

Netherlands Competition Authority

DECISION

of the Board of the Netherlands Competition Authority on the Request within the meaning of section 8.25f, subsection 1, of the Aviation Act (*Wet luchtvaart*) by **easyJet Airline Company Limited, a company incorporated under foreign law and having its registered office in the United Kingdom**, for determination of whether the charges and conditions for the activities of the airport operator within the meaning of section 8.25d, subsection 1, of the Aviation Act are contrary to the rules laid down by or pursuant to the Aviation Act.

Number: 200120/ 137.BT1377

Re: Request under section 8.25f Aviation Act – compliance test charges and conditions N.V. Luchthaven Schiphol

1. Introduction

1. On 21 November 2008 the Board of the Netherlands Competition Authority (referred to below as 'the Board') received a request from easyJet Airline Company Limited, within the meaning of section 8.25f, subsection 1, of the '*Wet luchtvaart*' the Aviation Act (referred to below as 'the Request'), which was directed against the setting of the charges and conditions by N.V. Luchthaven Schiphol for the activities referred to in section 8.25d, subsection 1, of the Aviation Act, which were set by Schiphol on 31 October 2008 in order to take effect on 1 April 2009 (referred to below as 'the Charges').

2. Parties

Applicant

2. The Request was submitted by easyJet Airline Company Limited, a company incorporated under foreign law and having its registered office at Hangar 89, London Luton Airport, Luton, (LU2 9PF) Bedfordshire, England (referred to below as 'easyJet').

Defendant

3. The operator of Schiphol Airport, as referred to in section 8.1 (g) of the Aviation Act is N.V. Luchthaven Schiphol, a public company under Dutch law, which has its registered office at Schiphol Airport, Evert van de Beekstraat 202, 1118 CP Luchthaven Schiphol, the Netherlands (referred to below as 'Schiphol').

3. Procedure

Consultation and determination of charges and conditions by Schiphol

4. In accordance with the provisions of section 8.25e, subsection 1, of the Aviation Act, Schiphol gave notice on 12 September 2008 of a proposal for the charges and conditions for the activities referred to in section 8.25d, subsection 1, of the Aviation Act.

5. Following this notice easyJet submitted its views as referred to in section 8.25e, subsections 2 and 3, of the Aviation Act. Schiphol responded in writing to these views on 31 October 2008.¹
6. On 31 October 2008 Schiphol set the charges and conditions with effect from 1 April 2009.² On 31 October 2008 Schiphol also gave notice of the charges and conditions as prescribed in section 8.25d, subsection 1, of the Aviation Act.³

Procedure under section 8.25f Aviation Act

7. On 21 November 2008 easyJet submitted its Request to the Board.⁴
8. On 28 November 2008 the Board informed Schiphol of the Request.⁵ Schiphol was given the opportunity to respond to the Request, and this response was received by the Board on 12 January 2009.⁶
9. The Board then gave easyJet the opportunity to reply to the above-mentioned response of Schiphol. EasyJet did this on 21 January 2009. Subsequently, Schiphol made use of the opportunity to respond to this reply on 29 January 2009.⁷
10. The Board also put questions to Schiphol and easyJet on 19 December 2009.⁸ EasyJet answered its questions on 9 January 2009. Schiphol answered its questions on 16 January 2009, when it also supplied, among other things, a calculation model.⁹
11. A hearing was held in the context of the present procedure at the office of the Dutch Competition Authority on 30 January 2009. Representatives of easyJet and Schiphol were present at the meeting and were able to explain their views orally and answer additional questions raised by the Board. A report of the hearing was prepared and the parties were given the opportunity to respond to the report.¹⁰ In so far as the parties made observations about the report, these have been added separately to the file.¹¹
12. On 6 February 2009 the Board put a number of questions to Schiphol in relation to the calculation model previously received with the response of Schiphol of 16 January 2009.¹² Schiphol replied to these questions by letter of 12 February and e-mail on 13 February.¹³

¹ File number 200120/1, annex 3.

² File number 200120/1, annex 1.

³ File number 200120/1, annex 3.

⁴ File number 200120/1.

⁵ File number 200120/2.

⁶ File number 200120/16.

⁷ File numbers 200120/24 (easyJet) and 200120/31 (Schiphol).

⁸ File numbers 200120/7 (easyJet) and 200120/8 (Schiphol).

⁹ File numbers 200120/13 (easyJet) and 200120/22 and 200120/23 (Schiphol).

¹⁰ File number 200120/57.

¹¹ File number 200120/64 (Schiphol).

¹² File number 200120/135.

¹³ File numbers 200120/47 and 200120/65.

13. On 19 February 2009 the Board informed the parties that it would make use of the possibility of extending the time limit for eight weeks, as referred to in section 8.25f, subsection 2, of the Aviation Act.¹⁴
14. In order to arrive at a well-reasoned opinion on easyJet's complaint, particularly with regard to the possibility that easyJet has been placed at a competitive disadvantage as a consequence of the charges set by Schiphol, the Board considered it necessary, pursuant to section 3:2 of the General Administrative Law Act ('*Algemene wet bestuursrecht*,' (*Awb*)), to carry out further investigation into this and accordingly extended the time limit for three months. On 24 April 2009 the Board informed easyJet that it was investigating the matter further and communicated the same to Schiphol on 28 April 2009.¹⁵ EasyJet then gave its response to this.¹⁶
15. On 29 April 2009 the Board once again put written questions to easyJet and Schiphol.¹⁷ The Board also put questions to KLM N.V. (referred to below as 'KLM') on the same date.¹⁸ In section 7 below the Board explains why it consulted KLM in this procedure.
16. EasyJet and Schiphol replied to the Board's questions on 15 May 2009.¹⁹ The parties were given the opportunity to explain their answers to the questions orally. EasyJet made use of this possibility on 19 May 2009 and Schiphol on 20 May 2009. In addition, the Board gave the parties the opportunity to respond to each other's answers in writing. Both parties made use of this opportunity.²⁰
17. The Board put a few additional questions to easyJet on 25 May 2009 in relation to its response of 15 May 2009, to which easyJet replied on 5 June 2009.²¹ EasyJet supplied the Board with further information on 11 June 2009 and 19 June 2009.²² This information prompted the Board to raise a few more questions on 22 June 2009, which were answered by easyJet on 25 June 2009.²³
18. The Board asked further questions during the oral explanation on 20 May 2009, in response to which Schiphol forwarded further information on 22 May 2009.²⁴ Schiphol too replied to additional questions of the Board on 12 June 2009.²⁵

¹⁴ File numbers 200120/53 (easyJet) and 200120/54 (Schiphol).

¹⁵ File numbers 200120/82 (easyJet) and 200120/83 (Schiphol).

¹⁶ File number 200120/120.

¹⁷ File numbers 200120/85 (easyJet) and 200120/84 (Schiphol).

¹⁸ File number 200120/86.

¹⁹ File numbers 200120/93 (easyJet) and 200120/94 (Schiphol).

²⁰ File numbers 200120/106 (easyJet) and 200120/108 (Schiphol).

²¹ File number 200120/98.

²² File numbers 200120/106 and 120200/112.

²³ File number 200120/116.

²⁴ File number 200120/121.

²⁵ File number 200120/107.

19. KLM too was given the opportunity to explain orally its answers to the Board's questions. KLM made use of this opportunity on 12 June 2009.²⁶ KLM answered additional questions of the Board on 19 June 2009.²⁷ The Board received KLM's replies on 24 June.²⁸
20. The Board forwarded KLM's response of 24 June to easyJet on 26 June 2009. The Board also forwarded KLM's response and the further information of easyJet of 19 June 2009 to Schiphol. Only easyJet responded to this, namely on 3 July.²⁹
21. Finally, easyJet lodged a notice of complaint on 13 July 2009, alleging a lack of due care in the decision-making procedure.³⁰

4. Legal framework

4.1 Introduction

22. Pursuant to section 8.25d, subsection 1, of the Aviation Act, the airport operator is required at least once a year to set the charges and conditions for its activities for the use of the airport by users.³¹
23. These so-called aviation activities are classified and summarised in Article 2 of the Schiphol Airport Operation Decree (referred to below as 'the Decree').³² These categories are:
 - (a) the take-off and landing of aircraft;
 - (b) aircraft parking;
 - (c) handling aircraft passengers and their baggage in connection with the take-off and landing of aircraft;
 - (d) implementing the security of passengers and their baggage, including the facilities for border control (referred to below as 'security activities').
24. The charges and conditions for the aviation activities should be cost-oriented.³³ In addition, the charges for aviation activities should be non-discriminatory and reasonable.³⁴ Moreover, the users of the airport should be consulted about the charges and conditions.³⁵ The users of the airport may submit a request to the Board to determine whether the charges and conditions set by Schiphol are in conflict with rules laid down by or pursuant to the Aviation Act.³⁶

²⁶ File number 200120/122.

²⁷ File number 200120/112.

²⁸ File number 200120/114.

²⁹ File number 200120/133.

³⁰ File number 200120/138.

³¹ A user is defined as an airline or a natural or legal person (other than an airline) which operates flights.

³² Decree of 7 July 2006, containing rules on the operation of Schiphol Airport (Schiphol Airport Operating Decree), Bulletin of Acts and Orders 2006, 333.

³³ Aviation Act, section 8.25d, subsection 3.

³⁴ Civil Aviation Act, section 8.25d, subsection 2.

³⁵ Civil Aviation Act, section 8.25e, subsection 2.

³⁶ Civil Aviation Act, section 8.25f, subsection 1.

25. Statutory requirements of cost orientation, non-discrimination and reasonableness are examined below in more detail, in so far as relevant to this decision. Afterwards, the transparency required during the consultation procedure under section 8.25e of the Aviation Act will be considered. This is the procedure in which Schiphol should consult the users in the period preceding the setting of the charges and conditions. Finally, brief attention is paid to the present procedure under section 8.25f of the Aviation Act whereby the users of the airport can request the Board for a decision on whether the charges and conditions are in conflict with the rules laid down by or pursuant to the Aviation Act.
26. The following representation of the legislation and regulations provides a broad outline. Further provisions of the legislation and regulations will be dealt with at other places in this decision in so far as they are relevant to this decision.

4.2 Cost orientation

27. Section 8.25d, subsections 3 and 4, of the Aviation Act provides that the charges for the aviation activities and security activities of Schiphol in their entirety must be cost-oriented. This requirement of cost orientation means that the product of the proposed charges and the (volume of) estimated aviation activities, netted with the estimated revenues from the aviation-related activities,³⁷ the permitted settlement of the differences³⁸ and a voluntary contribution from non-aviation activities³⁹ may not exceed the cost estimate (including the costs of capital). The obligation of cost orientation applies to the entirety of the aviation activities⁴⁰ (see margin number 23, at (a) to (d)) and to the security activities⁴¹ (see margin number 23, at (d)).
28. The requirement of cost orientation applies exclusively to the aggregation level of each of the above-mentioned two categories of services. This implies that the Act does not prescribe that each separate rate charged by Schiphol to the airline companies must be cost-oriented; an individual charge need not therefore be a reflection of the costs which are directly involved in providing a unit of the service to which the charge is made. Schiphol is therefore permitted to differentiate charges. This is also stated explicitly by the legislator in the explanatory notes to the Decree: *'Subject to the cost orientation requirement, the operator has the option of differentiating between charges, within reasonable limits. Incidentally, the charges must be applied non-discriminatorily and the individual charges must also pass the test of reasonableness.'*⁴²

³⁷ These aviation-related activities involve (a) the granting of a concession for aircraft fuel supply, (b) the granting of a concession for aircraft catering, (c) utility services and (d) activities by or on account of the aircraft operator charged to aviation activities and billed to third parties (Decree, article 2, paragraph 2). The estimated revenue from aviation-related activities is taken into account pursuant to section 8.25d, subsection 5, of the Aviation Act in setting the charges for the aviation activities.

³⁸ Section 8.25d, subsection 9, of the Aviation Act and article 4, paragraph 4 (d), at 5⁰ of the Decree determine what differences may be settled.

³⁹ Aviation Act, section 8.25d, subsection 7.

⁴⁰ Aviation Act, section 8.25d, subsection 3.

⁴¹ Aviation Act, section 8.25d, subsection 4.

⁴² Bulletin of Acts and Decrees 2006, 333, p. 18. Underlining added. See also Memorandum relating to the Further Report in respect of the Aviation Act, House of Representatives, 2004-2005 session, 28074, no. 12, p. 16: *'Product and charge*

29. It is evident from this quotation that Schiphol has the possibility of differentiating charges, but that scope to do so is limited by the requirements of non-discrimination and reasonableness. The Board will examine these two requirements in more detail in the next two sections.
30. For compliance with the requirements of cost orientation the Aviation Act provides, among other things, that Schiphol should apply an allocation system for the allocation of costs and revenues to aviation activities. In brief, the allocation system contains the computation methods⁴³ on the basis of which it is determined what part of the total costs and revenues of the airport should be allocated to the above-mentioned aviation activities. In this way, the allocation system constitutes an important basis for the periodic setting of charges for the aviation activities. The allocation system requires the approval of the Board.⁴⁴ The allocation system underlying the present charges (referred to below as ‘the Allocation System’) has been approved by the Board.⁴⁵

4.3 Non-discrimination

31. As indicated in margin numbers 28 and 29, the requirement of cost orientation in section 8.25d, subsections 3 and 4, of the Aviation Act leave Schiphol free, in principle, to apply charge differentiation, as a result of which individual charges contribute to a differing extent to covering costs. However, this freedom is limited by the requirement of non-discrimination contained in section 8.25d, subsection 2, of the Aviation Act. It follows that not every *differentiation* in charges and conditions automatically results in *discrimination* within the meaning of section 8.25d, subsection 2, of the Aviation Act.
32. The Aviation Act gives a number of indications of what the term non-discrimination in section 8.25d, subsection 2, of the Aviation Act should be taken to mean. First of all, the Explanatory Memorandum⁴⁶ states that Article 15 of the Chicago Convention⁴⁷ is applicable. This article describes a distinction on the basis of nationality of airlines as discriminatory. The Explanatory Memorandum⁴⁸ also states that no distinction may be made on the basis of the identity of the user. As soon as there can be said to be an equivalent service, the nationality or identity of users may not result in the application of a different charge or different condition.

differentiation by Schiphol Airport should be distinguished from any (price) discrimination. Subject to the requirement of cost orientation for aviation activities as a whole, the legislation allows the airport operator to differentiate between the individual charges within reasonable limits .’

⁴³ The Aviation Act and the Decree describe a number of conditions and requirements which these computation methods must fulfil.

⁴⁴ Aviation Act, section 8.25g, subsection 1.

⁴⁵ Decision of the Board of 25 April 2007 in case 200057 (Approval of Schiphol allocation system) and Decision of the Board of 24 September 2008 in case 200109 (Decision altering Schiphol allocation system).

⁴⁶ House of Representatives, 2001-2002, 28074, no. 3, pp. 3 and 4.

⁴⁷ Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (Government Gazette 1973, 109).

⁴⁸ House of Representatives, 2001-2002, 28074, no. 3, p. 5.

33. The Explanatory Memorandum does not provide any further explanation of the term non-discrimination, but it does indicate that terms in the Aviation Act may be interpreted by reference to the definitions used in competition law.⁴⁹ Owing to the competition law nature of the term discrimination in the Aviation Act, the Board, in assessing the charges and conditions of Schiphol, has referred to the definition of discrimination as contained in Article 82 of the EC Treaty.⁵⁰ 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;

[...]

34. Apart from the cases referred to in margin number 32, discrimination also therefore occurs where there are equivalent services for which different charges or conditions apply if this difference in treatment places users of Schiphol Airport at a competitive disadvantage.
35. This leads to the following conclusion in relation to the making of a distinction which is not permitted on the basis of the prohibition of discrimination in section 8.25d, subsection 2, of the Aviation Act. Discrimination occurs where different charges or conditions are applied to equivalent services and:
- the criterion applied constitutes a criterion, whether disguised or otherwise, for discrimination according to the nationality or identity of the disadvantaged user(s), or
 - if another criterion is applied in making the distinction and the consequence of the distinction made is that the users (or groups of users) are placed at a competitive disadvantage in relation to one another.
36. The last phrase of Article 82 (c) of the EC Treaty therefore shows that the application of different prices by an undertaking constitutes abuse of a dominant position if, as a consequence, trading partners are placed at a (clear) competitive disadvantage in relation to other undertakings.⁵¹ If the undertaking is not in itself a competitor of the customer in a downstream market, the existence of a competitive disadvantage must be demonstrated by reference to facts.⁵²
37. Finally, it should be noted from the case law that an objective justification may exist for certain forms of abuse, including discrimination.⁵³ A prohibited abuse occurs where (i) a

⁴⁹ House of Representatives, 2001-2002, 28074, no. 3, p. 3.

⁵⁰ Cf. the decision of the Board of 18 October 2007 in case 200085 (Airbridge Cargo).

⁵¹ EC Court of Justice 6 March 1974, joined cases 6 and 7 1974, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. the Commission*, [1974] E.C.R. 223, paragraph 32; EC Court of Justice 18 April 1975, case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. the Commission*, [1975] E.C.R. 495, paragraph 26.

⁵² See EC Court of Justice 24 October 2002, case C-82/01 P, [2002] E.C.R. I-9297.

⁵³ EC Court of Justice 15 March 2007, case C-95/04 P, *British Airways v. the Commission*, [2007] E.C.R. I-2331, paragraph 69; EC CFI 17 September 2007, case T-201/04 *Microsoft Corp et al. v. the Commission*, [2004] E.C.R. II-3601, paragraphs 319, 333, 665 ff.; EC CFI 30 September 2003, joined cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line et al. v. the Commission*, [2003], E.C.R. II-3275, paragraphs 1114-1117.

distinction is made in respect of charges or conditions for equivalent services which (ii) places customers at a disadvantage and (iii) is not objectively justified.

38. In order to determine whether there is discrimination within the meaning of section 8.25d, subsection 2, of the Aviation Act, the assessment framework described in this section will be applied.

4.4 Reasonableness

39. Pursuant to section 8.25d, subsection 2, of the Aviation Act each of the charges for aviation activities should in itself be reasonable. The requirement of reasonableness means, among other things, that there may not be a disparity between the charges and what is provided in exchange for them.⁵⁴ The requirement that each of the charges and conditions should in itself be reasonable precludes, above all, the possibility of ‘gold plating’, i.e. the provision of services of which the users have no objective need, but the costs of which are passed on in the charges.⁵⁵
40. The legislator mentions three methods which can be used to test whether the charges are reasonable.⁵⁶ These are (a) a comparison with the charges and conditions for similar activities at other airports in comparable market conditions, or in the light of what is usual internationally at leading airports (benchmarking), (b) a comparison of the charge with the underlying costs, and (c) an assessment of the charge in the light of the quality of the service. The quality indicators of Article 7 of the Decree may serve as a guide for assessment of the quality of the services offered.⁵⁷ However, the Aviation Act does not accord decisive importance in advance to any of these methods individually, and also provides scope for using other methods. Nor does the legislator indicate when the criterion of reasonableness is infringed.

4.5 Consultation and transparency

41. The airport operator gives notice of the proposed charges and conditions and is required to consult the users about this proposal. For the purpose of these consultations the users must be given information about the economic basis for the proposal and about the conditions, including the level of quality for the services to be provided.⁵⁸
42. This consultation procedure has been elaborated in section 8.25e of the Aviation Act and in Article 4 of the Decree. In setting the charges and conditions, the airport operator must take into account the views of the users. Following such consultation, it must explain its own position regarding the views expressed.⁵⁹ The operator must therefore always justify why it has not taken account of the views of users when setting charges and conditions.⁶⁰

⁵⁴ Bulletin of Acts and Decrees 2006, 333, p. 18.

⁵⁵ Ibid.

⁵⁶ House of Representatives, 2001-2002, 28074, no. 3, p. 6 and Bulletin of Acts and Decrees 2006, 333, p. 18.

⁵⁷ Bulletin of Acts and Decrees 2006, 333, p. 18.

⁵⁸ Ibid, p. 28.

⁵⁹ Aviation Act, section 8.25e, subsection 3.

⁶⁰ House of Representatives, 2001-2002, 28074, no. 3, p. 5.

43. During the consultation procedure Schiphol should try to provide a degree of openness about the charges and the reasons for setting the charges in the proposed manner. For example, Article 4, paragraph 4 (a), of the Decree provides that the proposal for the charges should contain a substantiation of the proposed charges: *'[...] in view of the requirements regarding the charges as prescribed in section 8.25d [of the Aviation Act]'*. It can therefore be inferred that users of the airport should be given a certain amount of information about the data on which the charges are based and the principles adopted by Schiphol for setting the charges.

4.6 Procedure under section 8.25f of the Aviation Act

44. After the airport operator has set the charges and conditions following the conclusion of the consultation procedure, the users of the airport may request the Board to determine whether the charges and conditions are in conflict with the rules laid down by or pursuant to the Aviation Act.⁶¹ The grounds on which the user may base its request include the level of the charges, the conditions imposed, the procedure followed in setting the charges and the lodging of documents by the operator.⁶² The assessment by the Board is made by reference to the statutory requirements of non-discrimination, cost orientation and reasonableness and, particularly in relation to the consultation procedure, the requirement of transparency.

5. Description of the request

5.1 Background

45. Schiphol charges the users of the airport, including easyJet, for the use of the airport. Schiphol applies aircraft-related charges and passenger-related charges. The aircraft-related charges include landing and parking charges. The passenger-related charges are the passenger service charge (referred to below as 'PSC') and the security service charge (referred to below as 'SSC'). These passenger-related charges are made for each departing passenger. Schiphol distinguishes in the case of both categories of passenger-related charge between the charge for transfer passengers and the charge for OD passengers.⁶³
46. The following table shows the PSC and SSC on 1 April 2009, as applicable after modification following the decision of the Board on the request of KLM and Barin.⁶⁴ The charges originally set by Schiphol on 31 October 2008 are shown in brackets.

⁶¹ Aviation Act, section 8.25f, subsection 1.

⁶² Bulletin of Act and Decrees 2006, 333, p. 31.

⁶³ OD stands for origin-destination. A transfer passenger is a passenger who arrives at the airport on one aircraft and departs on another and for whom the transfer is the main reason for the use of the airport. During the transfer the customs area may not be left for longer than 24 hours (2009 Schiphol definition of charges and conditions). OD passengers are passengers whose origin or destination is the Netherlands.

⁶⁴ Decision of the Board of 15 April 2009 in case 200121 (Barin/KLM).

Table 1: Passenger charges (in euros) from 1 April 2009

	<i>Passenger service charge</i>	<i>Security service charge</i>
OD passengers	14.24 (14.38)	12.84 (12.95)
Transfer passengers	5.98 (6.04)	7.25 (7.25)

5.2 The Request

47. EasyJet puts forward four grounds on which it considers that the charges and conditions set by Schiphol are in conflict with the Aviation Act and the regulations adopted pursuant to it. EasyJet considers that the distinction between transfer and OD passengers in the case of the passenger-related charges is discriminatory, that the OD charges are unreasonable and not cost-oriented and that the procedure by which the charges have been arrived at is not transparent. The grounds are set out briefly below. Any additional arguments advanced by easyJet will be dealt with – in so far as relevant – in the assessment of the Request.

5.3 Non-discrimination

48. EasyJet challenges the distinction which Schiphol makes between OD passengers and transfer passengers in the case of the PSC and SSC, which constitutes in its view unauthorised discrimination within the meaning of section 8.25d, subsection 2, of the Aviation Act. According to EasyJet, there is no objective – or sufficiently objective – justification for the distinction. EasyJet's arguments in respect of the framework for assessment of discrimination are set out below (see section 5.3.2). Subsequently, easyJet's arguments concerning the distinction between OD and transfer passengers in respect of the PSC and SSC are dealt with separately (see sections 5.3.3 and 5.3.4), as well as its argument that competitive disadvantage is not relevant and that the distinction is not justified (5.3.5 and 5.3.6). Before that, a number of easyJet's general submissions about discrimination are dealt with.

5.3.1 General submissions

49. EasyJet places what it considers to be the discriminatory nature of the charges in a broader context than that of the Aviation Act, the tenor being, according to EasyJet, that Air France/KLM receives preferential treatment.⁶⁵ It refers, for example, to the Alders Committee, the consultative body whose function is to advise the Dutch government on whether and, if so, to what extent the non-hub related traffic can be moved to regional airports in the Netherlands. EasyJet argues that one of the results of the consultations within this forum is that air traffic to Schiphol has been prioritised according to importance as follows: (1) hub carriers,⁶⁶ (2) other airlines that operate intercontinental business flights, (3) other airlines that operate European business flights, (4) cargo carriers and (5) holiday flights. On the basis of this prioritisation, easyJet considers that Air France/KLM is accorded preferential treatment by Schiphol in relation to other airlines.

⁶⁵ File number 200120/1, section 2.1

⁶⁶ This is evidently a reference by easyJet to airlines that also carry transfer passengers.

50. In this connection easyJet also refers to the alliance which Schiphol has entered into with Aéroports de Paris. EasyJet argues that this alliance too helps to strengthen the position of Air France/KLM at Schiphol airport and the Aéroports de Paris, which is to the detriment of the position of the competitors of Air France/KLM.
51. Finally, easyJet refers to the flight tax. As this tax is levied only on departing passengers from Dutch airports, it affects only OD passengers and not transfer passengers. EasyJet argues that this tax is therefore clearly discriminatory.

5.3.2 Framework for assessment of discrimination

52. According to easyJet, the question of whether a competitive disadvantage exists is not relevant in determining whether charges and conditions are discriminatory.⁶⁷ It argues that discrimination already exists if different charges are made for equivalent services. In easyJet's opinion, this results from the general principle of non-discrimination under European law.⁶⁸ EasyJet submits that an infringement of this principle could be justified by a pressing reason of public interest. However, a purely economic interest of Schiphol would not, in the opinion of easyJet, qualify as such.
53. EasyJet also refers to European legislation,⁶⁹ two documents of the European Commission (referred to below as 'the Commission')⁷⁰ and four judgments under European law,⁷¹ which show, according to easyJet, that the criterion of being placed at a competitive disadvantage does not form part of a test for compliance with the non-discrimination prohibition of section 8.25d, subsection 2, of the Aviation Act. In so far as being placed at a competitive disadvantage does form part of the test for non-discrimination, EasyJet argues that the applicant need not prove that there is an '*actual quantifiable deterioration in the competitive position of the business*'.⁷²
54. EasyJet also explains that, owing to a difference in price elasticities between transfer passengers and OD passengers, Schiphol has an incentive to apply differentiated pricing. As transfer passengers generally have a greater choice of connections, they have a higher price elasticity than OD passengers. As a result, an increase in the ticket price for transfer passengers will cause a relatively large decline in the number of transfer passengers. It follows that Schiphol can earn back higher charges more easily in the case of OD passengers because the fall in demand is limited. It is for this reason, according to EasyJet, that higher charges are applied to OD passengers. EasyJet submits that an airport that operates in a competitive market is permitted to apply any form of pricing it wishes. However, if an airport

⁶⁷ File numbers 200120/93 and 200120/106.

⁶⁸ EasyJet refers to the following cases of the EC Court of Justice: C-173/07, paragraph 39, C-344/04, paragraph 95, C-300/04, paragraph 57 and C-227/04, paragraph 63.

⁶⁹ Directive 2009/12/EC of the European Parliament and the Council of 11 March 2009 on airport charges, 2009, L70/11.

⁷⁰ Report from the Commission on financing aviation security, COM(2009) 30 final; Proposal for a Directive of the European Parliament and of the Council on aviation security charges, COM(2009) 217 final.

⁷¹ EasyJet refers in particular to the following judgments: *Aéroports de Paris* (case T-128/98, [2000] E.C.R. II-3929), *Corsica Ferries Italia* (case C-18/93, [1993] E.C.R. I-1783), *Irish Sugar* (case T-228/97, [1999] E.C.R. II-2969), and *United Brands* (case 27/76, [1978] E.C.R. 207).

⁷² EC Court of Justice 15 March 2007, case C-95/04, *British Airways v. the Commission*, [2007] E.C.R. I-2331, paragraph 145.

in a dominant economic position applies differentiation of charges in this way, this constitutes abuse. According to EasyJet, Schiphol can be deemed to be in a dominant economic position, partly because it is subjected to economic regulation in the Aviation Act.⁷³

5.3.3 The distinction between transfer and OD passengers in the case of the SSC

55. According to easyJet, making a distinction between OD passengers and transfer passengers in relation to the SSC is discriminatory.⁷⁴ EasyJet considers that such a distinction cannot be justified by the difference in costs incurred by Schiphol in performing the services for OD passengers and transfer passengers.
56. As a corollary, easyJet submits that the security services provided for transfer and OD passengers are essentially the same. According to easyJet, Schiphol even acknowledged in 2007 that the security costs for transfer passengers and OD passengers were approximately the same. It explains its submission that the service to OD passengers and transfer passengers is essentially the same by reference to the following process description.
57. OD passengers arrive at the landside concourse of the terminal and check in. Afterwards they pass through the centralised passport control area and enter the central part of the airside concourse. From here they move to the pier from which their aircraft will depart. Either the passengers pass through a central security check before entering a pier (this applies to piers B, C, H and M) or they enter the pier and are then subjected to a security check at the gate from which their aircraft is leaving (this applies to piers D, E, F and G).
58. EasyJet maintains that much the same procedure applies to transfer passengers. They arrive in the airside concourse of the airport through the gate. Before they board their connecting flight, they pass through the same security checks as the OD passengers. As in the case of the OD passengers, this may be either a centralised or a decentralised security check, depending on which piers they arrive at and depart from.
59. EasyJet also takes the position that the baggage security is the same for transfer and OD passengers.
60. On the basis of the above, easyJet considers that the security measures taken by Schiphol for OD passengers and transfer passengers are equivalent.
61. EasyJet adds that transfer passengers make more frequent use of decentralised security checks than OD passengers. As non-central security is more expensive than central security, it follows that the security services for transfer passengers are generally more expensive. EasyJet submits that it is not reasonable for Schiphol to apply a cross-subsidy from the SSC for OD passengers to the SSC for transfer passengers when the security costs for OD passengers are in fact lower than for transfer passengers.

⁷³ File number 200120/112.

⁷⁴ File number 200120/1, subsection 2.2.1.

62. Finally, easyJet submits that no other airport in Europe discriminates between OD and transfer passengers as regards the charges for passenger security. It bases its submission on data from IATA.

5.3.4 The distinction between transfer and OD passengers in the case of the PSC

63. EasyJet also considers that the distinction which Schiphol makes between OD and transfer passengers in relation to the PSC is discriminatory.⁷⁵ It submits that the difference between the charge for OD passengers and the charge for transfer passengers does not reflect the underlying cost differences.
64. In support of its argument, easyJet once again gives a description of the services provided to the different groups of passengers. The OD passengers arrive at Schiphol, check in at the check-in desks and then pass through passport control and thereafter a central security check. Afterwards they mix with the transfer passengers in the airside concourse of the airport. The transfer passengers arrive at Schiphol by air and after leaving the arrivals gate mix with the OD passengers. According to easyJet, the process for both categories of passengers is thereafter the same: either they pass through a centralised checkpoint before entering the pier of their destination or they pass through a checkpoint at the gate from which their aircraft is departing.
65. EasyJet then concludes that OD passengers, unlike transfer passengers, make use of Schiphol Plaza, the check-in desks and the central passport control. As against this, EasyJet maintains that the transfer passengers use the piers twice (on arrival and on departure). In connection with these differences EasyJet puts forward a number of arguments as to why the ratios described by it between the rates for OD passengers and transfer passengers do not reflect the ratio between the underlying costs of the service.
66. As regards the baggage handling EasyJet maintains that Schiphol uses a complicated baggage sorting system and that the capital expenditure on the system mainly benefits the transfer traffic at Schiphol. This is because the baggage of an OD passenger merely has to be transported from the check-in desk to the gate, whereas the baggage of a transfer passenger has to be transported from one gate to another and must pass through the sorting system in the process.
67. In addition, easyJet maintains that it actually helps to reduce costs for Schiphol because it makes much use of the H pier. This pier has minimal facilities and the perception of passengers leaving from this pier is that it provides lower quality.
68. EasyJet concludes that although it is unclear whether the overall PSC-related service which is provided to OD passengers is more expensive than the service provided to transfer passengers, there are sufficient elements that suggest that the cost difference between the PSC-related services to OD passengers and transfer passengers is not so great as to justify a charge for OD passengers that is 2.38 times as high as the charge for transfer passengers.

⁷⁵ File number 200120/1, section 2.2.2.

69. Finally, easyJet submits that benchmarking with other major European airports shows that many airports make no distinction between OD passengers and transfer passengers and that the maximum difference in the charge made by the other airports that do make a distinction between OD and transfer passengers is 1.60, whereas Schiphol applies a difference of 2.38.

5.3.5. Competitive disadvantage caused by lower charges for transfer passengers

70. Although easyJet takes the position that it is not necessary for it to have been placed at a competitive disadvantage in order to establish that there has been a violation of the prohibition of discrimination as contained in section 8.25d, subsection 2, of the Aviation Act,⁷⁶ it does indicate that its competitive position has been harmed by the lower charges for transfer passengers. In its Request EasyJet has made this argument only in respect of the SSC and not in respect of the PSC.
71. EasyJet submits, for example, that a mixed airline is able to mix the transfer and OD passengers in a single aircraft. As a result, a mixed airline company pays on average less in passenger-related charges per passenger than a company such as EasyJet, which focuses solely on the carriage of OD passengers. Mixed airlines of this kind can thus offset their losses on OD passengers against their profits on transfer passengers owing to the lower transfer charges. According to easyJet, companies that focus solely on the carriage of OD passengers are thus placed at a competitive disadvantage in relation to companies that carry both categories of passenger.⁷⁷
72. To support its argument that its competitive position has worsened, easyJet has provided figures on flight frequencies taken from the Official Airport Guide. These show, in its view, that the number of flights from Schiphol to destinations on which it competes with mixed airlines fell in 2009, whereas the total number of flights of the other airlines from Schiphol to these destinations actually rose in 2009.⁷⁸
73. EasyJet also indicates that mixed airlines focus primarily on the carriage of transfer passengers. As a result, OD passengers on a flight of a mixed airline provide an extra source of income on a flight that would in any event have been carried out for the carriage of transfer passengers, irrespective of the actual demand for the OD service. As a result, mixed airlines can service these OD passengers at a charge which is closer to the marginal cost price than EasyJet could do.⁷⁹
74. Finally, easyJet points out that owing to the lower transfer charges a significant proportion of the passengers are transfer passengers and that airlines which are able to mix transfer and OD passengers therefore carry a larger volume of passengers. As a result, they can deploy larger aircraft which have lower costs per seat. This too, it argues, creates a competitive disadvantage for EasyJet.⁸⁰

⁷⁶ See section 5.3.2.

⁷⁷ File number 200120/1, p. 7 and pp. 10/11.

⁷⁸ File number 200120/93. EasyJet flies to the following destinations from Schiphol: Milan, Liverpool, London, Bristol, Belfast, Edinburgh, Basel and Geneva.

⁷⁹ File number 200120/93, p. 2. See also file number 200120/116.

⁸⁰ File numbers 200120/93, p. 2 and 200120/112, p. 2.

5.3.6 Justification for discrimination between OD passengers and transfer passengers

75. EasyJet takes the position that a distinction in charges is in principle prohibited, unless it can be justified on the grounds that it is in the public or common interest. It has already been noted above that, according to easyJet, the difference in costs does not justify the present distinction in charges. In addition, easyJet mentions a number of arguments which, in its view, can also not serve as a justification for a distinction in charges.⁸¹
76. According to easyJet, the submission that the charges are not discriminatory because the charges for transfer passengers are in principle accessible to all airlines that carry transfer passengers cuts no ice. EasyJet argues that in practice only a few airlines, in particular Air France/KLM, can benefit from this.⁸² EasyJet submits that it cannot benefit from the lower transfer charges because operating transfer flights is not part of its business model.⁸³ EasyJet indicates in this connection that operating intercontinental flights implies another 'passenger value proposition' with a different operational model. According to easyJet, the barriers to gaining access to the transfer market are the need to obtain traffic rights (i.e. the rights to fly to a given country outside Europe), the greater complexity of operations and distribution, the need to purchase larger and more expensive aircraft, major investments in marketing and the overcapacity which exists in this market at present.
77. EasyJet also states that the distinction between charges for OD passengers and charges for transfer passengers cannot be explained by environmental considerations. Nor, in easyJet's view, can the difference in charges be explained by economies of scale in the market for transfer traffic.
78. Finally, easyJet argues that the discriminatory content of the charges can also not be justified by Schiphol's transport hub ('mainport') strategy.

5.3.7 Non-discrimination conclusion

79. EasyJet concludes that even if Schiphol were justified in applying different charges for OD and transfer passengers, this difference may be applied only within reasonable limits. According to easyJet, this is not the case here and the charges constitute prohibited discrimination.

5.4 Cost orientation and reasonableness

80. EasyJet points out⁸⁴ that although the Aviation Act states that charges need to be cost-oriented only for the security activities in their entirety, it follows from Article 5 of Regulation (EC) No. 300/2008⁸⁵ that the SSC must be cost-oriented precisely at individual level.⁸⁶ EasyJet

⁸¹ File number 200120/1, section 2.2.3.

⁸² File numbers 200120/1, pp. 10/11 and 200120/93.

⁸³ File number 200120/93, p. 5.

⁸⁴ File number 200120/1, sections 3.1 and 3.3.

⁸⁵ Regulation (EC) No. 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No. 2320/2002 OJEC (2008) L 97/72.

submits that priority should be given to this provision of EC law and that this therefore derogates from section 8.25d, subsection 4, of the Aviation Act.

81. According to easyJet, the SSC for transfer passengers entails higher costs than the SSC for OD passengers, whereas the charge for transfer passengers is lower than the charge for OD passengers. It follows, according to easyJet, that the present SSC for OD passengers is not cost-oriented. EasyJet argues that this is contrary to Article 5 of Regulation (EC) No. 300/2008.
82. EasyJet also states that according to the said provision no charge may be made for the cost of capital.⁸⁷ In so far as this is permitted, however, easyJet argues that the SSC now applied by Schiphol is too high.
83. EasyJet also invokes Article 7 of the Directive on airport charges.⁸⁸ According to easyJet, it also follows from this provision that the PSC too must be cost-oriented at individual level. It infers this from Article 7 (1) (d) of the said Directive, which provides that to explain the relationship between charges their underlying cost prices should always be made clear.⁸⁹
84. In addition, easyJet refers to a policy document on airport charges published by the International Civil Aviation Authority (referred to below as 'ICAO'), which would suggest that users of airports may be charged costs only in so far as they are directly imputable to them separately.⁹⁰
85. EasyJet compares the charges for OD passengers at Schiphol to those at other major airports in Europe.⁹¹ It concludes that Schiphol applies the highest rates for SSC and PSC together. It states that the difference between these charges and the next highest charge is almost 50%. EasyJet considers that the difference is so large that it cannot be justified by differences in the underlying cost structure of the different airports.

⁸⁶ Article 5 of Regulation 300/2008 reads: *'Subject to the relevant rules of Community law, each Member State may determine in which circumstances, and the extent to which, the costs of security measures taken under this Regulation to protect civil aviation against acts of unlawful interference should be borne by the State, the airport entities, air carriers, other responsible agencies, or users. If appropriate, and in conformity with Community law, Member States may contribute with users to the cost of more stringent security measures taken under this Regulation. As far as may be practicable, any charges or transfers of security costs shall be directly related to the cost of providing the security services concerned and shall be designed to cover no more than the relevant costs involved.'*

⁸⁷ File number 200120/1, section 3.3.1.

⁸⁸ See footnote 69.

⁸⁹ Article 7 (1) of the Directive reads: *'Member States shall ensure that the airport managing body provides each airport user, or the representatives or associations of airport users, every time consultations referred to in Article 6(1) are to be held with information on the components serving as a basis for determining the system or the level of all charges levied at each airport by the airport managing body. The information shall include at least: [...] (d) the revenue of the different charges and the total cost of the services covered by them'*.

⁹⁰ ICAO's policies on charges for airports and air navigation services, seventh edition, 2004, doc. 9082/07 (source: www.icao.int).

⁹¹ File number 200120/1, section 3.2

86. According to easyJet, the requirement of reasonableness implies that a connection exists between charges and the quality of services for which they are made.⁹² At Schiphol easyJet uses the H pier almost exclusively. It argues that the building costs of the H pier are lower than the costs of other piers. In addition, the H pier is fitted with a cheaper central security checkpoint, uses cheaper materials, is not equipped with toilets, shops and walkways and has smaller dimensions than the other piers. Nor are there any seats at the gates. Similarly, the H pier is not equipped with apron-drive airbridges, and passengers have to walk to the aircraft. Finally, easyJet argues that the baggage sorting system in the H pier is of a simpler type than at the other piers. In short, easyJet considers that the quality of the H pier is lower than that of the other piers, but that this difference in quality is not reflected in the SSC and PSC.

5.5 Transparency of the PSC and SSC for OD passengers

87. The last ground invoked by easyJet to challenge the lawfulness of the Charges relates to the manner in which the Charges are arrived at.⁹³ EasyJet submits that the documentation provided by Schiphol in the context of the consultation procedure on the basis of section 8.25e of the Aviation Act should contain information about the costs underlying the PSC and SSC for transfer and OD passengers. Once again easyJet refers in this respect to the Directive on airport charges,⁹⁴ which stipulates that such information must be provided. As this information is missing in the documents which are presented for consultation, easyJet argues that it is unable to determine the cost of the services which it receives at Schiphol. EasyJet submits that it was unable to ascertain from the information supplied to it during the consultation procedure how the fixed costs are divided among the charges made for the different categories of passenger. According to easyJet, there was also no analysis of the variable costs of services provided to passengers.

6. Schiphol's response

88. Schiphol has given its response to easyJet's Request,⁹⁵ and an answer to the further questions of the Board.⁹⁶ A summary of both of Schiphol's responses is given below.

6.1 Non-discrimination

89. Schiphol takes the position that the differentiation in charges which it applies in the case of OD and transfer passengers is explicitly permitted within the statutory framework of the Aviation Act. Schiphol points out that the Board has confirmed this principle in its decision in the KLM case.⁹⁷ Schiphol emphasises in this connection that a differentiation in charges is permitted in relation to the transport hub ('mainport') objective laid down in section 8.3 of

⁹² File number 200120/1, section 3.4.

⁹³ File number 200120/1, section 3.5.

⁹⁴ See footnote 69.

⁹⁵ File numbers 200120/16 and 200120/31.

⁹⁶ File numbers 200120/94 (response to questions), 200120/121 (further answers) and 200120/108 (response to easyJet).

⁹⁷ Decision of the Board of 25 October 2007 in case 200083 (KLM).

the Aviation Act, in particular in relation to attracting transfer traffic.⁹⁸ According to Schiphol, each of the Charges fulfils the statutory requirement of reasonableness and non-discrimination.

90. Schiphol does not share easyJet's views that it is evident from the statutory framework of the Aviation Act that the degree of differentiation in charges must be justified by the level of the costs incurred for different forms of service and that differences in charges are permitted only in so far as they are directly connected with the difference in the underlying costs. If these arguments were to be accepted, it would imply, in Schiphol's view, that every differentiation in charges applied by it would constitute prohibited discrimination. This would be contrary to the possibilities which the Aviation Act explicitly provides for such differentiation. This is evident, among other things, from the fact that the Charges need be cost-oriented only at the level of the overall costs incurred in connection with aviation activities in a given charging period and not at the level of costs of separate services.
91. Schiphol indicates that if the discrimination test used in the application of Article 82 of the EC Treaty or section 24 of the Competition Act is applied, the first test criterion, namely that discrimination can exist only if there is an equivalent service, is not fulfilled. Contrary to what easyJet alleges, the service provided to OD passengers and transfer passengers is not, according to Schiphol, equal or comparable. As far as a possible competitive disadvantage is concerned, Schiphol maintains that this must be distinguished from a mere impairment of profitability. Schiphol also considers that the test criterion of competitive disadvantage has not been fulfilled because the same charges are applied to all airlines that provide services to OD passengers. According to Schiphol, there is no competition between OD and transfer traffic (this involves passengers who have a different boarding place), so that a higher charge for OD passengers does not place the airlines that carry this category of passenger at a competitive disadvantage. A difference in charges cannot therefore be regarded as prohibited discrimination, since the latter condition is not fulfilled.
92. Schiphol has stated as a reason for the difference in charges that transfer passengers often have a number of choices when booking their flight.⁹⁹ In many cases, it is possible for them to book a direct flight. According to Schiphol a transfer flight is in these cases an imperfect substitute for a direct flight; the transfer at Schiphol costs the passenger more time, some inconvenience and a few risks such as the possibility of mislaying baggage, emitting a connecting flight and so forth. To be able to service these passengers, Schiphol considers that a lower price is necessary. In addition, transfer passengers have the possibility of choosing to transfer at an airport other than Schiphol for many destinations. For these two reasons, the price mechanism is, according to Schiphol, a very important instrument in providing a competitive service to these transfer passengers. These two factors are why it is

⁹⁸ Schiphol refers in this connection to the following passage from the Memorandum following the Further Report in relation to the Aviation Act (House of Representatives, 2004-2005 session, 28074, no. 12, p. 16): *'Product and charge differentiation by Schiphol Airport should be distinguished from any (price) discrimination. Subject to the requirement of cost orientation for aviation activities as a whole, the legislation allows the airport operator to differentiate between the individual charges within reasonable limits. This may be done, for example, in order to make efficient use of the capacity or the environmental noise area (noisy aircraft pay more, quiet aircraft less). The aircraft operator may also, for example, encourage measures to attract transfer traffic in the context of Schiphol's hub function'* (underlining added).

⁹⁹ File number 200120/94.

necessary, according to Schiphol, to make the distinction in charges applied by it. This necessity illustrates, according to Schiphol, the competitiveness of the market for airports with transfer facilities.¹⁰⁰ Schiphol also states that if airlines are to be profitable they must service both transfer and OD passengers in a single flight and cannot concentrate solely on the carriage of transfer passengers.

93. Finally, Schiphol submits that, even if there is held to be an equivalent service and if there is also held to be a competitive disadvantage, the obligation of Schiphol to achieve the transport hub ('mainport') objective of section 8.3 of the Aviation Act provides an objective justification for the difference in charges between OD passengers and transfer passengers.

6.2 Cost orientation and reasonableness

Cost orientation

94. As regards the applicability of Regulation (EC) No. 300/2008,¹⁰¹ which is cited by easyJet in its Request, Schiphol takes the position that this Regulation has not yet entered into force and is therefore not applicable. In addition, Schiphol states that it does not agree with easyJet's interpretation that under this Regulation the SSC must be separately cost-oriented. Schiphol also indicates that it considers that under this Regulation the costs of capital can be treated as costs relevant to security activities, contrary to what has been submitted by EasyJet in this respect.

Reasonableness

95. According to Schiphol, the reasonableness test on the basis of section 8.25d, subsection 2, of the Aviation Act means that there must be no disparity between the charges and what is provided for them. It bases its position in this respect on the Explanatory Memorandum to the Aviation Act. Schiphol adds explicitly in this connection that the reasonableness test does not, in its view, detract from the obligation of the operator to maintain the transport hub ('mainport') function of the airport.
96. According to Schiphol, there is no disparity between the charges and what is provided for them. Schiphol indicates in this respect that the assessment of the reasonableness requirement can or should be based on the case law of the European Community concerning abuse of a dominant position as a consequence of unfair charges. In that case it must be concluded that the charges for OD passengers are not excessive in relation to the economic value of the services provided. Schiphol referred in this connection in particular to the *United Brands*¹⁰² and *Scandlines* cases.¹⁰³

6.3 Consultation and transparency

¹⁰⁰ Schiphol indicates that its main competition in respect of transfer passengers comes from Paris Charles de Gaulle, London-Heathrow, Frankfurt, Madrid and Munich.

¹⁰¹ See footnote 85.

¹⁰² EC Court of Justice 14 February 1978, case 27/76, *United Brands Company and United Brands Continental BV v. the Commission*, [1978], p. 207.

¹⁰³ Case COMP/A.36.568/D3, *Scandlines Sverige AB v. Port of Helsingborg*, Commission decision of 23 July 2004.

97. As regards easyJet's allegation of a lack of transparency in the manner in which charges as of 1 April 2009 have been set, Schiphol takes the position that it has fulfilled its statutory transparency obligations. As regards easyJet's claim that Schiphol should supply cost specifications for each separate charge, Schiphol states that this requirement cannot be inferred from Dutch legislation or from any EC legislation such as the Directive on airport charges to which reference has already been made.

7. KLM's response

98. The Netherlands Competition Authority has decided to involve KLM N.V. (referred to below as 'KLM') in the present proceedings with regard to the question of whether easyJet has been placed at a competitive disadvantage by the fact that Schiphol differentiates between the charges for OD passengers and transfer passengers. The Netherlands Competition Authority has decided to do this because EasyJet indicates that it has been placed at a competitive disadvantage in relation to mixed airlines as a result of the differences between the charges for transfer and OD passengers. EasyJet refers in particular to KLM in this connection.¹⁰⁴ It is also relevant that KLM carries the majority of the transfer passengers who transfer at Schiphol.¹⁰⁵

99. In its response KLM first of all describes its business model.¹⁰⁶ KLM states that it applies the hub-and-spoke concept. This means that KLM does not focus exclusively on passengers who board at Schiphol, but also serves (transfer) passengers who board at other airports in Europe and elsewhere and then transfer at Schiphol. According to KLM, this increases the average occupancy rate of each aircraft and enables it to maintain a larger number of connections. By maintaining these connections KLM can serve a much greater area and also serve more passengers than an airline that focuses exclusively on OD passengers.

100. KLM also explains that transfer passengers are more price sensitive than OD passengers owing to the alternative travel options that are often available to them either directly or through an airport other than Schiphol. According to KLM, it is inconceivable that its ticket price could be raised without this resulting in a loss of market share. As a result of this price sensitivity and owing to the lower transport comfort on account of the transfer, transfer traffic can be provided competitively only by means of price incentives in combination with the quality of connection. KLM also presents data showing that the average ticket income from a transfer passenger on a European flight who is travelling to another European destination is [*confidential business information*]% lower than that from an OD passenger and that the average ticket income on a European flight from a transfer passenger travelling on an intercontinental flight is [*confidential business information*]% lower than that from an OD passenger.

¹⁰⁴ File number 200120/1, p. 7 at 'i'.

¹⁰⁵ According to information provided by Schiphol, KLM accounted for [*confidential business information*]% of the transfer traffic at Schiphol in 2007 and 2008 respectively (file number 200120/94).

¹⁰⁶ File number 200120/114.

101. Finally, KLM indicates that in levying the flight tax account is taken of the interests of Schiphol's role as a transport hub ('mainport') and that this is why this tax is not also imposed on transfer passengers.

8. Assessment by the Board

8.1 Introduction

102. In this section the Board assesses the objections raised by EasyJet in its Request to the grounds for the Charges. It deals successively with:
- the question whether the difference in charges (both the PSC and the SSC) for OD passengers and transfer passengers constitute a prohibited discrimination (section 8.4);
 - the question whether the PSC and SSC for OD passengers are cost-oriented and reasonable (section 8.5), and
 - the question whether Schiphol has been sufficiently transparent in the consultations on the Charges (section 8.6).
103. Before the Board answers these questions, it will first consider the admissibility of easyJet's application (section 8.2). The Board will then go on to define the context in which it will make its assessment (section 8.3). A summary is included at the end of this chapter (section 8.8), preceded by an observation about the procedure (section 8.7).

8.2 Admissibility

104. The Board holds that easyJet is a user within the meaning of section 8.25f, subsection 1, in conjunction with section 8.1, opening words and (i), of the Aviation Act. In addition, the Board holds that easyJet has submitted its Request within the period specified in section 8.25, subsection 1, of the Aviation Act. EasyJet's request is therefore admissible.

8.3 Delimitation of the assessment

105. In addition to the criteria in the Aviation Act, easyJet invokes a number of other criteria with which the Charges are, in its view, in conflict or which should influence the criteria applied by the Board. EasyJet bases its complaint on European and international legislation.¹⁰⁷ In sections 8.3.1 to 8.3.4 the Board will determine whether these documents should serve as a basis for the test in hearing the Request.
106. In addition, easyJet places its complaint about non-discrimination in a broader context, the tenor of which is, according to easyJet, that Air France/KLM is given preferential treatment and that this should be taken into account by the Board in its assessment (see section 5.3.1). This involves the advice of the Alders Committee, Schiphol's alliance with Aéroports de Paris and the flight tax. The Board will deal with this in section 8.3.5.

¹⁰⁷ See section 5.3.2 and 5.4.

8.3.1 Test for compliance with Regulation (EC) No. 300/2008 on civil aviation security

107. In its Request easyJet invoked Regulation (EC) No. 300/2008 (referred to below as ‘the Regulation’),¹⁰⁸ in particular its Article 5. Schiphol points out that this Regulation does not yet apply and that it cannot therefore be invoked. The Board endorses this position. According to Article 24, paragraphs 1 and 2, of the Regulation, Article 5 of the Regulation does not become applicable until 24 months after the entry into force of the Regulation. According to Article 24, paragraph 1, the entry into force is on the twentieth day following publication. As publication took place on 9 April 2008, the Regulation entered into force on 29 April 2008 and Article 5 of the Regulation will not become applicable until 29 April 2010. The Board will therefore not test the Charges for compliance with this Regulation, as the Regulation is not yet applicable at the moment when the Charges are assessed as a result of the Request.

8.3.2 Test for compliance with Directive 2009/ 12/ EC on airport charges

108. In its Request EasyJet invokes the Directive on airport charges (referred to below as ‘the Directive’).¹⁰⁹ This was adopted by the Council of the European Union on 11 March 2009. According to Article 13, this Directive must have been transposed into national law on 15 March 2011. Under section 8.25d, subsection 1, of the Aviation Act and Article 3, paragraph 4, of the Decree the present Charges apply until no later than 1 November 2010. Any Dutch legislation which is yet to be published by way of implementation of the Directive will very probably not have any effect during the period of charges to which easyJet’s Request relates. The Board concludes that the Charges cannot now be tested for compliance with the Directive in question. Nor is it necessary to rule on whether the provisions of the Directive invoked by EasyJet will have direct effect after the expiry of the transposition period.

8.3.3 Test for compliance with the Proposal for a Directive on aviation security charges

109. Nor will the Board test the Charges below for compliance with the Proposal for a Directive on aviation security charges.¹¹⁰ This is a proposal for a directive which the Commission has presented to the European Parliament and the Council of the European Union. Nor does the report of the Commission on security charges¹¹¹ cited by easyJet have any binding force. The Board will not therefore review the Charges in the light of this report.

8.3.4 Test for compliance with ICAO’s policies on charges for airports and air navigation services

110. EasyJet also invokes an ICAO document entitled ‘ICAO’s policies on charges for airports and air navigation services.’¹¹² The Board points out, following the ruling of Rotterdam District Court,¹¹³ that the ICAO criteria invoked by easyJet are not of a binding nature and do

¹⁰⁸ See footnote 85.

¹⁰⁹ See footnote 69.

¹¹⁰ See footnote 70.

¹¹¹ Ibid.

¹¹² See footnote 90.

¹¹³ Judgment of Rotterdam District Court of 23 January 2009 in cases AWB 07/4427 and 07/4439 MEDED-T1, section 2.4: ‘The ICAO policies mentioned by Schiphol do not necessitate a broader interpretation of the set-off provisions of the Aviation

not therefore constitute treaty rules binding on all persons. The Board will not therefore test the Charges for compliance with these criteria.

8.3.5 Other arguments of easyJet

111. As regards the advice of the Alders Committee and the alliance between Aéroports de Paris¹¹⁴ and Schiphol, the Board holds that it does not have the power to rule on this or to take this into account in arriving at its ruling. The Board will test Schiphol's Charges, in so far as easyJet has complained about them, for compliance with the requirements set by the Aviation Act for Charges.
112. As regards the flight tax,¹¹⁵ the Board points out that this is a levy imposed by government and does not form part of the Charges. The Board is not competent to rule on the flight tax or on its alleged discriminatory nature or to include this in its assessment of the Charges.

8.4 Non-discrimination

113. In this section the Board will assess whether Schiphol's charges are discriminatory. In accordance with the framework for testing for non-discrimination,¹¹⁶ the Board will first test the equivalence of the PSC and SSC (sections 8.4.1 and 8.4.2). As will be explained there, the Board comes to the conclusion that the SSC service provided to OD passengers and transfer passengers is equivalent. This is why the Board will assess in relation to the SSC whether the difference between the rates for OD passengers and transfer passengers places easyJet at a competitive disadvantage in relation to other airlines (sections 8.4.3 and 8.4.4).

8.4.1 PSC assessment: equivalence of service

114. EasyJet challenges the distinction made by reference to the category of passenger in the passenger-related charges, namely the distinction between OD and transfer passengers. To determine whether there are equivalent services in this case, the board will make a comparison between the services in relation to both categories of passenger and the costs thereof. Relevant factors in this connection include the deployment of personnel and means of production.
115. The means of production used to provide the service for both categories of passenger can be broadly divided into landside and airside infrastructure. The landside infrastructure includes Schiphol Plaza, the check-in desks, the coach transport to and from the terminal, the access roads and related facilities such as tunnels, crossings and green spaces.¹¹⁷ It should be noted that this includes more facilities than mentioned by easyJet in its Request.¹¹⁸ The airside infrastructure includes the terminal, lounges, central shopping area

Act and of the Operating Decree. As these policies are recommendations and are not treaty rules binding on all persons, the interpretation in accordance with the Convention as advocated by Schiphol is not relevant.'

¹¹⁴ See section 5.3.1.

¹¹⁵ Ibid.

¹¹⁶ See section 4.3.

¹¹⁷ Allocation System of Schiphol Group Aviation Activities at Schiphol Airport, Annex 4, p. 24.

¹¹⁸ See section 5.3.4.

and the piers. The services which Schiphol provides to OD passengers and transfer passengers largely overlap in terms of the airside infrastructure: OD passages and transfer passengers mix in the piers and in the central shopping area behind the customs posts and have equal opportunities to use the facilities there. This is not the case as regards the landside infrastructure. Transfer passengers do not generally use the landside infrastructure because they arrive in the airside area and depart from this area for their next destination. This is unlike the OD passengers, who arrive in the landside area.

116. The calculation model used by Schiphol also shows that OD passengers make use of different means of production than transfer passengers.¹¹⁹ This calculation model shows that the average costs per OD passenger are [*confidential business information*] than the average costs of a transfer passenger.
117. There is therefore a clear distinction in the service provided by Schiphol to the two categories of passenger for the PSC as regards the use of the landside infrastructure. This concerns two distinct forms of service, for which different means of production are required and which entail different costs.
118. The Board therefore considers that the PSC service to OD passengers and transfer passengers is not equivalent. The application by Schiphol of different PSCs for OD passengers and transfer passengers does not therefore constitute an infringement of the non-discrimination obligation to which Schiphol is subject under section 8.25d, subsection 2, of the Aviation Act.

8.4.2 SSC assessment: equivalence of service

119. EasyJet also challenges the distinction made by reference to the category of passenger in the security service charges.
120. The service in question relates to the security of passengers and their baggage, as referred to in section 8.25d, subsection 4, of the Aviation Act. Both OD passengers and transfer passengers are checked at detector gates and/or are searched manually. Baggage and other items of property are scanned by means of X-ray machines. The place where the passengers and their hand luggage are checked can vary. The check is carried out centrally in a number of piers and non-centrally in the other piers. In relative terms, transfer passengers are more likely to be checked non-centrally than OD passengers.
121. The Board holds that there is a greater degree of equivalence in the services provided to OD and transfer passengers in the case of the SSC than in the case of the PSC. The security checks are the same for both categories of passenger. Similarly, the same security standards are applied to both categories of passenger.¹²⁰

¹¹⁹ This is a reference to the model for allocating costs to transfer and OD passengers drawn up by Schiphol at the request of the Board for the purpose of the test of reasonableness (file number 200120/22). See also section 8.5.3.2.

¹²⁰ See chapter 4 of the Annex to Regulation (EC) No. 2320/2002 and section 37f, subsection 1, of the Aviation Act. Act of 15 January 1958, Bulletin of Acts and Degrees 1958, 471, as amended.

122. Although there may be some cost difference according to the place where the security checks are carried out, the Board considers that the fact that the nature of the acts themselves does not vary from passenger to passenger is decisive. It is precisely this fact which the Board considers important in arriving at its conclusion that equivalent services are provided in this case.
123. As the services provided for the SSC are highly comparable, the Board concludes that the services to OD passengers and transfer passengers in respect of security checks constitute equivalent services.

8.4.3 Framework for assessing competitive disadvantage

124. As explained in section 4.3, where dissimilar charges are made for equivalent services it is necessary to check whether the application of different charges places a party at a competitive disadvantage. Only where the distinction is based on nationality and identity is no separate investigation necessary for the second condition. The Board finds that the distinction in charges relevant in this case does not relate to the nationality or identity of (certain) users of Schiphol. Nor is this claimed by easyJet. It follows that the Board will examine whether EasyJet has been placed at a competitive disadvantage by the fact that Schiphol applies different SSCs for transfer and OD passengers.
125. EasyJet has expressly challenged the assessment framework applied by the Board.¹²¹ EasyJet submits *principally* that the discrimination test should consist solely of a test of the equivalence of the services. This is said to result from the European non-discrimination principle, the European documents discussed in sections 8.3.1 to 8.3.3 and four judgments of the European Court of Justice. EasyJet therefore maintains that the requirement of being placed at a competitive disadvantage should not be treated as a separate condition for being able to conclude that a distinction in charges results in a prohibited discrimination (except where there is an objective justification).
126. The Board holds as follows in this connection. EasyJet fails to recognise that the interpretation of Article 82 (c) of the EC Treaty determines the criterion. According to the literal text of the Treaty, this provision contains the requirement of being placed at a competitive disadvantage.¹²² In the present case there are no circumstances that would justify the assumption that this requirement has been fulfilled. EasyJet's argument based on the other rules of European law cannot succeed. This is apparent simply from section 8.3. The argument based on a 'general principle of European law' and the judgments cited in support of this argument cannot succeed if only because none of the judgments in question relates to European competition law.
127. Alternatively, easyJet submits that once the equivalence of the compared services has been determined, it can be treated as a given that it has been placed at a competitive disadvantage. The Board has already shown in section 4.3 and in the previous margin numbers that easyJet's submission cannot be accepted. Nor may it be inferred from the

¹²¹ See section 5.3.2. File number 200120/106, section 1.1.12.

¹²² See margin number 33.

British Airways judgment¹²³ to which easyJet refers¹²⁴ that in the case of equivalent services one or more customers or suppliers can, by definition, be said to be placed at a competitive disadvantage. It must always be made clear what a disruption of the capacity to compete consists of in a specific case and it will have to be shown that there is a causal connection with the dissimilar treatment of equivalent services.

128. It is up to the applicant to show that it has been placed at a competitive disadvantage. This is also apparent from the Aviation Act and the General Administrative Law Act which are applicable in this case. In the context of a Request under section 8.25f of the Aviation Act, the applicant must show, pursuant to section 4:2 of the General Administrative Law Act that it has been placed at a competitive disadvantage in relation to other airlines and that this disadvantage is a consequence of the application of a differentiation in charges. EasyJet must therefore show both the alleged competitive disadvantage and the causal connection between the differentiation in charges and the relevant disadvantage.
129. For these reasons the Board will therefore continue to apply the assessment framework adopted in section 4.3 for discrimination within the meaning of section 8.25d, subsection 2, of the Aviation Act. This will be applied in the following sections in order to test whether the distinction between transfer passengers and OD passengers in Schiphol's SSC is in conflict with section 8.25d, subsection 2, of the Aviation Act.

8.4.4 SSC assessment: placing at a competitive disadvantage

130. In view of the Board's opinion that Schiphol's security services to OD passengers and transfer passengers are equivalent, the Board will examine in this section whether the lower security charges for transfer passengers place EasyJet at a competitive disadvantage.

8.4.4.1 Competitive disadvantage

131. EasyJet submits that owing to the charges set by Schiphol it is placed at a competitive disadvantage in respect of the destinations which it serves from Schiphol and on which it competes for OD passengers with mixed airlines such as KLM.¹²⁵ According to easyJet, cross-subsidisation occurs in the case of mixed airlines because they are able to carry OD and transfer passengers in a single aircraft. As a result, a mixed airlines pays, on average, a lower charge per passenger than airlines that concentrate solely on carrying OD passengers. As a result, a mixed airline could cut its ticket prices on routes on which it fears competition, thereby placing easyJet (which carries only OD passengers) at a competitive disadvantage.
132. EasyJet mentions two other factors which play a role in this connection. First of all, according to easyJet, mixed airlines always implement flights on which they carry transfer passengers and therefore regard OD passengers as an 'extra' whom they can service at

¹²³ EC Court of Justice 15 March 2007, case C-95/04 P, *British Airways v. the EC Commission*, [2007] E.C.R. I-2331, paragraphs 144-145.

¹²⁴ See section 5.3.2.

¹²⁵ See section 5.3.5.

charges below the integral cost price. Second, easyJet maintains that airlines that are able to mix the two categories of passengers are able to attract larger numbers of passengers and hence deploy larger aircraft, thereby reducing the costs per aircraft seat. Finally, in support of its submission that it is placed at a competitive disadvantage by the charges set by Schiphol, easyJet has argued that the number of flights operated by easyJet to the destinations which it serves from Schiphol is declining in 2009, whereas the number of flights of the other airlines together to these destinations is growing.

133. On the basis of easyJet's complaint, the Board notes that easyJet does not claim to be in competition with mixed airlines for transfer passengers. EasyJet does not provide any connections involving a transfer at Schiphol and therefore does not compete with airlines that do offer indirect connections of this kind.¹²⁶ The competitive disadvantage which easyJet claims to suffer as a result of the charges set by Schiphol does not therefore in any event relate to this. In this respect, easyJet does not therefore experience any competitive disadvantage from the fact that Schiphol applies a lower SSC for transfer passengers than for OD passengers.¹²⁷
134. The Board also notes that a distinction must be made between a competitive disadvantage and a mere impairment of profitability. The mere fact that easyJet (and other airlines that carry OD passengers) are confronted by an OD charge that exceeds the transfer charge does not automatically mean that the competitive position is distorted as a result. A higher charge constitutes a disadvantage because it impairs profitability, increases the level of costs or depresses sales in so far as the cost increase is passed on in the ticket price, which impairs profitability in cases where the total cost remains at the same level. However, as all the airlines that carry OD passengers are confronted by the same problem this does not affect easyJet's competitive position in relation to other airlines, just as an increase in the price of fuel would not do so.¹²⁸

8.4.4.2 Explanation of the difference in charges

135. As Schiphol applies different SSCs for OD passengers and transfer passengers, easyJet considers that it is placed at a competitive disadvantage. EasyJet, Schiphol and KLM¹²⁹ all indicate that this distinction in charges is due to the different price sensitivities of OD passengers and transfer passengers. All three parties to this dispute also agree that transfer passengers are more price sensitive than OD passengers.¹³⁰ Where charges are increased the fall in demand is larger in the case of a high price elasticity than in the case of a low price elasticity. The price elasticity of transfer passengers is greater because they can switch to a flight through a different transfer airport relatively easily in the case of a price increase.

¹²⁶ EasyJet itself indicates that the competition between airlines takes place on 'city pairs' (see file number 200120/93, p. 3).

¹²⁷ Cf. Airbridge Cargo decision (see footnote 50), margin number 57.

¹²⁸ This also applies to the flight tax.

¹²⁹ See margin numbers 54, 92 and 100.

¹³⁰ Ibid. See also SEO/'Significance and effect of tax variants on Dutch welfare', 2007-96 and 07014-M07 report. August 2007 (www.seo.nl, file number 200120/131), pp. 5 and 15, and Connekt, 'Development of the hub concept', in the context of the study entitled 'Optimisation of aviation networks' by Connekt Foundation, December 2001 (file number 200120/127), p. 9.

136. The Board considers it relevant that airlines themselves choose their business model. By choosing a particular business model, airlines commit themselves to focusing on particular passenger categories such as OD passengers and transfer passengers. In making this choice they take account of the characteristics of these passenger categories, including their price sensitivity. In their business model airlines also make a series of other decisions (on routes, airports, fleet composition, price philosophy and so forth) in order to create a sales and cost profile that will make a profitable operation possible. EasyJet has decided to focus only on OD passengers and to base its business model on them. Other airlines have made different choices in this respect.
137. As Schiphol accommodates various types of airlines, both OD passengers and transfer passengers make use of Schiphol. This is why Schiphol takes account of the characteristics of both categories of passengers when setting its charges and makes an integrated assessment based on the demand characteristics of both categories of passengers.¹³¹ In setting its charges Schiphol therefore focuses – as do the airlines themselves – on these characteristics, including the price elasticities of the different categories of passengers. The result of this assessment is the application of different charges for OD passengers and transfer passengers. Schiphol must therefore make efforts to avoid losing a disproportionate number of transfer passengers.¹³² The Board observes in this connection that the profit which Schiphol can make on the total of the security activities is limited to the weighted average cost of capital (WACC) as a result of the cost orientation referred to in section 8.25d, subsection 4, of the Aviation Act. The users cannot therefore be said to be exploited. The Board notes that it has not been shown in what other way Schiphol benefits from the differentiation in the SSC.
138. As regards easyJet's arguments referred to in margin numbers 131 and 132, namely that it is placed at a competitive disadvantage by the SSC set by Schiphol, the Board holds as follows. In so far as there are advantages for mixed airlines and disadvantages for OD airlines as argued by easyJet, it is plausible that these result from the difference in price sensitivities of the categories of passengers in respect of which the airlines have themselves made choices through their business model. In this respect each business model has its own typical advantages and possibilities, but also disadvantages and limitations. The Board holds that no plausible case has been made for the existence of a causal connection between the points to which easyJet refers and the differentiation in charges which Schiphol makes in the case of the SSC. Nonetheless, the Board will deal briefly below with the four arguments made by easyJet.

¹³¹ Schiphol also makes provisions to meet the wishes of various types of airline. For example, Schiphol has constructed the H pier, in consultation with easyJet and others, for airlines that focus solely on the transport of OD passengers. The H pier has been built in such a way that short turnaround times can be achieved, enabling the aircraft to depart sooner. This is an important part of easyJet's strategy. EasyJet generally uses the H pier at Schiphol.

¹³² Schiphol indicates that transfer passengers in the commercial field generate on average [*confidential business information*] income than OD passengers, i.e. their expenditure is on average [*confidential business information*] than that of transfer passengers (file number 200120/95).

8.4.4.3 EasyJet's arguments

Subsidy for OD passengers from transfer traffic in the case of mixed airlines

139. EasyJet's argument that mixed airlines are able to subsidise OD passengers owing to the lower SSC for transfer passengers and hence to offer lower ticket prices for OD passengers is assessed by the Board as follows. The mere fact that passengers contribute to a differing extent to the covering of the costs is a general economic phenomenon. The extent to which different customer groups contribute to the covering of costs is not relevant to assessment of the question whether a party is placed at a competitive disadvantage. An airline chooses its customer groups and hence the potential contribution which each customer group can make to profits precisely by its choice of business model. The airlines base their price strategy on the customer groups on which they focus, taking account of the price elasticities of the customer groups which they serve. As explained above, this applies not only to the airlines but also to Schiphol.
140. Quite apart from this, the Board notes that it is apparent from information from KLM that the average ticket income per transfer passenger¹³³ on a European flight connecting with an intercontinental flight is [*confidential business information*]% lower than the average ticket income per OD passenger on a European flight. The average ticket income for each transfer passenger whose second flight is also a European flight is [*confidential business information*]% lower than that per OD passenger.¹³⁴ According to the Board, this indicates that on average transfer passengers make a lower contribution than OD passengers to the covering of costs. This is also explicable by the fact that an indirect connection (i.e. a transfer connection) is viewed by passengers as a product of inferior quality compared with a direct connection.¹³⁵ Transfer passengers are confronted with longer travelling times, the inconvenience of waiting times and the risk of missing the connection and losing baggage. As a result, they will not be prepared to pay a price equal to that of a direct flight (an OD flight).
141. In addition, flights are also often available through alternative transfer airports. This means that the mixed airlines feel stronger downward pressure on prices in respect of transfer passengers than in respect of OD passengers, as easyJet KLM and Schiphol have all indicated. It should be noted that KLM has chosen a business model based on a worldwide network of connections, as a result of which it focuses on a category of passengers whose contribution to covering costs is smaller in relative terms. By contrast, easyJet has chosen a business model that focuses on European routes used by many OD passengers. This enables easyJet to focus on a category of passenger who can make, in relative terms, a larger contribution to covering costs. It is plausible that easyJet is, in this respect, in a more favourable position than, for example, KLM.

¹³³ This concerns the part of the ticket price which constitutes turnover for KLM, i.e. after deduction of the moneys to be remitted (including airport charges).

¹³⁴ File number 200120/114, annex, p. 3.

¹³⁵ Ibid. p. 2.

Mixed airlines regard OD passengers as extra

142. As regards easyJet's argument that mixed airlines such as KLM view OD passengers as an 'extra' in relation to transfer passengers, the Board would note as follows. The Board points out that easyJet has not explained how such conduct on the part of a mixed airline could be the consequence of Schiphol's structure of charges.
143. Quite apart from this, the Board considers it unlikely that a mixed airline such as KLM would regard the OD passengers as an extra. KLM examines the willingness to pay of both categories of passenger and prices its product accordingly; neither category of passenger can be regarded as an extra (incremental) group in relation to the other. Both categories are an integral part of the Air France/KLM business model. Quite apart from that, it is evident, as already noted, that the average ticket price of transfer passengers is lower than that of OD passengers and that this provides no support whatsoever for easyJet's submission that KLM sells tickets to OD passengers at a price below the 'integral costs'.

Mixed airlines able to operate larger aircraft

144. As regards easyJet's argument that mixed airlines can attract larger numbers of passengers by mixing transfer and OD passengers and is thus able to operate larger aircraft and accordingly have lower costs per aircraft seat, the Board holds as follows. In respect of this argument too, the Board would point out that easyJet has not explained how such conduct on the part of a mixed airline would be a consequence of Schiphol's structure of charges.
145. Quite apart from this, the Board takes the view that if mixed airlines are able to operate larger aircraft this is a consequence of the business model they have chosen. Mixed airlines use a hub airport where they collect passengers in order to carry them to their final destination. A mixed airline maintains a network of destinations for this purpose, which would not be profitable if the airline were to serve only OD passengers since the volume of OD passengers is too limited to serve all destinations. Operating a business model that is focused in part on providing services to transfer passengers requires extra effort and investments because all kinds of measures have to be taken to make transfer traffic possible. This may involve, for example, baggage handling, extra marketing efforts and transfer desks.¹³⁶ This strategy means that there may be larger passenger numbers, as a result of which mixed airlines can operate larger aircraft. The Board concludes that in so far as mixed airlines can use larger aircraft with lower cost per seat as a result of mixing transfer passengers and OD passengers, this is a consequence of the strategic choice made by such an airline to carry transfer passengers and not a consequence of the structure of charges applied by Schiphol.

EasyJet faced with decline in number of flights

146. EasyJet has submitted figures about flight frequencies showing that the total number of flights to destinations served by it from Schiphol is lower in 2009 and 2008. This is despite

¹³⁶ As stated by KLM in answer to a question during the discussion with the Netherlands Competition Authority on 12 June 2009.

the fact that the total number of flights of the other airlines which fly to these destinations from Schiphol is actually rising in 2009. According to easyJet, this demonstrates that it has been placed at a competitive disadvantage in relation to the mixed airlines. The Board cannot agree with easyJet's conclusion in this respect.

147. First of all, in the opinion of the Board easyJet ignores the fact that the market share expressed in terms of the number of flights is not necessarily a good indicator of market share because an airline makes a decision on the number of flights it operates. Second, the Board considers that the market share of airlines can be influenced by very many different factors. In the present case, various other factors can be identified which could have accounted for a change in market share and which are considered to be of greater importance than Schiphol's structure of charges.
148. Quite apart from this, the Board notes as follows. First of all, the ratio of charges (for transfer passengers compared with OD passengers) is no different in 2009 than in 2008 and also does not differ from the ratio in 2007 and 2006, for which easyJet has also provided figures. Throughout this entire period the ratio of the SSC for OD passengers to the SSC for transfer passengers remained constant.¹³⁷ EasyJet has not therefore established a causal connection between these figures and the differentiation in charges applied by Schiphol and developments in market shares. In addition, the Board notes that the figures for the 2006-2008 period show that easyJet's market share expressed in numbers of flights from Schiphol, remained very stable at approximately [*confidential business information*]%. Finally, the Board notes that as the figures presented for 2009 include a number of uncertain factors,¹³⁸ it is not possible to ascertain from them whether easyJet's market share has worsened in 2009. The Board concludes that on the basis of the figures it is not possible to determine whether easyJet could have been placed at a competitive disadvantage by the distinction in the SSC made by Schiphol.
149. The Board's conclusion is that a plausible case has not been made for the existence of a connection between the difference in the SSC and a possible decline in easyJet's market share in flights from Schiphol.

8.4.4.4 Concluding remarks

150. Finally, the Board holds as follows. Even if there were to be a reason for bringing the SSC for OD passengers and transfer passengers closer together, any such action would be bound to result in the loss of a relatively large number of transfer passengers for Schiphol. It is important that the two charges should constitute 'communicating vessels' owing to the cost orientation obligation in respect of the total level of security activities and the fact that only two charge units have been established for security costs. This means that if Schiphol

¹³⁷ Namely 1.78. In this period the ratio of the PSC for OD passengers to the PSC for transfer passengers also remained constant, namely 2.38.

¹³⁸ EasyJet explains that these data were generated at the start of 2009 from the Official Airport Guide. The figures which airlines report for 2009 are therefore not yet final. In addition, the Board notes that it is evident from these figures on flight frequencies and the figures which EasyJet presents on passenger numbers that EasyJet is substantially increasing the occupancy rate on these routes. A lower flight frequency is therefore no indication in itself that the relative competitive position has worsened in terms of the number of passengers carried.

were to make the SSC for transfer passengers and OD passengers the same, as desired by easyJet, this would initially create a charge higher than the current SSC for transfer passengers and lower than the present SSC for OD passengers. In view of the greater price sensitivity of transfer passengers, which has been acknowledged by all parties to the present dispute, this could mean that the fall in the number of transfer passengers would so far exceed the rise in the number of OD passengers that the total number of passengers handled at Schiphol might fall.

151. If a large number of transfer passengers were to indeed avoid Schiphol on account of a higher SSC, the costs not covered as a result would have to be recovered from a smaller number of passengers, including what would then be a larger number of OD passengers in relative terms. As a result, the SSC for all passengers, including the OD passengers, might rise. If easyJet's objections to the Charges (in this case the SSC) were to succeed, it might to this extent be put in a worse position as a result of its Request than it is now in.
152. In summary, the Board concludes that, in view of the agreement for the services relating to the SSC, the security services provided in respect of OD passengers and transfer passengers are equivalent services. However, it is not evident from the Board's inquiries that the difference in the SSCs applied by Schiphol to OD passengers and transfer passengers places easyJet at a competitive disadvantage in relation to other airlines. Schiphol's application of different SSCs for OD passengers and transfer passengers does not therefore constitute an infringement of the non-discrimination obligation to which Schiphol is subject under section 8.25d, subsection 2, of the Aviation Act.

8.4.5 Non-discrimination conclusion

153. The Board comes to the following conclusion concerning easyJet's complaint that the PSC and the SSC are discriminatory.
154. As regards the PSC, the Board concludes that the services are not equivalent. The application of different PSCs for transfer passengers and OD passengers does not therefore constitute an infringement of the non-discrimination obligation to which Schiphol is subject under section 8.25d, subsection 2, of the Aviation Act.
155. As regards the SSC the Board concludes that the services are equivalent. However, as Schiphol applies different charges for transfer passengers and OD passengers, easyJet is not placed at a competitive disadvantage in relation to other airlines. The application of different SSCs for transfer passengers and OD passengers does not therefore constitute an infringement of the non-discrimination obligation to which Schiphol is subject under section 8.25d, subsection 2, of the Aviation Act.
156. In view of this finding, the Board need no longer consider Schiphol's arguments that the distinction in charges is objectively justified or easyJet's objections to these arguments.¹³⁹

¹³⁹ See margin number 93 and section 5.3.6.

8.5 Reasonableness

8.5.1 Introduction and cost orientation

157. In this section the Board will assess whether the passenger-related charges fulfil the requirement of reasonableness. By way of introduction, the Board will also pause and consider the requirement of cost orientation.
158. As indicated in section 5.4, easyJet casts doubt on whether the Charges are cost-oriented in keeping with European and international legislation, which is interpreted by easyJet as meaning that charges should be cost-oriented at the level of the separate charges.
159. The Board will disregard easyJet's request to test the cost orientation of the Charges at their separate level.¹⁴⁰ The Aviation Act states that the cost-orientation obligation applies only to the total level of the aviation activities or security activities.¹⁴¹ Quite apart from the question of the precise meaning of the European legislation cited by easyJet, it is sufficient to point out that the European legislation cited by easyJet is not yet in force or, in any event, not yet applicable (see also section 8.3 above).
160. As regards easyJet's complaint that the WACC for the SSC has been set too high, the Board considers that easyJet has not sufficiently explained its complaint. In its consultation documentation Schiphol has explained at length how the WACC was arrived at.¹⁴² EasyJet has not indicated in what respect the calculation of the WACC by Schiphol is incorrect. Nor has the Board seen any evidence that the calculation applied by Schiphol in the consultation documentation is different from the calculation prescribed in the Decree.¹⁴³

8.5.2 Framework for assessment of reasonableness

161. As regards the reasonableness of Schiphol's charges, the Board notes that this requirement relates to the amount of each separate charge and not to a difference between two charges (see section 4.4). A difference in the level of two charges should be tested within the framework of the non-discrimination obligation (see section 8.4). The Board will therefore disregard easyJet's request to test the reasonableness of the difference between the SSCs for transfer passengers and OD passengers.
162. In addition, easyJet establishes a direct relationship between the charge and the costs of a separate service in its complaint about reasonableness. On this point the Board would observe as follows. It is evident from the Aviation Act that the legislator has imposed a cost orientation obligation at the level of the total aviation activities and total security activities respectively. It follows that Schiphol is permitted to differentiate between charges (see section 4.2). The scope which the statutory framework provides for differentiation in charges means that there is no direct relationship a priori between a separate charge and

¹⁴⁰ See section 5.4

¹⁴¹ See section 4.2.

¹⁴² File number 200120/1, annex 2.

¹⁴³ See footnote 32.

the underlying costs. The Board therefore disregards easyJet's submission that owing to the requirement of reasonableness a separate charge should be directly related to the underlying costs.

163. EasyJet refers in its complaint to three methods that can be used to assess the reasonableness of the charges.¹⁴⁴ These are the three methods mentioned by the legislator itself, and they will also be applied in the following section.¹⁴⁵ The Board would observe in this connection, however, that Schiphol's freedom to differentiate charges as described in the above-mentioned marginal number imposes limitations on the interpretation of the results of the three methods of assessing reasonableness. This applies in particular to the comparison of the charge with the costs, as no direct relationship can be established a priori between the charge and the underlying costs.
164. The three methods mentioned also have a number of more specific limitations. The international benchmark method is hampered first of all by the fact that other airports too make frequent use of differentiation in charges and define their services differently,¹⁴⁶ and because it is not clear to what extent the costs are covered at other airports from sources other than the charges. The comparison of a charge with the average costs per passenger is limited not only by the freedom which Schiphol has to differentiate in charges but also by the method of cost allocation. Various methods can be used for this purpose, all of which are based on prudentially adequate principles,¹⁴⁷ and the results of which can vary within certain limits. A comparison of the quality of the service also encountered limitations since quality indicators often provide only a limited reflection of overall quality.
165. Owing to the limitations of each method, it is important to interpret the results with caution. The legislator has not recorded decisive importance to any of the three methods. Each method can provide an indication of whether a charge is reasonable or unreasonable, but is not in itself decisive. The Board will use the findings of the three methods, together with its assessment of the quality of the H pier, in arriving at a ruling on the reasonableness of the charges. If the findings warrant this, the Board will subject them to further analysis.

8.5.3 Test of reasonableness

8.5.3.1 International comparison of charges

166. In this sub-section the passenger-related charges of Schiphol are compared with those of other international airports.

¹⁴⁴ File number 200120/1, section 3.1.1.

¹⁴⁵ See section 4.4

¹⁴⁶ See SEO, Benchmark airport charges and government levies for 2003, 2006 and 2007, number 2008-24, March 2008 (www.seo.nl, file number 200120/128), chapter 5, and SEO, Benchmark airport charges and government levies for 2003, 2007 and 2008, number 2009-11, March 2009 (www.seo.nl, file number 200120/130), chapter 4.

¹⁴⁷ Article 8, paragraph 6, of the Decree states that the allocation of costs and revenues in the allocation system must be carried out by reference to prudentially acceptable principles. It goes without saying that the calculation of the average costs per passenger should also be made as far as possible by reference to these principles.

167. The legislator has indicated that a benchmark should consist of ‘leading airports’ and ‘other airports in comparable market circumstances’.¹⁴⁸ On this basis, the Board used as a benchmark in the KLM decision¹⁴⁹ the following airports: Charles de Gaulle (CDG), Frankfurt (FRA), London Heathrow (LHR), Madrid (MAD), Munich (MUC), Brussels (BRU), Dublin (DUB), Copenhagen (CPH) and Zurich (ZRH). The Board sees no reason to depart from this selection in this case. This selection comprises Europe’s five largest airports, the airports referred to by easyJet in its Request and the airports that form an alternative to Schiphol on account of either their location or their processing of a high percentage of transfer passengers.
168. Schiphol mentions in addition the airports of Prague, Cork and Shannon.¹⁵⁰ As Schiphol is four times larger in terms of passenger numbers than Prague airport, which is the largest of the three airports mentioned, the Board does not consider that these airports fulfil the specified selection criteria and that they are therefore not suitable for the comparison of charges.
169. The benchmarking has been carried out using information supplied by the parties and checked against – and where necessary supplemented by – IATA’s database of charges.

Table 2: PSC and SSC for OD passengers for various airports (as of 1/6/2009)

Airport	Passenger charge (PSC in euros)	Security charge (SSC in euros)
Schiphol	14.24	12.94
BRU	17.20	8.01
CDG non-EU	19.12	10.38
CDG EU/SGN	7.88	10.38
CDG EU/non-SGN	8.67	10.38
CDG domestic	7.88	10.38
CPH international	10.77	3.62
CPH domestic	2.82	3.62
FRA ica	19.17	8.77
FRA non-EU	17.57	8.77
FRA EU	14.87	8.77
FRA domestic	14.87	8.77
LHR international	22.06	-
LHR domestic	12.90	-
MAD non-EU	7.26	1.57
MAD EU	4.58	1.57
MUC non-SGN	15.72	5.47
MUC SGN	13.62	5.47
DUB	7.90	-
ZRH	12.73	8.78

¹⁴⁸ House of Representatives, 2001-2002, 28074, no. 3, p. 6 and Bulletin of Acts and Decrees 2006, 333, p. 18.

¹⁴⁹ See footnote 97.

¹⁵⁰ File number 200120/11.

- 1) The security charge of CDG consists of an airport tax per departing passenger (10.38 euros). This should be defined as a security charge (see SEO 2006, Airport charges and government levies, report 911, May 2006, (www.seo.nl, file number 200120/ 140,) p. 3).
 - 2) The charges of CPH, LHR and ZRH have been converted to euros at the selling rate on 8/6/2009 (CPH = 8.12, LHR = 0.96 and ZRH = 1.65).
 - 3) FRA ica = intercontinental passengers.
 - 4) The FRA passenger charge is inclusive of a Service Assistance surcharge of 0.17 euro per departing passenger.
 - 5) The FRA security charge consists of a basic security charge (6.55 euros), a surcharge (1.21 euros) and a screening charge (1.01 euros for an OD passenger).
 - 6) The security charge at LHR is included in the passenger charge.
 - 7) The security charge at MAD consists of a basic charge (1.44 euros) and an Air Security State Agency charge (0.13 euro).
 - 8) The passenger charge at DUB is shown for a connected flights. This has been done because the charge benefit at Schiphol for disconnected handling is shown in the landing charges and not in the service charges.
-

170. The comparability of the above charges is limited because airports offer different services. For example, Frankfurt airport has a separate charge for central ground handling and Dublin airport has separate charges¹⁵¹ for the use of apron-drive airbridges and check-in desks, whereas at Schiphol this forms part of the 'other aviation activities' (landing charges, parking charges and PSC). The results of the comparison of charges should be assessed in this light.

Assessment of PSC

171. It is evident from table 2 that there is considerable variation in the charges. The charges per OD passenger vary for European and international flights from 4.58 euros (Madrid) to 19.17 euros (Frankfurt). The Schiphol charge of 14.24 euros is just above the average of the other charges. The Board notes that the Schiphol charge is therefore not out of step with the rest.
172. In view of the limited extent to which these charges are comparable as explained above, the Board concludes that the level of the PSC for OD passengers at Schiphol does not appear to be unreasonable in comparison with the passenger-related charges at other international airports.

Assessment of SSC

173. It is evident from Table 2 that Schiphol's SSC for OD passengers of 12.94 euros is the highest security service charge. However, this fact alone is not sufficient to justify the conclusion that the SSC is not reasonable. This is analysed by the Board below.
174. It is evident from research by SEO¹⁵² that only one of the airports in Table 2, namely Schiphol, completely covers its security costs from the income from the passenger charges (SSC). It is clear in the case of at least three airports that part of the security costs are

¹⁵¹ Known as 'miscellaneous charges'.

¹⁵² SEO 2008-24, p. 18, 20 (see footnote 146). The SEO benchmark does not include Copenhagen and Dublin.

financed either by the government authorities or from non-aviation activities.¹⁵³ This may explain the differences in the security charges revealed by the benchmarking.

175. It is also evident from SEO studies that the structure of charges for security costs differs. For example, unlike Schiphol at least three airports charge security charges for freight.¹⁵⁴
176. The Board concludes that the SSC for OD passengers at Schiphol is relatively high in relation to the SSCs at other international airports. This high score provides an indication that the SSC for OD passengers may be unreasonable. However, the Board also notes that the comparability of the SSCs for OD passengers has limitations because in practice airports often use differentiations in charges and different charge units. In this connection, the high score of Schiphol's SSC could be explained by the fact that the security charges at Schiphol completely cover the costs, whereas this is not always the case at other airports.

Assessment of PSC and SSC together

177. EasyJet also complains that the sum of Schiphol's PSC and SSC is also almost 50% higher than that of Europe's next most expensive airport, and that this is not justified by the differences in the structure of costs at the different airports.¹⁵⁵ The Board will disregard the submission that a difference between the passenger-related charges of Schiphol and those of other airports must be due to the structure of costs, as there is no statutory requirement to this effect. Quite apart from this, the Board notes that the figure of 50% mentioned by EasyJet is not evident from the data presented above by the Board.

8.5.3.2 Comparison of the charges with the underlying costs

178. In this subsection Schiphol's passenger-related charges are compared with the average costs per passenger.
179. The Board has requested Schiphol to prepare a calculation model to be able to determine the average costs per passenger for OD passengers (and transfer passengers) in the same way as it has done for the KLM decision.¹⁵⁶ The Board mentions for the record that the Allocation System does not provide for a far-reaching allocation of costs of this kind (to OD and transfer passengers), and provides instead merely for the allocation of costs to the entirety of the security activities and to the entirety of the other aviation activities.¹⁵⁷

¹⁵³ SEO 2008-24, table 7.1 (see footnote 146). Three airports (CDG, LHR and FRA) have not answered the questionnaire on this point. In the case of the BRU, MAD and ZRH airports the security costs are financed at least partially from other sources. This is evident from a rather older report entitled *Study on civil aviation security financing* dating from 2004, which was commissioned by DG TREN of the European Commission, file number 200120/139 (<http://www.eurativ.com/en/transport-security/article-117548>). This shows that at the time in question the income from security charges at many European airports covered only part of the security costs.

¹⁵⁴ The SEO reports (see footnote 146) mention CDG, FRA and MUC (SEO 2008-24, table 5.2; SEO 2009-11, table 4.2).

¹⁵⁵ See margin number 85.

¹⁵⁶ See footnote 97.

¹⁵⁷ Schiphol's obligation to apply an allocation system is intended to fulfil the cost orientation obligation and is therefore aimed not at the separate service level but – as in the case of the cost orientation obligation – at the higher aggregate level of the entirety of the security activities or, as the case may be, the other aviation activities.

Schiphol's calculation model is therefore more far-reaching and more detailed than the Allocation System.

180. Schiphol has made a calculation of the average costs per passenger of the PSC and SSC service. For this purpose Schiphol has prepared a statement of the costs of each operational department, divided into activities connected with transfer passengers on the one hand and OD passengers on the other. This calculation is based on the 2009 budget, as also used for the Charges.¹⁵⁸ For the purpose of allocating the costs, use has been made of the passenger flows measured by Schiphol in 2007.¹⁵⁹

181. The calculation of the costs per passenger produces the following results:

Table 3: Statement of average costs and PSC and SSC per OD passenger in euros

Charge	Average costs per passenger (incl. capital costs)	Costs of capital	Difference in charge/ costs per passenger			
			Absolute difference in relation to charge	Percentage difference in relation to charge ¹⁶⁰	Percentage difference in relation to costs per passenger	Number of times of costs of capital
PSC	14.24	[confidential business information]				
SSC	12.94	[confidential business information]				

182. Assessment of the difference between the charge and the average costs per passenger can be made on the basis of three criteria: (1) the absolute difference between the charge and the average cost per passenger; (2) the percentage difference between the charge and the average cost per passenger (expressed in relation to the charge or the costs per passenger); (3) an expression of the difference in the weighted average cost of capital (WACC). However, no strict criteria for any of the specified criteria are provided for in the legislation and regulations or in other sources. Furthermore, the last criterion is less suitable for application to labour-intensive services as these services have relatively little invested capital. It follows that the percentage differences between the charge and the costs per passenger are of particular importance in the assessment by the Board.

Assessment of PSC

183. Table 3 shows that the difference between the PSC and the average costs per passenger is equal to [confidential business information] euros. As a result, the return on sales is equal to [confidential business information]% and the charge is [confidential business information] than the average costs per passenger. This difference amounts to [confidential

¹⁵⁸ These figures take account of the adjustment of the charges imposed by the Board in the Barin/KLM decision (see footnote 64), following the complaint by Barin and KLM against Schiphol's charges as of April 2009. The set-offs for 2008 have not been taken into account.

¹⁵⁹ The passenger flows for 2008 were not yet known at the time of the research by the Netherlands Competition Authority. See file number 200120/22.

¹⁶⁰ Also described as return on sales.

business information] times the cost of capital, as a result of which Schiphol has processed in total [*confidential business information*] times the cost of capital in the charge.

184. First of all, the Board holds that the percentage differences between the costs per passenger and the charge ([*confidential business information*]% and [*confidential business information*]) are not of such a nature as to suggest that the PSC is unreasonable.
185. In addition, the difference between the PSC and the costs per passenger expressed as a multiple of the cost of capital provide a good indication of the reasonableness. A difference between the charge and the cost per passenger of [*confidential business information*] times the cost of capital is not of such a nature as to suggest that the PSC is unreasonable.
186. In view of the limitations referred to above in relation to the comparison of the charges with the average costs per passenger, in particular the possibility for Schiphol to differentiate in charges, the Board concludes that the difference between the PSC and the average costs per passenger does not suggest that this charge is unreasonable.

Assessment of SSC

187. It is apparent from Table 3 that the difference between the SSC and the average costs per passenger is equal to [*confidential business information*] euros. As a result, the return on sales is equal to [*confidential business information*]% and the charge is [*confidential business information*] than the costs per passenger. The difference amounts to [*confidential business information*] times the cost of capital, as a result of which Schiphol has processed in total [*confidential business information*] times the cost of capital in the charge.
188. As regards Table 3, the Board finds that the percentage differences between the costs per passenger and the charge ([*confidential business information*]% and [*confidential business information*]) are not of such a nature as to suggest that the SSC is unreasonable.
189. The number of times that the cost of capital is processed in the SSC is relatively high. Schiphol's calculation model shows that more than two thirds of the passenger security costs are attributable to employment costs.¹⁶¹ The security activities can therefore be seen as a labour-intensive service. As the number of times the costs of capital are processed in the charge is not a good criterion for assessing the reasonableness of the charge in the case of labour-intensive services, the Board has not included this criterion in its assessment.
190. In view of the limitations referred to above, which are inherent in a comparison of the charges with the average cost per passenger, particularly since no direct relationship exists between the charge and the costs owing to differentiation in charges, the Board concludes that the difference between the SSC and the average cost per passenger of the SSC is not such as to suggest that the charge is unreasonable.

¹⁶¹ File number 200120/22.

8.5.3.3 Comparison on the basis of statutory quality indicators

191. In this subsection the quality of Schiphol is compared with that of other international airports.
192. In the explanatory notes on the Decree the legislator states that the quality indicators of Article 7 of the Decree can play a role in this connection.¹⁶² During the hearing the Netherlands Competition Authority asked the parties in this connection to state which of the quality indicators mentioned in the Decree are relevant to OD passengers. In reply, easyJet and Schiphol stated that there were no specific indicators which they considered to be of special importance as a criterion in assessing the quality of the services to OD passengers.¹⁶³ During the hearing Schiphol did state in reply to a question that as regards quality it did not specifically aim at one category of passenger.
193. The Board has selected the following indicators, mainly on the basis of the availability of information about these quality indicators:¹⁶⁴
- the peak hour capacity of the runway system;
 - the peak hour capacity of the baggage handling system;
 - the number of check-in desks at the airport;
 - the number of gates at the airport;
 - the number of destinations served by the airport;
 - the number of parking places at the airport.
194. The information about five of the six indicators is also related to the number of (OD) passengers as this provides a better indication of the score in terms of quality. For example, the number of gates at an airport says more about the quality if there is a clear indication of the number of other passengers with whom they must be shared. Table 4 gives an overview of the selected indicators and airports. The number of airports is limited to those about which sufficient information could be obtained.

¹⁶² See margin number 40.

¹⁶³ File number 200120/57, p. 5.

¹⁶⁴ The first four indicators are statutory quality indicators from Article 7 of the Decree. The first two indicators were also used in the KLM decision of 2007 (see footnote 96). The last two quality indicators have been added by the Board.

Table 4: Quality indicators

	Airport							
	AMS	BRU	DUB	FRA	MUC	ZUR	CDG	
Number of passengers (in millions)	48	18	23	52	34	21	60	
<i>of which OD passengers</i>	58%	92%	95%	47%	65%	68%	68%	
Number of OD passengers (in millions)		28	17	22	24	22	14	41
Peak hour capacity of runway system	110	74	46	82	90	68	112	
- per 1 million passengers	2.29	4.11	2.00	1.58	2.65	3.24	1.87	
Peak hour baggage handling capacity	25,110	-	-	1,000	33,200	15,000	12,000	
- per 1 million passengers	523	-	-	346	976	714	200	
Number of check-in desks	437	143	165	216	327	347	-	
- per 1 million OD passengers	16	9	8	9	15	24	-	
Number of gates	97	72	-	90	112	181	-	
- per 1 million passengers	2.02	4.00	-	1.73	3.29	8.62	-	
Number of destinations	267	200	200	281	244	150	250	
Number of parking spaces	21,379	10,600	22,000	14,500	20,000	17,000	25,000	
- per 1 million OD passengers	768	642	1,007	593	905	1,190	613	

1) The figures from the table have been taken from the KLM decision and supplemented with data from the websites of the airports concerned.

2) The – sign means that no information is available.

195. The extent to which the quality indicators can be used for the purposes of a test of reasonableness is limited by the following factors. In the first place, it is not always clear how a score should be interpreted. For example, Brussels has 9 check-in desks per million passengers, compared with 16 at Schiphol. This could be interpreted as meaning that Schiphol provides better quality, but another interpretation would be that Brussels is more efficient. Likewise, the number of parking spaces should be assessed in the light of the accessibility of the airport to other means of transport. In addition, the indicators referred to in the table concern PSC-related activities. The quality of Schiphol should be assessed bearing in mind these limitations of the data.
196. It is evident from Table 4 that Schiphol is placed fairly consistently in mid-table in relation to Europe's other leading airports that operate in comparable market conditions. Schiphol's quality is average when all indicators are taken into account.
197. This finding is confirmed by easyJet's statement during the hearing that it has no problem with the quality of Schiphol airport; it is no better and no worse than that of other airports of similar size used by easyJet.¹⁶⁵
198. The Board considers that the results of the study of the quality of Schiphol in relation to the quality of other airports does not provide any reason for assuming that Schiphol's charges are unreasonable in the light of the quality of service offered in exchange.
199. The quality of the H pier at Schiphol will be discussed in the following section.

¹⁶⁵ File number 200120/57, p. 6.

8.5.4 Reasonableness of the charges in the light of the quality of the H pier

200. As regards reasonableness, easyJet considers that the quality of the H pier is lower than that of the other piers, but that this difference in quality is not reflected in the charges.¹⁶⁶ According to easyJet, the requirement of reasonableness implies that there must be a connection between the charges and the quality of services for which the charges are made. At Schiphol easyJet makes almost exclusive use of the H pier. An airline whose aircraft departs from one of the other piers pays the same PSC as easyJet, but easyJet receives a lower quality in exchange at the H pier.¹⁶⁷ EasyJet contends that the saving in the costs of constructing this pier is not reflected in the charges.
201. Schiphol confirms that the H pier is of lower quality than the other piers.¹⁶⁸ It has indicated during the hearing, however, that the construction costs of the H pier were no lower than those of other piers, contrary to what has been alleged by easyJet. As the H pier is the last pier to have been built, the amount allocated for its construction on the balance sheet exceeds, according to Schiphol, that of the other piers. In addition, the position of the H pier is such that only limited use can be made of it (one side of the pier). This means that the utilisation rate of the H pier is relatively poor in relation to the costs. Furthermore, Schiphol states that easyJet benefits from the use of the H pier precisely because of the fast turnaround times¹⁶⁹ which can be achieved here. Lastly, Schiphol emphasises that the H pier was built in accordance with the 'wait-in-lounge' concept. This means that there are no waiting areas in the pier, and that passengers wait for longer in the lounges, i.e. until about 10 minutes before the departure time of their flight.¹⁷⁰ The passengers are then led to the aircraft as quickly as possible (through the pier). This concept has been designed in order to achieve the fast turnaround times desired by EasyJet.

Assessment of reasonableness in relation to the H pier

202. The Board cannot agree with easyJet's view that the level of the PSC should be compared only with the quality of the H pier. The PSC should be compared with the quality of the *entire* service provided for it. The service to passengers includes not only the use of the piers but also the use of the lounges and terminals and other facilities at Schiphol.
203. Assessing the quality of the entire service, the Board holds as follows. First of all, it is evident from Schiphol's defence during the hearing that passengers stay in the H pier only for a very short period. The 'wait-in-lounge' concept at the H pier encourages passengers to remain as long as possible in the waiting areas of the lounges and ensures that they are then led as quickly as possible through the H pier to the aircraft. Like all other passengers,

¹⁶⁶ See margin number 86.

¹⁶⁷ EasyJet indicates that this low quality is evident, among other things, from the following factors: there are no toilets or seats in the H pier; no use is made of apron-drive airbridges; the pier is much smaller than the other piers and is made of cheap materials and to a cheap design.

¹⁶⁸ File number 200120/11.

¹⁶⁹ The turnaround time or lead time is the time which an aircraft spends on the ground between landing at and taking off from the airport. A short lead time means that the aircraft can fly back and forth more quickly between destinations, thereby enabling the airline to recoup its investment costs more quickly.

¹⁷⁰ File number 200120/57, p. 8.

passengers who depart from the H pier can therefore make use of the facilities in the lounges until shortly before the departure time. The Board notes that the H pier forms only a small part of the entire service and the difference in quality which H pier passengers experience in comparison with other passengers is therefore very small.

204. Second, easyJet certainly does receive a discount for the use of the H pier. When using the H pier, easyJet receives a discount of 20% on the landing charges.¹⁷¹ EasyJet also benefits from using the H pier as it achieves shorter turnaround times, thereby enabling it to operate its aircraft as efficiently as possible. The Board is of the opinion that these benefits for easyJet must be taken into account in deciding whether the PSC is unreasonable in relation to the service (or quality of service) which easyJet receives in exchange.
205. As the quality of the H pier must be viewed in the context of the entire service provided for the PSC and the H pier forms only a small part of this entire service, and, given the benefits which easyJet obtains from using the H pier, the Board holds in this respect too that the PSC is not unreasonable.

8.5.5 Conclusion regarding cost orientation and reasonableness

206. Following easyJet's complaint, the Board has tested the PSC and SSC for OD passengers by reference to the requirements of cost orientation and reasonableness.
207. As regards cost orientation, the Board has disregarded easyJet's request to test the charges for compliance with European and international legislation as the legislation cited by easyJet is not yet in force or is in any event not yet applicable. The Board also considers that the WACC applied by Schiphol in the SSC has been established in accordance with the requirements of the Allocation System.
208. As regards reasonableness, the Board has merely assessed the OD charges and not the difference between the charges for OD and transfer passengers. The Board has applied three methods in testing the charges: international price benchmarking, a comparison of the charges with the underlying costs and an international comparison of the quality of the airport. In addition, the Board has taken into account easyJet's complaint about the quality of the H pier.
209. It follows from the international benchmarking that the PSC for OD passengers is not high in comparison with the PSC applied by other European airports. As regards the SSC, it appears from the international benchmarking that the SSC for OD passengers is relatively high compared with other airports. However, the Board does not consider this to be an indication that the charge is unreasonable because its level could be explained by the fact that the charges do not entirely cover the security costs at all airports. In addition, there is a difference between the structures of the charges used at airports.

¹⁷¹ Known as disconnected handling.

210. A comparison of the charges with the underlying costs in the case of both the PSC and the SSC for OD passengers shows that there is no disparity between the charge and the service provided in exchange. This merely serves to confirm that the charges are not unreasonable.
211. An international comparison of the quality of airports shows that the quality of the services at Schiphol is no worse than that of the services at other airports. Nor does the use of the lower quality H pier by easyJet warrant the conclusion that the charges are unreasonable.
212. On the basis of the above, the Board holds that the PSC and SSC for OD passengers of Schiphol are not contrary to the requirement of reasonableness as referred to in section 8.25d, subsection 2, of the Aviation Act. The Board also holds that the PSC and SSC for OD passengers of Schiphol are not contrary to the requirement of cost orientation as referred to in section 8.25d, subsection 3, of the Aviation Act.

8.6 Transparency

213. In its Request, EasyJet submits that the information which Schiphol supplies during the consultation period about the costs underlying the separate charges for OD and transfer passengers is not transparent because Schiphol should specify the costs for each individual service.¹⁷² Schiphol states that it has no obligation to supply cost specifications for each separate charge as this requirement cannot be inferred from Dutch legislation or from any EC legislation such as the Directive on airport charges.¹⁷³
214. The Board holds as follows regarding the transparency of the information substantiating the charges. Article 4 of the Decree indicates what information Schiphol must provide in the consultations on the charges. This does not show that Schiphol has an obligation to provide a cost specification for each separate charge. Nor would this be in keeping with the fact that the cost orientation obligation has been imposed for the entirety of the activities and not for each separate service. As regards the Directive on airport charges, the Board would refer to section 8.3.2 in which it has been explained that the Board cannot and therefore will not test the Request for compliance with the Directive on airport charges.
215. In view of the above, the Board concludes that easyJet has not shown that Schiphol has failed to comply with its statutory obligations resulting from the requirement of transparency under section 8.25e, subsection 4 (d), of the Aviation Act and Article 4 of the Decree.

8.7 EasyJet's notice of complaint

216. On 13 July 2009 easyJet submitted a notice of complaint about the present procedure to the Board.¹⁷⁴ The Board made its decision in the present procedure on 14 July 2009 and will reply to the notice of complaint separately.

¹⁷² See section 5.5.

¹⁷³ See footnote 69.

¹⁷⁴ See margin number 21.

8.8 Summary

217. It follows from the above analysis that easyJet's request is not well-founded.
218. Schiphol's charges are not contrary to the statutory requirement of non-discrimination. The services on which the PSCs for transfer passengers and OD passengers are based are not equivalent. It follows that in relation to the PSC Schiphol does not make a distinction that is in principle prohibited. However, the security services for both categories of passenger are equivalent. Nonetheless, easyJet has not shown that it has been placed at a competitive disadvantage in relation to mixed airlines such as KLM by the fact that Schiphol makes a distinction in charges between transfer and OD passengers.
219. Transfer traffic in particular has great price elasticity as a consequence of the pressure of international competition. Accordingly, Schiphol is bound to try and avoid losing a disproportionately large number of transfer passengers. Accurate analysis shows that the effects alleged by easyJet are due mainly to the difference between the business model which it has chosen and the business model applied by mixed airlines. In any event, any differences in the competitive position are not a consequence of Schiphol's differentiation in the SSC. In this respect, easyJet is in fact no different than other OD airlines.
220. Moreover, the study has not shown that Schiphol's PSC and SSC for OD passengers are not cost-oriented. Nor has it been shown that these charges do not fulfil the requirement of reasonableness. The methods of comparison applied do not show (even in combination) that the charges are so high that no other explanation can be given for them. Although the SSC is high in international terms, this does not detract from this conclusion.

9. Decision

221. The Board of the Netherlands Competition Authority holds that the charges and conditions of N.V. Luchthaven Schiphol as of 1 April 2009 are not in conflict, on the basis of the arguments put forward by easyJet, with the requirements set in or pursuant to the Aviation Act.

The Hague, 14 July 2009

(signature)

Gert Zijl
Member of the Board
For the Board of the Netherlands Competition Authority