same series of slots in the next equivalent scheduling period. These are also referred to as historic slots or historic rights. Historic rights may include certain characteristics of slots (such as aircraft type and route) that are relevant in the context of coordination parameters.
3. The remaining available (non-historic) slots (this is also called slot pool) are allocated according to criteria such as new entry, year-round operation and additional ones.

Why this policy rule?

4. There are no provisions in the Slot Regulation on how to proceed in the event that, on the basis of the coordination parameters, the number of available slots is lower than the number of requested historic slots (and/or the number of available slots with certain characteristics is lower than the number of requested historic slots with such characteristics). With this policy rule, ACNL explains how slot allocation will take place if such a case would occur. There are a number of current developments that give rise for to develop policy, such as the potential reduction in capacity at Amsterdam Airport Schiphol (AMS) announced by the government, the ongoing review processes for the Eindhoven Airport (EIN) and Rotterdam The Hague Airport (RTM) airport traffic decrees and revised or newly introduced coordination parameters regarding operational and technical constraints.

Relevant legislation & guidelines

Designation of coordinated airports and responsibilities

5. Airports are designated by member states as coordinated when capacity is scarce. Available capacity is expressed in coordination parameters reflecting technical, operational and environmental factors, which in the Netherlands are established by the airport managing body.

Article 3(5) Slot Regulation (EC) 95/93 as amended

Where capacity problems occur for at least one scheduling period, the Member State shall ensure that the airport is designated as coordinated for the relevant periods only if: (a) the shortfall is of such a serious nature that significant delays cannot be avoided at the airport, and (b) there are no possibilities of resolving these problems in the short term.

Article 2(m) Slot Regulation (EC) 95/93 as amended

'coordination parameters' shall mean the expression in operational terms of all the capacity available for slot allocation at an airport during each coordination period, reflecting all technical, operational and environmental factors that affect the performance of the airport infrastructure and its different sub-systems;

Article 6(1) Slot Regulation (EC) 95/93 as amended

At a coordinated airport the Member State responsible shall ensure the determination of the parameters for slot allocation twice yearly, while taking account of all relevant technical, operational and environmental constraints as well as any changes thereto.

Article 5a Slot allocation decree

1. The managing body of a coordinated airport:
 - a. determines the coordination parameters twice a year in accordance with Article 6 of the Regulation and taking into account the ATM capacity determined by the air traffic service provider; and
 - b. communicates the determined coordination parameters to the airport coordinator in good time before the initial slot allocation for the preparation of scheduling conferences.

Slot allocation

6. Without a slot that has been allocated by the slot coordinator, it is not permitted for an air carrier to operate at a slot-coordinated airport.

Article 2(9) Slot Regulation (EC) 95/93 as amended

'coordinated airport' shall mean any airport where, in order to land or take off, it is necessary for an air carrier or any other aircraft operator to have been allocated a slot by a coordinator, with the exception of State flights, emergency landings and humanitarian flights;

Article 2(a) Slot Regulation (EC) 95/93 as amended

'slot' shall mean the permission given by a coordinator in accordance with this Regulation to use the full range of airport infrastructure necessary to operate an air service at a coordinated airport on a specific date and time for the purpose of landing or take-off as allocated by a coordinator in accordance with this Regulation;

7. The slot coordinator uses priority rules in allocating the available slots. Air carriers are entitled to the same series of slots in the next equivalent scheduling period when they have met the use-it-or-lose-it requirements.

Article 8(1) Slot Regulation (EC) 95/93 as amended

Series of slots are allocated from the slot pool to applicant carriers as permissions to use the airport infrastructure for the purpose of landing or take-off for the scheduling period for which they are requested, at the expiry of which they have to be returned to the slot pool as set up according to the provisions of Article 10.

Article 8(2) Slot Regulation (EC) 95/93 as amended

Without prejudice to Articles 7, 8a and 9, Article 10(1) and Article 14, paragraph 1 of this Article shall not apply when the following conditions are satisfied:

- a series of slots has been used by an air carrier for the operation of scheduled and programmed non-scheduled air services, and
- that air carrier can demonstrate to the satisfaction of the coordinator that the series of slots in question has been operated, as cleared by the coordinator, by that air carrier for at least 80 % of the time during the scheduling period for which it has been allocated.

In such case that series of slots shall entitle the air carrier concerned to the same series of slots in the next equivalent scheduling period,

Article 8(3) Slot Regulation (EC) 95/93 as amended

Without prejudice to Article 10(2), in a situation where all slot requests cannot be accommodated to the satisfaction of the air carriers concerned, preference shall be given to commercial air services and in particular to scheduled services and programmed non-scheduled air services. In the case of competing requests within the same category of services, priority shall be given for year-round operations.

8. ACNL has issued a policy rule regarding Additional Allocation criteria according to article 1:3 (4) in conjunction with article 4:81 of the Dutch General Administrative Law Act. This policy rule concerns the application of the following additional allocation criteria in line with article 8.4.1 of the Worldwide Airport Slot Guidelines (WASG):

- a) *Effective Period of Operation*
- b) *Operational Factors*
- c) *Time Spent on Waitlist*
- d) *Type of Consumer Service and Market*
- e) *Connectivity*
- f) *Competition*
- g) *Environment*
- h) *Local Guidelines*

9. The WASG includes provisions on capacity reduction, which must be considered by the slot coordinator.

Article 8(5) Slot Regulation (EC) 95/93 as amended

The coordinator shall also take into account additional rules and guidelines established by the air transport industry world-wide or Community-wide as well as local guidelines proposed by the coordination committee and approved by the Member State or any other

competent body responsible for the airport in question, provided that such rules and guidelines do not affect the independent status of the coordinator, comply with Community law and aim at improving the efficient use of airport capacity. These rules shall be communicated by the Member State in question to the Commission.

Article 6.10.1 World Airport Slot Guidelines (WASG)

If a planned capacity reduction is unavoidable the Coordination Committee must be consulted during the decision process and as soon as possible before any reduction of capacity occurs. In all cases, airlines' historic slots must be honored. The coordinator, or other competent body, must communicate the capacity change to all relevant stakeholders well in advance of each scheduling season as soon as possible and at least 14 days and not later than 7 days before the Initial Submission Deadline for the SC.

Article 6.10.3 World Airport Slot Guidelines (WASG)

A capacity reduction after the Initial Submission Deadline, or a capacity reduction that cannot accommodate historic slots must be avoided except in exceptional circumstances.

Policy with respect to exceedance of historic rights

10. Based on the applicable legislation both the airport managing body and the slot coordinator have clear tasks. Firstly, the airport managing body determines the coordination parameters expressing the available capacity reflecting technical, operational and environmental constraints. Subsequently, the slot coordinator allocates such slots within the coordination parameters among the air carriers that have requested slots in accordance with the Slot Regulation.
11. Because of this division of tasks, it is never possible for the slot coordinator to exceed the coordination parameters. This applies also in the case that not all historic slots can be accommodated. The slot coordinator simply cannot exceed capacity made available by the airport managing body for slot allocation.
12. In the current practice coordination parameters are determined amongst others in terms of:
 - a. a maximum number of slots for a season reflecting an environmental constraint;
 - b. a maximum number of slots for a specific curfew (e.g. night) reflecting an environmental constraint;
 - c. a maximum number of arriving and departing flights in a certain time bracket reflecting runway capacity;
 - d. a maximum number of departing and arriving passengers reflecting terminal capacity;
 - e. a maximum number of departing and arriving flights on certain routes reflecting border control and customs capacity;
 - f. a maximum number of aircraft types that can arrive within a certain bracket reflecting stand capacity;
13. Above examples indicate that the historic rights can – besides the slot itself – also include aircraft type, service type, route and number of seats (when relevant in relation to the coordination parameters).

14. Article 8(5) of the Slot Regulation requires ACNL to take into account the WASG when allocating slots except where the WASG conflicts with Community law, affects the independence of the slot coordinator and does not aim at improving efficient use of airport capacity. With respect to the articles 6.10.1 and 6.10.3 of the WASG remains that ACNL is only responsible for the allocation of available slots. If the airport managing body makes fewer slots available than there are historic rights, ACNL simply cannot allocate all requested slots based on the provisions of the Slot Regulation.
15. This raises the following question: what priority rules should the slot coordinator apply in a situation where historic rights are exceeded?
16. Prioritising is as specific as possible; the aim is to solve the exceedance of the relevant coordination parameter.
17. The air carrier will get as much freedom as possible in contributing to solve the exceedance. For instance:
 - a. if a night curfew would be exceeded the air carrier can choose (if possible within the other coordination parameters) to retime slots of its choice;
 - b. if stand capacity for larger aircraft would be exceeded the air carrier can choose to change aircraft type or to retime the slot;
 - c. if a seasonal limit would be exceeded the air carrier can choose which (series of) slots are eligible for not allocating.
18. ACNL will use the principle of proportionality as included in the best practice paper for managing temporary capacity reduction (17 July 2020) issued by the World Airport Slot Board (WASB). This paper contains the following principle: *“Any mandatory schedule reductions must be spread across all affected airlines that utilise the affected infrastructure, in a fair, transparent, and non-discriminatory manner by a slot coordinator acting independently.”* and provision: *“The required schedule reductions will be measured based on a defined time period where congestion occurs and/or as a total per day, providing that a fair distribution of cancellations across carriers is ensured.”*.
19. ACNL believes that such method based on proportionality is more suitable than an allocation method based on priority rules, like the priority rules for the allocation for slots in the slot pool (as described in Articles 8 and 10 of the Slot Regulation and in the Policy rule regarding Additional Allocation criteria).
 - a. The method of proportionality aligns with the principle of the WASB best practice paper.
 - b. ACNL has conducted a simulation study of the announced capacity reduction of Amsterdam Airport Schiphol. Both the method of proportionality as the method of priority rules were evaluated on the effects on factors like effective period, connectivity, competition and environment and on the spread of the impact across air carriers. The two methods didn't significantly differentiate on the factors mentioned, however the impact on individual air carriers was spread significantly unequal.
 - c. Because of the short announcement period (coordination parameters are determined twice a year ultimately one week before air carriers have to submit their slot requests) it is more difficult for air carriers to anticipate on future allocation criteria. A method based on proportionality does not have this disadvantage.

Process

20. If ACNL expects an exceedance of the coordination parameters with all to be requested historic slots, ACNL will publish a working procedure to solve the exceedance of the relevant coordination parameter(s). The working procedure contains how ACNL will apply the criterium of proportionality with a holistic approach and provides air carriers with additional information regarding their slot requests at initial submission. ACNL strives to publish this working procedure before the coordination parameters are published.
21. Between SAL and Historic Baseline Date (HBD), air carriers are able to optimise their schedules as always.
22. Slots with historic rights which cannot be accommodated at SAL are placed on the waiting list and will have priority over any submissions that are not based on historical rights. This applies in principle only to the season for which the allocation is made. ACNL can decide to include in the working procedure that this priority applies to one additional equivalent season in case the capacity reduction is of a temporary nature and has a fixed expiry date.
23. This policy rule will be effective as of IATA Northern Summer Season 2024

Exhibit D

Letter from Keith Glatz, A4A Senior VP of Int'l Affairs and Rafael Schwartzman, IATA Regional VP – Europe, to Adina Vălean, European Commissioner for Transport (Sept. 12, 2023).

September 12, 2023

Adina Vălean
Commissioner
European Commission
Rue de la Loi 200
1049 Brussels, Belgium

RE: Request for a formal review of the Dutch government's plans to reduce flight movements at Amsterdam Airport Schiphol

Dear Commissioner Vălean,

We, the undersigned, are writing to you concerning the September 1, 2023, announcement by the Dutch caretaker government that they will be introducing a number of measures to reduce aircraft operations at Amsterdam Airport Schiphol (AMS)—a decision that is strongly opposed by the airline industry.

Respectfully, we ask that the European Commission conduct a formal review concerning the application of such significant reductions in aircraft operations and if such a reduction, in the manner proposed by the Dutch caretaker government, is compatible with EU law.

We, the undersigned, have strong reservations concerning the approach taken by the Dutch caretaker government and would ask that the European Commission's formal review take into account all relevant EU legislation on the requirements for effectuating a reduction in service. The airline industry has a legitimate expectation that existing rules and regulations pertaining to the level of aircraft operations are followed in their entirety by Member States.

The Experimental Regulation, the decision to end anticipatory non-enforcement of Airport Traffic Decree 2008—which should be published shortly according to the Dutch caretaker government—will reduce flight movements to 460,000 movements in March 2024. We further urge the Commission to undertake any steps they deem necessary to evaluate whether these reductions are also in compliance with relevant EU regulations. The package of measures submitted to your services would further reduce movements to 452,000 by November 2024 and introduce significant cuts to night flights, with further reductions planned.

Although the Dutch government based these decisions on the grounds of environmental pollution and noise, it is unclear if it respects the requirements of Regulation 598/2014 on the Balanced Approach to noise-related operating restrictions at EU airports. The Balanced Approach does not impose any outcome but prescribes a process to ensure that noise-related decisions are sufficiently informed and guided by robust analysis and transparent consultation of stakeholders, with the aim that they are fit for purpose.

There is no evidence that the Dutch government considered a number of key steps of the Balanced Approach as outlined in Regulation 598/2014 including the following: Noise assessment, Articles 6(1) and 6(2)(a); Cost-effectiveness, Article 6(2)(c) and Consultation process, Article 6(2)(d). Furthermore, not only are the Dutch authorities are bound by the Balanced Approach through Regulation 598/2014, but also by international law.

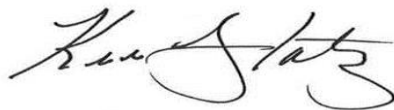
The Balanced Approach is enshrined through international standards in Part V of Annex 16, volume I to the Chicago Convention. It is also included in some air services agreements, including the U.S.-EU Air Transport Agreement. The agreement requires in Article 15(5) that where new mandatory noise-based operating restrictions at airports are imposed that authorities provide an opportunity for the views of interested parties to be considered and that such operating restrictions shall be “not more restrictive than necessary in order to achieve the environmental objective established for a specific airport”. It also allows the other party to request a written report explaining the measures that were considered, including the evaluation of the likely costs and benefits.

We respectfully request the European Commission to assess if the Balanced Approach principle was applied, and whether that such a policy is proportional, and in line with relevant EU legislation, such as Regulation 1008/2008, Regulation 598/2014, and Regulation 95/93 (on allocation of slots).

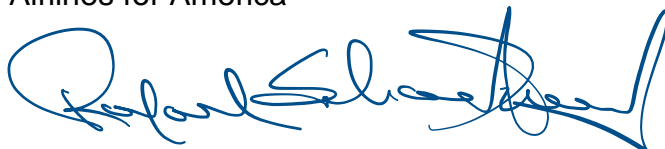
Our industry plays a vital role in facilitating connections between people and businesses, enabling global cultural exchange and promoting economic growth. With 588 scheduled passenger flights daily from AMS and 1.4 million tons of cargo being transported in 2022, AMS is a prominent global hub. The networks of both passenger and cargo carriers sustain vital trade flows between the Netherlands and Europe. Restricting flight operations will have far-reaching implications for a wide variety of stakeholders, including airlines, passengers, consumers and businesses.

We appreciate your attention to this matter and remain at your disposal to answer any questions or provide further information for your services.

Sincerely,



Keith Glatz
Senior Vice President, International Affairs
Airlines for America



Rafael Schvartzman
Regional Vice President – Europe
International Air Transport Association

cc: Vice President Maroš Šefčovič, European Commission

Exhibit E

Letter from Robert Land, Senior Vice President, Government Affairs and Associate General Counsel, JetBlue Airways Corp., to Ruud Sondag, Chief Executive Officer, Royal Schiphol Group (May 5, 2023).



1212 New York Avenue, NW
Suite 1212
Washington, DC 20005
T: 1-800-JETBLUE
jetblue.com

May 5, 2023

Mr. Ruud Sondag
CEO, Royal Schiphol Group
NV Luchthaven Schiphol
Evert van de Beekstraat 202
1118 CP Schiphol

Dear Mr. Sondag,

I am writing to express JetBlue's concerns about developments at Amsterdam Airport Schiphol (AMS) that may affect JetBlue's upcoming service launch and to request immediate clarification regarding AMS slot policy.

JetBlue has been working diligently for years to secure slots at AMS in order to allow us to launch our low-fare, disruptive service at Schiphol. Only after JetBlue filed a formal complaint with the U.S. Department of Transportation in February 2023, ACNL offered JetBlue AMS slots for the Summer 2023 traffic season. JetBlue was informed that some of these slots were historic and previously belonged to carriers that ceased operations at AMS, including FlyBe. In April 2023, JetBlue, in reliance on this information, announced plans to begin AMS service in August 2023 and opened up sales for two flights: one to New York City and the other to Boston.

JetBlue has since learned from discussions with the Royal Schiphol Group that AMS appears to be exacerbating the new entrant access problem by planning to retire, for the Winter 2023/2024 scheduling season, historic slots previously held by carriers that have ceased service at the airport, rather than following IATA WSG guidelines and returning such slots to the pool for reallocation to other carriers, including new entrants. Under a so-called "incremental recovery" policy, AMS appears to be planning to retire capacity next winter rather than re-allocating it. This is deeply concerning to JetBlue because, consistent with airline industry practice, we are selling AMS seats for flights 331 days into the future, but have no assurance of whether we will receive slots for the Winter 2023/2024 traffic season, which begins two months after our first flight in August.

From our discussions, it appears that Schiphol's policy might lead to the removal of up to 17 daily slots worth of slots previously held by FlyBe and other carriers, potentially including those slots held by JetBlue in the Summer 2023 season. More concerning, this appears to have been done as stated in your capacity declaration for ACNL, "in anticipation of the entry into force of announced legal restrictions on future air transport movements." This action to remove, from the official capacity declaration, slots that have been

historically operated potentially imposes an unjustifiable and unreasonable restriction on JetBlue and other U.S. carriers at AMS, and has the practical effect of achieving that which the Dutch government has been prevented from doing by Dutch courts – reducing annual movements at the airport for the upcoming Winter scheduling season.

We are urgently requesting clarification regarding the purpose of this slot reduction policy. We note that the Summer 2023 capacity declaration included a significant number of these slots, which we believe are the slots JetBlue was granted that will allow us to operate in Amsterdam this summer. But if these slots are being removed for the Winter 2023/2024 season, this could have a detrimental effect on JetBlue's nascent service. We have yet to receive a sufficient explanation as to why capacity which was able to be supported in the Winter 2022/2023 and Summer 23 seasons can no longer be supported as part of Schiphol's incremental recovery in Winter 2023, well after COVID-related disruptions have peaked. More concerning, we have been told that we should expect a similar policy to apply in future capacity declarations should additional slots revert to the pool due to carrier insolvencies, or other instances which might cause a carrier to return its slots to the slot pool. In these circumstances, a new entrant like JetBlue might potentially never be allowed to receive permanent AMS slots. For these reasons, JetBlue is concerned that the actions behind the "incremental recovery" policy might deprive JetBlue of permanent access to AMS and constitute a direct violation of obligations under the US/EU Open Skies Agreement.

We respectfully request immediate clarification from the Royal Schiphol Group and the Dutch Government regarding how this decision to retire these previously-operated slots from future capacity declarations will affect JetBlue's forthcoming AMS operations and our ability to secure permanent slots in the Winter 2023/2024 season and beyond.

Sincerely,



Robert C. Land
Senior Vice President, Government Affairs
and
Associate General Counsel

CC: U.S. Department of Transportation
U.S. Embassy Hague
ACNL
Dutch IW Ministry

Exhibit F

Letter from Ruud Sondag, Chief Executive Officer, Royal Schiphol Group, to Robert Land, Senior Vice President, Government Affairs and Associate General Counsel, JetBlue Airways Corp. (June 1, 2023).



Mr Robert C. Land
Senior Vice President, Government Affairs and Associate General Counsel
JetBlue Airways
1212 New York Avenue, NW
Suite 1212
Washington, DC 20005
United States of America

**SUBJECT: Your letter dated 5 May
2023**

L.M. Sondag
CEO
+ 31 (0)20-6012309

1 June 2023
RS.2023.015

Dear Mr Land,

Thank you for your letter dated 5 May 2023, in which you request information about RSG's reasons for incremental recovery and the consequences it may have for JetBlue Airways.

As explained in earlier sessions and meetings over the past years, incremental recovery is based on the operational restrictions that came from the COVID-19 pandemic and the effects that it had on the operational agility of the airport in the light of ensuring a safe and viable operational situation as well as an optimal use of available capacity. The context in which Schiphol, as a severely congested airport, operates has significantly changed since the outbreak of the pandemic in 2020. The reasons and application for incremental recovery were valid for the past seasons and still hold for the current season S23 and the coming season W23, in particular because the operational situation for different crucial airport processes remains fragile.

Although we do understand your concerns, we would like to remark that your letters contain a few erroneous assumptions and statements, such as differentiating capacity levels from W22 to W23 and S22 to S23. In addition, we would like to remark that the W23 CapDec (formally published by ACNL on May 2nd) has been formally consulted within the Coordination Committee Netherlands on April 6th and that the EU Slot Regulation strictly limits the role of the airport to declare the capacity. The Capacity Declaration for W23 has been set in compliance with all formal and substantive requirements, including consultation with our airline partners. ACNL has exclusive authority for the allocation of slot capacity. For that reason, we kindly refer you to ACNL for any individual enquiry about capacity and the allocation of capacity to JetBlue Airways. Apart from that, we have noted that JetBlue has been allocated daily slots in W23 for both JFK and BOS, following the publication by ACNL late yesterday of the Slot Allocation List for W23. We can imagine that this a positive development for the continuity of the operation of JetBlue Airways at AMS.

Should you have any further questions, please let me know. As communicated through your Airline Partnership Manager, I am also open for a digital meeting if this would still be desired.

Yours sincerely,
ROYAL SCHIPHOL GROUP

Ruud Sondag
CEO

Royal Schiphol Group
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Royal Schiphol Group N.V.
C of C Amsterdam 34029174
NL11 ABNA 0621 8441 79

Exhibit G

Letter from Robert Land, Senior Vice President, Government Affairs and Associate General Counsel, JetBlue Airways Corp., to Lianne van Houten, Coordinating Policy Officer DGLM, Ministry of Infrastructure & Water Management, The Netherlands (Aug. 11, 2023).



1212 New York Avenue, NW
Suite 1212
Washington, DC 20005
T: 1-800-JETBLUE
jetblue.com

August 11, 2023

Ms. Lisanne van Houten
Coordinating Policy Officer DGLM
Ministry of Infrastructure and Water Management
lisanne.van.houten@minienw.nl

Dear Ms. van Houten,

I am writing to update you regarding JetBlue's service at Amsterdam Airport Schiphol (AMS) and to re-iterate JetBlue's concerns about slot policy developments that we explained in our May 5, 2023 letter.

JetBlue has been working diligently for years to secure slots at AMS in order to allow us to launch our low-fare transatlantic service at Schiphol. We were granted temporary slots for the Summer 2023 traffic season, which is allowing us to inaugurate AMS service later this month. We were later granted historic-eligible slots for the Winter 2023/2024 traffic season. These slots were available for allocation because certain carriers ceased operations and/or returned slots at AMS.

While we are pleased that we were allocated permanent slots for the winter season, we remain greatly concerned about Summer 2024. JetBlue's concerns are separate and distinct from the wider airline industry's concerns about the Dutch authorities' efforts to drastically reduce the overall number of flights operated at Schiphol. We share those concerns and believe that the Dutch government is required to follow applicable legal processes, including the Balanced Approach in the U.S.-EU Open-Skies Agreement, and have failed to do so. JetBlue's concerns about Summer 2024, however, exist regardless of whether these proposals are implemented, for the reasons explained below.

Even if the Schiphol shrinkage proposals are not advanced, JetBlue believes that all Dutch stakeholders—including the Dutch Government and the Royal Schiphol Group, owned by the Government itself, are exacerbating the new entrant access problem by using the bi-annual AMS Capacity Declaration to enact *de facto* policy.¹ We understand that the Summer 2024 capacity declaration, set to be issued next month, may once again retire

¹ We believe that this has been occurring since 2021 and has been officially stated in previous capacity declarations. By removing capacity without any provision for access to AMS for new entrants, the government is circumventing the slot allocation process by effectively closing the airport to new entry. While

slots/capacity, possibly including some of the (corresponding summer) slots that were granted to JetBlue for Winter 2023/2024. We believe this may represent up to 19 daily roundtrip flights. If these slots are indeed retired, then JetBlue is concerned about whether a viable path exists for it to be granted slots for Summer 2024.

We are sending this letter now because we are aware of upcoming deadlines in September 2023 for the airport to issue a capacity declaration and for the government to determine other next steps regarding Schiphol access. We respectfully request that the Dutch authorities take official notice of JetBlue's concerns and their obligations under WASG Rule 8.14 and 8.15.4, and take steps to ensure that the Summer 2024 capacity declaration is sufficient to comply with all historic operations, including for operators that will have used historic slots in Winter 2024/2025 and, in reliance on WASG 8.3.5.1, expect to operate those flights into the Summer 2024 season.²

Consistent with airline industry practice, we are selling seats for JetBlue's scheduled flights between the United States and AMS 331 days into the future. Our concerns are real and timely. We ask you to address this now, ahead of the September 2023 capacity declaration and not, as previously done, use the capacity declaration as a method of implementing capacity declarations "in anticipation of the entry into force of announced legal restrictions on future air transport movements."³

Any steps to remove, from the official capacity declaration, slots that have been historically operated, which would result in JetBlue not being granted slots for Summer 2024 to continue its services, would impose an unjustifiable and unreasonable restriction on JetBlue and could result in a situation where JetBlue finds out in November 2023 that it will not have slots for flights beginning in March 2024, just four months later.

Such an occurrence would be deeply distressing, but we believe that the Dutch authorities can take steps now to avoid this outcome, and allow JetBlue to continue serving Schiphol and exercising its rights as a duly authorized new entrant airline under the US-EU Open Skies Agreement.

JetBlue is not eager to re-file a legal complaint against the Kingdom of the Netherlands with the U.S. Department of Transportation (USDOT), as it did in February 2023. For these reasons, we respectfully request that the Dutch authorities address these concerns now as they formulate slot policy for 2024 and beyond.

we understand that COVID was a plausible explanation for capacity limitations for some period of time, that is no longer the case.

² IATA WASG Rules 8.14 and 8.15 require coordinators to re-allocate capacity when a carrier loses its operating licenses due to a cessation of service. We also note that IATA WASG Rule 8.3.5.1 states that a request to extend an existing operation to operate on a year-round basis should have priority over any new slot requests.

³ < <https://slotcoordination.nl/wp-content/uploads/2022/05/Capacity-Declaration-Amsterdam-Airport-Schiphol-Winter-2022-v1.0.pdf> >

JetBlue is grateful for all of the support that has been provided by the Royal Schiphol Group as our team makes final preparations for its inaugural flight at AMS in less than three weeks. We look forward to serving the Netherlands and continuing to engage with all Dutch stakeholders on these important public policy issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert C. Land". The signature is fluid and cursive, with the first name being the most prominent.

Robert C. Land
Senior Vice President, Government Affairs
and
Associate General Counsel

CC: ACNL
Royal Schiphol Group
US DOT
US Embassy Hague

Exhibit H

Letter from Henri van Faassen, Acting Director General for Civil Aviation, Ministry of Infrastructure and Water Management, to Robert C. Land, Senior Vice President, Government Affairs and Associate General Counsel, JetBlue Airways Corp. (Sept. 25, 2023).



> Return address Postbus 20901 2500 EX Den Haag

Mr Robert C. Land
Senior Vice President, Government Affairs and Associate
General Counsel, JetBlue
1212 New York Avenue, NW
Suite 1212
Washington, DC 20005
United States

**Ministerie van
Infrastructuur en
Waterstaat**

Rijnstraat 8
2515 XP Den Haag
Postbus 20901
2500 EX Den Haag
T070-456 0000
F070-456 1111

Date 25 September 2023
Subject Response to your letter dated August 11, 2023

Dear Mr Land,

Thank you for your letter dated August 11, 2023, in which you express JetBlue's concerns over slot policy developments for the Summer 2024 scheduling season. We would like to share our appreciation for the fruitful meeting between ourselves at our offices in The Hague on August 31.

In view of our commitment to make sure you are in possession of the latest information, we would like to provide you with a brief update on the current state of affairs. As you may be aware of, the Schiphol rebalancing decision as taken by the Netherlands authorities on June 24th, 2022 comprises three Phases. Please allow us to briefly recapitulate them here:

- Phase 1 involves the ending of anticipatory non-enforcement and the introduction of an Experimental Regulation in order to restore the legal position of local residents;
- Phase 2 relates to a further rebalancing of public interests and is subject to the Balanced Approach procedure for the noise-related part of the rebalancing act of interests;
- Phase 3 concerns the development of a new norms-based system for noise pollution and other emissions, replacing any fixed number of movements.

In view of the collapse of the Netherlands ruling coalition on July 7 and how this may affect the Netherlands' authorities plans going forward, it is relevant to know that a parliamentary session has been held on September 12. In this session, the Netherlands Parliament has decided to not label elements of the Schiphol rebalancing decision as "controversial" (i.e. politically contentious) in its, which means that the implementation of the three Phases of the Schiphol rebalancing decision will go ahead as planned. We would like to reiterate that decisions on controversiality are made by the Netherlands Parliament, without potential for interference by the Ministry.

The first phase to take effect – Phase 1 – will be the first Phase to take effect and to subsequently influence the availability of slots for the Summer 2024 scheduling season. The final version of the Experimental Regulation has been published in the Netherlands Government Gazette on September 11th and will take effect on March

31st, 2024.¹ This corresponds with the start date of the Summer 2024 scheduling season. The Experimental Regulation is set to be reflected as an environmental limitation in the final determination of the coordination parameters for Amsterdam Airport Schiphol, as declared by the airport operator on September 28th, 2023 latest.

The Ministry has asked ACNL to indicate how, in relation to the rules and procedures involving slot allocation, a potential reduction in the number of aircraft movements and the related slots can be achieved in a fair, transparent and non-discriminatory manner, since current legislation does not provide for a mechanism for the structural reduction of slots. In response to the Ministry's question, ACNL has published a Policy Rule for Slot Allocation in case of exceedance of historic rights. The draft version of this Policy Rule was shared with all members of the Coordination Committee Netherlands (hereafter: CCN) on 16 February 2023 to give airlines the opportunity to submit comments to ACNL. The final version of the Policy Rule was published on 7 September 2023.²

The Policy Rule sets out the principles to be applied in case historic rights are exceeded in the coordination parameters. Central to the Policy Rule is the proportionality principle, which means that slot reductions are spread equally among all airlines holding historic slots at Schiphol. Any reduction of coordination parameters therefore impacts all airlines flying to and from Schiphol. The Phase 1 measures therefore do not discriminate against any particular airline, categories of service and/or destinations, nor do the measures discriminate on any other grounds.

JetBlue's concerns over slot reductions at Amsterdam Airport Schiphol are and remain well noted. Unfortunately, we are not in the position to fully alleviate these concerns, as slots may only be allocated within the applicable coordination parameters. We would like to reiterate our understanding of the impact of the Phase 1 measures, and by extension the Schiphol rebalancing decision as a whole, on JetBlue and the wider air transport industry. At this moment in time, we advise you to adhere to the global calendar of coordination activities as published by the Worldwide Airport Slot Board (WASB), as well as to keep a close eye on any instructions provided by ACNL. We would also like to put emphasis on the fact that once the Phase 1 and Phase 2 measures have been realized, slot allocation procedures will normalize and new entrants may have improved market access.

The Netherlands authorities are committed to the Balanced Approach procedure for Phase 2. We have notified the European Commission, EU Member States and other interested parties, including US DOT, of our decision in the Balanced Approach procedure for Phase 2 on September 1st.³ Regardless of the temporary nature of the Experimental Regulation for Phase 1, we find it important to emphasize that Phase 1 does not concern a noise-based operating restriction in the sense of Article 15(5) of the EU-US Air Transport Agreement or EU Regulation 598/2014. Therefore, it is our position that the Balanced Approach is not

¹ See: <https://www.officielebekendmakingen.nl/stcrt-2023-24537.html>

² See: <https://slotcoordination.nl/wp-content/uploads/2023/09/230907-Policy-Rule-ACNL-exceedance-historic-rights-v1.0.pdf>

³ See:

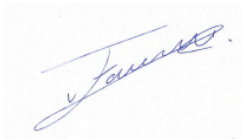
<https://www.luchtvaartindetoekomst.nl/documenten/besluiten/2023/09/01/notification-document-balanced-approach-procedure-schiphol>.

applicable for Phase 1. This reading has been confirmed by the Appellate Court in its verdict dated July 7.

**Ministerie van
Infrastructuur en
Waterstaat**

We would like to reiterate our appreciation of our constructive dialogue on slot policy developments in The Netherlands. Please note our continued commitment to liaise further on all matters relating to the Schiphol rebalancing decision, and by extension the development of civil aviation in The Netherlands.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'H. van Faassen', is written over a light blue grid background.

Henri van Faassen
Acting Director General for Civil Aviation
Ministry of Infrastructure and Water Management

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail this 28th day of September, 2023, on the following:

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