



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MOBILITY AND TRANSPORT

The Director-General

Brussels, ... 3 JUL. 2018

*By registered letter with
acknowledgment of receipt*

Ms Marlies de Brouwer
FOIA – Specialist de Volkskrant
Jacob Bontiusplaats 9
NL- 1018 LL Amsterdam
Advance copy by email:
ask+request-5581-
d434654d@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2018/2772

Dear Ms de Brouwer,

I refer to your letter dated 18/05/2018 in which you make a request for access to documents, registered on 22/05/2018 under the above mentioned reference number.

You request access to:

1. *All documents – including but not limited to e-mails, minutes, draft papers - related to the 'Traffic Distribution Rule' (TDR) regarding Schiphol Airport and Lelystad Airport.*
2. *All written communication between, on the one hand, the Dutch government (including Ministry of Infrastructure and Water Management), and on the other hand, the European Commission Directorate General for Transport and Mobility relating to the 'Traffic Distribution Rule' (TDR) regarding Schiphol Airport and Lelystad Airport.*

Your request covers the period between the 1st January 2016 and the 18 May 2018.

Your application concerns the documents referred to in the Annex I.

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹, I regret to inform you that certain documents concerned by your application can only be partially granted, as disclosure for some of the documents is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

¹ OJ L145 of 31.05.2001, p. 43.

In accordance with the provisions of Article 4(4) of the Regulation, we have consulted the Dutch Government with a view to assessing whether the documents may be disclosed.

The Commission has carried out a *prima facie* assessment of the arguments put forward by the Dutch authorities following the consultation of the latter based on Article 4(4) and (5) of Regulation (EC) No 1049/2001.

According to settled case law, "*the institution to which the request is made does not have to carry out an exhaustive assessment of the Member State's decision to object by conducting a review going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/2001*"⁴.

The Dutch authorities stated in their reply to the Commission that the documents contain commercially sensitive business information of the airlines that submitted it. The information is not public and was received through confidential information from the airport operator Schiphol Group or the slot coordinator. This information relates to the business strategies of the undertakings concerned and their expertise.

Disclosure of the documents requested would undermine the protection of the commercial interests of the company that submitted it, as putting this information in the public domain would affect its competitive position on the market. Therefore, the exception laid down in Article 4(2), first indent of Regulation (EC) No 1049/2001 applies to these documents.

The documents included in Annex III are also protected by the exception of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 following which "*Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.*".

These documents relate to a decision which has not yet been taken by the Commission. To this regard, I would like to refer to Article 19 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast)⁵. This Article establishes the provisions applicable to the traffic distribution between airports and the exercise of traffic rights. In particular, paragraph 3 establishes as follows "*3. A Member State concerned shall inform the Commission of its intention to regulate the distribution of air traffic or to change an existing traffic distribution rule.*

The Commission shall examine the application of paragraphs 1 and 2 of this Article and, within six months of receipt of the information from the Member State, and in accordance with the procedure referred to in Article 25(2), shall decide whether the Member State may apply the measures. (...)"

While the procedure established in this provision has not yet been officially engaged, the documents concerned were provided by the Dutch authorities to the European

⁴Judgment of 21 June 2012, C-135/11 P, *IFAW Internationaler Tierschutz-Fonds v Commission*, ECLI:EU:C:2012:376, para 63; see also judgment of 5 April 2017, T-344/15, *France v Commission*, ECLI:EU:T:2017:250.

⁵ OJ L 293 31.10.2008, p.3.

In accordance with the provisions of Article 4(4) of the Regulation, we have consulted the Dutch Government with a view to assessing whether the documents may be disclosed.

The Commission has carried out a *prima facie* assessment of the arguments put forward by the Dutch authorities following the consultation of the latter based on Article 4(4) and (5) of Regulation (EC) No 1049/2001.

According to settled case law, *"the institution to which the request is made does not have to carry out an exhaustive assessment of the Member State's decision to object by conducting a review going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/20"*⁴.

The Dutch authorities stated in their reply to the Commission that the documents contain commercially sensitive business information of the airlines that submitted it. The information is not public and was received through confidential information from the airport operator Schiphol Group or the slot coordinator. This information relates to the business strategies of the undertakings concerned and their expertise.

Disclosure of the documents requested would undermine the protection of the commercial interests of the company that submitted it, as putting this information in the public domain would affect its competitive position on the market. Therefore, the exception laid down in Article 4(2), first indent of Regulation (EC) No 1049/2001 applies to these documents.

The documents included in Annex III are also protected by the exception of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 following which *"Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."*

These documents relate to a decision which has not yet been taken by the Commission. To this regard, I would like to refer to Article 19 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast)⁵. This Article establishes the provisions applicable to the traffic distribution between airports and the exercise of traffic rights. In particular, paragraph 3 establishes as follows *"3. A Member State concerned shall inform the Commission of its intention to regulate the distribution of air traffic or to change an existing traffic distribution rule.*

The Commission shall examine the application of paragraphs 1 and 2 of this Article and, within six months of receipt of the information from the Member State, and in accordance with the procedure referred to in Article 25(2), shall decide whether the Member State may apply the measures. (...)"

While the procedure established in this provision has not yet been officially engaged, the documents concerned were provided by the Dutch authorities to the European

⁴Judgment of 21 June 2012, C-135/11 P, *IFAW Internationaler Tierschutz-Fonds v Commission*, ECLI:EU:C:2012:376, para 63; see also judgment of 5 April 2017, T-344/15, *France v Commission*, ECLI:EU:T:2017:250.

⁵ OJ L 293 31.10.2008, p.3.

Commission in an informal stage in order to receive the Commission's view on these matters before proceeding to the information referred to in Article 19(3) of Regulation (EC) No 1008/2008. In doing so, the Dutch authorities shared information reflecting viewpoints from the Dutch authorities at that time. This was done in order to help in the decision and policy-making process.

If the Dutch authorities could not share this information with the Commission on a confidential basis, it would seriously impede upon the flow of information between the Commission and the Dutch authorities, thereby making Member States more reluctant to share all relevant information prior to the Commission's decision. This would therefore seriously and actually undermine the decision-making process as mentioned in Article 4(3) of Regulation (EC) No 1049/2001. Please also note that these documents were exchanged in the context of an administrative procedure therefore the documents concerned are not legislative in nature and the requirement of wider access to legislative documents does not apply in this case.

In addition, the disclosure will impact the decision-making process of the Commission, as it would reveal preliminary views and policy options which are currently under consideration; the Commission's services must be free to explore all possible options in preparation of a decision free from external pressure.

Therefore, the exception laid down in Article 4(3) first subparagraph of Regulation (EC) No 1049/2001 applies to these documents.

Following this assessment, I conclude that the Dutch authorities based their substantive opposition to disclosure of the requested documents on the exceptions in Article 4(2) and (3) of Regulation (EC) No 1049/2001 and have given proper reasons for their position.

These exceptions are also applicable to the Commission documents.

Finally, I would also draw your attention to Article 4(2), third indent of Regulation (EC) No 1049/2001 following which *"The institution shall refuse access to a document where the disclosure would undermine the protection of — the purpose of inspections, investigations and audits"*.

In this particular case the decision envisaged in Article 19(3) of Regulation (EC) No 1008/2008 is the outcome of a procedure where the Commission has to analyse the adequacy of the proposed new rules on the traffic distribution with the criteria established in paragraphs 1 and 2 of Article 19 of Regulation (EC) No 1008/2008. Therefore, the exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001 fully applies to these documents. Disclosure of the documents at this point in time would affect the climate of mutual trust between the authorities of the Member State and the Commission, which is required to enable them to resolve the case without having to refer it to the Court of Justice.

We have considered whether partial access could be granted to the documents requested. However, these documents are entirely covered by the exceptions above mentioned.

The exceptions laid down in Article 4(2) and 4(3) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. The Commission has examined this question and does not see any overriding public interest in disclosing the documents.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

A handwritten signature in black ink, consisting of several vertical strokes followed by a horizontal line and a long, sweeping curve to the right.

Henrik HOLLEI

Annex I - Documents concerned by the application**Documents from the Dutch Government**

N° of document	Date	Document	Registration reference
Doc 1	26/09/2017	Letter from NL Slides EC traffic distribution	Ares (2018) 3065822
Doc 2	12/10/2017	E-mail from NL authorities	Ares (2018) 3065822
Doc 3	18/10/2017	Letter from NL Draft report Dutch traffic distribution / split operations	Ares (2018) 3066108
Doc 4	24/10/2017	Letter from NL authorities	Ares (2018) 3066167
Doc 5	09/11/2017	NL authorities letter on consultation on traffic distribution rule	Ares (2018) 3066200
Doc 5a		o Draft ministerial regulation	Ares (2018) 3066200
Doc 5b		o Draft explanation ministerial regulation	Ares (2018) 3066200
Doc 5c		o Covering letter	Ares (2018) 3066200
Doc 5d		o Draft decree Dutch Traffic Distribution Rule	Ares (2018) 3066200
Doc 5e		o Draft decree explanation by article	Ares (2018) 3066200
Doc 5f		o Draft explanatory memorandum	Ares (2018) 3066200
Doc 5g		o Text website	Ares (2018) 3066200
Doc 5h		o IAK questions	Ares (2018) 3066200
Doc 6	07/12/2017	Letter from Dutch authorities on traffic distribution rule	Ares (2018) 3066228
Doc 6a		o Final draft study practicability and feasibility 2016	Ares (2018) 3066228
Doc 6b		o Final draft study capacity demand at Schiphol Airport 2017	Ares (2018) 3066228
Doc 6c		o Final draft study split operations 2017	Ares (2018) 3066228
Doc 6d		o Appendix 1	Ares (2018) 3066228
Doc 6e		o Appendix 2	Ares (2018) 3066228
Doc 6f		o Appendix 3a retiming w17	Ares (2018) 3066228
Doc 6 g		o Appendix 3b w17 non-slotted	Ares (2018) 3066228

Doc 6h		o Appendix 3c non slotted s18	Ares (2018) 3066228
Doc 6i		o Appendix 3d retiming s18	Ares (2018) 3066228
Doc 6j		o Appendix 5	Ares (2018) 3066228

Documents from the Commission

N° of document	Date	Document	Registration reference
Doc 7	30/10/2017	Internal minutes meeting tdr 30-10-2017	Ares(2018)3389458
Doc 8	16/11/2017	Email to the NL authorities	Ares(2018)3388888
Doc 9	20/02/2018	Email to the NL authorities Traffic Distribution Rule	Ares(2018)3389020
Doc 10	06/04/2018	Internal minutes meeting tdr	Ares(2018)3389093

Annex II List of Documents that can be partially disclosed and where personal data has been redacted

N° of document	Date	Document	Registration reference
Doc 3	18/10/2017	Letter from NL Draft report Dutch traffic distribution / split operations	Ares (2018) 3066108
Doc 5	09/11/2017	NL authorities letter on consultation on traffic distribution rule	Ares (2018) 3066200
Doc 5a		o Draft ministerial regulation	Ares (2018) 3066200
Doc 5b		o Draft explanation ministerial regulation	Ares (2018) 3066200
Doc 5c		o Covering letter	Ares (2018) 3066200
Doc 5d		o Draft decree Dutch Traffic Distribution Rule	Ares (2018) 3066200
Doc 5e		o Draft decree explanation by article	Ares (2018) 3066200
Doc 5f		o Draft explanatory memorandum	Ares (2018) 3066200
Doc 5g		o Text website	Ares (2018) 3066200
Doc 5h		o IAK questions	Ares (2018) 3066200
Doc 6*	07/12/2017	Letter from Dutch authorities on traffic distribution rule	Ares (2018) 3066228
Doc 6a		o Final draft study practicability and feasibility 2016	Ares (2018) 3066228
Doc 6b		o Final draft study capacity demand at Schiphol Airport 2017	Ares (2018) 3066228
Doc 6c		o Final draft study split operations 2017	Ares (2018) 3066228

* Some parts of this document are disclosed. Some parts of this document are not disclosed in order to protect personal data and some parts of this document are not disclosed based on other reasons.

Annex III List of Documents that cannot be disclosed

Documents from the Dutch Government

N° of document	Date	Document	Registration reference
Doc 1	26/09/2017	Letter from NL Slides EC traffic distribution	Ares (2018) 3065822
Doc 2	12/10/2017	E-mail from NL authorities	Ares (2018) 3065822
Doc 4	24/10/2017	Letter from NL authorities	Ares (2018) 3066167
Doc 6*	07/12/2017	Letter from Dutch authorities on traffic distribution rule	Ares (2018) 3066228
Doc 6d		o Appendix 1	Ares (2018) 3066228
Doc 6e		o Appendix 2	Ares (2018) 3066228
Doc 6f		o Appendix 3a retiming w17	Ares (2018) 3066228
Doc 6 g		o Appendix 3b w17 non-slotted	Ares (2018) 3066228
Doc 6h		o Appendix 3c non slotted s18	Ares (2018) 3066228
Doc 6i		o Appendix 3d retiming s18	Ares (2018) 3066228
Doc 6j		o Appendix 5	Ares (2018) 3066228

* Some parts of this document are disclosed. Some parts of this document are not disclosed in order to protect personal data and some parts of this document are not disclosed based on other reasons.

Documents from the Commission

N° of document	Date	Document	Registration reference
Doc 7	30/10/2017	Internal minutes meeting tdr 30-10-2017	Ares(2018)3389458
Doc 8	16/11/2017	Email to the NL authorities	Ares(2018)3388888
Doc 9	20/02/2018	Email to the NL authorities Traffic Distribution Rule	Ares(2018)3389020
Doc 10	06/04/2018	Internal minutes meeting tdr	Ares(2018)3389093

Annex IV Documents partially disclosed