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Buissing, T.N.

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Challenging the 'Balanced Approach to Aircraft Noise Management' Principle

Will the Dutch Approach Stand or Will the Principle Prevail?

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Abstract

In order to find a new balance between economic considerations and a healthy living environment, the Dutch government attempts to limit capacity at Schiphol Airport. Three 'tracks' are devised to effectuate its decision designed to reduce capacity, with the first two exclusively related to noise-related restrictions on the number of aircraft movements. Introducing such noise-related operating restrictions at airports requires a "Balanced Approach (BA) to aircraft noise management," as international and European law prescribes. Both tracks pursued by the government of the Netherlands are heavily disputed for not complying with the international BA principle and the Balanced Approach Regulation of the European Union. In the 1,5 years since the initial announcement, the Dutch approach to the BA has gained much international attention, and developments have followed one another in quick succession. This article attempts to provide a comprehensive overview of the developments that have been and are taking place and to put the BA in a broader, international context. The article will first study the BA concept and conditions at the international level (section 2) and how these have been transposed in and supplemented by the noise regime under EU law (section 3). The way the BA procedure in the present case is being conducted in the Netherlands and the results that have been notified to the EU Commission are then analysed against this background (section 4). While the EU Commission reviews the Dutch BA procedure, and questions about its enforcement powers arise, the last part places noise-related operating restrictions in the broader context of the EU internal air transport market (section 5) and international obligations vis-à-vis third States (section 6).

Keywords: Balanced Approach, Aircraft Noise Management, Noise Problem, Noise Measures, Noise-related Operating Restrictions, Capacity Reduction Airport, EU Balanced Approach Regulation, EU Environmental Noise Directive, Dutch Balanced Approach Procedure 2023, Traffic Rights, EU Internal Market, Environmental Measures.

1. INTRODUCTION

In June 2022, the Dutch Minister for Infrastructure and Water Management announced, to much surprise, the decision to reduce capacity at Amsterdam Airport Schiphol (AAS, or Schiphol) from 500,000 to 440,000 flight movements per year.¹ Having taken office earlier that year, the government is breaking with the trend to focus on growth. It has taken on the view that capacity at Schiphol should instead be based on a trade-off between economic considerations, such as network quality and the maintenance of Schiphol's hub function, but also a healthy living environment, noise reduction and other climate considerations. The approach, however, appears less balanced.

The Dutch government initiated a three-tier process to effectuate, or perhaps even attempt to impose, this policy change; the first two intermediate steps are exclusively noise-related restrictions on the number of flight movements at Schiphol aimed to reduce capacity first to 460,000 movements and further down in 2024. The third 'track' is developing a new system based on standards and values for limiting noise *and* emissions by 2027. This distinction is significant because rules at the level of the International Civil Aviation Organisation (ICAO) and European Union (EU) prescribe a Balanced Approach ("BA") for managing aircraft noise and introducing noise-related operating restrictions at airports.

The three tracks pursued in the Netherlands have many facets, each leading to more discussions and potentially straying off this article's course. To structure and restrict its scope, the first part will articulate the application of the BA for aircraft noise management, first in general terms, on both the level of ICAO and the EU and with particular attention to operating restrictions, followed by the Dutch government's approach in the second track. To understand the broader legal framework of the BA and place it in an international context, the second part can draw from the experiences in the aftermath of the first track, which has been heavily disputed for trying to circumvent the BA.² Because the envisaged capacity reduction to 460,000 flight movements that was set in motion for the summer season of 2024 has led to further international outrage, the Dutch government announced on 14 November

^{1.} See, Hoofdlijnenbrief Schiphol ("Schiphol Outline Letter"), 24 June 2022, IENW/BSK-2022/156292.

^{2.} An overview and commentary of the court proceedings on the experimental scheme by the author will be available (in Dutch) in *Tijdschrift Vervoer en Recht*, "De aanloop naar de Balanced Approach in Nederland: niet polderen voor een 'evenwichtige aanpak' maar procederen over krimp Schiphol" (The run-up to the Balanced Approach in the Netherlands: from consensus decision-making to litigating Schiphol shrinkage" translation provided by author)" Issue 6 of 2023.

2023 to suspend its measures under this track and focus on the BA of track two.³ These events highlight the importance of the international dimension and warrant an analysis of the operating restrictions in light of the EU's internal market and obligations under international agreements with other States.

The Dutch application of the BA is unique, as are the developments surrounding it and its perceived consequences. Because the foundations of the BA as an international principle are tested for the first time, the Dutch case provides a perfect case to study the Balanced Approach in practice. Will the Dutch approach stand, or will the BA principle prevail?⁴

2. INTERNATIONAL FRAMEWORK FOR MANAGEMENT OF AIRCRAFT NOISE

2.1 State responsibilities under ICAO's Balanced Approach

ICAO's BA to aircraft noise management is not a detailed procedure but reflects an internationally agreed-upon concept to manage noise problems at individual airports. The concept was adopted by the 33rd ICAO Assembly in 2001 and has been reaffirmed repeatedly since.⁵ Recognizing that solutions to noise problems need to be tailored to the specific situation at an airport, requiring an "airport-by-airport approach" and that States adopt diverging policies on noise management, ICAO's BA identifies the principal elements that the approach should consist of and the relationship between them, but leaves "the process for implementation and for decisions between [these] elements" to the Member States.⁶

Thus, the responsibility for implementing the BA is for individual States. Still, they should do so "with due regard to ICAO rules and policies" and "take full account of ICAO guidance, relevant legal obligations, existing agreements, current laws and established policies."⁷ The latter is specifically relevant to traffic rights, which will be alluded to in sections 5 and 6.

³. See, Stand van zaken Hoofdlijnenbesluit Schiphol, 14 November 2023, IENW/BSK-2023/345691.

⁴. This article takes account of developments and announcements up to and including 19 November 2023.

⁵. Assembly Resolution A33-7: Consolidated statement of continuing ICAO policies and practices related to environmental protection, Appendix C.

⁶. Ibid.

⁷. Ibid.

2.2 The Balanced Approach conditions

2.2.1 SARPs in ICAO's Annex 16

The Standards and Recommended Practices for the Balanced Approach to noise management are found in Annex 16, Volume 1, Part V, and require States to ensure that:⁸

"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." (italics added)

The Standard concisely and clearly identifies two incremental parts of the BA process: first, the identification of the noise problem at an airport, *and then*, followed by analysing various measures to reduce noise to solve the noise problem, the type of measures that should be considered and in what manner. ICAO has developed guidance material on these matters.⁹

Among other things, ICAO's Guidance Material stipulates that a transparent process provides for consultation with stakeholders, which should be clearly defined, at different steps of the BA procedure. Stakeholders include air carriers, airport authorities, States, nearby residential and business communities, and private and commercial entities that rely upon air transport. Further guidance on the essential steps and conditions for conducting the BA, namely, the assessment of the noise problem, the setting of a noise objective and the hierarchical position of operational restrictions as a last resort, will be analysed in the following sections.

2.2.2 Identifying the noise problem

A fundamental part of any Balanced Approach consists in identifying whether there is a noise problem at an airport. An *actual* noise problem exists where there is a difference between the assessed current and future noise situation on the one hand and the defined noise objective to be achieved.¹⁰

^{8.} On the binding force of SARPs, see, L. Weber, *International Civil Aviation Organization – An Introduction*, (2007); M. Milde, *International Air Law and ICAO*, 71–73 (2016).

^{9.} ICAO Guidance Material on the Balanced Approach to Aircraft Noise Management (Doc 9829)

^{10.} ICAO Guidance Material, Chapter 3.

Although noise annoyance is subjective, the assessment of noise levels on and around the airport for the purposes of a BA “should be based on objective and measurable criteria.”¹¹ Many States continuously measure noise around airports for monitoring purposes using, for instance, ‘noise contours’ and noise indexes.

To assess the development of noise around an airport, a BA perceives from the basis of the identification of a “baseline” scenario of the noise situation as it currently exists, considering “existing noise controls and current operating and land-use regulations” and the projection of that what “is expected to occur based on existing plans”. The baseline “should be assessed over a projected time period taking into account what is known about the fleet mix and fleet noise performance over that time period [...],” which “should be sufficiently long to take into account changes in the fleet mix, the longer-term nature of airport planning and other factors.”¹²

2.2.3 The setting of the noise objective

ICAO does not provide guidance or requirements for setting a noise objective, recognising that States and their airports “may have different standards and policies regarding what constitutes a noise problem, how these may be assessed and what objectives are sought in airport-related noise programmes.”¹³ The EU applies a Noise Abatement Objective (NOA) as to which see section 3.2.2.

Under ICAO's BA, a noise objective should be “identified and defined” to assess whether the evolution of the baseline noise scenario will satisfy the objective. It is “appropriate” to compare the baseline scenario with the noise objective to determine the existence, extent and characterisation of the noise problem *before* reviewing potential measures.¹⁴

2.2.4 Operating restrictions

Once a noise problem and noise objective have been identified, the ICAO BA encompasses four types of measures that can be considered. The first three, namely, reduction of noise at source through noise certification of an airline's fleet,¹⁵ land-use planning and management, and noise-related operational procedures fall outside the scope of this legal analysis. An operating restriction is “any noise-related action that limits or reduces an aircraft's access to an airport” other than based

¹¹. Assembly Resolution A39-1, Appendix C.

¹². ICAO Guidance Material, section 4.1.6

¹³. Ibid., section 3.1.2.

¹⁴. Ibid., section 3.1.

¹⁵. Annex 16, Volume 1 to the Chicago Convention set noise limits for aircraft, categorizing them pursuant to increasing technology standards in Chapters 2, 3, 4 and 14.

on certification. ICAO Contracting States have agreed that operating restrictions “should not be applied as a first resort, but only after consideration of the benefits gained from other elements [of the BA].”¹⁶

The SARPs, Assembly Resolutions and ICAO guidance material on the Balanced Approach generally concern *limiting* or *restricting* operations of aircraft in the context of the growth of air traffic, creating a noise problem as compared to the current noise situation, for instance, when concerns arise on the “*expansion of existing airports or construction of new airports.*”¹⁷ When discussing local noise-related *operating restrictions* at airports, States have been primarily concerned with operating restrictions on the access of aircraft which comply with the noise certification standards, suggesting that there is no consensus on restricting capacity.¹⁸

A *reduction* of an airport’s capacity is only marginally referenced in ICAO’s Guidance Material on the BA; the category of “progressive restrictions” provides for a *gradual decrease* in the maximum level of traffic or noise over a time period of time before reaching a final level.¹⁹ For instance, under such systems, using cap rules or noise quotas, “the use of quieter aircraft becomes necessary just to maintain a given number of slots.”²⁰

2.3 Enforcement of ICAO’s noise measures

ICAO does not possess genuine enforcement powers. Its contracting States must take care of enforcement in their national legislations and through Air Services Agreements (ASAs).²¹ The US has always been very vigilant about ensuring that States respect internationally agreed standards. This attitude has been evidenced in a noise-related dispute between the US and the EU, in which the US argued that the EU had not complied with the internationally agreed SARPs laid down in ICAO Annex 16. EC Regulation 925/1997 required foreign operators, including US airlines, to provide their aircraft’s engines with ‘hushkits’ devices that diminish aircraft noise.²² These aircraft were marginally compliant with the Chapter 3 certification standards of ICAO

¹⁶. Resolution A39-1: Consolidated statement of continuing ICAO policies and practices related to environmental protection – General provisions, noise and local air quality, Appendix E

¹⁷. Ibid., Appendix C

¹⁸. Ibid., Appendix E, on local noise-related *operating restrictions* at airports, deals with restricting access of *aircraft* which comply with the noise certification standards (*italics added*).

¹⁹. ICAO Guidance Material, section 7.2.1.

²⁰. Ibid., section 7.3.3.

²¹. On enforcement of ICAO SARPs, see, M. Milde, *International Air Law and ICAO*, 185–195 (2016); see also J. Huang, *Aviation Safety and ICAO*, 69-71 (PhD Leiden, 2009).

²². EC Regulation 925/1997, also referred to as the ‘hushkit regulation’.

Annex 16, Volume I. After protracted negotiations between the US and the EU, the EU withdrew Regulation 925/1997. Instead, the European Commission published Directive 2002/30/EC allowing EU States to introduce operating restrictions on aircraft that are marginally compliant with Chapter 3, provided that they do so in accordance with the BA set out in ICAO Assembly Resolutions A33-7 and 35-5.

States parties to ICAO are bound by SARPs unless they have notified ICAO that they find "it impracticable to comply ... with any such international standard or procedure."²³ Since the Netherlands has not notified ICAO of a deviation of the BA Standard, it is bound by it. In addition, the EU, the Netherlands, and the other EU States are subject to Article 15(4) of the EU-US Agreement on Air Transport of 2007, as amended in 2010, which reads:

"The Parties reaffirm the commitment of Member States and the United States to apply the balanced approach principle."

The question is, therefore, whether the Netherlands will respect ICAO's BA, with particular reference to such conditions as the proportionality of the noise objective and the proposed measures, their cost-effectiveness, apply operating restrictions only as a last resort and the involvement of stakeholders, as defined above, before adopting a decision to implement noise-related measures. If, in this case, the US finds it has not, the Netherlands and possibly the EU Commission may be requested in the Joint Committee established under the EU-US Agreement to clarify its position. On Monday, 13 November 2023, a special Joint Committee meeting convened in Brussels for this purpose. The position of the US is further alluded to in section 6.

Other avenues for enforcement are litigation, probably in the Netherlands, arbitration under the mentioned EU-US Agreement, proceedings under the Chicago Convention (1944),²⁴ and before the Department of Transportation (DOT) under the International Air Transportation Fair Competitive Practices Act (IATFPCA) of 1974, as amended.²⁵

²³ See, Art. 38 of the Chicago Convention on international civil aviation. The Netherlands, and 192 other States, are parties to this convention, as well as to ICAO.

²⁴ *Article 84 - Settlement of disputes* "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council.

²⁵ 49 U.S.C. 41310 pursuant to which DOT may take action in response to anti-competitive, discriminatory, predatory or unjustifiable activities by a foreign government or foreign airlines against a U.S. airline. The DOT may take such action upon a complaint by a U.S. airline or on its own initiative.

2.4 Concluding remarks on the International Framework for Management of Aircraft Noise

As internationally agreed upon, the “Balanced Approach” concept provides global standards for noise management at individual airports. In this context, ICAO SARPs on aircraft noise must be observed in conjunction with norms laid down in the Standard and related materials, including ICAO Assembly Resolutions. These norms are formulated in general terms, leaving ICAO States ways and means to implement these norms, provided the BA concept is followed.

The BA Standard concisely and clearly identifies two incremental parts of the BA process: first, the identification of the noise problem, *and then*, followed by analysing various measures to reduce noise to solve the noise problem and the type of measures that can be considered. ICAO has developed guidance material on establishing a noise problem, the difference between the assessed current and future noise situation and the noise objective, which should be objectively defined and measurable. Measures should be weighed for their cost-effectiveness, and operating restrictions only be considered a last resort.

The Netherlands has not notified ICAO of a deviation from the BA Standard and is thus bound by it. Since ICAO cannot oblige States to follow its norms, including those pertaining to the BA, ICAO States must do so and have done so. The US is known for strictly requesting its aviation partners adhere to the agreed provisions, including those on adopting the BA, whose international dimension is dealt with in more detail in the second part of this article.

3. THE EU LEGISLATION ON AIRCRAFT NOISE

3.1 A brief overview of the EU regime on aircraft noise

In addition to the EU’s legislation regulating noise at the source of aircraft,²⁶ the EU’s policy on the management of noise from aircraft at major EU airports is governed by the Environmental Noise Directive 2002/49/EC (END),²⁷ and Balanced Approach Regulation 598/2004 (BAR).²⁸ Reducing noise pollution falls under the EU Environmental Action Programmes (EAP).²⁹

^{26.} Directive 89/629/EEC on the limitation of noise emission from civil subsonic jet aeroplanes.

^{27.} Directive 2002/49/EC relating to the assessment and management of environmental noise.

^{28.} Regulation (EU) No 598/2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach.

^{29.} Decision (EU) 2022/59 on a General Union Environment Action Programme to 2030.

The END concerns the assessment and management of environmental noise emitted by major sources, including aircraft, with the aim to define “a common approach” intended to avoid, prevent and reduce the harmful effects of environmental noise.³⁰ EU States are required to report their commitment to assessing and managing noise produced by aircraft based on “noise maps” and “action plans” based on technical standards.³¹ The END does not set binding EU-wide quality levels or targets for noise and leaves this to the Member States.³² Limit values can be established by national legislation or environmental permit and/or planning conditions, but these must be incorporated in the action plans, including current and planned measures aimed at noise mitigation. The legal framework for noise in the Netherlands and the Dutch BA procedure will be dealt with in section 4.

3.2 EU Balanced Approach Regulation (BAR)

3.2.1 *Transposition of ICAO's BA*

The EU transposed ICAO's Balanced Approach concept via EU Regulation 598/2014 (BAR), reaffirming that the BA “should remain the foundation of noise regulation for aviation as a global industry” and with the view that the BAR “should substantially lessen the risk of international disputes in the event of third-country carriers being affected by noise-related operating restrictions.”³³ The BAR has ‘direct effect’, meaning it applies directly in each Member State without transposition in national law.³⁴ Specifications of the BAR will be analysed below.

3.2.2 *The definition of a noise problem and the Noise Abatement Objective (NAO)*

The BAR requires that the noise situation at a Community airport is assessed in accordance with the END.³⁵ It also links the definition of the noise problem and the noise abatement objective (NAO) to the Member State's action plans under the END,³⁶ which are “designed to manage, within their territories, *noise issues* and effects, including noise reduction”. At a minimum, it must include “an evaluation of

^{30.} END, Art. 1(1).

^{31.} END, Art. 5, and Directive (EU) 2015/996 of 19 May 2015 establishing common noise assessment methods according to Directive 2002/49/EC of the European Parliament and of the Council, with reference to the European Civil Aviation Conference Report Doc 29 (ECAC Doc 29).

^{32.} Report from the commission, on the implementation of the Environmental Noise Directive in accordance with Article 11 of Directive 2002/49/EC, COM(2023) 139 final, under 3.

^{33.} BAR, Recital 3.

^{34.} See, ECJ decision of 5 February 1963 in Case No. 26/62 *Van Gend en Loos*; see also, for instance: M. Horspool & M. Humphreys, *European Union Law* 171–175 (2006).

^{35.} BAR, Art 5(1).

^{36.} BAR, Art 5(2) jo END. Art. 8 and Annex V.

the estimated number of people exposed to noise, *identification of problems and situations that need to be improved*" (italics added).³⁷ The BAR does not set rules on how a noise problem is to be defined, nor on establishing an NAO, as it assumes that this flows from the noise assessment process under the END.³⁸

"While noise assessments should be carried out on a regular basis in accordance with Directive 2002/49/EC, such assessments should only lead to *additional* noise abatement measures *if the current combination of noise mitigating measures does not achieve the noise abatement objectives*, taking into account expected airport development" (italics added)

This implies that establishing an NAO must be a long-term process and set in advance for it to be tested against the "current combination of noise mitigation measures" during regular noise assessments under the END. Only if such an assessment reveals that the NAO will not be reached, thus creating a noise problem, for which "*new* operating restriction measures may be required to address the noise problem," should additional measures be considered pursuant to a BA procedure, using the method, indicators and information in Annex I of the BAR.³⁹

3.2.3 **Consideration of measures for noise-related actions under the BAR**

The BAR defines noise-related actions as "any measure that affects the noise climate around airports, for which the principles of the Balanced Approach apply [...]."⁴⁰ In line with ICAO's Balanced Approach, under the BAR, when Member States take noise-related action, they must consider four types of measures to determine the most cost-effective approach:⁴¹

(a) *the foreseeable effect of a reduction of aircraft noise at source;*

³⁷. END, Articles 3(t) and 8 and Annex V, under 1.

³⁸. BAR, Recital 9, and Art 5.

³⁹. BAR, Art 6(2). This view is supported by the requirements of Annex 1, which include under the *current inventory*, "a description of any environmental objectives for the airport and the national context. This will include a description of the aircraft noise abatement objectives for the airport" and "a description of the existing and planned measures to manage aircraft noise." It then requires a 'forecast without *new* measures', i.e., a projection of the baseline scenario, thus taking into account the current measures and their effect towards the NOA as previously established. Such current measures explicitly include, amongst others, approach and take-off forecasts, projected future traffic mix and a detailed study of the noise impact on the surrounding area caused by modifying flight paths and approach and take-off routes.

⁴⁰. BAR, Art 2(5).

⁴¹. BAR, Art 5(3).

- (b) *land-use planning and management;*
- (c) *noise abatement operational procedures;*
- (d) *not applying operating restrictions as a first resort, but only after consideration of the other measures of the Balanced Approach.*

An operating restriction is defined as “a noise-related action that limits access to or reduces the operational capacity of an airport [...]”.⁴² Operating restrictions should only be applied as a last resort because of the possibility of “distorting competition or hampering the overall efficiency of the Union aviation network.”⁴³ It may also lead to “exporting” noise problems to other Member States when traffic flows divert to other airports.⁴⁴ In line with general EU law principles, new measures or a combination of measures “shall not be more restrictive than necessary” (principle of proportionality) to achieve the NOA set for that airport and “shall be non-discriminatory.”⁴⁵

3.2.4 **Procedural requirements of the BAR**

The BAR requires stakeholders to be consulted. The consultation process must be organised in a “timely and substantive manner, ensuring openness and transparency as regards data and computation methodologies.”⁴⁶ Interested parties, including at least local residents, representatives of businesses at or near the airport, the airport operator, airlines, air navigation service provider and the slot coordinator should have three months to submit comments.⁴⁷

After completion of the consultation phase, the views submitted must be assessed and weighed to arrive at a balanced and comprehensive package of measures. If these measures include an operating restriction, the other EU Member States and the EU Commission must be given a six months’ notice, ending at least two months, i.e. eight months in total, before the airport capacity to which the restriction applies is determined in the relevant scheduling period.⁴⁸ These periods refer to the start of the summer season as per April and the winter season as per November, as defined by the International Air Transport Association (IATA).

^{42.} BAR, Art 2(6).

^{43.} BAR, Recital 6.

^{44.} See, for instance, <https://www.luchtvaartnieuws.nl/nieuws/categorie/3/airports/dusseldorf-airport-verwacht-dit-jaar-bijna-2-miljoen-nederlandse-passagiers-parking-vol-gele> (last visited 19 November 2023).

^{45.} BAR, Art 5(6).

^{46.} BAR, Artikel 6, lid 2(d).

^{47.} Ibid.

^{48.} BAR, Article 8(1), referring to “the determination of the slot coordination parameters as defined in point (m) of Article 2 of Council Regulation (EEC) No 95/93” (the Slots Regulation).

The notification must be accompanied by a written report explaining the reason for introducing the operating restriction, the NOA, the assessment of measures and the evaluation of their cost-effectiveness, “including, where relevant, their cross-border impact.”⁴⁹

The EU Commission may, on its own initiative or at the request of another Member State, review the procedure for introducing an operating restriction. If it concludes that the correct procedure has not been followed, the BAR only prescribes that the Commission will *notify* the Member State of its finding. The BAR does not explicitly attach any consequences for not following the correct procedures; it only requires the Member State to examine the Commission's notification and inform it about its intentions before introducing the operating restriction.⁵⁰

However, in view of the Dutch BA, given the potential impact of the operation restriction on the freedom to provide services, both in the internal air transport market as governed by EU Regulation 1008/2008 on *common rules for the operation of air services in the Community* and possible precedent-setting effect, as well as under Open Skies agreements with third states, the Commission can also check compliance and conformity with EU law and general principles, and where necessary, take legal action against the Member State, by launching a formal infringement procedure.⁵¹ This dimension of the BA will be further discussed in sections 5 and 6.

Finally, if, after the notification phase and the Commission's assessment, the government of the Member State in question makes a definitive decision to proceed with an operating restriction. The BAR stipulates that there must be the possibility “to appeal against operating restrictions [...] before an appeal body other than the authority that adopted the contested restriction, in accordance with national legislation and procedures.”⁵²

3.3 Limited Application of the Balanced Approach in the EU

3.3.1 Noise-related actions without explicitly applying the BAR

A study on airport noise in the EU Member States of June 2022 confirmed that noise is considered an issue at many of the major EU airports.⁵³ However, there is

^{49.} BAR, Article 8(2).

^{50.} BAR, Article 8(3).

^{51.} Article 25 of the Treaty on the Functioning of the European Union (TFEU).

^{52.} BAR, Art. 4(1).

^{53.} Study on Airport Noise Reduction, June 2022, section 3.4.

no indication of a systemic approach to the application of the BAR; even where national limit values exist, the noise problem is often not clearly defined by the competent authorities, and the identification of an NAO or strategy to noise abatement is lacking.⁵⁴ Noise-related actions are often linked to pre-existing environmental permits or planning conditions and dealt with under the national noise-management framework. The results of an examination of these noise-related actions are then “reported” through the END process.⁵⁵

A range of noise-related actions has been taken or considered in the EU since the introduction of the Balanced Approach in 2002.⁵⁶ Several studies identify measures and case studies where such noise-related actions under different BA pillars were introduced at EU airports without going through an explicit BA procedure.⁵⁷ The selection of noise-related actions was often the result of stakeholder dialogue and compromise and/or benchmarking with other airports.⁵⁸ Only some examples exist where authorities initiated a formal BA procedure because some interpret the BAR as only applicable when operating restrictions are considered.⁵⁹

3.3.2 *Dublin Airport*

In Ireland, the Airport Noise Competent Authority (ACNA)⁶⁰ applied the BA, as implemented in the Aircraft Noise Act,⁶¹ because the Dublin Airport Authority (DAA) wished to replace two existing operating restrictions to provide for the airport's growth beyond 2025. The ACNA confirmed that DAA's planning application would create a noise problem when referenced against the situation that would otherwise pertain.⁶² It then extensively researched an appropriate NOA within the BA context,⁶³ considering legislative requirements,⁶⁴ and core principles it had

^{54.} Ibid, sections 3.4, 4.1.2 and 4.1.4.

^{55.} Study, under 4.1.5.

^{56.} Directive 2002/30/EC, the predecessor of the BAR, also prescribed a BA pursuant to the adoption of the ICAO balanced approach in 2001.

^{57.} See, Aviation Noise Impact Management through Novel Approaches (ANIMA) Research, Deliverable D2.1 - *Pan-European overview of Existing Knowledge and Implementation of Noise Reduction Strategies* of 2018, and D2.5, *Critical review of Balanced Approach Implementation across EU Member States*, of 2019.

^{58.} Study, under 4.1.5.

^{59.} Ibid, section 3.4 at page 54, some authorities interpret the BAR only applicable when operating restrictions are considered of which few have been established since the introduction of the BAR.

^{60.} See, <https://www.fingal.ie/aircraftnoiseca> (last visited 19 November 2023).

^{61.} Aircraft Noise (Dublin Airport) Regulation Act of 2019 (the Aircraft Noise Act).

^{62.} Chief Executive Order ref. ANCA/002/2021, dated 10 February 2021.

^{63.} ANCA, Noise Abatement Objective Report, November 2021.

^{64.} Ibid., section 5, derived from BAR, Recital 2 and Art. 1, END Art. 1 and ICAO Guidance material.

identified.⁶⁵ Having regard to this legislative and policy context, ANCA set the high-level objective for the NAO at Dublin Airport as follows:

“Limit and reduce the long-term adverse effects of aircraft noise on health and quality of life, particularly at night, as part of the sustainable development of Dublin Airport.”

In addition, the ANCA formulated expected outcomes to be achieved through this NAO; the number of people highly sleep disturbed and highly annoyed shall be reduced in 2030 by 30%, in 2035 by 40% and in 2040 by 50% compared to 2019.⁶⁶ The number of people exposed to aircraft noise above 55 dB L_{Night} and 65 dB L_{den} should be reduced compared to 2019.

The ANCA performed noise and environmental assessments,⁶⁷ held public consultations, and advised the planning authority accordingly.⁶⁸ The proposed measures within the “operating restrictions” category concerned shortening the night curfew by two hours. On 8 August 2022, the application received the green light, but an appeal was lodged. A decision is still pending.⁶⁹

3.3.3 *The United Kingdom (UK)*

Applying a BA procedure similar to the BAR,⁷⁰ the UK government sets night-time operating restrictions at Heathrow, Gatwick, and Stansted at regular intervals. For the procedures conducted in 2017 and 2021,⁷¹ the setting of the noise objective was part of the consultation process and was ultimately formulated as follows:

“Limit or reduce the number of people significantly affected by aircraft noise at night, including through encouraging the use of quieter aircraft, while maintaining the existing benefits of night flights”.

⁶⁵. Ibid., section 6.3.

⁶⁶. Taking into consideration targets of the EU Environmental Action Plan, and standards of the WHO Environmental Noise Guidelines for the European Region 2018, as adopted by Directive 2020/367.

⁶⁷. Overview at <https://www.fingal.ie/aircraftnoiseca/documents-f20a0668> (last visited 19 November 2023).

⁶⁸. ANCA, Regulatory Decision Report, 20 June 2022.

⁶⁹. See, <https://planning.agileapplications.ie/fingal/application-details/88548> (last visited 19 November 2023).

⁷⁰. The Airports (Noise-related Operating Restrictions) (England and Wales) Regulations 2018.

⁷¹. DfT, Night Flight Restrictions at Heathrow, Gatwick and Stansted, Decision Document, July 2017 & 2021.

Achievement of the objective is measured against; the area of and the number of people in a specific night contour, sleep disturbance associated with night flights, the average aircraft noise using noise Quota Counts and the number of movements in the night quota period.⁷²

As part of setting the regime beyond October 2025, consultations ran between 27 March and 9 May 2023 and included defining an NAO. To frame the consultation, the government published its revised overarching aviation noise policy statement: "The impact of aviation noise must be mitigated *as much as is practicable and realistic* to do so, limiting, and *where possible* reducing, the total adverse impacts on health and quality of life from aviation noise." (*italics added*).⁷³

3.4 Concluding remarks on EU Legislation on Aircraft Noise

The EU's BAR is far more specific than ICAO's BA. Coupled with the EU Environmental Noise Directive, it provides a mechanism and tools for setting a noise problem and noise abatement objective. There can be no doubt about the EU BAR's binding force,⁷⁴ whereas the EU Commission must enforce its provisions. The BA is a concept for continuously managing noise problems at airports. In essence, comprehensive noise management requires the systematic application of measures under one of the four BA pillars, informed by effective noise monitoring. In that process, stakeholders must be involved through consultations.

Upon notification, the EU Commission may, on its own initiative or at the request of another Member State, review the procedure for introducing an operating restriction. Although not explicitly provided for in the BAR, the Commission can also check compliance and conformity with EU law and general principles when examining any operating restrictions. The possibility of, and reasons for, enforcement will be further discussed in section 6.

In practice, a wide range of noise-related actions have been adopted at EU airports. However, such noise actions have not always explicitly referred to the BA or the BAR because they did not concern *operating restrictions*. Very few examples exist where a BA under the BAR has explicitly been conducted. The cases examined above pertain to noise problems due to the airport's expansion plans or night-time

⁷² Ibid.

⁷³ See, <https://www.gov.uk/government/publications/aviation-noise-policy-statement/overarching-aviation-noise-policy> (last visited 19 November 2023).

⁷⁴ In case of conflict between EU law and national law, EU law prevails, as stated by the CJEU, to begin with, in its decision of decisions of 5 February 1963 in Case 26/62 *Van Gend en Loos* and of 15 July 1964 in Case 6/64, *Costa v. Enel*. This hierarchical order is known as the *supremacy of EU law*.

restrictions, the latter having a special position in the noise nuisance context. Until now, the BA has never been used to reduce airport capacity.

4. MANAGEMENT OF AIRCRAFT NOISE IN THE NETHERLANDS AND THE BA OF 2023

4.1 Aircraft noise in Dutch law

The END has been implemented into Dutch law via the Dutch Aviation Act (*Wet Luchtvaart*)⁷⁵ and the Aviation Environmental Noise Regulation (*Regeling omgevingslawaaï luchtvaart*). The latest noise map for Schiphol was published in 2021.⁷⁶ The last environmental noise action plan for Schiphol dates from 2018.⁷⁷ A new action plan is currently being developed.

There are no binding limit levels for aircraft noise at airports in Dutch legal acts. Noise value limits for Schiphol Airport are instead imposed through, and enshrined within, the framework of the Schiphol Airport Traffic Decree (*Luchthavenverkeersbesluit*, or LVB). The “equivalence criteria” (*gelijkwaardigheidscriteria*) require that every new LVB must offer an equal or better level of protection.⁷⁸ The current LVB dates from 2008 and uses noise impact limits on fixed enforcement points. This system proved to be inflexible and complex to enforce.

Since 2010, a new system based on strict preferential runway has been tested and applied at Schiphol.⁷⁹ The new system was to be implemented in a new LVB, which required, among other things, a new environmental permit for the airport. In the meantime, the system was provisionally applied through “anticipatory non-enforcement” if exceeding the legally binding noise limits of the fixed enforcement points was the result of strict preferential runway use. Due to political and societal developments, the system was never incorporated into a new legally binding LVB.⁸⁰

⁷⁵. Dutch Aviation Act (*Wet Luchtvaart*), Title 8A.4.

⁷⁶. Noise map Schiphol airport (Geluidsbelastingkaarten luchthaven Schiphol) 2021, available at: <https://www.rijksoverheid.nl/onderwerpen/geluidsoverlast/documenten/rapporten/2022/06/30/geluidsbelastingkaarten-luchthaven-schiphol-2021> (last visited: 19 November 2023).

⁷⁷. Action plan Schiphol 2018-2023 of 29 Augustus 2018 (hereafter: Action plan Schiphol).

⁷⁸. Dutch Aviation Act (*Wet Luchtvaart*), Art. 8.17(7).

⁷⁹. i.e. to use, where possible, the runways that cause the least noise nuisance.

⁸⁰. See for an overview, Action plan Schiphol 2018-2023.

4.2 Recent developments in Dutch noise policies

On 24 June 2022, the new cabinet announced its 'decision' to reduce the number of flight movements at Schiphol to 440,000, following a three-tier approach.⁸¹ First, it planned to stop anticipatory non-enforcement per November 2023 and return to the old system of the LVB 2008. By setting up and applying an experimental scheme, a possibility provided in the Dutch Aviation Act, the government can allow up to 460,000 flight movements per year.⁸²

The use of this scheme is heavily disputed for circumventing the BA and has been challenged in court. Several airlines instigated legal proceedings at the District Court of Haarlem in the first instance. The judge made short work of the government's defences that the BAR did not apply and that the measure was, in fact, not a noise-related action but a policy change. The judge concluded that the government's decision led to a capacity reduction, for which the necessary Balanced Approach procedure as required under EU law was not followed. Consequently, the judge blocked the experimental scheme for the 2023 winter season, including future use of schemes to the same extent.⁸³

The Dutch government appealed the matter before the Court of Amsterdam, which overturned the judgement in a surprising change of events.⁸⁴ Although the BAR does not provide for any exemptions, the Court reasoned, among other things, that it cannot be intended to include a temporary, short-term experiment such as in the case at hand. It also found that the government has the policy freedom to balance interests, including societal interest, and that the BAR cannot be intended to subject a policy change concerning enforcement, at the national level, to a formal and long-lasting n EU procedure. The judgement cleared the way for the government to apply the experimental scheme for the 2024 summer season.⁸⁵

Although the airlines filed for cassation with the Supreme Court, the government implemented the experimental scheme to be applied as of April 2024. Consequent to setting in motion the reduction of Schiphol's capacity to 460,000 movements, it

^{81.} Schiphol Outline Letter, 24 June 2022.

^{82.} In October 2023, The Netherlands Aerospace Centre (NLR) revealed that the government used old data to calculate the permissible number of flights under the experimental scheme, which data did not include fleet renewal since 2014. If these had been considered, NLR calculated that 487.000 flight movements would be possible. See: NLR, Analyse effect vlootverstillend NRM op basis van GP2023, 1 September 2023.

^{83.} Rechtbank Noord-Holland, 5 April 2023, ECLI:NL:RBNHO:2023:3010.

^{84.} Hof Amsterdam 7 juli 2023, ECLI:NL:GHAMS:2023:1589.

^{85.} For a more detailed commentary on the court proceedings, see article referred to in footnote 2.

became apparent that all airlines operating at Schiphol would have to return slots with historical rights pro-rata for the 2024 summer season.⁸⁶ Requests for new slots could not be granted. Faced with the potential consequences and retaliation on the measures in the first reduction phase, the Dutch government has decided to suspend these measures but to continue with the BA procedure under track two. Section 6 will deal with the international follow-up in more detail.

While the battle in court raged on, the Dutch government simultaneously initiated a Balanced Approach procedure as part of the second step of its three-tier approach. Now that the first track has been suspended and the intermediate reduction to 460,000 movements is off the table, the Dutch government still pursues a capacity reduction through the Balanced Approach. The following section will study the conduct of the Dutch BA in light of international requirements and, more specifically, those of the EU's BAR.

4.3 The BA procedure in the Netherlands

4.3.1 *The Dutch 'Balanced Approach' vs the BAR*

The Dutch government has initiated a Balanced Approach procedure with the aim of measures resulting from that process to take effect by November 2024. The consultation phase of the underlying Dutch BA procedure started on 15 March 2023 with the publication of a Consultation Document.⁸⁷ Although the government has meanwhile produced a Notification Document, dated September 2023,⁸⁸ since the former is the leading document upon which the stakeholder's consultation is built, it forms the basis for the next part.

In its introduction, the government recognises that since 2006, "a large number of measures have been taken to mitigate noise nuisance in the vicinity of Schiphol based on intensive consultation between stakeholders – a unique approach, internationally."⁸⁹ In 2019, Schiphol Airport, in collaboration with other stakeholders, published a supplementary Schiphol Noise Reduction Implementation Plan covering 43 additional measures.⁹⁰ Indeed, over the years, various measures have been taken within the different BA pillars without explicitly labelling the process as

⁸⁶. See, ACNL Policy Rule - Slot allocation in case of exceedance of historic rights, 7 September 2023.

⁸⁷. Stakeholder Consultation document Balanced Approach procedure for Schiphol, March 2023 (hereafter: Consultation Document).

⁸⁸. European Commission Notification document Balanced Approach procedure for Schiphol, September 2023 (hereafter: Notification Document).

⁸⁹. Consultation Document, p.8

⁹⁰. Parliamentary Paper 31936, no. 646.

such. Studies support this view, according to which the Netherlands is considered amongst the group of “pathfinders” with airports “at the forefront of extensive BA implementation in terms of breadth and depth of their approaches,”⁹¹ and measures at Schiphol are used as examples of effective implementation following the BA concept.⁹² Nevertheless, according to the government, despite these attempts to reduce noise nuisance and the use of a quieter fleet, perceived noise nuisance by local residents is still increasing. The Dutch BA procedure aims to set a maximum for the noise nuisance.

4.3.2 A brief analysis of the consultation

The Consultation Document does not define a noise problem other than stating that there is still a “need to reverse the upward trend” in *perceived* noise nuisance; that is, residents’ perception that severe noise increases into a concrete noise target for the short term.⁹³ Perception of noise nuisance does not qualify as an objective criterion, as the perception of noise is subjective per se.

While there is no clear or objective definition of the noise problem, there is neither an objectively defined noise abatement objective (NOA) that can be linked to the solution or remedy of the noise problem. The noise objective was first presented during a technical session in January 2023, well after the announcement of the noise issue in June 2022 in the Schiphol Outline Letter. the Consultation Document sets specific reduction percentages for various categories of groups affected. The objectives of -20 % and -15 % for the day and night, respectively, are remarkably high, whereas no explanation is given for the urgent need to achieve this objective by November 2024.⁹⁴ Instead of the noise problem or current NOA being projected against the baseline scenario, taking into consideration current measures, the Dutch BA procedure projects the new NOA against a baseline reference situation in the future, that is, November 2024, thereby effectively bypassing the effect of autonomous and planned fleet renewal and other noise-related actions already conducted or planned for that period.⁹⁵

In total, 23 potential noise abatement measures were identified and analysed. When referencing the analysis to requirements under the BAR, certain proposed combinations of measures result in an “overshoot” where the reduction is (far)

⁹¹. ANIMA study, p. 37; as referred to in footnote 57.

⁹². See ICAO Guidance material and ANIMA studies.

⁹³. Consultation Document, p. 22.

⁹⁴. Consultation Document, section 4.3 at p. 25.

⁹⁵. Consultation Document, section 4.2.

more significant than the objective and thus “more restrictive than necessary.”⁹⁶ Regarding operating restrictions, it exclusively considers a reduction to 440,000 flight movements. Since these should only be considered a last resort and not result in an overshoot, lower capacity reductions should also have been on the agenda.

As part of the consultation, stakeholders were asked to indicate their preferred package. Many respondents submitted alternative measures and plans, the most notable being Schiphol Airport’s 8-point plan and the alternative plan submitted by KLM. On the one hand, the airport operator is opting for a quieter, cleaner and better Schiphol and going beyond the measures proposed by the government,⁹⁷ on the other hand, KLM’s plan will require slightly more time to meet both night and day objectives, but in three years’ time will lead to a stronger decline in noise than the plan proposed by the government.⁹⁸

4.3.3 Notification of measures

On 1 September 2023, the responsible Minister announced that the Ministry “made a careful assessment and determined the final combination of measures.”⁹⁹ The outcome of the BA procedure would, at that time, soon be notified to the EU Commission and other relevant parties to meet the deadline for establishing airport capacity for the November 2024 season.¹⁰⁰

The assessment concludes, unsurprisingly, that only “a limited number of measures ... contribute to achieving the noise objective in the short term”, that is, by November 2024. Furthermore, a ‘phased realisation’ is proposed because not all noise objectives can be reached within this short timeframe.¹⁰¹ Next to the measures to use quieter aircraft during the nighttime and a reduction of secondary runway use, the first step will cap the number of flight movements at 452,500 annually instead of the anticipated 440,00 flight movements. The number

^{96.} BAR, Art 5(6).

^{97.} See, <https://news.schiphol.com/less-hindrance-as-a-result-of-a-curfew-and-banning-the-noisiest-aircraft-and-private-jets/> (last visited: 19 November 2023).

^{98.} See, <https://news.klm.com/klm-group-presents-plan-ensuring-greater-reduction-in-night-time-noise/> (last visited: 19 November 2023).

^{99.} Notification Document, Introduction, p. 5.

^{100.} Letter from the Minister of Infrastructure and Water management of 1 September 2023 (Kamerstukken II 2022/23, 29665, nr. 481).

^{101.} Notification Document, Summary, p. 9, “All this leads to the proposal to maintain the noise objective of minus 20 per cent in the 24-hour period and minus 15 per cent at night, *but to opt for achieving about 15 per cent of this as a first step (by November 2024) and achieving the remaining 5 per cent in the 24-hour period in a subsequent phase.*” (italics added).

of movements at night is limited to 28,700. The remainder of the noise objectives, with a potential further reduction, is to be achieved in a subsequent phase.

4.4 Concluding remarks on the Dutch BA of 2023

Although both ICAO's BA concept and the EU's BAR leave room for discretion to States to tailor the BA to the specifics of the airport and local legislation, it is required by international and EU regulations to establish the existence of a noise problem to begin with. In the EU, such a problem is considered where there is a difference between the current noise situation, projected in the future, and a long-term noise objective, taking into consideration current and planned measures. Where a noise problem exists, it must be clearly defined, using objective and measurable criteria, leading to a new NOA for the application of the BA to solve or remedy the noise problem.

The Dutch BA procedure does not adhere to fundamental principles. Instead, it appears to create a noise problem by setting a steep NOA in the near future. The objective and the short timeframe are not proportionate. Some of the proposed measures go beyond what is necessary to achieve the NOA, and the operating restrictions leading to a capacity decrease are not considered a last resort but are part of the starting point of the BA process.

In addition, with the June 2022 announcement to reduce capacity to 440,000 flight movements via the Balanced Approach while at the same time starting the development of a new system to be operational by 2027 based on a maximum of 440,000 flight movements, later dubbed track three, the government appears to create a noise problem to effectuate the desired capacity reduction. It runs counter to the BA principle to allow States to apply such a purpose-driven methodology and design the process in such a way as to achieve a pre-determined outcome.

Having concluded that the Dutch BA did not follow the BAR to the letter, the last part of this article will look at the potential impact of such operation restrictions on the provision of air services, both in the EU and vis-à-vis third States and how the BA and BAR can be enforced.

5. ENVIRONMENTAL MEASURES IN THE CONTEXT OF THE FREEDOM TO PROVIDE SERVICES UNDER EU REGULATION 1008/2008

5.1 The Balanced Approach review in a broader perspective

Following the Dutch notification of the BA results to the EU Commission, EU Member States, and relevant third States, it is now up to the EU Commission to review the Dutch BA procedure for compliance with the procedural and substantive conditions of the BAR and assess the final combination of measures with particular attention to the operating restrictions. However, the Commission will also need to consider the impact of operating restrictions of this magnitude on the freedom to provide services in the EU internal air transport market, as established by EU Regulation 1008/2008,¹⁰² and its precedent-setting effect, as well as freedoms under Open Skies agreements with third States, and more specifically, the potentially distortive effect on competition in these markets.

This section will place the assessment to be undertaken by the Commission in the broader context of the EU internal air transport market. It also addresses how such restrictions affect, and should be balanced with, the operation of traffic rights. Section 6 will look at international obligations towards other third States, most notably the US and Canada.

5.2 The relationship between the freedom to provide services, the operation of traffic rights and the availability of airport slots

The above mentioned EU Regulation 1008/2008 removes the barriers to operating traffic rights within the EU internal air transport market.¹⁰³ ASAs between EU States regulating the operation of air services between them are superseded.¹⁰⁴ This means that in the EU, subject to the availability of airport slots and absent restrictions caused by safety and environmental concerns, any EU national air carrier possessing an EU Operating Licence can fly anywhere within the internal market.

The number of available slots at an airport is determined based on the airport's capacity, expressed in terms of physical and environmental capacity. In this regard, environmental capacity also refers to the capacity of an airport to accommodate noise produced by aircraft while operating their traffic rights.

^{102.} EU Regulation 1008/2008 *on common rules for the operation of air services in the Community*.

^{103.} See, Article 15(1) of EU Regulation 1008/2008.

^{104.} See, Art. 15 (2) of EU Regulation 1008/2008.

Airport slots are thus operationally related to the exercise of traffic rights. Still, the availability of slots at specific airports, as such, is not a prerequisite for exercising traffic rights, except for the few cases where this has been explicitly negotiated in an ASA.¹⁰⁵ Nevertheless, operating restrictions resulting in reduced airport capacity may affect other arrangements of ASAs, such as the freedom to provide air services and the non-distortion of competition. This is even more tangible when fewer slots can be distributed to airlines than before, especially where these slots have previously been used and thus have a historical rights claim.

5.3 Restrictions on the freedom to provide air services

An operating restriction, such as the one notified under the Dutch BA, limits the freedom to provide services, including the freedom to provide air services. The Court of Justice of the EU (CJEU) and the EU Commission regard the provision of services as a “fundamental freedom” guaranteed by the TFEU. Hence, concerning the justification for such a restriction,

“... it is settled case-law that national measures which are *liable to hinder the exercise of fundamental freedoms* guaranteed by the Treaty or make it less attractive may be allowed only if they pursue a *legitimate objective in the public interest*, are *appropriate* to ensuring the attainment of that objective, and *do not go beyond what is necessary* to attain the objective pursued.”¹⁰⁶

As to air transport, this judgement has been confirmed in *International Jet Management GmbH*,¹⁰⁷ and in the Decision on *Access to Karlstad Airport* which will be discussed in section 5.4.2 below. In short, any limitation to the freedom to provide air services must be justified pursuant to the achievement of a legitimate objective in the public interest and the proportionality principle. Similar wording and principles are also found in EU Regulation 1008/2008.

^{105.} Japan explicitly binds the exercise of traffic rights to slots at, for instance, Narita Airport.

^{106.} Par. 50 of Case C475/11, *Kostas Konstantinides*, and CJEU case law mentioned in this judgment.

^{107.} Case C628/11, Judgment of 18 March 2014, Par. 57: “According to the Court’s settled case-law, Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.”

5.4 Environmental measures under EU Regulation 1008/2008

5.4.1 Substantive and procedural conditions of environmental measures

EU Regulation 1008/2008 dictates that the operation of traffic rights is “subject to *published* Community, national, regional and *local operational rules* relating to safety, security, *the protection of the environment* and the allocation of slots.”¹⁰⁸ (*italics added*). When published, the envisaged capacity reduction at Schiphol Airport notified under the Dutch BA should be interpreted as “local operational rules” designed to protect the living environment.

The term “environment” is not further defined in EU Regulation 1008/2008; there is no reference to the regulation on the reduction of emissions via the EU Emission Trading Scheme (ETS) or CORSIA,¹⁰⁹ nor to the abatement of noise via the Balanced Approach Regulation. However, case law (see next section), as well as the title of ICAO Annex 16 named “Environmental Protection” encompassing norms for noise and emissions, confirm that operational restrictions aimed at abatement of noise must be regarded as an “environmental measure.”

Following this rationale, an EU State wishing to limit or refuse the exercise of traffic rights on environmental grounds, such as by imposing a capacity reduction at an airport, can do so based on Article 20 of EU Regulation 1008/2008. The principal conditions for such environmental measures are the following:

- 1) The EU State must determine that there is an “environmental problem”, in the present case, a ‘noise problem’;
- 2) That problem must be a “serious” one;
- 3) In principle, the EU State wishing to adopt the environmental measure must be able to provide “other modes of transport provide appropriate levels of service;” – see the French ban on short-haul flights adopted in 2022 and examined in section 5.4.3 below;
- 4) The envisaged environmental measure:
 - a. must be non-discriminatory as to the nationalities of the operators of the aircraft, that is, the EU air carriers;
 - b. may not distort competition between EU air carriers, nor yield the effect of distorting competition between EU air carriers;
 - c. may not otherwise be contrary to EU law;

^{108.} See, Art. 19(1) of EU Regulation 1008/2008.

^{109.} Carbon Offsetting and Reduction Scheme for International Aviation of ICAO.

- d. may not be more restrictive than necessary to relieve the problems, in other words: it must meet the test of 'proportionality', which is also laid down in the BA procedure;
- 5) The environmental measure must have a limited validity period, not exceeding three years, after which it shall be reviewed.¹¹⁰

Once an EU State esteems that it complies with all these substantive conditions for environmental measures and "that action ... is necessary", that EU State must follow the procedure prescribed by Article 20(2) of EU Regulation 1008/2008. This includes informing the other EU Member States and the Commission at least three months before the envisaged entry into force of the action/ measure and providing adequate justification. The measure may be implemented unless, within one month of the notification, a Member State contests the measure or the Commission "takes it up for further examination." The Commission may, at its own initiative or at the request of another Member State, suspend the measure if it feels the substantive conditions mentioned above are not satisfied. The procedure for adopting a suspension measure is also subject to compliance with general EU law, particularly the involvement of an advisory committee composed of EU States representatives and chaired by the Commission's representative.¹¹¹

The next sections will look at two cases where environmental measures have been implemented in the EU; the decision Karlstad airport (1998) concerned noise measures, whereas the French ban on shorter domestic flights in France (2022) revolves around emissions.

5.4.2 The EU Commission's Decision on Access to Karlstad Airport (1998)¹¹²

In the case at hand, SAS's complaint targeted the Swedish government's prohibition of aircraft accessing the airport of Karlstad meeting Chapter 2 of ICAO's Annex 16 only, that is, noisier types of aircraft.¹¹³ Generally, only the quieter 'Chapter 3' aircraft were permitted to use this airport.

^{110.} See, Art. 20 of EU Regulation 1008/2008.

^{111.} See, Art. 25(2) of EU Regulation 1008/2008 in conjunction with the provisions of Council Decision 1999/468/EC, *laying down the procedures for the exercise of implementing powers conferred on the Commission*.

^{112.} EU Commission Decision 98/523/EC of 22 July 1998 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case VII/AMA/10/97) - *Access to Karlstad airport*

^{113.} Ibid. par. 4: "scheduled air services may not be operated with aircraft which do not comply with the requirements of Part II, Chapter 3, Volume 1 of Annex 16 to the Convention on International Civil Aviation (hereinafter referred to as 'Chapter 3 aircraft')."

By restricting access to Karlstad airport to Chapter 3 aircraft, the EU Commission argued in its decision that the Swedish noise measures affected the operation of traffic rights secured by then Art. 3(1) of EEC Regulation 2408/92, preceding EU Regulation 1008/2008. The Swedish noise measures were qualified as an “operational rule” under Art. 8(2) of EEC Regulation 2408/82. The EU Commission argued that the Swedish measures are not permitted to infringe EU law, that is, the noise standards agreed upon in EEC Directive 92/14 which applied at that time. The EU Commission determined that these measures infringed said EU (then EEC) law standards. Citing jurisprudence of the CJEU, the EU Commission also held that restrictions on the freedom to provide air services by limiting traffic rights of EU carriers must be justified by reasons of public necessity and meet the principle of proportionality.¹¹⁴ The latter principle implies that limitation of traffic rights is “unacceptable” if the envisaged result – noise reduction – can be achieved by less restrictive instruments. The Swedish measures were found to be “unacceptable” based on these arguments. The EU Commission concluded that the Swedish authorities were not entitled to impose operational restrictions at Karlstad airport going beyond those drawn up in EU law.

In another case concerning airport access around 2000, the establishment of new noise configurations also hampered access to Zurich Airport. The Swiss and German governments had agreed on adapting noise zones for landing traffic using South German airspace, but the German side did not ratify the agreement. Although court cases followed, EU law, as described and analysed in this article, was not or not yet applicable at that time, a further discussion of this case falls outside the scope of this article.¹¹⁵

5.4.3 *The French ban on certain short-haul, domestic flights*

In June 2021, a French Law imposed a ban on domestic flights on routes also served by several daily direct rail connections of less than 2,5 hours.¹¹⁶ The measure was

¹¹⁴. Ibid. par. 24: “... as the Commission has already indicated in relation to national measures adopted under Article 8(1) of Regulation (EEC) No 2408/92 (see, in particular, Commission Decision 95/ 259/EC of 14 March 1995, French traffic distribution rules for the airport system of Paris (4), any restrictions adopted under that provision must comply with the general principles governing the freedom to provide services as spelled out in the case-law of the Court of Justice ...”, in which context the CJEU referred to its other fundamental decisions in this area, namely, Cases C-288/89 *Mediawet* (1991) ECR 4007 and C-76/90 (*Säger v. Dennemeyer* (1991) ECR 4221).

¹¹⁵. See, Regula Dettling-Ott, *Der Flughafen Zürich und die Auseinandersetzung mit der Bundesrepublik Deutschland über den An- und Abflug: The right to fly vs. The right to sleep*, in: *Rechtsfragen rund um den Flughafen Zürich*, Hrsg. Tobias Jaag, 2004.

¹¹⁶. Law No 2021-1104 on combating climate change and strengthening resilience to its effects on 22 August 2021.

adopted because of serious concerns about aircraft emissions' effect on climate change. Albeit the measure only applies domestically, the French State nonetheless notified the matter under Article 20 of EU Regulation 1008/2008,¹¹⁷ and submitted its Law to the EU Commission on 17 November 2021.

The Commission went through all the conditions, as explained in section 5.4.1. It contextualised the French measures to the Commission's 'Green Deal' objective, calling for a 90 % reduction in greenhouse gas (GHG) emissions from transport by 2050. The EU Mobility Strategy promotes a multimodal transport system to effectuate this reduction. The Commission also considered that the French State had sufficiently addressed the other conditions drawn up in Art. 20(1) of the Regulation 1008/2008. On 1 December 2022, more than a year after its initial notification, the EU Commission held that the French measures complied with:¹¹⁸

- the general EU principles on non-discrimination based on the nationality, identity or business model of an air carrier;
- avoidance of distortion of competition;
- the proportionality principle, because the restriction of the freedom to provide services must be offset by the availability of affordable, convenient and more sustainable alternative transport modes, in this case, the French high-speed train (TGV);
- conditions on the administration of the measures by assessing *ex-ante* whether the alternative transport mode provides a reasonable alternative for travel by air;
- the "limited period of validity" upon which the French State must review its measures within 24 months after they enter into force and notify the Commission of its findings.

On 1 December 2022, the EU Commission approved the French measures.¹¹⁹

5.5 Concluded remarks on operating restrictions and the EU internal market

It follows that noise-related operating restrictions are not only subjected to the procedural and substantive requirements of the BAR, but also to other conditions, including, but not limited to, those laid down in general EU law and in EU Regulation

¹¹⁷. See, Art. 20(2) of EU Regulation 1008/2008.

¹¹⁸. Commission Implementing Decision (EU) 2022/2358 of 1 December 2022 on the French measure establishing a limitation on the exercise of traffic rights due to serious environmental problems, pursuant to Article 20 of EU Regulation 1008/2008.

¹¹⁹. Commission Implementing Decision (EU) 2022/2358 of 1 December 2022 on the French measure establishing a limitation on the exercise of traffic rights due to serious environmental problems, pursuant to Article 20 of EU Regulation 1008/2008.

1008/2008. This is especially relevant where traffic rights are affected, which is linked to the provision of air services and the availability of airport slots. The freedom to provide such air services in liberalised markets may only be restricted by the introduction of environmental measures, including noise measures.

The limitedly available cases where environmental measures have been implemented in the EU concerning the reduction of noise and emissions, confirm that operating restrictions that affect the freedom to provide services in the EU, must be seen in a broader context and considered diligently. States must thus consider the specific regulations governing the case in question as well as general EU rules and principles. Although the BAR only stipulates a notification procedure where the EU Commission can *inform* the Member State that it finds that the BA procedure has not followed the BAR and does not explicitly grant enforcement powers to the EU Commission (see section 3.2.4), through EU Regulation 1008/2008, the EU Commission can place its assessment of noise-related operated restrictions in the broader context of its obligations to maintain the EU internal air transport market, and subsequently approve or disapprove the notified measures.

In assessing the Dutch BA procedure and measures, the EU Commission must also consider their effect on international markets and its international obligations vis-à-vis third States. The last section (6) will delve into this international dimension, including the question of enforcement.

6. INTERNATIONAL OBLIGATIONS UNDER AIR SERVICES AGREEMENTS

6.1 International reactions to reduced capacity at Schiphol Airport

Concerns that the operating restriction and the reduced capacity at Schiphol will affect traffic rights and competition are not limited to the EU internal market. As a result of the measures under the first track of the Dutch government's three-tier approach, as alluded to in section 4.2, airlines from third States were already faced with the consequences of capacity reduction at Schiphol. Air India, for instance, has lost its slot at Schiphol and can no longer offer services to the airport.

US airlines have been more vehement about the reduced slot allocation. JetBlue, a new entrant at the airport, challenging the monopolist position of KLM and Delta on routes to, for instance, New York, similarly was not allocated slots it had applied for in the 2024 summer season. In retaliation, JetBlue has asked the US Department

of Transport (DoT) to revoke KLM's slots at JFK airport in New York.¹²⁰ Airlines for America even requested the DoT to defer a German airline's application for a foreign air carrier permit until after the special meeting of the Joint Committee, established under the EU-US Air Transport Agreement (ATA), which took place on 13 November 2023.¹²¹ The DoT found that the capacity reduction to 460,000 flight movements indeed violated the EU-US ATA,¹²² and ordered Dutch airlines to file their flight schedules in preparation for retaliatory measures while at the same time pressing for a diplomatic solution.¹²³

On the day of the Special Joint Committee meeting between the EU, the US and the Netherlands, the EU Commissioner for Transport sent a letter to the Dutch Minister for Infrastructure, expressing "serious concerns" that the BA procedure for these measures had not been followed and explicitly informing the Dutch government that the EU Commission reserves the right to start infringement procedures for non-compliance with EU Law. Due to these concerns from the US and the EU Commission, the Dutch minister announced suspending the measures of the first track the following day.¹²⁴

Although the capacity reduction to 460,000 flight movements for the 2024 summer season is suspended,¹²⁵ the measures resulting from the BA procedure in the second track are not. The analysis of the international dimension that the EU Commission will have to consider in its review of the Dutch notification under the BA is thus still relevant. It will do so from two angles; first, it will look at international obligations under air services agreements, most notably concerning traffic rights. The second part will deal with the enforcement of the BA.

^{120.} See, for instance, <https://nltimes.nl/2023/09/29/jetblue-threatens-klm-schiphol-downsizing-plans> (last visited: 19 November 2023).

^{121.} Answer of Airlines for America to Application of USC GmbH for an exemption under 49 U.S.C. § 40109 and amended foreign air carrier permit pursuant to 49 U.S.C. § 41301 (Docket No. DOT-OST-2023-0107), Letter of 2 November 2023.

^{122.} As to which see the next section (6.2).

^{123.} See, US Department of Transport, Order 2023-11-6 of 2 November 2023.

^{124.} See, *Stand van zaken Hoofddlijnenbesluit Schiphol*, (Status of outline decision Schiphol, translation provided by author), 14 November 2023, IENW/BSK-2023/345691.

^{125.} Due to planning and capacity constraints of airlines, the airport, and air traffic control, it is unclear if additional slots for the 2024 summer season can and will still be allocated. See also: <https://nltimes.nl/2023/11/15/jetblue-may-still-lose-schiphol-airport-slots-despite-halt-downsizing-plans> (last visited 19 November 2023).

6.2 Traffic rights and market access under Open Skies Agreements

In addition to the complaint that the BA was not applied for implementing the concerned operating restrictions of the first phase, the US and Canada also questioned the procedural and substantive aspects of the BA procedure in the second phase. However, the concise analysis below will focus on their grievance that the proposed measures are discriminatory, anti-competitive, and unduly restrict access to the transatlantic market.

Both the EU-US Air Transport Agreement of 2007, as amended in 2010, and the Canada-EU Air Transport Agreement of 2021,¹²⁶ contain provisions on the freedom to provide services in their respective markets and impose obligations on the parties when considering limiting the number of aircraft movements at airports based on environmental grounds:

“The costs and benefits of measures to protect the environment must be carefully weighed in developing international aviation policy. When a Party is considering proposed environmental measures, it should evaluate possible adverse effects on the exercise of rights contained in this ATA, and, if such measures are adopted, it should take appropriate steps to mitigate any such adverse effects.” (italics added)¹²⁷

Canada is concerned that “restriction of flight movements may potentially be implemented in a manner that unduly impacts Canadian air operators”, which approach would be contrary to the ATA’s aim “to promote an international aviation system based on market competition – rather than governmental direction – among airlines in the marketplace.” The same applies to the “fair and equal opportunity for the airlines of the other Party to provide the air services,” especially with a view to new entrants and the ATA’s requirements to be “non-discriminatory in slot allocation, access to airport facilities, and the application of environmental measures.”¹²⁸

The US DoT expressed similar concerns in its order of 2 November 2023, leading to the conclusion that the “Phase 1 noise reduction plan at AMS constitutes an unjustifiable and unreasonable discriminatory and anticompetitive practice.” It also

^{126.} Agreement on Air Transport between Canada and the European Community and its Member States of 2010.

^{127.} See, for instance, Article 18(3) of the EU-Canada ATA.

^{128.} The response of the Government of Canada to the Balanced Approach Consultation is available at: https://www.internetconsultatie.nl/balanced_approach_schiphol/reactie/4d103394-c5ef-40ca-915a-baeca1a36b2 (last visited: 2 November 2023).

finds that the Dutch government "has imposed an unjustifiable and unreasonable restriction on access of an air carrier to the U.S.-Amsterdam market."

Canada and the US voiced genuine concerns; the number of slots that airlines had to return is currently calculated on a pro-rata basis, as put forward in section 4.2. This means that KLM, as the largest user of Schiphol Airport, must return, by far, the most slots as compared to other airlines. On the other hand, as the home carrier, it is more flexible to adjust its planning. When other or smaller users must give up slots, they may have to reduce frequencies or be unable to continue serving specific routes, leading to less competition on those routes.

The reduced capacity will also make it more difficult for new entrants to acquire slots at Schiphol Airport, further limiting the competitive environment. Although the measure to return slots at Schiphol may not intended to be discriminatory, the reduced competition due to reduced capacity has the potential effect to lead to positive discrimination in favour of the home carrier.

6.3 Enforcement of the Balanced Approach

On the management of aircraft noise, the ATA between the EU and US, includes an express reaffirmation of the "commitment of Member States and the United States to apply the balanced approach principle [of ICAO]."¹²⁹ It also imposes conditions on the process for "the imposition of new mandatory noise-based operating restrictions", including that "operating restriction shall be (i) non-discriminatory, (ii) not more restrictive than necessary ... and (iii) non-arbitrary."¹³⁰

Despite the condition in the EU-US agreement to apply the BA for noise-related operating restrictions, the US remained concerned that enforcement of the EU's BAR provisions was not clearly and effectively vested in Brussels but remained in the hands of Member States or even local authorities. To incentivise a change in European law that would grant appropriate "authority" to the EU Commission, the US was prepared to reward the EU side with additional passenger seventh freedom rights and greater rights concerning ownership and control of third-country airlines when the following condition was met:

"4. Upon written confirmation by the Joint Committee, ..., that the laws and regulations of the European Union and its Member States with regard to the imposition of noise-based operating restrictions at

¹²⁹. See, Art. 15(4) of EU-US Air Transport Agreement of 2007, as amended in 2010.

¹³⁰. Ibid. Art. 15(5).

airports ... *provide* that the European Commission has the authority to review the process prior to the imposition of such measures, *and where it is not satisfied that the appropriate procedures have been followed* in accordance with applicable obligations, *to take in that case, prior to their imposition, appropriate legal action* regarding the measures in question."¹³¹ (italics added)

The EU and the US disagree on whether the EU has enacted legislation allowing the Commission "to take appropriate legal action" that would trigger the additional rights. In subsequent Joint Committee Meetings, the EU Commission argued that the conditions are satisfied through Article 8 of the BAR. It further stated "that "appropriate legal action" in this context meant an infringement proceeding, or whatever procedure is provided for by EU constitutional law."¹³² The US maintains that the commencement of infringement proceedings would not be adequate to *prevent* the imposition of noise restrictions that do not follow the balanced approach. The EU delegation contests that "nowhere in the ATA was it stated that the Commission must have the authority to "prevent the imposition of the restrictions in question."¹³³

6.4 Concluding remarks on international obligations and enforcement of the BA

In the EU's relationship with the US and Canada, the application of the BA is reaffirmed explicitly through incorporation in the Open Skies Agreements with these States. This brings about obligations to comply with and uphold the provisions of these ATAs. The effects of the Dutch measures limiting airport capacity are inconsistent with the obligations under these agreements, where they may be considered discriminatory, having a distortive effect on competition and unduly impacting access of the air operators of the other State. So far, other third States have not been vocal about retaliation, but if the reduction continues to be effectuated, this may be the calm before the storm.

Concerning whether the EU Commission can take appropriate legal action where a Member State has not followed the BA procedure correctly, the Commission reiterated its right to start infringement procedures for non-compliance with EU law against the Dutch measures in the first phase of the reduction. Proceeding on the basis that the Dutch government has not applied the BA principle to the letter

¹³¹. Ibid. Art. 21(4).

¹³². Eighteenth Meeting of the U.S.-EU Joint Committee Record of Meeting April 19, 2016; Washington DC.

¹³³. Seventeenth the U.S.-EU Joint Committee Record of Meeting June 4-5, 2015; Helsinki, Finland.

or followed the BAR by the book in the second phase, it remains to be seen if the EU Commission, following its assessment of the Dutch notification, will indeed take 'appropriate legal action' and enforce compliance with the BAR.¹³⁴

7. CONCLUSION

The Netherlands and Schiphol Airport have often been applauded for their approach to noise management and for taking noise-related measures. A formal Balanced Approach (BA) procedure was never called for, but the long-standing, typically Dutch, practice of consensus decision-making (*'polderen'* in Dutch) involving all stakeholders through consultative structures matched the BA principle in full. This nearly romanticised reminiscence starkly contrasts the one-sided "Balanced Approach" currently being conducted and imposed by the Dutch government.

The BA principle is an internationally agreed-upon global standard for noise management at individual airports. The standard in ICAO's Annex 16 concisely and clearly identifies two incremental parts of the BA process: first, identifying the noise problem and *then* analysing various measures to solve the noise problem and the type of measures that can be considered. The EU's Balanced Approach Regulation is more specific and, coupled with the EU Environmental Noise Directive, provides a mechanism and tools for setting noise objectives, identifying problems and establishing the procedure for taking noise abatement measures in the EU.

By announcing a set of quantitative restrictions on Schiphol Airport's capacity in June 2022, before considering the different steps and conditions for taking noise-related operating restrictions under EU and international law, the Dutch BA procedure was flawed from the start. The "Balanced Approach" is built on the premise that different noise measures must be explored and exhausted first and operational restrictions only as an instrument of last resort. This process cannot start with announcing a pre-determined or 'expected' outcome, nor can it be purpose-driven to reach a desired end result, as appears to be the case here.

The Dutch BA procedure does not adhere to fundamental principles of international and EU law. Instead, it appears to create a noise problem by setting a steep NOA in the near future. The high objective and the short timeframe are not proportionate. Some of the proposed measures go beyond what is necessary to achieve the NOA,

^{134.} When the Commission has issued its response to the Dutch notification under the BAR, the author intends to write and publish a follow-up article or note in this journal to analyse the decision.

and the operating restrictions leading to a capacity decrease are not considered a last resort but are part of the starting point of the BA process. The government's conclusion of the results of the Dutch BA comes as no surprise: the only way to achieve a large part of the noise reduction objectives is to reduce Schiphol's capacity. The sector's alternative plans to achieve the objectives, albeit partly in a slightly more extended -three-year- period, but without a capacity reduction, have been disregarded for not reaching the objectives in time.

Upon the Netherlands' notification of the outcome of the BA, the EU Commission must now review whether the BAR's necessary procedural and substantive requirements are complied with, including general EU rules and principles. It is also mandated to consider the notification of the operating restriction in the broader context of the EU internal air transport market, that is, EU Regulation 1008/2008 and its provisions on environmental measures, as well the international dimension of the open skies markets with States like the US and Canada.

It is questionable whether the Dutch BA will sustain the tests of proportionality, non-discrimination, and not having a distortive effect on competition that can be justified. International obligations have not been adequately observed, and the stakeholders' consultation and involvement in the process were marginal. The question remains whether the EU Commission will take "appropriate legal action" and to start an infringement procedure if it finds the Dutch BA procedure and measures incompatible with the BAR and EU principles.

The Dutch have a rich history of aviation pioneering, and the application of this first-of-its-kind Balanced Approach could have set an example for balancing different interests at a time of increased awareness for environmental measures. However, the scheme pursuant to which the Dutch BA has been framed, set up and conducted is anything but exemplary. This is a missed opportunity and a mistake that may come at a cost for Dutch aviation. However, it may not be too late to turn the tide.

