Sustainable governance of aviation: changing tailwinds: from shareholding to stakeholders?

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The Path Towards the Balanced Approach in the Netherlands:

From Consensus to Litigation Over Schiphol's Downsizing[1]

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Abstract

Dutch noise policy at Schiphol has a long and complex history. The polder model of reaching consensus on measures to reduce nuisance for local residents has long been under pressure. The unilateral government announcement in June 2022 that Schiphol must reduce its capacity has further strained relations. The policy choice to implement *noise-related* operational restrictions via two 'tracks' places the "Balanced Approach" for noise-related measures at airports centre stage. In particular, the application of an experimentation regime in the first phase leads to much discussion and legal proceedings. This article describes developments in Dutch noise policy and contextualises the initiated processes and court cases in relation to European and international rules regarding this balanced approach and the wider context.

1. This English translation has been prepared for the purpose of this PhD manuscript and is based on the original Dutch-language article "De aanloop naar de Balanced Approach in Nederland: niet polderen voor een 'evenwichtige aanpak' maar procederen over krimp Schiphol", published in Tijdschrift Vervoer & Recht, no. 6 (2023). The initial translation was prepared with the support of translation software and subsequently reviewed and refined for accuracy, consistency, and legal terminology. While care has been taken to preserve the text of the original, certain passages and quotes may have been lightly adapted for clarity in English. All footnotes have been translated as well, though they frequently reference Dutch-language sources. In case of ambiguity or interpretative questions, the original Dutch text prevails. This article reflects developments up to and including 22 September 2023.

1. Introduction

Since the government's announcement on 24 June 2022, that the number of aircraft movements (AMs) at Schiphol must be reduced from 500,000 to 440,000 per year, the debate over shrinkage has engaged minds both at home and abroad. Less than a year later, developments occurred rapidly; on 3 April 2023, Schiphol announced measures that go significantly beyond the government's targets. Two days later, on 5 April, the preliminary relief judge blocked the proposed temporary measure intended to reduce AMs to 460,000 for that year, citing that the correct *Balanced Approach* procedure was not followed.

This was not the end of the matter. In parallel, the State rushed a *Balanced Approach* procedure with the aim of achieving 440,000 aircraft movements by 2024 and also appealed against the 2023 ban on the temporary measure. On 7 July 2023, the Amsterdam Court of Appeal issued a judgment lifting the ban; one day later, the Rutte IV cabinet collapsed. Initially, the cabinet's caretaker status appeared to affect political decision-making on the skrinkage dossier, but by 1 September it had become clear that the plans would go ahead. On 25 July, several airlines announced their intention to appeal in cassation against the Court of Appeal's judgment. A ruling is expected by the end of the year.

This article aims to provide insight into the various trajectories and events, placing them in context, analysing the legal proceedings already conducted, and looking ahead to the trials still ongoing. The article explicitly does not advocate for or against environmental measures—including noise policies—but focuses solely on the procedures and conditions to be followed when implementing noise-related restrictions.

The first part provides relevant background on the development of Dutch noise policy (Section 1) and outlines the circumstances that led to the current situation (Section 2). This is followed by a discussion of the main issues surrounding the temporary experimental scheme (Section 3) and the legal dispute it has generated (Section 4). The following section offers observations on the context and *Balanced Approach* procedure as deployed in the Netherlands (Section 5). The article concludes with final reflections (Section 6).

2. Background Dutch noise policy at Schiphol

2.1 Development of a legal and policy framework for noise policy

Due to the noise impact on the surrounding area, traffic rules for the use of the runway system at Schiphol and the surrounding airspace, as well as noise impact limit values, are laid down in the Airport Traffic Decree (ATD).[2] The first ATD dates from 2003 and has been amended and updated several times.[3] It uses limit values for noise at 35 fixed enforcement points. The 2008 ATD set the enforcement value based on a maximum number of 480,000 AM.[4]

The enforcement point system appears to be complex and inflexible. In the event of "an imminent exceedance of a noise limit at an enforcement point near a runway with relatively few noise-affected residents, it may [potentially] be necessary to switch to a runway with relatively many noise-affected residents."[5] The Ministry of Infrastructure and Water Management (I&W), hereinafter also referred to as the ministry, starts working on developing a new system. A consultation process involving administrators, residents, and the aviation sector led to the then-widely supported Alders agreement, which in 2008 recommended a system based on strict preferential runway use with a maximum growth to 510,000 AM in 2020.[6] The Alders agreement was updated in 2012, 2013, and 2015, with the latest update increasing the maximum number of AM to 500,000 in 2020.

An experiment with the "New Standards and Enforcement System" (*Nieuw Normen en Handhavingsstelsel*, NNHS) between 2010 and 2012 was successful and has since been adopted as policy. Overall, the new noise system minimises disturbance for local residents by prioritising the use of runways that cause the least noise wherever possible. To enable the introduction of a new ATD based on the NNHS, the Aviation Act (*Wet luchtvaart*, Wlv) was amended accordingly in 2016.[7] However, implementing a new ATD also requires Schiphol to obtain a new environmental permit, for which an environmental impact assessment (EIA) must be conducted.[8]

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2. AMvB, Decree of 26 November 2002 adopting an Airport Traffic Decree for Schiphol Airport (Schiphol Airport Traffic Decree) (Stb. 2002, 592).
3. For an overview, see, *Analysis equivalence criteria Schiphol*, RIVM report 2020-0219.
4. Explanatory Memorandum to the Decree of 18 September 2008 to amend the Schiphol Airport Traffic Decree in connection with better use of environmental space and amendment of the departure routes in an easterly direction from Runway 18-27 (Stb. 2008, 390).
5. MvT bij de Wijziging Wet luchtvaart, Kamerstukken II 2006/07, 34 098, nr. 3, p. 3
6. Consultation Document Balanced Approach for Schiphol, March 2023, section 3.1.
7. Schiphol Action Plan, p. 12-13.
8. Environmental Impact Assessment Decree to the Environmental Management Act.

2.2 Anticipatory enforcement

In anticipation of the legal embedding of the NNHS in the new ATD, the Inspectorate for the Human Environment and Transport (*Inspectie Leefomgeving en Transport*, ILT), which is responsible for supervising national airports, has been applying so-called "anticipatory enforcement" since 2015, at the instruction of the then State Secretary. This means that the ILT does not impose sanctions when noise limits at fixed enforcement points are exceeded, provided this is due to strict preferential runway use.

In legal proceedings brought by residents against the tolerated exceedances of the ATD, the court in 2018 noted that "the NNHS has already been applied for eight years" and that it was "expected to enter into force by the end of 2019 along with a revised Schiphol Airport Traffic Decree." [9] In 2019, the court reached the same conclusion: "Since the entry into force of the statutory regulation establishing the NNHS is foreseen for the end of 2019, this concerns a temporary situation that will come to an end in the foreseeable future."[10]

2.3 No nature permit

After the nitrogen ruling by the Council of State triggered the 'nitrogen crisis' in the Netherlands in late May 2019, the Dutch organisation *Mobilisation for Environment* (MOB) submitted an enforcement request to the Ministry of Agriculture, Nature and Food Quality (*Landbouw, Natuur en Voedselkwaliteit*, LNV); MOB argues that Schiphol does not hold a nature permit for its activities under the Nature Conservation Act (*Wet natuurbescherming*, Wnb), and asks the minister to take enforcement action.[11]

In the Schiphol Enforcement Order of April 2020, the Minister of LNV confirmed that, since 2017, Schiphol has been operating more AMs and may be causing higher nitrogen deposition than permitted under the applicable ATD 2008. To assess the deposition, Schiphol is required to apply for a nature permit. Until then, the Minister considers enforcement action to be disproportionate and rejects the request.[12]

At the time of writing, Schiphol has submitted a nature permit application that would allow for 500,000 AMs. In early 2023, the airport had already announced that

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9. District Court Noord-Holland 24 October 2018, ECLI:NL:RBNHO:2018:9181, consideration 7.3.
10. District Court Noord-Holland 12 March 2019, 19/58 and 19/171, recital 12.
11. Sections 2.7(2) and 2.8, Nature Protection Act. The Minister for Nature and Nitrogen is the competent authority for this permit.
12. Schiphol Enforcement Decision, 8 April 2020, see: http://puc.overheid.nl/doc/PUC_305658_17.

it had acquired sufficient nitrogen rights from farming businesses around Schiphol and Lelystad Airport.[13]

2.4 From growth perspective to vigilance mode

For a brief period, it was anticipated that the aviation sector could earn room for growth after 2020 by pursuing sustainability and innovation, potentially reaching a maximum of 540,000 AMs by 2024.[14] In early 2021, the Rutte III cabinet collapsed over the childcare benefits affair. A month later, the then-outgoing Minister submitted a new draft ATD based on the NNHS to Parliament.[15] Despite a warning that ending anticipatory enforcement might be delayed as a result—leaving a continued legal vacuum[16] —the House of Representatives declared the draft amendment to the ATD "controversial", thereby suspending its consideration until a new cabinet has taken office.[17]

In the second half of 2021, concerns mounted over the nature permit and the possibility that "the number of flights may need to be significantly reduced."[18] Because the complex nature permitting procedure—running in parallel with the ATD process—could take considerable time before a permit becomes irrevocable due to potential appeals, "a number of legal alternatives are being explored in parallel with the nature permit process"[19] to restore the legal position of local residents.

Furthermore, on 30 August 2021, the Foundation for the Right to Protection from Aircraft Nuisance (*Stichting Recht op Bescherming tegen Vliegtuighinder*, RBV) had formally summoned the State in civil proceedings to reduce the number of AMs.[20] On 5 November 2021, the ILT warned the government that, in future legal cases, the

13. NOS, "Schiphol: voldoende stikstofrechten opgekocht voor natuurvergunning" (Schiphol: sufficient nitrogen rights bought up for nature permit), 19 January 2023.
14. Letter from the Minister of Infrastructure and Water Management (I&W) dated 5 July 2019 (Parliamentary Papers II 2018/19, 29665, no 646, p. 6).
15. Draft amendment to Schiphol Airport Traffic Decree, 16 February 2021, I&W/BSK-2021/39589 .
16. Letter from the Minister of I&W dated 19 April 2021 (Parliamentary Papers II 2020/21, 29665, no 406, p. 2).
17. List of controversial issues as adopted by the chamber on 1 June 2021, Parliamentary Papers II 2020/21, 35718, no 49.
18. NOS, "Grote zorgen kabinet over Schiphol, aantal vluchten mogelijk fors omlaag" (Major Cabinet concerns about Schiphol, number of flights possibly sharply reduced), 8 December 2021.
19. Letter from the Minister of I&W of 3 November 2021 (Parliamentary Papers II 2020/21, 31936, no 829).
20. On 15 November 2023, the District Court of The Hague rules on the admissibility of RBV to act on behalf of local residents. The substantive hearing of the writ is scheduled for 30 January 2024, see https://www.beschermingtegenvliegtuighinder.nl/tijdlijn-civiele-procedure/.

legal vacuum caused by anticipatory enforcement might no longer be tolerated, particularly now that there was no longer a concrete prospect of embedding the NNHS in a new ATD—and that courts could decide to restore the legal position of local residents.[21] This leads to a growing sense in The Hague that urgent action on noise nuisance is needed.

3. A new balance vs a "balanced approach"

The coalition agreement, concluded on 15 December 2021, stated that reducing the negative effects of aviation and addressing challenges around the airport "requires an integral solution that offers certainty and perspective for both Schiphol's hub function and the airport's surroundings."[22] Six months later, in June 2022, the cabinet unexpectedly announced in an 'Outline Letter' the "decision" to cap 440,000 AMs at Schiphol in the coming years.[23] This figure is part of a search for "a new balance", but seems instead the result of a hasty and careless, largely internal process of only a few months to arrive at a rationale for shrinking Schiphol Airport. The self-conceived calculation method in a dubious "destination analysis"[24] is dismissed by three independent parties as "(highly) arbitrary and difficult to objectify", which "seems to ignore economic activity outside business services" and is "sceptical" about the index used to identify strategic destinations for Schiphol.[25] The selective adoption of findings from external studies, such as the exclusion of fleet renewal, and a summary proportionality assessment, also contributes to the conclusion that the outcome appears to have been leading.[26]

At the time, the decision lacked a clear legal basis or underlying rationale. Initially, the policy shift was justified on the grounds of noise pollution and emissions, with the reasoning that the aviation sector should also contribute to CO_2 reduction efforts. Less evident, however, is the weight the Ministry of Infrastructure and Water Management appears to assign to nitrogen emissions. A possible explanation may lie in the political context of the farmer protests earlier that year, although—unlike

21. Letter from the Minister of I&W dated 10 December 2022 (Parliamentary Papers II 2020/21, 29665, no 418), and note "signaal duur anticiperend handhaven Schiphol" (signal duration anticipatory enforcement Schiphol) , 5 November 2021, ILT-2021/60234.
22. Coalition Agreement 2021-2025, 15 December 2021.
23. See, Letter from the Minister of I&W of 24 June 2022 (Parliamentary Papers II 2021/22, 29665, no 432), hereinafter "Outline Letter 24 June".
24. Outline letter 24 June, Annex 3a: Destination analysis adequate accessibility.
25. Ibid, see Appendices 3b to d respectively, with reviews conducted by SEO Economic Research, Erasmus UPT and CE Delft.
26. Outline letter 24 June, Annex 5: Background note on proportionality.

in the agricultural sector—much remains uncertain regarding nitrogen deposition from aviation.[27]

After a period during which much remains unclear, in autumn 2022, it appears that the government is pursuing three tracks to implement the 'decision' to reduce the number of AM at Schiphol; the first two involve *noise-related* restrictions on the number of flight movements, first through an intermediate step, or a temporary measure, to 460,000 AM by November 2023, and then to 440,000 AM a year later. The third track is the development of a new standards system based on boundary values for noise and emissions by 2027.

The policy decision to prioritise noise reduction over emissions has been pivotal for the subsequent process and may significantly influence the outcome. This is because the introduction of noise-related operating restrictions at airports is subject to European and international rules requiring a *Balanced Approach*.

3.1 The Balanced Approach

The Balanced Approach ("BA") is a procedure developed by the *International Civil Aviation Organization* (ICAO), a United Nations (UN) organisation, and is laid down in Annex 16 to the Convention on International Civil Aviation of 1944, more commonly referred to as the Chicago Convention.[28] The text of the Balanced Approach reads:

> "The balanced approach to noise management consists of *identifying the noise problem at an airport* and then *analysing the various measures available to reduce noise* through the exploration of *four principal elements*, namely reduction at source, land-use planning and management, noise abatement operational procedures and operating restrictions, with the goal of addressing the noise problem in the *most cost-effective manner*" (emphasis added).

The standard clearly describes two main steps in the BA process: first, identifying the noise problem at an airport; second, analysing various noise abatement measures to resolve the issue and selecting the appropriate measures and the manner of implementation. ICAO has provided guidance on these matters.[29] Regarding operating restrictions, ICAO Contracting States also agreed that such

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27. See, Aviation Sector Opinion, Advisory Committee on Nitrogen Problems, 15 January 2020.
28. Convention on International Civil Aviation (1944), Annex 16, Volume 1, Part V, Balanced Approach to Noise Management.
29. ICAO Guidance Material on the Balanced Approach to Aircraft Noise Management (Doc 9829).

restrictions "should not be applied as a first resort, but only after consideration of the benefits gained from other elements [of the BA]."[30]

The EU has adopted ICAO's Balanced Approach concept and enshrined it more concretely in the EU Noise Regulation.[31] The EU Noise Regulation prescribes a similar procedure that ensures a "balanced approach" in which:

> "the range of available measures, namely aircraft noise abatement at source, land-use planning and management, noise abatement operational procedures and operating restrictions, are approached in a coherent manner in order to solve the noise problem for each individual airport in the most cost-effective way."[32]

A noise-related action is defined as any measure that "affects the noise environment around an airport", with an operating restriction being an action that "reduces the access or operational capacity of an airport."[33] The EU Noise Regulation also explicitly prescribes "operating restrictions should not be applied in the first instance, but only after the other measures of the balanced approach have been considered."[34] The steps involved in carrying out a BA procedure and in imposing operating restrictions are discussed in Section 5. The BA is, therefore, a lengthy and meticulous process. To expedite capacity reduction, the government set up an experimental scheme to circumvent the BA procedure.

4. The experimental scheme and implications for airport capacity

4.1 Ending anticipatory enforcement

The Outline Letter of 24 June clearly states that the government intends to prevent anticipatory enforcement by the ILT by November 2023, coinciding with the start of the 2023/2024 winter season as scheduled by the International Air Transport Association (IATA). As the new ATD remains pending due to the absence of a nature permit, this step should resolve the flawed legal position of local residents.

30. Resolution A39-1: Consolidated statement of continuing ICAO policies and practices related to environmental protection - General provisions, noise and local air quality, Appendix E.
31. EU Regulation 598/2014 of 16 April 2014 on the establishment of rules and procedures for the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC (the "EU Noise Regulation").
32. EU Noise Regulation, Article 2.
33. Ibid.
34. EU Noise Regulation, Article 5(3)(d).

By ceasing anticipatory enforcement of the NNHS, the Ministry of I&W aimed to revert to enforcing the previous system of the ATD 2008. Since this enforcement point system could increase noise nuisance for local residents, the Minister of I&W stated in the Outline Letter that maintaining strict preferential runway use (i.e. NNHS) is critically important.[35] At the same time, reverting to the limit values of the enforcement points would lead to a reduction in the maximum number of AMs that can be processed at the airport. Further analysis shows that if current operational practices are applied to the limits in force at the time, the earlier estimate of 450,000–465,000 AMs must be revised downward, with only 410,000 AMs proving feasible. This is partly due to noise abatement measures and modified approach routes that have already been implemented.[36]

4.2 The Experimental Scheme

The Minister found a solution in the Aviation Act, as it permits him to deviate from established regulations through a ministerial regulation on an experimental basis, including "replacing a noise impact limit value set in the Airport Traffic Decree at a specific enforcement point with another limit value."[37]

By simultaneously updating the limit values at all enforcement points and adjusting them accordingly, the intention is to ensure that the rules for strict preferential runway use can be applied within the (new) limit values. In drafting this experimental regulation, the number of aircraft movements under the 2008 ATD—480,000—was used as a reference point. Still, internal calculations show that this must be scaled down to 460,000 AMs in order to remain within the equivalence criteria and to continue operating under the NNHS. As a result, the design of the scheme resembles something more than a small-scale experiment.[38]

The choice of this instrument is also noteworthy: strict preferential runway use was previously the subject of an experimental scheme,[39] and the Alderstafel already advised in 2013 that the combination of enforcement points is incompatible with the NNHS.[40] In addition, the Regulations Instruction (*Aanwijzingen voor de*

35. Outline Letter 24 June.
36. To70 memo, *Actualisatie effect op jaarvolume bij beëindigen anticiperend handhaven op Schiphol (Actualisation effect on annual volume when terminating anticipatory enforcement at Schiphol)*, 8 February 2023.
37. Aviation Act (Wlv) Art 8.23a, paragraph 1(b).
38. See, "Draft explanation of experimental regulation for internet consultation", available at: https://www.internetconsultatie.nl/experimenteerregeling_schiphol/b1.
39. Regulation of the State Secretary for Infrastructure and the Environment, of 9 July 2013, no IenM/BSK-2013/129725, to continue the NNHS between July and October 2013.
40. Advice "Alderstafel" Schiphol 2013.

regelgeving, Ar) emphasises in Note 2.41 that the primary purpose of an experiment must be the *collection of essential information*, and is therefore not anticipatory in nature. An anticipatory function is only permitted in the case of a transitional arrangement bridging the experiment and the final regulation.[41] However, when a new experimental scheme governs noise standards and the NNHS, "it can readily appear to constitute improper use of the experimental provision," according to an earlier opinion submitted to the House of Representatives.[42] Perhaps the most crucial reason why this regulation cannot simply be applied in its current form is that it *de facto* results in a reduction in airport capacity, which brings it under the scope of the Balanced Approach prescribed by the EU Noise Regulation—and EU law takes precedence over Dutch law. These and other considerations are addressed in Sections 4 and 5.

However, to implement the new regulation as early as November 2023, speed is of the essence. Royal Schiphol Group (RSG) must issue the capacity declaration for the winter season in early May, and the airport slot coordinator (ACNL) must have certainty by mid-April as to how many slots—defined as the time window in which an aircraft is allowed to take off or land—can be allocated to airlines in accordance with the EU Slot Regulation.[43] The experimental regulation was therefore published for consultation at the end of January.

4.3 Airport capacity and slots

A reduction in capacity at Schiphol has a direct impact on airline operations. At coordinated airports, airlines depend on slots to operate their flights. When an airline uses its allocated slots, it builds up what is known as a historical or grandfather right to that slot, which gives it the right to reuse the slot in a subsequent scheduling season.[44] If the airline does not do so—whether due to reduced operations or bankruptcy—the slot is typically returned and placed into the *slot pool*,[45] after which the slot coordinator must redistribute these slots to existing users and, with priority, to new entrants at the airport.

Where operating restrictions reduce the total capacity to below the number of accrued historical rights, airlines are required to surrender these rights; otherwise, they may be withdrawn. At the request of the Minister, the slot coordinator has

41. Aviation Act Art 8.23a, paragraph 6.
42. See answer to questions of the Lower House, "Anticipatory Enforcement of the New Standards and Enforcement System" by Prof H.E. Bröring & Prof A.R. Neerhof, 20 February 20220.
43. Regulation No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (EU Slot Regulation).
44. EU Slot Regulation, Article 8.
45. EU Slot Regulation, Article 10.

issued an opinion on how such a capacity reduction could be legally implemented in practice.[46] In its capacity declaration for the 2023/2024 winter season, Royal Schiphol Group (RSG) revised the maximum number of aircraft movements downward, in line with the number of slots already returned, citing the special circumstance of facilitating phased recovery following the COVID-19 pandemic.[47] Earlier, the Minister of I&W had urged the airport not to release slots from bankrupt carriers in anticipation of the planned downsizing. Whether RSG has interpreted this guidance independently and whether such action is legally sound falls outside the scope of this article. According to the slot coordinator, as of May 2023, the airport had made a total of 17,000 fewer slots available.[48]

5. Legal procedures

The Ministry of I&W planned to introduce the Experimental Scheme before the final decision and legal confirmation of Schiphol's capacity for the 2023/2024 winter season in April-May. Subsequently, several airlines filed preliminary relief proceedings to prevent the implementation and application of the Experimental Scheme. They cite, among other reasons, the failure to follow the *Balanced Approach*, as briefly outlined in section 2 and explained in greater detail in section 5. This section addresses the legal proceedings that have already been taken or are being initiated in relation to the Experimental Scheme.

5.1 Preliminary Relief Proceedings

In the ruling of 5 April 2023, the preliminary relief judge recognised the urgent interest of the claimants and reprimanded the State; the prescribed *Balanced Approach* procedure for a capacity limitation had not been followed. The State's defences that the EU Noise Regulation does not apply to the cessation of anticipatory enforcement and the experimental scheme, because (i) the number of 500,000 AMs under the NNHS was never formally established and no legitimate expectations could arise from it (ii) there is no *new* operating restriction, (iii) the measures would expand operations rather than restrict them, and (iv) the measure does not constitute a noise-related action, did not stand.[49]

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46. ACNL, Policy Rule - Slot allocation in case of exceedance of historic rights, 13 February 2023.
47. AMS Capacity Declaration Winter 2023-2024, April 2023, available at https://slotcoordination.nl/slot-allocation/declared-capacity/.
48. Telegraph, "Schiphol already cuts flights this winter: 17,000 fewer take-offs and landings", 30 May 2023.
49. Rb. Noord-Holland (Haarlem district court) 5 April 2023, ECLI:NL:RBNHO:2023:3010, para 4.20, hereinafter "Preliminary relief judgment".

The State's assertion that the maximum of 500,000 AMs under the NNHS was never formally established is notable, as this number had been treated as a target for many years and was actively applied—not only in determining available capacity but also through anticipatory enforcement. The judge pointed to the periodic determinations made through fixed procedural steps by the Ministry of IenW and RSG; Schiphol's capacity declarations in recent years had unambiguously set the airport's capacity at a "legally binding" level of 500,000 AMs per year, with the draft ATD based on the NNHS serving as the formal reference point.[50] Because the State failed to legally embed the new system in a revised airport decree, the court ruled that the NNHS and the corresponding maximum of 500,000 AMs must be regarded as a set of written policy rules. Interested parties may derive rights from the application of these rules pursuant to Article 4:84 of the Dutch General Administrative Law Act (*Algemene wet bestuursrecht*, Awb). The fact that the cessation of anticipatory enforcement and the proposed regulation represent a change in policy does not, according to the judge, affect the applicability of European law.[51]

Even more striking is the State's argument that falling back on the old 2008 system means the BA procedure does not apply, since those standards were adopted prior to the entry into force of the EU Noise Regulation in 2016. Equally notable is the defence that there would be no capacity reduction in this case, because—based on the 2008 ATD as applied today—only 410,000 AMs would be possible, whereas the proposed scheme, following the adjustment of the limit values, would allow a maximum of 460,000 AMs.[52]

The court rejected both defences. The policy shift to revert to an earlier regulatory framework by ending anticipatory enforcement occurred after 2016, and the content of the experimental regulation—along with the maximum of 460,000 AMs—must be regarded as "an outcome of a policy decision to restrict operations at Schiphol."[53] The EU Noise Regulation has been in force in the Netherlands since 13 June 2016 and contains no exemptions from its application.

The final defence is legally the most compelling. By abandoning the draft ATD incorporating the NNHS and the ceiling of 500,000 AMs, the concrete prospect of legalisation disappears—undermining the justification for the tolerated practice of

50. Judgment in preliminary relief proceedings, grounds 4.23-4.27.
51. Judgment in summary proceedings, paras. 4.28-4.32.
52. See paragraph 3 above.
53. See respectively, Judgment in preliminary relief proceedings paras. 4.34 and 4.35-4.39.

anticipatory enforcement. According to the State, the termination of anticipatory enforcement does not constitute a noise-related action that would require an assessment of alternative measures under the BA procedure.

The preliminary relief judge acknowledged that anticipatory enforcement is, in principle, at odds with the State's enforcement obligation, and that enforcement may only be waived where there is a concrete prospect of legalisation of the unlawful situation. However, the State failed to convincingly demonstrate why the external factor of the missing nature permit now suddenly obstructs the legalisation of the NNHS at 500,000 AMs, or why continuation of anticipatory enforcement beyond 1 November 2023 would no longer be legally permissible.[54]

According to the court, the extent to which a change in policy perspective may be applied with immediate effect is also constrained by the policy and implementation history, on the basis of which airlines have aligned—and were entitled to align—their expectations, conduct, and decision-making.[55] Moreover, the policy change does not merely concern the cessation of anticipatory enforcement, but also involves a change of regime through a constructed scheme that results in the intended capacity limitation of 460,000 AMs.[56]

The preliminary relief judge concluded that he "cannot regard the proposed scheme as anything other than a vehicle used to work towards an operating restriction that the Minister seeks to implement more rapidly than would be possible under the Balanced Approach procedure," and that "the balancing of interests involved in the policy change—insofar as it includes the possibility of a capacity restriction—must be carried out within the framework of the Balanced Approach procedure."[57] By failing to conduct the BA procedure prior to the policy change, the State acted in breach of the EU Noise Regulation.

The court prohibited the State from adopting the proposed regulation for the 2023–2024 operating year and from terminating anticipatory enforcement. RSG was prohibited from declaring a reduced number of AMs and/or slots in the capacity declaration for the winter season in connection with the proposed scheme, or from taking into account the Minister's request and intention to reduce the number of AMs at the airport.[58]

54. Judgment in preliminary relief proceedings paras. 4.41 and 4.43.
55. Judgment in preliminary relief proceedings para. 4.45.
56. Ibid.
57. Judgment in preliminary relief proceedings paras. 4.51 and 4.56, respectively.
58. Judgment in preliminary relief proceedings paras. 5.1 and 5.7, respectively.

5.2 Appeal Proceedings

The Minister lodged an appeal against the judgment of the preliminary relief court. Having already determined the capacity for the winter season, he had, at that time, intended to adopt the Experimental Scheme—albeit in a revised form—for the subsequent operating year, so that it would apply to the capacity declaration for the summer season starting in April 2024. Despite the Court's serious doubts as to whether the State would be able to finalise the matter before the 13 September 2023 deadline, the Minister had an interest in overturning the contested judgment, as it would otherwise also preclude implementation at a later stage.[59]

In a landmark decision issued on 7 July 2023, the Court of Appeal overturned the first instance judgment. The appeal proceedings involved 13 grounds of appeal; however, this article focuses on four core issues that differ substantially from the decision made in the preliminary relief stage.

First, the Court held that there was insufficient basis to characterise the Experimental Scheme as a 'short-cut' towards 440,000 AMs. Although the Minister's statements "give cause for concern regarding the purity of motives," this was not sufficient to support the far-reaching conclusion that the State was using the Experimental Scheme for a purpose other than that for which it was intended.[60] Unlike the preliminary relief court, the Court of Appeal paid little attention to the functioning of the Experimental Scheme and its outcome—460,000 AMs—even though there were legitimate doubts as to the proportionality of the scheme and whether it did not exceed its aim.

Second, regarding the scope of the EU Noise Regulation, the Court found that the Experimental Scheme could not be classified as an operating restriction within the meaning of the Regulation. It left unresolved the key question of whether, in substance and in effect, the scheme 'reduces' access to or the operational capacity of an airport—precisely the core of the definition of an operating restriction in Article 2(6) of the Regulation, which defines it as: "a noise-related action that reduces the access to or operational capacity of an airport." Paragraph 5 defines a noise-related action as "any measure that affects the noise environment around an airport, [...] *including other non-operational actions* that may affect the number of people exposed to aircraft noise" (emphasis added). The title of the Regulation further underlines its relevance, referring explicitly to the establishment of rules

59. Amsterdam Court of Appeal 7 July 2023, ECLI:NL:GHAMS:2023:1589, paras. 4.7-4.8, hereinafter "Court of Appeal Judgment".

60. Court of Appeal judgment, para. 4.14.

and procedures "for the introduction of noise-related operating restrictions." The Court went a step further by stating:

> "However, the answer to this question is not decisive for the decision, as this is a temporary and short-term experiment, in preparation for possible future adjustments to the new ATD to be based on the [Aviation Act], for which the State does intend to follow the balanced approach procedure."

It is unclear on which legal provisions the Court bases its conclusion that a temporary and short-term experiment falls outside the scope of the EU Noise Regulation. This conclusion cannot be unequivocally derived from the text of the Regulation or its preamble, as the Court suggests. Nowhere in the text are such grounds for exemption—of any kind, whether temporary or otherwise—expressly provided. The Court's reasoning, that by the nature and spirit of the Regulation it cannot have been intended to subject a short-term and clearly delineated experiment to a comprehensive and time-consuming BA procedure, and that doing so would contravene the principle of proportionality, is in fact inconsistent with the objectives of the EU Noise Regulation and the procedural rigour it mandates through the Balanced Approachh. It is noteworthy that the Court attributes this due diligence to the justification of the Experimental Regulation itself, whereas the primary legal question is whether there has been a breach of the EU Noise Regulation—an instrument of Union law that takes precedence over national law and does not appear to allow for derogations of this kind.

In order to assess whether there has been a manifest breach of EU law, it is necessary to examine the legal framework of the EU Noise Regulation and the processes it prescribes. The judgment reveals no awareness of the systemic structure of slot allocation, historical (grandfather) rights, or the implications of a reduction in airport capacity. The Noise Regulation, in fact, explicitly addresses the risk of "distortions of competition" and the "impediment to the overall efficiency of the Union aviation network," and aims to "significantly reduce the risk of international disputes in cases where third-country carriers are affected by noise-related operating restrictions."[61]

I take the position that since 13 June 2016, the EU Noise Regulation has been fully applicable to all capacity reductions. The European BA sets out a clear and detailed procedural framework, which leaves little room for discretion. Even if the Regulation were interpreted as allowing for limited exceptions, the scope and

61. EU Noise Regulation, recitals 3 and 6.

impact of the Experimental Regulation in question would preclude its qualification. The Court appears to overlook the fact that the experimental provision in the Aviation Act (Wlv) allows for a one-year extension, and potentially longer in the case of a transitional arrangement.[62] Permitting Member States to conduct noise experiments outside the scope of the EU Noise Regulation—on the basis that they are temporary and time-limited—undermines the Regulation's effectiveness. The justification that the experiment is merely "preparatory" to "potential future amendments" of a new ATD, "for which the State does intend to follow the Balanced Approach procedure," is anticipatory in nature. Such an anticipatory justification is not the purpose of the experimental provision,[63] and pre-empts a procedure whose outcome is not yet determined.

Thirdly, with respect to the cessation of anticipatory enforcement, the Court held that the purpose of the EU Noise Regulation cannot be that a decision by the competent authority to begin enforcing limit values previously laid down in legislation—or to adopt other enforcement measures or policies—must first be preceded by BA procedure.[64] Unlike the court of first instance, the Court of Appeal paid little attention to the legal status of the policy or policy change in question, the rights that may be derived from it, and the way in which the change was introduced.

On the tolerated policy of anticipatory enforcement, the Court ruled that airlines could not reasonably expect it to continue indefinitely.[65] This is noteworthy: the cap of 500,000 AMs has been in place since 2008, and from 2015 to 2022, the explicit objective was to codify the tolerated policy into binding legislation. That the legislation ultimately failed to materialise in 2022 was the result of political developments, as discussed in Section 1. The argument that airlines could have adjusted their expectations at the end of 2021—on the basis of a broad reappraisal announced in the coalition agreement regarding Schiphol—is unconvincing, given the general wording of the agreement and the inherent uncertainties of political processes. What airlines could reasonably have expected, and over what timeframe, is a crucial issue—especially given that aviation is inherently a long-term industry, with strategic decisions on aircraft purchases and fleet size directly informing route and network planning.

62. See paragraph 3 above.
63. Ibid.
64. Court of Appeal judgment, para. 4.20.
65. Court of Appeal judgment, para. 4.26.

In the context of good governance, the State also has a duty to balance competing interests. In doing so, it enjoys a wide degree of policy discretion.[66] It is not the role of the Court to assess the substantive balancing of interests underpinning the policy change. On the other hand, with regard to the principle of material diligence, the Court might have taken into account the fact that the sector was neither consulted nor informed about the impending policy shift. Insofar as the State placed significant weight on restoring legal protection for local residents, it appears that insufficient consideration was given to alternative measures that could have prevented harm of this scale, in my opinion.

Now that the aforementioned objective has been abandoned and the justification for the tolerated policy no longer applies, the Court considers that the remaining question is whether airlines are being disproportionately affected. The Court concludes that, given the complex and competing interests, a termination accompanied by a nine-month transitional period—until the start of the 2024 summer season—is sufficiently balanced, falls within the limits of what the State is permitted to do, and does not impose a disproportionate burden on airlines.[67] Nevertheless, a nine-month transitional period is extremely short in view of the aforementioned procedural timelines for determining capacity, the legal and operational complexities surrounding slot allocation, and the long-term planning that is standard in the aviation sector. The Court takes into account that compensation for losses may be available. Whether, and how, such compensation will be calculated remains unclear at the time of writing; highly sought-after slots at major airports are sometimes sold for tens of millions of euros.

Finally, the reference to temporary measures—such as those adopted during the COVID-19 pandemic or in response to natural phenomena—as justification for not readily interpreting a temporary measure like the Experimental Scheme as a breach of, in this case, aviation treaties or bilateral air service agreements is incomprehensible.[68] Conducting a noise experiment cannot be equated with implementing necessary safety measures for passenger protection or safeguarding public health in exceptional circumstances. Nor does the temporary nature of the measure alter this: a breach of one year is still a clear violation, which may only be justified under (very) exceptional circumstances. That is not the case here. What is the value of a treaty provision, and of the commitments made under it, if either party can unilaterally and temporarily set it aside with such ease?

66. Court of Appeal judgment, paras. 4.27 and 4.28.
67. Court of Appeal judgment, para. 4.28.
68. Court of Appeal judgment, para. 4.22.

5.3 A new Experimental Scheme

Following the annulment of the preliminary relief judgment, the Minister was free to adopt the proposed Experimental Regulation—or a modified version thereof. At the time of the Court's ruling, it remained uncertain whether this could be finalised before 13 September 2023, the date by which Royal Schiphol Group (RSG) was required to issue its draft capacity declaration for the summer season. This was particularly uncertain given that a positive recommendation from the Schiphol Social Council was needed,[69] and that notification to—or consultation with—stakeholders and the House of Representatives was also required. Several airlines took matters into their own hands and announced on 25 July their intention to file for cassation against the Court of Appeal's decision.[70] Cassation proceedings were initiated on 30 August, and the Supreme Court is expected to issue a ruling by the end of 2023.

The fall of the Rutte IV government in July 2023 initially appeared to have potential consequences, but on 12 September 2023, the House of Representatives decided not to designate the matter as "controversial," despite the ongoing legal proceedings and political sensitivity.[71] On 1 September, the outgoing Minister of I&W announced that anticipatory enforcement would end as of 31 March 2024, in conjunction with the introduction of a revised Experimental Scheme allowing for 460,000 AMs.[72] Shortly thereafter, the ILT received the implementation mandate,[73] and the slot coordinator confirmed that—based on the draft capacity declaration for the summer season—a reduced number of slots would be made available accordingly.[74] An assessment of ACNL's policy rule "Slot allocation in case of exceedance of historic rights"[75] and the non-recognition of historic slot rights falls outside the scope of this article. Also on 1 September, the Minister of I&W announced that the outcome of the BA procedure would be notified to the European Commission. The next section provides a brief overview of this notification process.

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69. Aviation Act, Article 8.23(a)(1), the opinion must confirm that the experiment "may have a beneficial effect on the perception of annoyance". On 28 August 2023, the Schiphol Social Council issued a positive opinion, see letter "Advice on revised experimental scheme", reference u-23.083.
70. NOS, "Vliegmaatschappijen in cassatie tegen kabinetsbesluit over krimp Schiphol" (Airlines in cassation against cabinet decision on shrinking Schiphol), 25 July 2023.
71. See, list of controversial issues as adopted by the chamber on 12 September 2023, Parliamentary Papers II 2022/23, 36408, no 16.
72. Letter from the Minister of I&W dated 1 September 2023 (Parliamentary Papers II 2022/23, 29665, no 481).
73. Letter from Minister of I&W to ILT dated 11 September 2023 (Stcrt. 2023, 24546).
74. Aviation Week, "At Schiphol Airport, Airlines' Worst Fears Are Getting Real", 18 September 2023.
75. ACNL, Policy Rule - Slot allocation in case of exceedance of historic rights, 7 September 2023.

6. The Balanced Approach procedure in the Netherlands

A comprehensive analysis of the BA procedure, as initiated by the Ministry of I&W, does not fit within the scope of this article. However, for context, it is useful to provide some substantive comments and outline the follow-up steps of the procedure.

6.1 Consultation phase

The BA procedure requires that stakeholders be consulted. This includes, at a minimum, local residents, airlines, the airport, air traffic control, and businesses located at or near the airport.[76] The consultation phase of the Dutch BA procedure commenced on 15 March 2023 with the publication of a consultation document,[77] which forms the basis for the following observations. Interested parties were invited to submit views and alternative plans until 15 June.

Although the EU Noise Regulation allows some flexibility to adapt the BA to the specific characteristics of each airport and national legal context, the existence of a noise problem must first be established, and then defined on the basis of objective and measurable criteria. The associated objective must aim to resolve the identified problem. Thus far, the Ministry of I&W has not adhered to these basic principles. By announcing the intention to cease anticipatory enforcement and abandon the draft-ATD without offering a viable alternative, the government is effectively creating a problem whose sole apparent purpose is to justify capacity reduction. The selected target bears no meaningful relationship to the actual problem, and is set so high—and for such a near-term horizon—that it can only be achieved through short-term contraction. As such, the targed is disproportionate.[78]

The measures under consideration focused solely on a capacity reduction to 440,000 AMs. First, an operating restriction should only be introduced as a measure of last resort, and must not serve as the default starting point. In addition, several of the proposed combinations of measures exceed what is necessary to achieve the stated objective,[79] thereby violating the proportionality requirement inherent in the BA procedure.[80] It would have been reasonable to assess alternative capacity levels as part of the analysis.

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76. EU Noise Regulation, Article 6(2)(d).
77. Consultation Document Balanced Approach for Schiphol, March 2023, hereinafter "Consultation Document".
78. Consultation document, section 4.3 at p. 25.
79. Ibid., p. 38.
80. EU Noise Regulation, Article 5(6).

The announcement of a new standards-based system, to be developed by 2027 and based on boundary values for noise and emissions, while taking 440,000 AMs as the baseline, suggests a predetermined outcome. This points to a targeted methodology rather than an objective and balanced process in line with the BA framework. Other foreseeable developments—such as the planned airspace redesign, which aims to improve routing and distribution across four approach corridors and facilitate the less disruptive Continuous Descent Approach (CDA)—also affect the degree of (serious) noise nuisance experienced by local residents. Yet these factors are not accounted for due to the chosen timeline and methodological approach.

6.2 Follow-up process

Following the completion of the consultation phase, the submitted views must be assessed in order to arrive at a well-reasoned decision on the appropriate package of measures. A substantiated decision to impose an operating restriction must be notified to the other EU Member States and the European Commission at least eight months prior to determining the airport capacity to which the restriction will apply.[81] In his letter of 1 September 2023, the Minister of Infrastructure and Water Management announced that the outcome of the Balanced Approach procedure—452,000 AMs instead of 440,000—will now be notified, to meet the timeline for setting airport capacity by November 2024.[82]

The European Commission may, either on its own initiative or at the request of another Member State, review the procedure for introducing an operating restriction. The Commission has confirmed that such a review will take place.[83] However, the EU Noise Regulation does not attach formal consequences to non-compliance with procedural requirements. The Member State is merely required to examine the Commission's notification on the matter and to indicate its intentions prior to adopting the restriction.[84] That said, given the significant impact and potential precedent-setting nature of the case, it is not inconceivable that the Commission will broaden the scope of its review and adopt a more expansive interpretation of its role. If, following the Commission's assessment, the competent authority ultimately decides to proceed with the restriction, the Regulation provides that "appeal against operating restrictions to an appeal body other than

81. EU Noise Regulation, Article 8(1) and (2), the six-month notification period ends no later than two months before the determination of slot coordination parameters/airport capacity.
82. Letter from the Minister of Infrastructure and the Environment dated 1 September 2023 (Parliamentary Papers II 2022/23, 29665, no 481).
83. Aviation Week, "At Schiphol, Airlines' Worst Fears Are Getting Real", 18 September 2023.
84. EU Noise Regulation, Article 8(3).

the authority that adopted the challenged restriction".[85] It is highly likely that this option will be exercised, leaving the end of the shrinkage saga still far from sight.

7. Concluding remarks

The noise issue at Schiphol has a long and complex history, in which the State—particularly the Ministry of I&W—alongside stakeholders including local residents and the aviation sector, has sought joint solutions to address noise disturbance.

Over the years, various legal and policy measures have been introduced, but in 2022, the Ministry suddenly steered this course in a radically new direction. In doing so, the tradition of consensus-based policymaking—the so-called polder model—was notably set aside. The June 2022 decision amounted to nothing less than a ministerial ukase that stirred considerable unrest—and noise. In my view, this measure was, and remains, legally unsound more than a year later.

Given the political controversy, the ongoing proceedings before the Supreme Court, the unprecedented impact on Dutch aviation, and the caretaker status of the government, it is, in my view, both incomprehensible and irresponsible that the Experimental Regulation is being pushed through at short notice. With Schiphol's final reduced capacity declaration submitted in September 2023, a new chapter in the downsizing saga is about to begin—likely giving rise to further litigation, particularly regarding the withdrawal of historically held slots. The pending Supreme Court ruling could yet throw all of this into uncertainty.

Despite the timely notification of the outcome of the Balanced Approach procedure to Brussels, it is highly doubtful that the resulting measures can be implemented as early as November 2024. Given the significance and potential precedent-setting nature of the case, it is entirely possible that the European Commission will extend its review and require additional time. Only then will the Dutch government issue a final decision and incorporate it into Schiphol's capacity declaration. The option to appeal the operating restriction—an opportunity that will almost certainly be taken—will still be available at that stage. The risk of delays in implementing the outcome of the Balanced Approach procedure remains very real.

It is striking that the Netherlands—of all places—is failing to achieve a truly 'balanced approach': a kind of internationally and Europeanly grounded polder

85. EU Noise Regulation, Article 4(1).

model. Instead, we find ourselves entangled in policy "tracks," legal battles over an Experimental Scheme, a rushed BA process, and yet another attempt at redefining policy. Could this not have been done differently—more integrally? It remains to be seen which track, and which one first, will reach the finish line. One thing is certain: the battle over Schiphol's capacity reduction is far from over.