COMMISSION

COMMISSION DECISION

of 14 January 1998

on the application of Article 9 of Council Directive 96/67/EC to Frankfurt Airport (Flughafen Frankfurt/Main AG)

(notified under document number C(1998) 67)

(Only the German text is authentic)

(Text with EEA relevance)

(98/387/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports [1], and in particular Article 9(5) thereof,

After consulting the Advisory Committee established thereunder,

Whereas:

I. SCOPE OF THE EXEMPTION NOTIFIED BY GERMANY

1. *The notification presented by the German authorities*

By letter of 8 April 1997, received by the Commission on 10 April 1997, the German authorities notified a communication from the Government of the Federal Republic of Germany dated 27 March 1997 granting Frankfurt airport (Flughafen Frankfurt/Main AG) the following exemption:

(a) to allow the airport to ban self-handling for the categories of services referred to in points 3, 5.4, 5.5 and 5.6 in the Annex to Directive 96/67/EC (the Directive) and self-handling as regards the physical handling of freight and mail, whether incoming, outgoing or in transit, between the air terminal and the aircraft. This exemption, granted on the basis of Article 9(1)(d) of the Directive, ran from 1 January 1998;

(b) to reserve to Frankfurt airport the monopoly on the provision to third parties of the categories of services referred to in points 3, 5.4, 5.5 and 5.6 in the Annex to the Directive, and also for the handling of freight and mail, whether incoming, outgoing or in transit, between the air terminal and the aircraft. This exemption, granted on the basis of Article 9(1)(b) of the Directive, runs from 1 January 1999.

By letter dated 13 June 1997, the Commission informed the German authorities that this notification could not be accepted, in particular on the grounds that:

(a) the scope of the exemption granted had not been precisely defined, which allowed the airport alone to decide whether or not to ban self-handling;

(b) no plan aimed to overcome the problems cited had been submitted.

By letter dated 15 October 1997, received by the Commission on 20 October 1997, and supplemented by a letter dated 9 December 1997, Germany notified a further communication dated 29 September 1997 supplementing that of 27 March 1997 and granting the following exemption:

(a) to ban self-handling, save in the cases already authorised prior to the exemption decision, for the categories of services referred to in points 3, 5.4, 5.5 and 5.6 in the Annex to the Directive, and to ban self-handling as regards the handling of freight and mail,

[1] OJ L 272, 25. 10. 1996, p. 36.

whether incoming, outgoing or in transit, between the air terminal and the aircraft. This exemption, granted on the basis of Article 9(1)(d) of the Directive, ran for three years starting on 1 January 1998;

(b) to reserve to Frankfurt airport the monopoly on the provision to third parties of the categories of services referred to in points 3, 5.4, 5.5 and 5.6 in the Annex to the Directive, and also for the handling of freight and mail, whether incoming, outgoing or in transit, between the air terminal and the aircraft. This exemption, granted on the basis of Article 9(1)(b) of the Directive, runs for two years starting on 1 January 1999.

Pursuant to Article 9(3) of the Directive, the Commission published a summary of the said notification in the *Official Journal of the European Communities* [1] and invited interested parties to submit comments.

Pursuant to Article 9(5) of the Directive, Germany was consulted by the Commission on its draft evaluation on 17 December 1997. On 18 and 19 December 1997 the German authorities replied to this consultation by written observations.

Basis of the exemption

The general rules for access to the groundhandling services market are set out in Articles 6 and 7 of the Directive. These provisions clearly state the principle that most categories of groundhandling services should be opened up to the maximum possible extent. However, because of the specific situation and role of an airport, and in particular constraints of safety and security, but also considerations of space and capacity which can arise in some parts of most airports, the Directive does not demand total freedom but requires a minimum degree of opening-up to third parties of both self-handling and services for four categories of services located airside — that is to say, in a particularly sensitive area of the airport. These categories concern ramp handling, baggage handling, fuel handling and certain freight and mail handling operations.

The Directive also takes account of the fact that, in certain very special cases, severe space and capacity problems may prevent the opening-up of the market to the degree provided for. In such cases, exemptions may be granted on a temporary basis to give the airports the time to overcome the constraints. Such exemptions can therefore be only exceptional in nature and are not intended to automatically give airports an extra transitional period in addition to that already provided for in Article 1 of the Directive.

An exemption can be granted only on the basis of specific space or capacity constraints. This is the basis on which Germany has granted the abovementioned exemption in accordance with paragraph 3 of the German *Verordnung über Bodenabfertigungsdienste auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften* transposing the Directive into national law.

[1] OJ C 335, 6. 11. 1997, p. 7.

2. ***Current situation at Frankfurt airport***

2.1. **Presentation of the airport**

Frankfurt airport is bounded on the north and east by motorways, on the south by railways and on the west by a forest which is protected for environmental reasons. No extension of the airport site is therefore conceivable.

The airport's runway system consists of two parallel (north/south) runways and a third runway reserved exclusively for take-off (west) lying almost at right angles to them. Most of the airport buildings are situated to the north of the two main runways, the southern part having hitherto been largely reserved for the US Air Force. The airport recently recovered control of part of this area, which it has converted into freight areas.

The airport buildings extend along the north runway for a distance of nearly six kilometres, and include the freight buildings, the Lufthansa operations and freight buildings, the fuel storage bunkers, Terminals 1 and 2 and the German post office buildings. The north-eastern corner accommodates the 'little league' area and the area for short-haul companies, which the airport recently regained and which it has assigned to the USAF's mail service.

The configuration of the two passenger terminals is radically different. Terminal 2 (divided into parts D and E) is one long building, whereas the larger Terminal 1 is W-shaped with three Piers A, B and C with *culs-de-sac* between them.

The airport currently has 49 gate parking positions (36 in Terminal 1 and 13 in Terminal 2) and 57 remote positions; groundhandling services for the remote positions are generally combined with the same services for the gate parking positions of the nearest terminal. It also has eleven positions for short-haul flights and 15 for freight. Thanks to the extension of Pier A of Terminal 1 and the allocation of new positions in the corridor between Terminals 1 and 2, the airport should have a total of 156 positions by the year 2000. This parking capacity is sufficient to cope with the increase in capacity planned by FAG for the coming years, which provides for an increase in movements from 74 per hour in 1997 to 80 per hour in 2000.

2.2. **Groundhandling services at the airport**

Before the new rules laid down by the Directive were introduced into German law, the situation regarding groundhandling services at Frankfurt airport was as follows:

(a) for most of the services listed in the Annex to the Directive and referred to in Articles 6(1) and 7(1) thereof, the market for which should be opened up to the maximum possible extent:

(i) self-handling was authorised; as regards the provision of services for third parties, airlines could use either the services of other carriers or the airport services.

(ii) groundhandling services provided by independent service suppliers were also authorised, with the exception of registration services.

(b) for the services listed in Articles 6(2) and 7(2), in respect of which the Directive provides that the market must normally be opened up to at least two service suppliers and two self-handling users:

(i) self-handling was prohibited, except in the case of an express mail integrator who, for historic reasons, had been authorised to perform certain loading and unloading operations;

(ii) the airport had a monopoly on the provision to third parties of these services, with the exception of certain services (fuel and oil handling, catering services, de-icing, snow removal) which the airport does not perform itself but contracts out to service suppliers.

The exemption granted by Germany concerns services referred to in Articles 6(2) and 7(2) of the Directive, in respect of which the Member States are already permitted to limit the number of service suppliers or self-handling users to no fewer than two.

The German decision allows the situation which existed prior to the entry into force of the Directive to continue. It restricts the number of parties involved even more than is intended by the Directive, as it prohibits self-handling and reserves to the airport alone the right to provide groundhandling services to third parties. It covers self-handling and handling for third parties of the following services set out in the Annex to the Directive: baggage handling (point 3), certain ramp-handling services — loading and unloading of aircraft (point 5.4) and the operation of appropriate units for engine-starting (point 5.5), the moving of aircraft (point 5.6), and freight and mail handling as described in Articles 6(2) and 7(2) (point 4). The German authorities' decision would therefore open the market up to the extent provided for in the Directive, namely to at least a second service-supplier and to two self-handling airport users, only in respect of a limited range of ramp-handling services — services relating to aircraft marshalling, parking, communication between the aircraft and the supplier of services, and the transport and loading of food and beverages and — for freight and post services — customs and administrative formalities. There is to be a completely free market for cleaning services.

2.3. **Article 86 of the Treaty**

On 20 July 1993 the companies KLM Royal Dutch Airlines NV, Air France Compagnie Nationale SA, and British Airways plc lodged a complaint with the Commission about the performance of groundhandling services at Frankfurt airport, suggesting that the company Flughafen Frankfurt/Main AG (FAG) had infringed Article 86 of the Treaty.

The various studies and comments on this matter have been communicated by the German authorities in support of the exemption decision, including the comments of FAG on the study carried out by Cranfield University for the Commission.

II. CONSTRAINTS PLEADED BY GERMANY

The exemption granted by the German Government is based principally on the problems of the space available at the airport:

(a) the impossibility for the airport of finding the space needed to store additional groundhandling equipment;

(b) the exacerbation of these space problems as a result of the works currently being carried out at the airport.

Furthermore, the following implications of opening up the market as envisaged in the Directive were cited:

(a) the resulting reduction in capacity, particularly airside;

(b) the physical impossibility of admitting a second service supplier for baggage handling;

(c) the negative consequences on the quality of services provided.

The exemption decision is based on the arguments and studies presented by FAG, which are annexed to the Decision, namely:

— Netherlands Airport Consultants BV (NACO) study (I) *Vorfeldverkehr* of 10 December 1993,

— NACO study (II) *Vorfeldverkehr und Flughafenkapazität* of 18 June 1994,

— NACO study (III) *Eine Zusätzliche Abfertigungsgesellschaft* of 17 February 1995,

— NACO study (IV) *Eine Zusätzliche Abfertigungsgesellschaft*, updated for the period 1997-2000, from 27 October 1995,

— NACO study (IV), re-updated from 14 May 1997,

— comments by NACO on the conclusions presented at the hearing of 9 July 1997 as part of the procedure referred to in paragraph 2.3 above, and sent by Germany to the Commission on 30 October 1997,

— several letters from FAG to the Commission dated 25 July,

— *Fraunhofer-Institut für Materialfluß und Logistik* (study I): *Kapazitäts- und Qualitätsauswirkungen einer Zulassung zusätzlicher Abfertiger auf dem Vorfeld für den Flughafen Frankfurt/Main* of 1 August 1994,

— *Fraunhofer-Institut für Materialfluß und Logistik* (study II): *Kapazitäts- und Qualitätsauswirkungen für den Flughafen Frankfurt/Main durch die Zulassung eines weiteren Abfertigers auf dem Vorfeld für die Jahre 1995/2000* of 16 February 1995.

1. ***The problems of space needed to store equipment***

The exemption decision is based on the lack of space for parking the extra equipment of one or more users carrying out self-handling, or additional service suppliers, and the consequences of the work's being carried out at the airport.

1.1. **The NACO and Fraunhofer studies**

The NACO studies quantify the total space available at 148 000 m^2, this figure being obtained by adding 102 000 m^2 of parking areas, 22 000 m^2 of preparation areas, 22 000 m^2 of vehicle and equipment storage areas and 2 000 m^2 of 'buffer zone'.

Of the 148 000 m^2 available, FAG, which, since Delta abandoned self-handling at the beginning of 1997, is currently the only service supplier, currently occupies 146 000 m^2 for its own groundhandling requirements ([1]): this estimate takes account of the fact that the airport currently provides all ramp handling services, thus including services provided for Delta and services provided for the companies which replaced Delta in Terminal 2 when Delta substantially reduced its flights in 1997.

According to NACO, opening up the market to a second service supplier would increase total space requirements to 178 000 m^2, that is, 32 000 m^2 more than the space currently occupied (146 000 m^2), thus resulting in a shortfall of 30 000 m^2 in terms of the current data on space available (148 000 m^2).

Whereas the NACO figures relate to the entry of a second service supplier, the Fraunhofer figures are based on opening up the market to two additional service suppliers in Terminal 2. According to the Fraunhofer Institut, the total space required would increase from 150 000 to 167 000 m^2: at Terminal 2, the requirement for parking areas would increase by 14 000 to 29 000 m^2, whereas only 18 000 m^2 is available. Opening up these services would have repercussions on Terminal 1: on account of the structural space problems at Terminal 1, the space hitherto borrowed from Terminal 2 would no longer be available as it would be allocated to new service suppliers.

1.2. **Works at the airport**

The German decision is also based on the fact that the works in progress at the airport will exacerbate the existing space problems.

The airport's internal development plan provides for a large number of works at the airport, including:

(a) in Terminal 1, alterations to meet the Schengen standards;

(b) on the tarmac, the extension of Pier A (alpha) and the fitting-out of the western part of the pier.

FAG maintains that this restructuring is justified by the need to react to the increase in traffic.

According to FAG, these works will have repercussions at two levels:

(a) first, the new buildings will result in a loss of nearly 20 000 m^2 of parking space,

(b) second, while the works are in progress, the space needed to store the construction equipment and the changes resulting from the works, particularly in traffic around the works, will have temporary negative repercussions in terms not only of the space available but also of the traffic near a terminal which already has serious difficulties.

2. ***The implications of opening up the market***

According to Germany, the space available cannot be extended either inside or outside the airport site. Thus the current lack of space obliges FAG to manage all available areas in an optimal manner. Opening up the market would have repercussions on capacity management, the organization of baggage handling and the quality of services provided at Frankfurt airport.

2.1. **Impossibility of extending the airport**

FAG cannot use the wooded parts of the airport site (229 ha) for environmental reasons, nor the areas to the south still occupied by the USAF base, a total of nearly 170 ha with runway access.

Moreover, according to the German authorities, the absence of spare space cannot be overcome by extending the airport site, which is limited to the north and the east by the road network (A3 and A5 motorways) and to the west and south by the forest, which acts as a protective area against noise nuisance. The available area at the

([1]) These figures are arrived at by combining the equipment deemed necessary in each case (monopoly or open market) and the space occupied by each piece of equipment, increased by a coefficient to allow for the space needed around each piece of equipment and for manoeuvring it (1,30 and 1,34 respectively, making a total of 1,75).

airport has increased by a factor of just 2,4 over 35 years, while the number of passengers has increased by a factor of 130, and there are no plans for development beyond the current airport perimeter in either the short or long term. The regional development plan clearly states that airport capacity can be increased only within the current geographical limits of the airport.

2.2. **Optimal management of area available**

According to FAG, the lack of space combined with the configuration of the airport installations means that two-thirds of the aircraft positions are not gate parking positions, thus increasing the necessary traffic between the positions and the terminals, which in itself increases the need for space for traffic and for the parking of mobile equipment.

Moreover, the remote positions cannot be managed entirely independently of each other. The lack of space makes it impossible to handle two large-capacity aircraft side by side; this in turn increases the amount of equipment needed in the area and the amount of traffic on the tarmac.

Finally, the German authorities claim that the number of positions on the tarmac is not sufficient to accommodate the traffic in a satisfactory manner. The limited number of positions obliges the airport not only to use all positions without interruption, but also to treat every available space as a position. Thus the airport works at full capacity from 6 a.m. to 10 p.m., with no capacity in reserve.

2.3. **Capacity management**

According to the German authorities, FAG cannot satisfy the current demand for capacity and intends to increase capacity from 74 movements per hour in 1997 to 80 movements per hour in 2000, which will require additional positions.

Because of the large number of remote positions, FAG expects the volume of service vehicle traffic to increase in line with the number of movements. Vehicle traffic on the tarmac is expected to increase by between 11 and 24 %, with a density of 250 movements per hour. Moreover, opening up the market in groundhandling services would force the airport to close three areas on the north side (seven positions). The consequences of opening up the market would thus run counter to the airport's efforts to increase its capacity. FAG considers that allowing other service suppliers would have a negative impact on the proper operation of its electronic logistics system and on capacity.

FAG points out that increasing its capacity is a commercial choice of the highest importance, which should enable the airport to maintain a high position among the major European airports, and to which it attaches the highest priority. According to NACO, the arrival of a single additional operator would result in additional space requirements of almost 32 000 m^2, which would have to be found by closing positions, causing the loss of 18 000 movements a year.

2.4. **Baggage handling**

The documentation presented in support of the German decision highlights the quality and efficiency of the airport's baggage-handling system, particularly for luggage in transit; Germany considers it impossible to maintain this level if a second operator is admitted.

It points out that in addition to safety checks for passengers and random baggage inspection, the American companies require 100 % control of the baggage intended for their flights. This requirement entails operations which, if carried out by the carrier, take up time and space. It is argued that the congestion of the baggage retrieval halls does not permit admission of a second operator.

2.5. **Service quality**

Because of the configuration of the airport installations, which in particular only permit a third of flights to use gate parking positions, large distances have to be covered on the tarmac. According to the studies presented in support of the exemption, the shortage of space for storing groundhandling equipment obliges the airport to park it on certain aircraft positions. According to these studies, these problems can be overcome only by means of the total interdependence of the various parties involved, and opening up the market to other service suppliers would have harmful effects on the quality of services provided, particularly the minimum connecting time of 45 minutes, which is a major element of Frankfurt airport's commercial policy.

3. ***Views of the interested parties***

In accordance with Article 9(3) of the Directive, interested parties were invited to express their opinions. A number of airlines recognised the quality of the services provided at Frankfurt, but emphasised the high prices demanded by the airport in its monopoly position. They consider the space requirement figures put forward by Frankfurt to be greatly exaggerated, and quote examples of companies providing services to third parties for numerous flights with half the space which Frankfurt claims will be needed if a second service supplier is accepted. They also point

out that when Delta carried out self-handling, it had only 8 000 m² available and possessed enough equipment to handle up to 10 % of the airport's traffic. The airlines therefore consider that the space needed for opening up the market is less than the airport claims, and that it can easily be found. They point out that some of the equipment can be stored overnight on unoccupied positions, which is common practice in numerous airports and causes no particular problems. They object to the practice whereby for many years all available space has been systematically allocated to purposes other than groundhandling.

III. EVALUATION OF THE EXEMPTION IN THE LIGHT OF DIRECTIVE 96/67/EC

1. *The rules in force concerning groundhandling*

1.1. **The scope for restricting access to the market**

The Directive provides for the market to be opened up to different extents as a function of the way in which groundhandling services are provided (self-handling or service suppliers) and the level of traffic at the airport. In view of the volume of traffic at Frankfurt airport, the latter must, pursuant to Article 1 of the Directive, permit self-handling from 1 January 1998 and open up the market to service suppliers on 1 January 1999.

The general rules on market access for the categories of groundhandling services covered by the exemption are laid down in Articles 6(2) and 7(2) of the Directive. These rules have been taken over by paragraph 3(2) of the German implementing rules. Under those Articles, Member States are permitted to restrict market access to not less than two service suppliers and two self-handling users, who must be chosen on the basis of objective, transparent and non-discriminatory criteria.

Moreover, Article 6(4) of the Directive provides that airport users must have an effective choice between at least two service suppliers, whatever part of the airport is allocated to them.

However, where specific constraints of available space or capacity, particularly as regards congestion or the rate of space usage, make it impossible to open up the market or permit self-handling to the extent provided for in the Directive, the Member State concerned may, on the basis of Article 9(1)(b), reserve the right to provide such groundhandling services to a single supplier and/or, on the basis of Article 9(1)(d), ban self-handling or restrict it to a single user. However, Article 9(2) specifies that such an exemption must:

(a) specify the category or categories of services for which the exemption is granted and the specific constraints of available space or capacity which justify it;

(b) incorporate a plan of appropriate measures to overcome the difficulties.

Moreover, the exemption must not:

(a) unduly prejudice the aims of the Directive;

(b) give rise to distortions of competition;

(c) extend further than necessary.

The main purpose of the Directive is to liberalise groundhandling services. Limitations imposed on third parties amount to restrictions of those parties' freedom to provide services. By way of analogy with State measures restricting the freedom to provide services, and as the Court of Justice has held in its judgments of 25 July 1991 in Case C-288/89, Mediawet [1] and Case C-76/90, Säger v. Dennemeyer [2], measures which are liable to exclude or prohibit the activities of a provider of services even if they apply without distinction to national providers of services and to those of other Member States, must be justified by overriding reasons relating to a non-economic public interest and must in addition be proportionate to the objective they pursue.

1.2. **Procedure**

Under Article 9(6), the exemptions relating to self-handling granted under Article 9(1)(d) may not exceed a duration of three years and may be renewed, while those relating to service suppliers granted under Article 9(1)(b) may not exceed a duration of two years, which may be extended only for a single period of two years.

In accordance with Article 9(3) of the Directive, the German authorities undertook to make the entry into force of the exemption decision subject to a Commission decision approving it.

In accordance with the procedure provided for in Article 9(3), (4) and (5), the Commission must examine the exemption granted by the Member State and approve that decision or oppose it. It may also require the Member State to amend the extent of the exemption or restrict it to those parts of the airport where the alleged constraints have been proved to exist.

The Commission therefore considers that in its examination it must concentrate on the following three points:

(a) the existence and extent of the space and capacity constraints used to justify the exemption and the impossibility of opening up the market to the degree provided for in the Directive;

[1] [1991] ECR I-4007.
[2] [1991] ECR I-4221.

(b) the plan of appropriate measures, which has to be credible, whose implementation must be unconditional, and which must include both measures to which the airport has to commit itself and the timetable for the implementation of those measures. In the case of an exemption permitting the continuation of a complete monopoly for certain categories of services and allowing the various airport users neither a choice, nor the possibility of self-handling with the exception of the user carrying out self-handling for historic reasons, the Commission must examine very closely the plan of appropriate measures submitted;

(c) conformity with the principles referred to in Article 9(2) of the Directive concerning respect for the objectives of the Directive, absence of distortions of competition, and extent of the measure.

Thus an exemption may not be used to allow the airport a further general adaptation period in addition to that already granted by Article 1 of the Directive. It must permit the airport to overcome the specific constraints which it may encounter when the market is opened up. Any exemption must therefore be examined in the light of the specific constraints pleaded as evidence of the impossibility of opening up the market within the time allowed. Moreover, according to the case-law of the Court of Justice of the European Communities in its judgments of 20 April 1978 in Joined Cases 80 and 81/77, Commissionaires réunis v. Receveur des Douanes [1] and of 25 June 1992 in Case C-116/91 British Gas [2], any exemption must be interpreted strictly and the scope of an exemption must be determined in the light of the aims of the measure in question.

It is in the light of these considerations that this exemption has to be examined.

In accordance with Article 9(4) of the Directive, the Commission has made a detailed analysis of the alleged space and capacity constraints, has considered whether the decision taken is appropriate to those constraints, and has appraised the measures put forward to overcome them. It has relied in particular on the studies presented by Germany, the visits it has made to Frankfurt airport, and the study it commissioned following the lodging of the complaint under Article 86 of the Treaty, with a view to assessing the space and capacity problems which would result at the airport from the opening-up of the market for groundhandling services. The conclusions of this study, carried out by Cranfield University College of Aeronautics — Air Transport Group, and entitled *Ground handling at Frankfurt Airport*, were presented to the Commission in June 1997. The Commission also took account of the comments made by Frankfurt airport on the Cranfield study, which were communicated to it by Germany on 30 October 1997, and heard that Member State on 4 December 1997 and FAG on 29 December 1997 with regard to this evaluation.

[1] [1978] ECR 927.
[2] [1992] ECR I-4071, at point 12.

2. ***Space and capacity constraints***

The principal point made in the notification from Germany is that there is not enough space at the airport to accommodate the extra equipment which admission of a second handling service or of a self-handling user would entail.

Introduction

Before evaluating the space and capacity constraints at the airport, certain general principles need to be recalled.

First, the various studies submitted to substantiate the decision (NACO, Fraunhofer) or requested by the Commission (Cranfield) show that current equipment levels at the airport are not excessive and that FAG endeavours to optimize equipment utilisation by planning the demand.

Second, it can be accepted that the requirements of a self-handling user are generally comparable to those of a supplier of handling services to third parties, although they sometimes differ depending on the situation at each airport, and particularly on the fleet of the largest carrier at the airport. For present purposes, it is therefore possible to refer to operators in general, without drawing any distinction between handlers providing services to third parties and self-handling users (who may, in some cases, be one and the same company).

It is recognised that admission of one or more operators requires extra space: equipment requirements are geared to the volume of traffic at the airport's peak time. In a monopoly situation, the peak time at the airport is, therefore, the reference point. In the event of competition, however, the peak time of each operator is the point which must be taken into account; this does not always coincide with the peak for the airport in general. As a result, total equipment requirements at the airport depend on the sum total of the peak requirements of each supplier. Competition therefore increases total requirements in terms of equipment, and hence of parking space for it.

However, another factor which must be taken into account is that any opening-up to competition will reduce the market share of the previous monopoly-holder, thus reducing that operator's equipment and, hence, space requirements. Allowance must be made for such repercussions, even though requirements will not necessarily fall in proportion to market share, so that it is difficult to assess the impact of opening up to competition on each supplier's market share, which will depend not only on each supplier's market share but also on the relevant customer distribution.

2.1. **Space available at Frankfurt**

The studies commissioned by FAG put the total space available at 148 000 m², of which FAG itself currently occupies 146 000 m². These figures are for the current situation at Frankfurt, whereby FAG services all flights, including the few flights still operated by Delta at the airport in 1997. The current situation is, therefore, that there are no major space problems at Frankfurt airport. According to FAG, the arrival of a new supplier would create a space shortage of 32 000 m².

The NACO studies indicate that on the assumption that Delta performed its own handling services and operated more flights, the forecast for 1997 would have resulted in a space shortage of 13 725 m². Allowing for the traffic growth forecast and planned at the airport, this shortfall would have risen to 16 300 m² by 2000. FAG estimates that in the same scenario admission of a second supplier would have pushed the space shortage up to 32 200 m² in 1997 and to over 35 000 m² in 2000.

The Commission has a number of comments to make on these studies:

(a) *Estimates*

Based on evaluation of plans, NACO estimated the space available at 148 000 m², but the figures supplied to the Commission by FAG on 16 May 1997 showed only 138 235 m² available on site in 1997. According to FAG, the parking space for groundhandling equipment has been reduced since 1994, partly to create new positions to meet the demand for capacity and partly to build the new fire station.

(b) *Withdrawal of Delta*

The NACO figures indicate a space shortage of 32 000 m² if the market is opened up to competition. The notification sent to the Commission even mentions a shortfall of 35 000 m². However, these figures are based on the assumption of admission of a new supplier in addition to Delta's self-handling service. Consequently, instead of merely the admission of a second supplier (making two operators in all), it assumes the presence of two suppliers — or one supplier and one self-handling user — plus FAG itself (three operators). This no longer reflects the true situation, since Delta has abandoned its self-handling activities.

By contrast, Delta's withdrawal this year on two fronts — abandoning its self-handling services and cutting its number of flights — has vacated space. When Delta provided its own handling services, it was operating just 17 flights a day, which were handled to a large extent with own equipment capable of handling up to 13 flights within a limited time-frame. Consequently, a considerable amount of space was vacated, estimated at 8 000 m².

The file accompanying the decision by the German authorities indicates that at least part of this space has been used by FAG itself to service Delta's remaining flights and other airlines. Consequently, Delta's withdrawal has enabled FAG to improve conditions for its own handling operations, since the airport now has more space for itself. Nevertheless, Delta's self-handling operations until the start of 1997 show that it is not impossible to accommodate a second supplier or a self-handling user.

(c) *Admission of an extra supplier*

The NACO studies attempt to demonstrate that it is impossible to admit a further supplier or a self-handling user. They also conclude that the airport needs to ensure total coordination of all ground-handling activities. However, it must be noted that, for historic reasons, Federal Express has been self-handling certain categories of service and, under the exemption decision, will be able to continue to do so. SAS, in turn, handled its own flights until 1995. It is true that these airlines' operations were or still are on an extremely small scale and, in the case of Federal Express, limited to certain parts of the airport reserved specially for freight and mail and separate from the passenger terminals. These activities may be regarded as marginal for the purposes of application of the Directive. However, this was not the case with Delta's operations in Terminal 2, which show that even with at least one operator other than FAG the airport structures still worked.

(d) *Calculations*

The Cranfield report estimates the space available at 164 000 m². This was calculated by starting with the 138 000 m² declared available today by FAG, then adding the space which should become available from certain freight areas (51 000 m²) and deducting the area actually to be occupied by new buildings (25 000 m²).

2.2. **Space requirements**

A number of comments must be made on the space requirements as set out in the NACO studies to substantiate the exemption decision, both with regard to the data submitted and on use of the space available.

(a) *The figures*

The NACO study dated 27 October 1995 indicates that if a second supplier were admitted an extra 20 000 m² would be needed, assuming a total of three operators, since these figures are based on the assumption that, in addition to FAG, Delta was still running its own self-handling operations. In the current situation, now that Delta has abandoned self-handling and FAG acknowledges that it occupies 146 000 m² itself, NACO estimates that a further 32 000 m² would be needed (giving a total of 178 000 m²) instead of the 20 000 m² when Delta was operating. The NACO studies also calculated that the total space which would have been required if Delta had continued self-handling operations — that is, if a second operator (self-handling user) were active at the airport, would be just 155 000 m².

However, the net additional space requirements attributable by NACO to Delta (13 778 m²) should not be counted together with the net additional space requirements attributable to the additional handler, because they are not due to the presence of the independent handler but to that of Delta and because in any case Delta has ceased self-handling and the requirements attributable to the handling of Delta flights are already included in the 146 000 m² required by FAG. The net additional space requirements of an independent handler as compared with the monopoly conditions should accordingly be some 18 500 m² (32 000 minus 13 725). In the present situation where FAG is the only operator since Delta has ceased its activities, one would accordingly expect the total space requirements attributable to be less than 165 000 m² (146 000 plus 18 500) and not the NACO figure of 178 000 m².

Moreover, in the scenario adopted by NACO, Delta was not only operating more flights than in 1997, but was also using equipment with capacity to handle more flights than it was operating at the time. In fact, Delta managed to park on an area of 8 000 m² equipment capable of ensuring the major part of the handling of 8 to 10 % of flights at the airport.

This fact shows clearly that far less space is needed to service this segment of the market than is estimated in the NACO studies. This is even more true in view of the fact that Delta used a share of the market comparable to the figure used in the NACO study and that Delta, which does not operate in the afternoon, needed the space to park all of its equipment, which would not be the case for a supplier operating for several clients and would therefore be able to spread its services in a more regular way across the whole day.

In addition, NACO's estimate is based on each supplier's peak requirements (see above) but simply adds together all the space required by each supplier in order to park all its equipment, disregarding the fact that a large proportion of the equipment is in use virtually non-stop and is not parked for most of the day, least of all in such a busy airport as Frankfurt. The equipment is parked at night, when there are no flights to service, and it can therefore be parked in the positions available, as it is today.

In fact, the need for space in connection with access to the market depends to a large extent on the distribution of clients between the suppliers and the spreading of operations over the whole day.

On the basis of the various evaluations presented by NACO and Cranfield and taking into account the different hypotheses as to the distribution of clients and the periods of the day over which handling services can be spread out, it appears nevertheless that the following can be estimated:

(i) that the need for space lies between 104 000 m² and 165 000 m²;

(ii) that the available space can be estimated at between 148 000 m² and 164 000 m².

Even on the most pessimistic assumption used by NACO (need for 165 000 m² for an available space of 148 000 m²), the available space would allow for parking of 90 % of all required equipment. However, in an airport where peak hours are very limited, as FAG itself agrees, at least 10 % of the equipment is not parked but remains in constant circulation. Outside the peak hours this equipment can then be parked on spaces which have remained vacant.

(b) *Use of the space available*

As was indicated above, Article 9 must be interpreted in a restrictive manner, taking into account the aim of the measure. As is shown by its title, the aim of the Directive is to provide access to the groundhandling market and the principle of free access is clearly defined in Articles 6 and 7 even though it is true that specific possibilities are granted to the Member States to limit access to a minimum of two operators for certain categories of service.

The Commission is of the opinion that adherence to the aim of the Directive means that only the constraints mentioned in Article 9, which by themselves present obstacles to the implementation of the Directive, can afford a basis for exemption. This cannot include constraints created by the airport itself, as was the case for the allocation of space left vacant by Delta even after the adoption of the Directive. The impossibility of opening up the market must be ascribable to a factor which is independent of the will of the party relying on it.

For a number of years, new space has been vacant at the airport. However, the development plans for the airport show that the space freed has always been, and still is, allocated to uses other than groundhandling, including commercial activities not essential to air traffic management.

It is not lack of space as such which makes it impossible to admit any new operator at Frankfurt but principally the use which FAG has decided to make of the space available or which will become available which could create problems if another operator were admitted.

Until 1997 Delta operated self-handling services without disrupting groundhandling operations at Frankfurt airport. The space shortage claimed by FAG with one self-handling carrier in addition to FAG did not disrupt the smooth operation of the airport, the quality of service provided or the general reputation of Frankfurt airport.

The German authorities have failed to demonstrate that it is impossible to admit any new operator to the airport as a whole.

2.3. **Airport layout problems**

Although the space requirements are no reason for maintaining the monopoly over the airport as a whole, consideration must also be given to whether the infrastructure configuration permits the opening-up of every part of the airport and, if so, to what degree. Therefore, at this stage, a more detailed analysis must be made of the airport installations, drawing a distinction between the two terminals.

At Terminal 2, it is possible to service 13 gate parking positions, plus 18 remote positions opposite the terminal and 11 positions for short-haul services. Terminal 2 is occupied by a large number of different carriers which do not generally park at Terminal 1. Its straight axis avoids equipment traffic problems. According to the Cranfield study, the baggage sorting halls could accommodate new operators. A considerable amount of space was vacated when Delta ceased self-handling, although part of it has been allocated to FAG's equipment since then. Terminal 2 has no space or traffic problems precluding any other operator, as has been demonstrated for many years by Delta's self-handling activities at this Terminal. It is by no means proven that it is impossible to open up these services and there is no reason to maintain a monopoly in this part of the airport. According to the Cranfield study, however, the space available at this Terminal allows no more than three handlers at the same time, whether suppliers of services to third parties or self-handlers.

At Terminal l, by contrast, an increase in the number of operators would make groundhandling equipment traffic extremely difficult. The configuration of Terminal 1 already poses problems with aircraft shunting in the *culs-de-sac* between Piers A and B, and between Piers B and C. The presence of several handlers and/or self-handling users would cause problems. A number of handlers is likely to occur in the eastern part of the Terminal where several airlines operate. The western part, by contrast, has been allocated to Lufthansa and Condor on an almost exclusive basis. According to the flight plan simulation submitted by FAG (Fraunhofer 27 June 1997, last Annex), 94 % of the movements in that area are attributable to Lufthansa and Condor, while other airlines account for 124 weekly movements only (approximately one movement every three days on each stand of this area). Conversely, Lufthansa or Condor flights outside this area are very limited, with the exception of position B2 which is almost fully allocated to Lufthansa. This implies that in this area predominantly one handler would operate in any case (be it FAG, an independent handler or Lufthansa as a self-handler). Accordingly there are no technical obstacles to Lufthansa's being handled by a different handler than the one operating in the eastern part of Terminal 1.

On 7 January 1998, FAG indicated a change in those figures, stating that in August 1997 an average of 12,2 % of the traffic in the western part of Terminal 1 accounted for 18 airlines other than Lufthansa. The Commission is not convinced that, even on the assumption of those figures being true and representative, such an increase would necessarily result in severe congestion problems. Moreover, it should be noted that FAG is responsible for the allocation of airlines to their different stands and, where the congestion problems increase, can take measures to reduce the problem. In this context, it should be recalled that only the constraints recited in Article 9 of the Directive can serve as a basis for an exemption. The impossibility of opening up the market must be due to a factor which is independent from the will of the party bringing it up.

However, the configuration of a terminal cannot in itself be an adequate reason for maintaining a monopoly. By limiting exemptions granted by Member States under Article 9(1)(b) to a maximum of two years, which may be extended once only, and by stipulating that users must have an effective choice whatever part of the airport is allocated to them, the Directive does not allow Member States to deprive users of this right by way of constraints if there are no plans to change them throughout the period covered by the exemption. All exemptions must be accompanied by measures to overcome the constraints invoked as reasons for granting them.

The exemption submitted made no provision for any reconfiguration of Terminal 1 to overcome the constraints invoked. Consequently, the configuration by itself cannot justify extension of the monopoly beyond the date set in Article 1 of the Directive for opening up the market at airports in the same category as Frankfurt, namely beyond 1 January 1999.

2.4. **Ongoing work**

The exemption is based on the fact that construction work is in progress on Pier A in Terminal 1 to create new aircraft gates and to reduce the airport's dependence on remote positions on the western part of the tarmac. In addition, the whole of Terminal 1 is being converted to comply with the Schengen standards, particularly by doubling the floors in Terminal 1. Terminal 2 already complies with these standards. This work should be completed by the end of 2000. This extension should increase the number of gate parking positions and reduce the distance to certain remote positions, thereby reducing boarding and disembarkation times and traffic in the area.

While this work is in progress the exacerbation of problems caused by an already difficult ground-traffic situation in the northern part of Pier A and in both *culs-de-sac* will preclude the parallel presence of any additional operator at Terminal 1, up to Gate C 15 of Pier C, according to the 1994 plan dated 16 May 1994 submitted by the German authorities. This limitation to a single operator must therefore, for the same reason, cover not only operations on the apron between piers but also operations involving the transport of passengers, baggage and crew as well as freight and mail between aircraft on remote positions and Terminal 1. This work, making it impossible to open up the market, combined with the exceptional but temporary nature of its consequences could be reasons for granting an exemption.

2.5. **Effects on capacity**

Germany claims that opening up the groundhandling market would make it necessary to convert the remote positions into parking spaces for groundhandling equipment and thereby reduce the total capacity of the airport.

This argument is directly linked to the space-shortage argument outlined above, since it is based on the assumption that conversion of aircraft positions is the only way of vacating enough space for a second operator. As is shown above, no evidence has yet been produced of any such constraints.

The decision states that the space occupied by the airport has increased by a factor of 2,4 over the last 40 years, compared with a 130-fold increase in the number of passengers over the same period, and is based on the fact that the demand for capacity far exceeds the current supply.

The reason for the capacity constraints lies in the layout of the installations, and in particular their lengthwise arrangement, as a result of which almost two-thirds of the positions are remote from the terminal. Moreover, the two runways are too close together to allow independent control of each runway, forcing the airport to use only one runway at a time, which takes up time and capacity. These constraints also entail greater use of servicing vehicles.

According to the file submitted by the German authorities to substantiate their decision, there is already a shortfall of 11 aircraft parking positions and this undercapacity leaves no alternative to making full use of every position and using all areas vacated to create new positions, at the same time precluding allocation of any further parking areas to groundhandling vehicles.

According to the file, the development plan to increase the number of movements at the airport will not be feasible without a proper increase in the number of aircraft parking positions. Accordingly, admission of any additional supplier would have adverse consequences on the capacity expected, because of the space which it would take up.

The capacity shortages invoked by Germany and the consequences of opening up the market cannot justify maintaining a full monopoly.

First, no airport can expand its surface area in proportion to traffic growth. Its capacity therefore varies, depending on the decisions taken on extensions. At the same time, most major European airports have to cope with demand exceeding the capacity available, and Frankfurt is no exception. The fact that the airport is currently operating a perfectly acceptable quality of service with 38,8 million passengers in 1996 (compared with 300 000 in 1950) shows that until now it has been possible to overcome the capacity problems. The figures submitted do not, in themselves, directly indicate any insurmountable capacity problems. The planned closure of seven positions will not affect the current overall capacity of the airport. In any case, these closures were designed to allow the construction of new infrastructure to proceed. The nine gates created by the work exceed, the seven positions lost, and the total number of positions — 156, including those added by the extension of Pier A and the link between the two terminals (Pier C) — suggests that, compared with other airports, it will be possible to achieve the demand envisaged by the airport, totalling some 80 movements per hour in 2000. Consequently, the number of positions is not the decisive factor as regards capacity at Frankfurt.

The German authorities' argument is based on the repercussions which admission of a second supplier will have on the planned capacity growth. The German authorities clearly state that the airport's priority for the next few

years is to increase its capacity substantially. It should be pointed out that equipment and staff levels at any given time depend, above all, on the number of aircraft requiring handling services. This has nothing to do with the number of suppliers. Secondly, the plan to increase its capacity is a decision on the part of the airport to meet some of the demand from carriers.

Although the decision to increase capacity is one which may not be limited exclusively to the commercial interest of the airport alone, but is of wider economic importance, nonetheless the Directive is meant to be applied by airports, exemptions being granted only where it is impossible to open up the market. The temporary nature of the exemption would, on its own, be sufficient reason to open up the market, if any were needed. Were it otherwise, then airports would acquire the right to decide for themselves, as long as they see fit, which objectives that they consider to take priority over application of the legislation. Moreover, the German authorities' argument could be supported by all airports, though possibly to differing degrees, since any extra space made available to groundhandling operations must be taken away from the space which could be allocated for other purposes. The problem addressed by the Directive is different: it is to determine whether space or capacity problems 'exist' for the purposes of Article 9(4) of the Directive which make it impossible to open up the market, and not whether hopes or decisions to develop capacity for economic reasons may be fulfilled. The German authorities have provided no proof that it is impossible.

As was mentioned earlier, the total number of positions planned (156) should meet the demand generated by the increase in runway capacity.

Finally, Germany bases the exemption decision on the effects of opening up the market on management of the system and baggage sorting operations and on the quality of service at Frankfurt, notably the minimum connecting time. Article 9 of the Directive allows exemptions to be granted on the basis of space and capacity constraints only. The Commission cannot, therefore, accept this argument.

3. ***Measures planned***

Under Article 9(2) of the Directive, any decision to grant an exemption must be accompanied by a plan of appropriate measures to overcome the alleged constraints.

Germany explains its exemption decision by reference to a space and congestion problem at the airport. The space problem has not been demonstrated and the congestion is, in the view of the Commission, confined to Terminal 1. However, no plan to totally overcome this congestion problem accompanied the German authorities' decision. The final reason given for the exemption is exacerbation of the congestion at Terminal 1.

In particular, construction work is in progress to convert Terminal 1 to Schengen standards and to extend Pier A in Terminal l. This extension will add 12 new gate parking positions and, consequently, reduce the distance to some of the remote positions. On completion of the work on Pier A, at the end of 2000, the vacated remote positions could be allocated as parking spaces for groundhandling equipment.

While the work is in progress, the traffic problems created by the conversion to Schengen standards and extension of Pier A will be too great to allow more than one operator in Terminal 1, particularly in the two *culs-de-sac* between the piers. When this work is completed, certain difficulties will persist but the plan submitted by the German authorities includes a commitment on the part of the airport to open up the market at this point and to release parking spaces equivalent to seven aircraft parking positions between the runway and Terminal l for groundhandling equipment. The commitment relates to organizing the competitive procedure for selecting the suppliers of the services by the beginning of 2000.

FAG's commitment to allocate the positions vacated as parking spaces for groundhandling equipment, and to do so no later than that moment and in all circumstances, in order to open up the market, can be considered a measure to overcome the constraints, in accordance with Article 9(2) of the Directive.

4. ***Compliance with the criteria laid down in Article 9(2) of the Directive***

The German decision fails to state explicitly whether it complies with the principles laid down in Article 9(2) of the Directive as to compliance with the aims of the Directive, non-distortion of competition and proportionality of the measures taken relative to the existing constraints, nor is any evidence thereof adduced.

Contrary to the conclusions reached in the study by Cranfield University — as notified to Frankfurt airport and drawn to the attention of the German authorities — stating that different approaches were needed, tailored to the configuration at each terminal, the exemption decision draws no distinction between the terminals and gives no explanation as to why it is impossible to open up the market at either of them. In the light of the foregoing considerations concerning the space available at Terminal 2 and the situation regarding Piers A and B in Terminal 1 which are used largely by companies in one and the same group, the Commission considers that the exemption extends further than necessary and fails to comply with

principle (iii) set out in the second subparagraph of Article 9(2) of the Directive.

IV. CONCLUSIONS

For the reasons stated above, the Commission is of the opinion that the arguments, studies and plans submitted by the German authorities do not adequately show that constraints are so great as to justify the derogation requested.

After hearing the German authorities and consulting them on the draft decision, the Commission considers that in order to be approved the decision taken by the German authorities and notified on 15 October 1997 must be amended, in accordance with Article 9(5) of the Directive, as follows:

In relation to Terminal 1:

The exemption granted from the provisions of the Directive for third-party and self-handling shall apply in relation to the eastern part of the terminal (eastern part of Pier B from Gate B 2 to B 42 and Pier C up to Gate C 15 in the 1994 plan submitted by Germany) as well as for operations involving the transport of passengers, baggage and crew as and also of freight and mail between aircraft on remote positions and Terminal 1, in view of the exacerbation of congestion in Terminal 1 during the construction work. For the other parts of the terminal, on the other hand, on the grounds set out above, the exemption from the provisions of the Directive for third-party handling shall not apply and the exemption from the self-handling provisions shall be restricted to a single airport user;

In relation to Terminal 2:

The exemption granted in respect of third-party handling shall be withdrawn. In order to guarantee to all airlines a choice between at least two suppliers of groundhandling services, as provided for by the Directive, the market needs to be opened up to a second supplier, in addition to FAG. However, since in practice the space available at this Terminal allows no more than three operators at the same time (whether they be suppliers of services for third parties or self-handling users), it follows that, in derogation from the provisions of the Directive, the right to self-handle shall be restricted to a single user,

HAS ADOPTED THIS DECISION:

Article 1

The exemption decisions granted to Flughafen Frankfurt/Main AG, as notified to the Commission on 10 April and 20 October 1997, are hereby approved, provided that Germany makes the following amendments thereto:

(a) in relation to Terminal 1, the exemptions under Article 9(1)(b) and (d) of Directive 96/67/EC shall be granted only in respect of the eastern part of Pier B running from Gate B 2 to Gate B 42, and Pier C up to Gate C 15, as well as to the transport of passengers, baggage, crew, cargo and mail between the aircraft and the Terminal; as regards Pier A and the western part of Pier B from Gate B 10 to Gate B 23, no exemption under Article 9(1)(b) of the Directive shall be granted, and the exemption under Article 9(1)(d) of the Directive shall be granted in such a way as to allow one airport user the right to self-handle;

(b) in relation to Terminal 2, no exemption under Article 9(1)(b) of the Directive shall be granted and the exemption under Article 9(1)(d) of the Directive shall be granted in such a way as to allow one airport user the right to self-handle.

Article 2

Germany shall notify the exemption decisions, as amended pursuant to Article 1, to the Commission before they enter into force.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 14 January 1998.

For the Commission
Neil KINNOCK
Member of the Commission