Netherlands Competition Authority

Number: 200085/31 .BT37

Re: Tariffs and conditions Schiphol- Airbridge Cargo

DECISION

The Board of the Netherlands Competition Authority, pursuant to an application in terms of section 8.25f(1) of the Aviation Act [*Wet luchtvaart*] by Volga-Dnepr UK Ltd., acting under the name of AirBridge Cargo, also situated *de facto* at Schiphol Airport, in the municipality of Haarlemmermeer, with a view to ascertaining whether the tariffs and conditions applicable to the activities of the airport operator, in terms of section 8.25d(1) of the Aviation Act, contravene rules provided in or pursuant to the Aviation Act.

1. Introduction

1. On 28 June 2007, the Board of the Netherlands Competition Authority (hereinafter "the Board") received an application, in terms of section 8.25f(1) of the Aviation Act,[1] objecting to the determination of (new) tariffs and conditions by N.V. Luchthaven Schiphol (hereinafter "Schiphol") for the activities, as referred to in section 8.25d(1) of the Aviation Act.

2. Parties

Applicant

2. The application was submitted by the company, Volga-Dnepr UK Ltd., established under foreign law, acting under the name of AirBridge Cargo (hereinafter "AirBridge"), with its registered office in the United Kingdom, situated *de facto* in the Netherlands at Uiverweg 2-6, 1118 DS Luchthaven Schiphol. AirBridge's main activity is the transportation of freight by air.

Operator of Schiphol Airport

3. The operator of Schiphol Airport, as referred to in section 8.1, preamble and subsection (g), of the Aviation Act, is N.V. Luchthaven Schiphol, a public limited liability company established under the law of the Netherlands, with its registered offices at Evert van de Beekstraat 202, 1118 CP Luchthaven Schiphol

[1] The Aviation Act, as amended by the Aviation (Amendment) Act of 29 June 2006 in respect of the operation of Schiphol Airport [*Wet van 29 juni 2006 tot wijziging van de Wet luchtvaart inzake de exploitatie van de luchthaven Schiphol*], *Netherlands Bulletin of Acts and Decrees*, 2006, 332, which came into force on 19 July 2006 (hereinafter "the Aviation Act").

(hereinafter "the Airport" or "Schiphol").

3. Procedure

Course of the procedure

Announcement of the tariff proposal and consultation of users

4. In accordance with the provisions of section 8.25e(1) of the Aviation Act, on 19 April 2007 Schiphol presented the air carriers with a proposal for tariffs and conditions. The proposal was published, for instance, by means of an advertisement in the *Financieele Dagblad* of this date.

5. Following this announcement, AirBridge entered into consultations with Schiphol and discussions took place on 23 April 2007 and 2 May 2007. On 16 May 2007, AirBridge submitted written views, as referred to in section 8.25e(3) of the Aviation Act. Schiphol responded to these in a letter of 31 May 2007, the same day on which Schiphol announced the setting of the tariffs and conditions, as prescribed in section 8.25d(1) of the Aviation Act. This announcement was also made by means of (for instance) the publication thereof in the *Financieele Dagblad*.

Submission of the application for an assessment of the tariffs

6. On 28 June 2007, AirBridge submitted an application, as referred to in section 8.25(1) of the Aviation Act, to the Board. The Board concludes that AirBridge, as an air freight carrier, is a user, in terms of section 8.25f(1), read in conjunction with section 8.1, preamble and subsection (i), of the Aviation Act. In accordance with information obtained from AirBridge, AirBridge makes use of Schiphol Airport approximately four times a week for the landing and taking off of its aircraft. In addition, the Board notes that AirBridge submitted its application within the term of four weeks, stipulated in section 8.25(1) of the Aviation Act. AirBridge's application is therefore admissible.

7. On 5 July 2007, the NMa notified Schiphol of the fact that AirBridge had submitted an application, as referred to in section 8.25e of the Aviation Act. On 13 July 2007, the NMa put to Schiphol questions which it had in the light of AirBridge's application. Schiphol answered these questions in its letter of 26 July 2007.

8. On 13 July 2007, the NMa also put questions to AirBridge, which were answered by AirBridge in its letter of 27 July 2007. Subsequently on 30 July 2007, Schiphol and AirBridge were given the opportunity to respond to the NMa on each other's initial responses. The responses to each other's documents, which had been submitted to the NMa, reached the NMa on 9 August 2007 (AirBridge) and on 10 August 2007 (Schiphol).

9. On 31 July 2007, a hearing was also organised at the offices of the NMa. Representatives of AirBridge and Schiphol were present at this hearing and were given the opportunity to explain their opinions

verbally and to answer additional questions which the NMa had. A report of the hearing was drawn up and the parties were given the opportunity to respond to the report. Schiphol commented on the report of the hearing in a letter of 7 September 2007, which was received by the NMa on 11 September 2007. AirBridge did not avail itself of the opportunity to respond to the report of the hearing.

Background information

10. One of the changes which Schiphol has made to its tariffs, compared to the tariffs which applied up until 1 November 2007, relates to an amendment to the number of categories of so-called 'landing and take-off charges', in other words, the tariffs which Schiphol charges for the taking off and landing of aircraft at the airport. In the tariff system applicable up until 1 November 2007, a distinction was made between categories A, B and C.[2] The categorisation in question, used by Schiphol to differentiate charges, is based on the noise emission of aircraft. This subdivision into tariff categories has been used since the end of the 1990s, according to Schiphol. In the new subdivision, effective as of 1 November 2007, a division has been made within the category previously applied, namely category A. The new tariff category, 'Marginally Compliant Chapter 3'[3] hereinafter "MCC3"), has been separated from this category as of 1 November 2007. Category A will continue to exist, except for the part assigned to the MCC3 category. The latter category comprises aircraft with relatively high noise emission, which are allowed to land and take off at Schiphol.

11. This yardstick applied by Schiphol in determining the categories of noise pollution of various aircrafts and types of aircraft is based on a system recognised and accepted by the International Civil Aviation Organisation (hereinafter "ICAO"). These noise certification standards can be found in Annex 16, Volume 1 (version of 2 March 2002) to the treaty establishing ICAO, namely the Treaty of Chicago,[4] and are expressed as a certain unit, namely ΔEPNdB.[5] The value of this unit is determined according to procedures approved by ICAO, as set out in Annex 16 to the Treaty of Chicago. The ultimate value, which is assigned in a certificate to individual aircraft, is decisive in determining the tariffs charged by Schiphol for the taking off and the landing of these aircraft.[6]

12. The categorisation criteria, which Schiphol uses for the categories, are derived from the aforementioned

[2] The distinction between the categories is based on noise levels. See paragraphs 11 up to and including 15 below for the basis on which this distinction is made.

[3] For the definition, see the Schiphol Airport Traffic Decree [*Luchthavenverkeerbesluit Schiphol*] (Decision of 26 November 2002 in relation to the adoption of an airport traffic decision for Schiphol Airport), *Netherlands Bulletin of Acts and Decrees*, 2002, 592 (as amended by the Decision of 9 August 2004 amending the Schiphol Airport Traffic Decree and the Decision of 21 May 1981, relating to the adoption of several rules to limit noise pollution by aircraft (*Netherlands Bulletin of Acts and Decrees*, 2004, 432), hereinafter "Schiphol Airport Traffic Decision"), section 1(h).

[4] Treaty of Chicago: Treaty in relation to international civil aviation of 7 December 1944 concluded in Chicago (hereinafter "the Treaty of Chicago").

[5] 'Effective perceived noise in decibel'. Briefly, the unit, ΔEPNdB, is based on a measurement taken at three points when an aircraft takes off and lands. On the basis of this measurement, whether the noise level of an aircraft lies below a maximum norm determined by ICAO is determined for the respective measurement points. The further the noise measured lies below (each of) these three norms, the less noisy the aircraft is, relatively speaking.

[6] Furthermore, the noise level also depends on other factors which may differ from one flight to another, such as the load factor. These are not taken into account for certification purposes and are therefore also not included in the tariff differentiation.

system introduced by ICAO. The class, MCC3, which was introduced by the European Union, is a further subdivision within these categories.[7] The categorisation of aircraft according to their noise emission, applied by Schiphol, is as follows:

Noise category MCC3	0 ≥ ΔEPNdB > - 5	Marginally compliant chapter 38 (the relatively noisiest aircraft)
Noise category A	- 5 ≥ ΔEPNdB > - 9	(relatively noisy aircraft)
Noise category B	- 9 ≥ ΔEPNdB > -18	(aircraft which produce average noise)
Noise category C	ΔEPNdB ≤ -18	(the quietest aircraft)

13. The level of noise pollution of aircraft, in relation to the tariffs applied by Schiphol, is assessed on the basis of scales, in accordance with Article 4(1) of Schiphol's tariffs and conditions. Firstly, consideration is given to whether the noise pollution of an individual aircraft has been determined on the basis of the criteria drawn up by ICAO in this regard and whether this has been stated in the certificate relating to this aircraft. If an individual aircraft does not have such a certificate, in determining tariffs Schiphol adheres to the default table in Annex II[9] of the tariffs and conditions. The categorisation in accordance with the table is based on the model of the respective type of aircraft with the most unfavourable level of noise pollution.

14. The table makes the above-mentioned distinction between aircraft on the basis of noise categories, namely the categories MCC3, A, B and C, whereby category MCC3 comprises the relatively noisiest aircraft and category C the quietest aircraft. Schiphol has stated that, compared to the previous tariffs applicable up until 1 November 2007, the MCC3 category is new. The introduction of this new category with higher tariffs is prompted by the desire to ensure that the aircraft fleet which makes use of Schiphol becomes quieter.[10]

15. Another change relative to the previous tariffs relates to the increase in tariffs (per flight movement) in category A from 130% of the basic tariff to 140% of the basic tariff, an increase of approximately 7% in absolute terms. The same tariff also applies to tariff category MCC3, on the understanding that the tariffs for flight movements at night for aircraft in the MCC3 category are 50% higher than the tariffs for category A.

4. Description of the application

16. In its application, AirBridge requests the NMa to assess the tariffs and conditions, in relation to the points

[7] Directive 2002/30/EC of the European Parliament and of the Council of 26 March 2002 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports, *OJ* (2002) L 85/40.
[8] The 'marginally compliant aircraft' only just ('marginally') comply with the conditions contained in chapter 3 of Annex 16, volume 1, part II of the Treaty of Chicago.
[9] This is included as Annex II to this decision.

which it raises, in accordance with the Aviation Act and the Schiphol Airport Operation Decree [*Besluit exploitatie luchthaven Schiphol*]. AirBridge's arguments are summarised below.

17. AirBridge objects to the introduction of a new tariff structure for 'landing and take-off charges'. AirBridge's objections focus mainly on the introduction of the MCC3 category as a separate tariff category. In addition, AirBridge objects to the tariff increase accompanying the introduction of the new category. The reason which it gives for this is that since the adjustment to the tariff structure is cost neutral, according to Schiphol, this means that air freight carriers pay higher tariffs, which are then passed on to passenger airlines, which AirBridge assumes cause less noise pollution. AirBridge deems this to be unreasonable ('unjust') and undesirable cross subsidisation. AirBridge also argues that the so-called 'low-cost operators' (passenger airlines with below-average pricing) benefit as a result because they mainly use aircraft in favourable noise categories. AirBridge also states that this cannot be a coincidence, since Schiphol serves more 'low-cost operators' than other mainports in Europe.

18. AirBridge also argues that air freight carriers cannot circumvent the tariff increase by deploying quieter aircraft in the short or medium term. In relation to air freight carriers, the system therefore only has a punitive character, according to AirBridge. In all cases, they are confronted with a 100% tariff, the basic tariff which applies to noise category B in accordance with the default table.[11] They possibly even pay more, since air freight carriers mainly carry out their activities using Boeing 747-200 aircraft (classified in category MCC3), which, according to AirBridge, is 'the standard-bearer for cargo operators', and Boeing 747-400 aircraft. The latter aircraft are classified in category A, but in practice are usually charged in accordance with category B on the basis of certificates issued to individual aircraft.

19. AirBridge argues that it is making serious efforts to comply with the noise standards, but does not deem itself to be in a position to replace its fleet from one day to the next. According to AirBridge, the reason for this is, amongst other things, the magnitude of the investment required for this and the limited availability of quieter aircraft, such as the Boeing 747-400. AirBridge states that it is endeavouring to comply with Schiphol's requirements, but feels that it is insufficiently rewarded for doing so.

20. AirBridge states that a noise levy was already charged before Schiphol adopted the (new) tariffs and conditions. Since a distinction is now made in the present tariffs and conditions on the basis of noise levels, noise as a criterion is unjustly used twice as a basis for setting tariffs.

21. AirBridge is of the opinion that solutions other than the introduction of the tariff category MCC3 are conceivable as a means of solving the noise problem and argues that the choices made by Schiphol in this respect are not acceptable. Assuming that air freight carriers fly with a lower frequency than passenger airlines, AirBridge is of the opinion that the present tariff system unfairly fails to stimulate a reduction in the frequency of less noisy aircraft, but only penalises aircraft deemed to be 'Marginally Compliant', but

[10] Letter from Schiphol to the NMa of 27 July 2007 (reference 2007018), page 1, point 1.
[11] See Annex II to this decision.

which fly with very low frequency. AirBridge also notes that a covenant was recently concluded under the supervision of the Alders Commission, which permits an increase in the total noise level of Schiphol.

22. In this regard, AirBridge also considers it unacceptable that carriers which carry out their flights during the day are charged more relative to carriers which do so at night. In its view, this does not result in the shifting of transport by means of noisy aircraft from the night to the day, while Schiphol states that it wishes to stimulate this. AirBridge is of the opinion that if higher tariffs are charged, this should only apply to night flights. This can be realised, in its view, without the introduction of a new tariff category.

23. The present conditions and tariffs jeopardise the position of Schiphol as a mainport since the 'Marginally Compliant Aircraft' are still used on a large scale by air freight carriers, according to AirBridge. Barring these aircraft, according to AirBridge, amounts to barring freight companies, as a result of which Schiphol's position as a mainport is at issue.

24. Finally, AirBridge is of the opinion that the change in the categorisation and the accompanying tariff increases are directed exclusively at foreign air carriers. AirBridge considers it a rather remarkable coincidence that the proposed change to the tariffs coincides with the moment at which the largest users on the home market, KLM and Martinair, have sold their MCC3 aircraft. AirBridge states that it has heard from third parties that Schiphol entered into agreements three years ago with KLM and Martinair with regard to the introduction of the MCC3 tariff category. In this regard, AirBridge is of the opinion that Schiphol should have made provision for a transitional period of at least five years within which the air carriers could have renewed their fleets.

5. Schiphol's response to the application

25. On 26 July 2007, Schiphol responded to AirBridge's application at the NMa's request. In its response, Schiphol noted firstly that air freight carriers were not the only companies affected by the new tariffs.

26. Schiphol also stated that it conceded (partially) to several wishes of the air freight carriers. The proposed tariff categorisation for daytime hours, according to Schiphol, differentiated between the categories MCC3/A/B/C on the basis of 150%/140%/100%/85% respectively. Partly on the basis of AirBridge's arguments, this differentiation was reduced to 140%/140%/100%/85%, whereby the night-time tariff for category MCC3 was increased by 50%. According to Schiphol, the aim of setting these tariffs in this way was to stimulate air carriers to operate with quieter fleets at the airport. In Schiphol's view, by doing so it implemented government policy.

27. In addition, Schiphol refers to the fact that since the end of the 1990s, stricter measures have progressively been introduced to bar aircraft which cause greater noise pollution from the airport. For instance, in the past so-called 'chapter 2 aircraft' were successfully phased out of the overall fleet which operated at Schiphol and since the end of the 1990s tariffs have been subdivided into the categories A, B and C, which makes a distinction on the basis of noise pollution. A start was made in 2006 with a further

differentiation between day and night tariffs.

28. In addition, Schiphol states that other airports, including those in Frankfurt, London (Heathrow), Brussels and Paris (Charles de Gaulle) also apply tariff differentiation, in which a distinction is made (partially) according to noise pollution as the basis for differentiation.

29. Considerable operational restrictions also apply at present to aircraft in the MCC3 class at Schiphol Airport. For instance, no new flights may be planned any longer using certain aircraft in the MCC3 class[12] and these aircraft are prohibited from landing and taking off between 1800 hrs and 0800 hrs. A different category of aircraft, which can be distinguished within the MCC3 category,[13] may not take off between 2300 hrs and 0600 hrs.

30. With regard to the noise pollution of the various types of aircraft, Schiphol provided the NMa with the following information:

		Category MCC3		Other categories (A, B and C)	
Per day (TVGden)	Number of flight movements:	9,727	2%	428,296	98%
	Noise in dB(A):	54.33	14%	62.39	86%
Night (TVGnight)	Number of flight movements:	1,506	5%	26,966	95%
	Noise in dB(A):	45.38	17%	52.12	83%

31. According to Schiphol, the above table shows how total sound pollution and the number of flight movements respectively can be assigned to the MCC3 classes and to the other three noise categories, namely A, B and C. The noise level is based on the so-called *Totaal Volume Geluidsbelasting (TVG)* (Total Volume Noise Impact) and, as in the case of the number of flight movements, is subdivided on the basis of full days and night-time hours. The data are derived from Schiphol's operating plan for 2007. The '*TVG*' norm is the norm used by the government for managing noise at Schiphol.[14] According to the above-mentioned information, MCC3 aircraft account for 2% of the number of flight movements on a daily basis and 14% of the sound pollution. During night-time hours, MCC3 aircraft account for 5% of the number of MCC3 flight movements and 17% of sound pollution.

32. Furthermore in presenting its arguments Schiphol refers to correspondence between it and AirBridge within the framework of tariff consultation. In a letter from Schiphol, addressed to AirBridge and dated 31 May 2007, which is included in this correspondence, Schiphol denies that there is a relationship

[12] This relates to aircraft equipped with engines with a bypass ratio of less than 3. Within the MCC3 category, these aircraft produce the most noise pollution.

[13] This relates to aircraft equipped with engines with a bypass ratio greater than 3.

[14] See the Schiphol Airport Traffic Decree, sections 4.2.1 and 4.2.2.

between the tariffs for passenger flights and the tariffs for freight flights. The lower tariffs for freight flights are driven by market conditions. There is therefore no subsidisation, according to Schiphol; neither between passenger flights and freight flights, nor between freight flights and 'low-cost-carrier' flights. The last point is confirmed, according to Schiphol, by the fact that the last-mentioned market segment has a relatively large share of aircraft in category A and a relatively low share in category C.

33. In addition, in its response to the application Schiphol states that it takes into account the fact that it is not possible for AirBridge to invest in aircraft which cause less noise pollution in the short or medium term. For this reason, according to Schiphol, it has made concessions to AirBridge by limiting the differences in tariffs between category MCC3 and category A (for the time being) to night-time tariffs.

34. In its response, Schiphol provides detailed information on the number of flight movements for each noise category in 2006. This can be presented schematically as follows:

Market segment	Noise category			Total
	A	B	C	
Hub carriers	1%	68%	31%	100%
Low cost carriers	10%	84%	6%	100%
Ica carriers	13%	53%	35%	100%
Euro carriers	7%	64%	29%	100%
Leisure carriers	4%	94%	1%	100%
Full freighter carriers	38%	55%	7%	100%
Total	5%	71%	24%	100%

N.B: The category MCC3 was not used by Schiphol in 2006. The aircraft in this category are included in noise category A.

35. Finally, in its response Schiphol provided information on the number of freight flight movements for each type of aircraft and for each noise category in 2006. This resulted in the following table:

A		B		C	
B747-100/200/300	4,953	B747-400F	6,346	BAE ATP	823
DC-10	630	MD-11	2,836	PIPER 31 NA	443
Airbus A300	496	Airbus 300-600F	440	Other	18
Antonov 12/26/74/124	176	Other	14		
B763F	322				
Other	32				
Total movements	6,609	Total movements	9,636	Total movements	1,284
Share	38%	**Share**	55%	**Share**	7%

N.B: The category MCC3 was not used by Schiphol in 2006. The aircraft in this category are included in noise category A.

Schiphol is of the view that by providing this information it has shown that all the tariff categories include aircraft which are suitable for carrying out freight flights. However, Schiphol also states that categories A and B include aircraft which are suitable for intercontinental transport and that aircraft in category C are only used for transport to European destinations.

6. Legal framework

36. In accordance with section 8.25d(1) of the Aviation Act, at least once a year the airport operator must determine the tariffs and conditions for its activities for the use of the airport by users.

37. These so-called aviation activities are categorised and summarised in section 2 of the Schiphol Airport Operation Decree [*Besluit exploitatie luchthaven Schiphol*].[15] These categories are:

- the taking off and landing of aircraft;
- the parking of aircraft;
- the handling of aircraft passengers and their baggage in relation to the taking off and landing of aircraft;
- providing security for passengers and their baggage, including border control facilities (hereinafter "security activities" or "security").

38. In determining the tariffs for the above-mentioned activities, Schiphol must take into account the revenue allocation of its other activities, which are directly related to the above-mentioned aviation activities. These so-called aviation-related activities are listed in the Decree.[16]

39. The tariffs for aviation activities must be cost oriented[17] and, in addition, must be reasonable and non-discriminatory.[18] The latter requirement means that, in principle, every user is entitled to the same tariffs and conditions for equivalent services. In its application, AirBridge has given no grounds which lead the Board to conclude that the tariffs and conditions as such are not cost oriented or that they are in conflict with the requirement of fairness contained in the Aviation Act,[19] leaving aside the question of whether there are grounds for the latter claim in the light of the relatively low level of landing and take-off charges for freight aircraft compared to passenger aircraft at Schiphol. In the discussion which follows, the Board will therefore only consider whether discrimination has occurred in relation to the tariffs.

40. The Explanatory Memorandum to the Act attributes specific meaning to the concept of 'discrimination' in section 8.25d(2) of the Aviation Act. This can be derived from the fact that the Aviation Act does not by definition prohibit Schiphol from differentiating its tariffs.[20] Not every *differentiation* therefore automatically results in *discrimination*. The situations in which discrimination does occur, however, can be derived from the following passages in the Explanatory Memorandum to the Act:

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[15] In this regard, see the Decision of 7 July 2006 in relation to rules pertaining to the operation of Schiphol Airport [*Besluit van 7 juli 2006, houdende regels betreffende de exploitatie van de Luchthaven Schiphol*], *Netherlands Bulletin of Acts and Decrees*, 2006, 333 (Schiphol Airport Operation Decree)

[16] Schiphol Airport Operation Decree, section 2(2). The aviation-related activities relate to: a) the granting of a concession for the supply of aviation fuel; b) the granting of a concession for catering for aircraft; c) utility services; and d) activities for or on behalf of the operator of the airport which are charged to aviation activities and which may be charged to third parties.

[17] See the Aviation Act, section 8.25d(3).

[18] See the Aviation Act, section 8.25d(2).

[19] See also the discussion under the heading "Scope of the assessment" in section 7 below.

[20] See also paragraph 44 and in footnote 25 below.

"Sector-specific supervision is strengthened and placed in the hands of the [Board of the NMa]. This supervision is limited to the conditions included in the Bill with a view to preventing the abuse of a dominant position and therefore have the nature of provisions relating to competition law."[21]

and:

"[...] the Cabinet [has] already indicated that the tariffs for countries, for handling passengers and for parking (the tariffs for activities which are usually referred to as the aviation activities) must be non-discriminatory, transparent and cost-oriented, in accordance with competition law."[22]

41. Due to the competition law nature of the concept of discrimination in the Aviation Act, in assessing Schiphol's tariffs and conditions, the Board bases its assessment on the definition of discrimination, as set out in Article 82 of the EC Treaty. This definition reads as follows:

[...]

Such abuse may, in particular, consist in:[...]

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

[...].

42. The last phrase of this provision refers to a principle of competition law, namely that exclusion or exploitation must occur for an infringement of competition rules due to the abuse of a dominant position to exist.[23] In the light of this, the Board will also assess the tariffs and conditions in question in accordance with the Aviation Act.

43. Furthermore, in accordance with the Explanatory Memorandum to the Aviation Act, the concept of 'discrimination' is also defined in part by Article 15 of the Treaty of Chicago, which prohibits discrimination in relation to tariffs between national and foreign air carriers.[24]

[21] Proceedings of the Lower House of the Dutch Parliament, Session Year 2001-2002, 28 074, No. 3, p. 3 (underlining added).

[22] Proceedings of the Lower House of the Dutch Parliament, Session Year 2001-2002, 28 074, No. 3, p. 3 (underlining added).

[23] ECJ 6 March 1974, joined cases 6 and 7, 1974, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation* v. *Commission*, ECR (1974) p. 223, para. 32; ECJ 18 April 1975, case 6/72, *Europemballage Corporation and Continental Can Company Inc.* v. *Commission*, ECR (1975) p. 495, para. 26.

[24] Proceedings of the Lower House of the Dutch Parliament, Session Year 2001-2002, 28 074, No. 3, pp. 3 and 4.

7. Assessment

Scope of the assessment

44. It should be emphasised in advance that, in accordance with section 8.25f of the Aviation Act, with regard to the tariffs and conditions the Board assesses whether the tariffs and conditions set by Schiphol are contrary to the requirements contained in or pursuant to the Act. If the answer to this question is negative, the Board has no legal authority to impose different choices on Schiphol with regard to tariff systems which Schiphol could introduce additionally or as an alternative. In other words, Schiphol is granted a certain degree of freedom to determine its own tariff policy within the limitations of the Act when setting its tariffs and conditions.[25]

45. In addition, it should be emphasised that within the framework of the Aviation Act, the Board is only authorised to assess tariffs and conditions for aviation activities over which Schiphol itself exercises control. The 'so-called noise charge'—by which AirBridge presumably means the so-called 'GIS levy'—is a government levy.[26] The existence of this levy or these levies, as well is any planned changes to these, are therefore not taken into account in the assessment made in this decision.

46. It should also be noted that the Board does not have the legal authority to act in a regulatory capacity in relation to Schiphol with the aim of compelling Schiphol to realise certain environmental objectives or to set certain priorities in this regard. The Act does not stipulate criteria for this.

47. The latter applies with regard to arguments contained in AirBridge's application, namely that Schiphol could have opted for tariff differentiation and/or a categorisation which focused on simulating carriers to schedule flights during the day, rather than at night, which could have included incentives to reduce the frequency of flights or which might have reduced the speed with which the tariff was introduced, because the measure would not have been necessary at this moment. AirBridge's reasoning is a reference to whether Schiphol had set the right priorities with a view to realising environmental objectives, which the Board is not authorised to assess.

48. The sections of the Act, against which the tariffs and conditions for aviation activities can be assessed, do not provide a basis and norms by which the Board can assess whether Schiphol has complied with its so-called 'mainport obligations'. All these considerations arise from the freedom and responsibility which the legislator has granted Schiphol, as referred to in paragraph 44. The aspects referred to in this paragraph

[25] See the explanation of the Schiphol Airport Operation Decree, *Netherlands Bulletin of Acts and Decrees*, 2006, 333, p. 17. "Since the requirement of cost orientation applies to the tariffs for aviation activities as a whole, it is possible that so-called cross-subsidisation occurs within these aviation activities as a whole. This is permissible as long as the operator acts in this regard in accordance with the requirements, as referred to in section 8.25d(2) up to and including (4), of the Act and section 13 of this Decree."

[26] The so-called "GIS levy", in accordance with section 77 of the Aviation Act, is a revenue-generating levy. The revenues are used to limit the impact of aircraft noise, for instance by installing noise insulation in the neighbourhood of the airport.

also lie outside the scope of the assessment in this decision.

49. In the discussion which follows, an assessment is made to ascertain whether the tariffs set by Schiphol for its landing and take-off charges as of 1 November 2007 are discriminatory. The Aviation Act aims to prevent the abuse of a dominant position. According to the Explanatory Memorandum to the Act, the tariffs must be non-discriminatory in the sense that they must comply with competition law.[27]

Introduction of a separate tariff category for MCC3 aircraft

50. In order to assess whether discrimination has occurred through the introduction of a separate tariff category for MCC3 aircraft, it is necessary to consider whether equivalent or inequivalent performance applies in this case. The Board notes that with regard to the capacity which Schiphol makes available for aircraft to land or to take off, the performance provided by Schiphol is not equivalent. In this case, the performance consists of making infrastructure capacity available to enable aircraft to land and to take off. Aircraft in the MCC3 class generate relatively more noise per aircraft than aircraft in other categories.[28] As a result, an aircraft movement using an aircraft from the MCC3 class makes relatively greater demands on Schiphol's capacity—measured in terms of the number of aircraft movements—than an aircraft movement with an aircraft from a different tariff class. This is important because Schiphol Airport's capacity—measured in terms of the number of aircraft movements—is determined by an externally determined total noise volume (*Totaal Volume Geluid*, or 'Total Noise Volume').[29] As a result, making capacity available for the taking-off or landing of relatively noisy aircraft is a different performance than making capacity available for the taking off or landing of relatively less noisy aircraft.

51. The relatively high noise pollution of MCC3 aircraft is also the basis for the applicable regulations. The MCC3 class, in other words, is not an arbitrarily chosen category. The category in question is based on Annex 16 of the Treaty of Chicago and, as such, is already identified in Article 2(d) of Directive 2002/30/EC,[30] which makes it possible to introduce noise-related operating restrictions at airports in the Community. This Directive even makes it possible to bar marginally compliant aircraft (MCC3 aircraft) from certain European airports, including Schiphol. The noise figures provided by Schiphol (see paragraph 30) confirm the relatively high noise pollution of aircraft in the MCC3 category. Indicative calculations made by the Inspectorate for Transport and Water Management at the NMa's request confirm the difference in noise pollution between aircraft of the Boeing 747-200 and the Boeing 747-400 types.

52. Although the Board is not authorised to assess whether Schiphol complies with certain environmental objectives as a result of the proposed tariffs, as was stated in paragraph 46, tariff differentiation on the

[27] See the Proceedings of the Lower House of the Dutch Parliament, Session Year 2001-2002, 28074, No. 3, p. 3.
[28] See the table in paragraph 30.
[29] See the Schiphol Airport Traffic Decree, sections 4.1 .1 to 4.2.3.
[30] See footnote 7.

basis, for instance, of noise pollution is consistent with the principle that the party which causes environmental pollution must pay for this itself. Making a distinction between aircraft which cause more or less noise pollution can be justified, for instance, on the basis of this argument and is not discriminatory. These various points are also confirmed by European case law in relation to common transport policy.[31]

53. The noise pollution of aircraft in the MCC3 class therefore makes greater demands on the noise capacity of an airport. This applies irrespective of the number of flights carried out by an aircraft, irrespective of whether this is an aircraft registered in the Netherlands or an aircraft registered in a foreign country, irrespective of the location of the operator, irrespective of whether the aircraft is a freight aircraft or a passenger aircraft and irrespective of whether the aircraft lands or takes off at night or during the day.

54. The fact that there are possibly also air carriers which had not replaced aircraft, which they use for flights to Schiphol, with less noisy aircraft before the introduction of the new tariff category does not detract from this analysis, according to the Board. In addition, given the policy followed by Schiphol in this respect, it does not make sense only to introduce this measure once the last air carrier has phased out its MCC3 aircraft. Furthermore, European legislation[32] was adopted in 2002 which makes it possible[33] for Member States of the EC to take measures aimed at barring marginally compliant aircraft altogether from certain airports in the European Community, which once again does not detract from the analysis in the above paragraphs.[34] Since then, the market has been faced with uncertainty with regard to whether such measures will in fact be taken.[35] Air carriers could have been aware in time of this uncertainty with regard to the deployment of marginally compliant aircraft by taking note of these regulations and could have adjusted their policy in this regard in time.

55. In accordance with the above and the arguments raised by AirBridge, the Board concludes that the introduction of a separate tariff category for MCC3 aircraft is not contrary to the prohibition on discrimination contained in the Aviation Act.

Freight transport versus passenger transport

56. AirBridge also argues that the introduction of MCC3 as a separate tariff class is to the disadvantage of freight operators compared to passenger operators. In order to establish that prohibited discrimination

[31] According to case law of the European Court of Justice, distinguishing between aircraft on the basis of their noise levels is not prohibited because this distinction is based on objective grounds: ECJ,12 March 2002, joined cases C-27/00 and C-122/00, *The Queen v. Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd* (C-27/00) and *Omega Air Ltd, Aero Engines Ireland Ltd and Omega Aviation Services Ltd v. Irish Aviation Authority* (C-122/00). ECR 2002, p. I-2569, recitals 80-84.

[32] Directive 2002/30/EC, see footnote 7.

[33] In the Netherlands, this authority is assigned to both Schiphol and the Inspector General for Aviation in accordance with section 4A1 of the Schiphol Airport Traffic Decree.

[34] This Directive was adopted on 26 March 2002, came into force on 29 March 2002 and had to be implemented by Member States of the European Community by 28 September 2003. The proposal for the Directive was published on 28 November 2001: COM (2001)695 def.

[35] Directive 2002/30/EC does not make it mandatory to take measures to limit noise but it leaves the decision to take measures to the individual Member States of the EC.

has occurred in the setting of tariffs on the basis of this argument, it is necessary that an observed distinction in the tariffs has a disadvantageous effect on competition. In the discussion which follows, the Board assesses whether a disadvantageous effect on competition is at issue in this case.

57. The distinction in tariffs and conditions made for passenger carriers, on the one hand, and freight carriers, on the other hand, is not contrary to the prohibition on discrimination. After all, these two groups of air carriers do not compete with each other on the same market. Any preferential treatment to the advantage of one of the two groups does not therefore affect the interests of the other group. The fact that air freight carriers are supposedly not in a position to operate aircraft which fall in the quietest category, namely category C, while passenger carriers are in a position to do so, must be assessed in this light. If this were the case, in the light of the above this would have no adverse effect on competition because this fact, if it were true, would only affect the freight sector.

58. In this regard, it should also be noted that the 'landing and take-off charges' set by Schiphol for freight flights are considerably lower than those for passenger flights, as is apparent from Annex 1 to this decision. This annex provides a schematic overview of the tariffs levied for passenger flights and freight flights. It is therefore not the case that freight carriers are placed at a disadvantage or exploited in comparison to passenger carriers in any way whatsoever.

59. The argument raised in paragraph 57 above also applies in relation to AirBridge's argument that 'low-cost operators' (passenger carriers) are supposedly placed at an advantage as a result of tariff measures because they fly aircraft which fall into favourable noise categories. In particular, AirBridge states in this regard that air freight carriers pay higher tariffs which are subsequently passed on to passenger carriers, which are assumed to cause less noise pollution. AirBridge notes that this is an unfair ('unjust') and undesirable form of cross-subsidisation.

60. In the Board's opinion, the same argument applies mutatis mutandis to the claim that air freight operators are placed at a disadvantage. Air freight operators do not compete with low-cost carriers, which only transport passengers. Preferential treatment of low-cost carriers therefore does not result in a competitive disadvantage to freight operators. If cross-subsidisation does exist, in the light of the above, this is not prohibited as such, due to the freedom which the legislator has granted Schiphol, since the obligation to apply cost-oriented tariffs only applies to the tariffs as a whole and does not apply to individual tariffs, as is apparent partly from section 8.25d(3) of the Aviation Act.

61. Without prejudice to the above, it has not been possible to discern any strategy whatsoever on the part of Schiphol to place 'low-cost operators' at an advantage relative to any other types of air carriers. This can be derived from the figures which Schiphol presented to the Board (see table in paragraph 35).'Low-cost operators' own aircraft in each noise category (and not only in category C). On the other hand, noise category C even includes a large number of air carriers which do not belong to the 'low-cost' segment.

62. In the light of the above, the Board concludes that there is also no question of discrimination between passenger carriers and freight carriers.

Domestic versus foreign air carriers

63. With regard to whether discrimination occurs on the basis of the nationality of the air carrier, whether or not this is formalised in relation to the place of registration of the aircraft or the place in which the company is based or registered, AirBridge raises two arguments, namely: 1) the moment at which the (new) tariff structure was introduced, which supposedly coincides with the moment at which the Dutch air carriers, KLM and Martinair, had allegedly phased out their MCC3 aircraft entirely and 2) the fact that the MCC3 class supposedly only consists of foreign air carriers.

64. From the point of view of competition, in order specifically to ascertain whether discrimination has occurred on the basis of nationality, it is necessary to ascertain whether foreign air carriers have been excluded from the more favourable tariff categories. Irrespective of whether this must be viewed in isolation, prohibited discrimination may have occurred if it were to emerge that the more advantageous tariff categories had been selected in such a way that these would be accessible (almost) exclusively to national air carriers. Article 15 of the Treaty of Chicago refers to the application of 'uniform conditions' to national and foreign air carriers.[36]

65. If these criteria were to be applied to Schiphol's new tariff structure, the Board concludes firstly that the nationality of the air carrier or the country of registration of the aircraft are not criteria on which the distinction between tariffs is based. There is therefore no question of direct discrimination to the disadvantage of foreign (freight) carriers. Uniform conditions apply to both Dutch and non-Dutch air carriers.

66. Secondly, there is no (de facto) exclusion of foreign air carriers from access to other (more favourable) tariff classes in the MCC3 class. It follows directly from the previous paragraph that the scheme as such is open to foreign air carriers. In practice, a large number of foreign air freight carriers operate flights to Schiphol using aircraft which, in practice, can be charged at the basic rate of 100% (category B) or, in any event, in accordance with category A with a more favourable night tariff than the MCC3 class.[37] AirBridge itself, according to its own submissions, is engaged in a replacement programme which will result in the purchase of this type of aircraft.

[36] Article 15 of the Treaty of Chicago, in so far as this is relevant, reads as follows: "Every airport in a contracting State which is open to public use by its national aircraft shall likewise, subject to the provisions of Article 68, be open under uniform conditions to the aircraft of all the other contracting States. The like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation."

[37] See, for instance, the list of air movements by freight carriers at Schiphol on January 2007, accessible at http://www.scramble.nl/splmovs.htm (5 September 2007). In January 2007, there were 218 landings of freight aircraft of foreign freight carriers using aircraft of the Boeing 747-400 type. According to the default table, this is a type of aircraft which is charged according to category A, but according to information obtained from Schiphol during the hearing of 31 July 2007, in practice the tariffs charged fall exclusively in category B. On the other hand, there were 78 landings of freight aircraft of the Boeing 747-200 type, a type of aircraft which is charged on the basis of the MCC3 class in accordance with the default table. The foreign air carriers which fly to Schiphol and which do not or no longer fly to Schiphol with marginally compliant aircraft include, for instance, China Airlines, Singapore Cargo, Great Wall Airlines, China Southern, Nippon Cargo and Korean Air.

67. Despite the above, the Board concludes that AirBridge's argument, namely that the moment at which the measure was introduced is discriminatory because Dutch air carriers no longer own aircraft in the MCC3 class, is not correct. AirBridge itself modified this view in its letter to the NMa of 26 July 2007.[38] Martinair, an air carrier established in the Netherlands, still has two freight aircraft in the MCC3 class in its fleet of six freight aircraft, both of which are of the Boeing 747-200 type, which, according to AirBridge, will be phased out by Martinair in February 2008. If Schiphol had, in fact, wished to give preferential treatment to Martinair, it would have had to wait until a moment after February 2008 before introducing the new tariff structure. In addition, the possibility that some air carriers did, in fact, adjust their policies in time, as a result of the (European) legislation referred to in paragraph 54, should be noted.

68. In the light of the above, the Board concludes that in setting its tariffs Schiphol did not discriminate on the basis of nationality.

Conclusion

69. On the basis of the arguments presented by AirBridge, the Board concludes that no prohibited discrimination has occurred in terms of section 8.25d of the Aviation Act. In the Board's opinion, this conclusion can be drawn solely on the grounds of "equivalent performance", as referred to in paragraphs 50 up to and including 55.

8. Decision

70. The Board of the Netherlands Competition Authority concludes that the tariffs and conditions of N.V. Luchthaven Schiphol applicable as of 1 November 2007, are not contrary to the criteria stipulated in or pursuant to the Aviation Act on the basis of the arguments presented by AirBridge.

Date: 18 October 2007

The Board of the Netherlands Competition Authority,
on its behalf:

[Signed]

G.J.L. Zijl

Member of the Board

Any person, whose interests are directly affected by this decision, may file a judicial appeal against this decision within six weeks of its publication with the Court of Rotterdam, Administrative Law Section, P.O. Box 50950, 3007 BL Rotterdam.

[38] See paragraph number 7.

Annex I – Table from Annex I of Schiphol's tariffs and conditions (as of 1 November 2007)

Annex 1 Overview of tariffs in Euros

Landing and take-off charges	Category MCC3			Category A			Category B			Category C		
	Day	Night		Day	Night		Day	Night		Day	Night	
(charge per 1000 kg)	landing/ take off	landing	take -off	landing/ take off	landing	take-off	landing/ take off	landing	take- off	landing/ take off	landing	take-off
Point-to-point flight												
Connected handling	€ 6.43	€ 12. 24	€ 14.46	€ 6.43	€ 8.16	€ 9.64	€ 4.59	€ 5.83	€ 6.89	€ 3.90	€ 4.95	€ 5.85
Disconnected	€ 5.14	€ 9.79	€ 11.57	€ 5.14	€ 6.53	€ 7.71	€ 3.67	€ 4.66	€ 5.51	€ 3.12	€ 3.96	€ 4.68
Local/instruction flight												
Connected handling	€ 3.21	€ 6.12	€ 7.23	€ 3.21	€ 4.08	€ 4.82	€ 2.30	€ 2.91	€ 3.44	€ 1.95	€ 2.48	€ 2.93
Disconnected	€ 2.57	€ 4.90	€ 5.78	€ 2.57	€ 3.26	€ 3.86	€ 1.84	€ 2.33	€ 2.75	€ 1.56	€ 1.98	€ 2.34
Cargo flight	€ 3. 34	€ 6.37	€ 7.52	€ 3..34	€ 4.24	€ 5.01	€ 2.39	€ 3.03	€ 3.58	€ 2.03	€ 2.58	€ 3.04

Minimum tariff based on 20 ton MTOW

Day: 0600 hrs to 2300 hrs

Night:2300 hrs to 0600 hrs

This annex is an integral part of this decision.

ANNEX II Default table from Schiphol's tariffs and conditions (1 November 2007)

Annex II Default table for charging based on noise (based on the day tariffs)

Noise category MCC3 (basic charge +40%)*	**Noise category A (basic charge +40%)**	**Noise category B (basic charge)**	**Noise category C (basic charge -15%)**
Airbus A300 Antonov all types B707 B727 B737-100/200/400 B767-200/300 B747-100/200/300/SP BAC 1-11 DC-8 DC-9 DC-10 Fokker 28 Gulfstream II/III Hawker 700 (HS 125-700) Ilyushin all types Tupolev all types Yak42	Airbus A310 Airbus A321 BAe types not listed Shorts Belfast B737-300//500 B747-400 Cessna 650 Falcon 10/20/ 50 Fokker 27 Lockheed all types M D-81/82/83/87/88	Airbus A319 Airbus A320 Airbus A330 ATR42 ATR72 BAe 146/AVRO RJ series Bombardier CRJ700 Bombardier 900 B737-600/700/800/900 B757 B767-400 B777 Canadair CL600 Canadair RJ 700/900 Cessna 500 other types Dash all types Embraer 170/1 75/1 90/1 95 Falcon 200/900/2000 Fokker 50 Fokker 100 Hawker 800 (BAe 125-800) IAI other types Learjet 31 /35/36/45/55/60 MD-11 Shorts 360	Airbus 318 Airbus A340 BAe ATP BAe Jetstream Beech all types Bombardier Global Dornier 228 Express B717 Canadair CL601/604 Canadair RJ 100/200 Cessna 560 XL Cessna 750 Dornier 328/JET Embraer types not listed Fokker 70 Gulfstream IV/V Hawker 800 XP IAI Galaxy/Astra 1125 Piper 31 NA SPX MD-90 Saab all types
All aircraft not listed in the noise categories MCC3, A, B or C		All helicopters	All aircraft < 6 ton MTOW All propeller aircraft ≤ 9 ton MTOW

This annex is an integral part of this decision.