COMMISSION DECISION

of 27 April 1999

on the application of Article 9 of Council Directive 96/67/EC to Berlin Tegel Airport (Berliner Flughafen GmbH)

(notified under document number C(1999) 1066)

(Only the German text is authentic)

(Text with EEA relevance)

(1999/316/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,

Having regard to the request for approval of the decision of the German authorities of 26 January 1999 and after consulting those authorities,

After consulting the Advisory Committee,

Whereas:

I. SCOPE OF THE EXEMPTION NOTIFIED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

1. *Notification by the German authorities*

(1) By letter of 28 January 1999, which the Commission received on 29 January, the German authorities requested approval of the decision of the Government of the Federal Republic of Germany of 23 July 1999 to grant to Berlin Tegel airport (Berliner Flughafen GmbH) an exemption to:

— ban self handling, and

— reserve for Berlin Tegel Airport (Berliner Flughafen GmbH) the provision of services to third parties, for the categories of services referred to in points 3, 4 (with regard to the physical handling of freight and mail, whether incoming, outgoing or being transferred, between the air terminal and the aircraft), 5.4 and 5.6 of the Annex to the Directive.

This exemption is to be granted, on the basis of Article 9(1)(b) and (d) of the Directive, until 31 December 2000.

(2) Pursuant to Article 9(3) of the Directive, the Commission published an extract from the said notification in the *Official Journal of the European Communities* [2] and invited interested parties to submit comments.

(3) In accordance with Article 9(5) of the Directive, the Commission consulted the German Government on its draft evaluation on 22 and 24 March 1999.

Basis of the exemption

(4) The general rules for access to the groundhandling services market are set out in Articles 6 and 7 of the Directive. They clearly state the principle that most categories of groundhandling services should be opened up to the maximum possible extent. For an airport with a volume of traffic like that of Berlin Tegel the Directive provides for the right to self-handle from 1 January 1998 and opens up the market for services to third parties from 1 January 1999. However, in order to take into account the specific situation and role of an airport, and in particular the safety, security, space and capacity constraints which can arise in certain parts of most airports, the Directive does not impose complete liberalisation for four categories of services located air-side, i.e. in a particularly sensitive area of the airport, but does require a minimum degree of liberalisation of both self handling and the supply of services to third parties. The categories concerned are ramp handling, baggage handling, fuel handling and certain freight and mail handling operations.

(5) Article 9 of Council Directive 96/67/EC also takes account of the fact that, in certain very special cases, severe space and capacity constraints 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

[1] OJ L 272, 25.10.1996, p. 36.

[2] OJ C 64, 6.3.1999, pp. 9-11.

time to overcome the constraints. These 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.

(6) An exemption can be granted only on the, basis of specific space or capacity constraints. This is the basis on which the German authorities have granted the abovementioned exemption in accordance with Article 3 of the German 'Verordnung über Bodenabfertigungsdienste auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften' ([3]) transposing Directive 96/67/EC into national law.

2. *Situation regarding groundhandling at Berlin-Tegel airport*

2.1. **Presentation of the airport**

(7) Until 1990, Berlin Tegel airport served the western zone of Berlin, Schönefeld airport served the eastern zone, and Tempelhof airport was reserved mainly for military operations. Following reunification, Tegel became Berlin's main airport. Air traffic in Berlin is expected to increase by nearly 24 % between 1996 and 2002, which not only makes it necessary, at least for the time being, to keep all three airports open and to reopen Tempelhof to civilian flights, but also causes capacity problems at Tegel airport, which is in greatest demand by carriers on account of its infrastructure and its proximity to the city.

(8) The increase in demand and the problems caused in particular by inefficient use of the runway, resulting in excessive transfer times, prompted the company which manages Berlin's airports (BFG) and its partners to decide to build the new Brandenburg International Airport on the existing Schönefeld site, the only site capable of meeting space and environmental constraints. However, pending completion of the new airport, Tegel, which handled nearly 9 million passengers in 1997, may soon have to handle the bulk of the traffic. If Tempelhof is closed in 2001-2002, as currently planned, much of its traffic would be transferred to Tegel until 2007, when the new airport is scheduled to open.

([3]) Bundesgesetzblatt 1997 Teil 1 Nr. 82, 16 Dezember 1997, 2885.

2.2. **Groundhandling services at the airport**

(9) At the date of the decision by the German authorities, 54 of the 59 groundhandling services — i.e. all land-side services and certain air-side services such as catering and fuel handling — were already open to competition, permitting a total of 28 service suppliers to operate. The exemption covers certain air-side services which since 1998 have been provided solely by a subsidiary of Berlin Lufthansa Airport Services (BLAS), in which the airport has a majority holding. These services are baggage handling (point 3 of the Annex to the Directive), loading, unloading, and transport between the aircraft and the terminal (point 5.4), engine starting (point 5.5) and freight and mail handling (point 4).

II. CONSTRAINTS REFERRED TO BY THE GERMAN AUTHORITIES

(10) The German authorities based their decision on the impossibility of opening up the market for the operations in question on account of the lack of air-side space and capacity to accommodate an additional operator, whether a service supplier or a user wishing to self-handle.

1. *Capacity problems*

(11) Berlin Tegel airport was built with a design capacity of 5,5 million passengers. However, since 1990, the airport management company has had to cope with overcapacity of nearly 60 % on account of rapid growth in the number of passengers and amount of freight transported — 8,4 million passengers and 24 000 tonnes of freight in 1996 — corresponding to a growth rate of 80 % over 10 years. Given this situation, the airport, which cannot be extended beyond its existing boundaries, and the northern part of which is reserved for military use, has partly overcome its shortage of capacity by creating new positions and additional check-in desks, lounges, and parking areas, to the extent that all spare space is now used to the full and it is impossible to accommodate additional groundhandling operations in the existing infrastructure. The airport is managed at the limits of its capacity. The capacity limit is set at 18 departures and arrivals per hour on account of groundhandling problems, but this limit is already exceeded several times a day. Traffic is forecast to rise from 118 000 movements and 8 million passengers in 1996 to 125 000 movements and 10,2 million passengers in 2000.

(12) According to the German authorities, full use of the groundhandling capacity requires full cooperation between the various activities, especially air-side. Moreover, managing the capacity shortage will require changes to the groundhandling procedure in the very near future. The multiplication of the number of service suppliers for certain air-side operations (catering, fuel) in recent years has complicated the management of traffic on the apron.

2. ***Shortage of space***

A. **Parking areas for groundhandling equipment**

(13) Of the 14 500 m^2 available for groundhandling operations, 10 100 m^2 can actually be used to park equipment and, according to the German authorities, all of this space is currently used. The remaining 4 400 m^2 are operational zones near the aircraft parking areas which cannot be allocated to an individual operator. Moreover, their triangular shape makes them harder to use.

(14) The current air-side requirement is for 10 700 m^2 for all groundhandling service suppliers (excluding winter equipment, which is not parked at specific positions but distributed among the workshops and several other airport areas); 8 000 m^2 is allocated to BLAS and 2 700 m^2 to other operators. The estimated current shortfall is 600 m^2.

B. **Baggage handling**

(15) The current baggage handling system comprises nine 'baggage cellars' (seven around the terminal itself and two in the terminal extension) which are not interlinked. Each cellar has an area of between 300 m^2 and 450 m^2 and handles the flights of aircraft at adjacent gate parking positions and at remote positions. Each of the seven cellars around the terminal is equipped with one conveyor for arrivals and two conveyors for departures. The other two cellars have a continuous double conveyor system. Each cellar has staff changing rooms and rest areas. According to the German authorities, the shortage of space in these cellars prevents any increase in the number of service suppliers, and only a single service supplier can handle flights properly and keep to transfer times. According to the file submitted, there is insufficient space to park all waiting trolleys and to cope with trolley movements when several flights are handled at the same time. Moreover, the association between each cellar and the corresponding gate parking positions makes it impossible to allocate the cellars to different service providers. Such allocation would seriously affect the operation of the airport.

C. **Areas reserved for staff use**

(16) The shortage of space also affects rest areas, which are already full on account of the increase in traffic and the multiplication of service suppliers. The German authorities consider it impossible to open new rest areas in the immediate future on account of the administrative problems which such constructions can cause. Moreover, in agreement with the management, baggage handlers spend their rest periods in rooms adjacent to the baggage cellars; new rest areas could only be created at an unacceptable distance.

(17) Schönefeld airport can be expected to reach full capacity in 2001 – 2002, when Tempelhof airport closes. The carriers' preference for Tegel is expected to increase traffic at this airport by an estimated 20 % — to 10,2 million passengers a year — by the year 2002. The airport authorities predict capacity problems both land-side and air-side. The additional space required on the apron is estimated at 700 m^2, thereby increasing the shortfall to 1 300 m^2, and this is based simply on the increase in traffic, without taking account of the impact of the arrival of an additional service supplier.

3. ***Impact of the introduction of new operators***

(18) According to the file submitted, the arrival of new service suppliers would result in a considerable increase in space requirements on account of the increase in the amount of equipment needed to handle the peak periods of each service supplier.

(19) According to the German authorities, the impact would depend on the number of new service suppliers, the volume and structure of their operations, and their commercial policy.

(20) Studies carried out on behalf of the airport tend to show that on the basis of two new operators (service suppliers or self handlers) operating the same policy as is currently operated by the sole operator, and with one operator handling Lufthansa traffic, the second operator handling the traffic of British Airways and its subsidiary Deutsche BA, and the

third operator handling the other companies, 3 500 m^2 would be needed to park the additional equipment. The total space shortfall would thus be 4 100 m^2, which would increase to 4 800 m^2 by the year 2000 on account of the increase in traffic. However, according to the additional documents handed over by the airport authorities, certain service suppliers forecast much higher equipment requirements, the average figure being of the order of 6 500 m^2.

(21) According to the German authorities, these studies failed to take sufficient account of the impact of the arrival of new operators on the market share of the current sole operator, and hence of his reduced requirements for equipment and staff and, therefore, space. However, they consider that given the existing shortfall of 600 m^2, it will not be possible to find sufficient space for a new operator.

(22) The file also refers to a considerable degradation of traffic on the apron, which will be very difficult to coordinate with the multiplication of the number of operators, the airport already being at the limits of its capacity. The increase in traffic due not only to the amount of equipment, but also to the changeover between equipment, will require a reorganisation of runways which will affect the airport's capacity and lead to substantial delays, estimated at 32 % in 2002, compared with the current 12 %.

(23) The study predicts an increase of between 20 % and 50 % in traffic on the apron with the arrival of a second operator, rising to between 140 % and 160 % at the north intersection point, resulting in serious safety problems.

(24) However, the airport says that it is prepared to accept a second operator insofar as this would have only a limited impact on capacity, space and traffic on the apron.

III. REACTIONS OF THE INTERESTED PARTIES

(25) The various interested parties were invited to submit comments in accordance with Article 9(3) of the Directive. The companies which submitted comments all stressed that the airport knew several years in advance of the obligations it would face pursuant to the Directive and that no measures had been taken to overcome the difficulties cited and thus allow the market to be liberalised.

(26) The current shortfall of 600 m^2 referred to by the airport could be overcome easily, and additional space could be found by optimising the use of existing areas. In particular, the winter equipment could be moved to remoter parts of the airport, thus making space available at positions 51 to 56 on the western part. The companies also claim that the airport has failed to take account of the loss of market share by the current sole operator following the arrival of a new entrant.

(27) The traffic forecasts put forward appear to be overestimates, as is shown by the latest trends, and capacity requirements should therefore be adjusted downwards. As regards baggage transport and handling, on the basis of the current possibility of handling three flights simultaneously in the baggage cellars, the arrival of a second service supplier should not give rise to any problems, given the space available in each cellar and the fact that the number of trolleys depends on the number of flights and not on the number of service providers. The organisation of this area should not give rise to problems, as the airport continues to have sole responsibility. The companies claim that the problem of space, both on the apron and for baggage handling, is primarily a matter of poor management of the space available and ineffective organisation.

(28) As regards staff areas, the companies recognise that it would be difficult to find room for all the staff of a second service supplier. However, the use of light structures or the renting of space off-airport could resolve the problem for new service suppliers, those already present on the airport not necessarily needing them. In general, the companies which submitted comments consider that the situation is liable to deteriorate at Berlin Tegel airport in the next few years, whatever the increase in traffic, but that this deterioration will have nothing to do with the presence of a sole or several groundhandling service operators.

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

1. *The rules in force concerning ground-handling*

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

(29) Council Directive 96/67/EC provides for the market to be opened up to different extents as a function of the way ground handling services that are provided (self-handling or service suppliers) and the level of traffic at the airport.

(30) The general rules governing groundhandling for the service categories listed in the German authorities' notification are set out in Articles 6(2) and 7(2) of the Directive. Those rules have been incorporated into the provisions of Article 3(2) of the German regulations transposing the Directive. The Directive provides that a Member State may restrict self handling to not less than two users, who must be selected on the basis of relevant, objective, transparent and non-discriminatory criteria, and that suppliers must be chosen through a public tender procedure. On this basis Berlin Tegel airport is required, pursuant to Annex 5 of the 'Verordnung über Bodenabfertigungsdienste auf Flugplätzen und zur Änderung weiterer luftrechtlichter Vorschriften' of 10 December 1997 ([4]) which transposes the Directive into German Law, to open up the market for groundhandling services to a second service supplier and to permit self handling by two users for the services in respect of which the number of service suppliers or self-handling users can be limited pursuant to Articles 6(2) and 7(2) of the Directive.

(31) However, where specific space or capacity constraints, arising in particular from the rate of utilisation of space or space occupation, make it impossible to authorise self-handling or the provision of services to third parties to the extent provided for by the Directive, the Member State concerned may, on the basis of Article 9(1)(b) and (d), restrict the provision of groundhandling services to third parties to a single supplier and ban self-handling or restrict it to a single user.

However, under Article 9(2) any such exemption must:

— specify the category or categories of ground handling services for which the exemption is granted and the specific constraints of available space or capacity which justify it,

— be accompanied by a plan of appropriate measures to overcome the constraints.

Moreover, pursuant to Article 9(2), it must not:

— unduly prejudice the aims of the Directive,

— give rise to distortions of competition,

— extend further than necessary.

(32) As stated by the Commission in its decisions of 14 January 1998 on Frankfurt and Düsseldorf airports ([5]), the main aim of the Directive is to liberalise groundhandling services. The restrictions imposed on third parties are restrictions on the freedom of such parties to supply such services. By analogy with State measures restricting the freedom to supply services ([6]), measures likely to exclude or prohibit the activities of service suppliers or, in the present instance, those of users wishing to self-handle, even if they apply without distinction to national service suppliers or users and to those from other Member States, must be justified by overriding public-interest requirements and not by economic factors and must, moreover, be in proportion to the aims pursued.

1.2. **Procedure**

(33) The German authorities have undertaken to make the entry into force of the exemption decision subject to the Commission's decision.

(34) As stated in its two decisions on the airports at Frankfurt and Düsseldorf ([7]), the Commission must direct its examination towards:

— the existence and extent of the constraints justifying the exemption and the inability to open up the market to the extent provided for by the Directive; only space and/or capacity constraints may be taken into account,

— the plan of appropriate measures intended to overcome those constraints; that plan must be credible and unconditional and include a timetable for the implementation of those measures,

([4]) See 3.

([5]) Commission Decisions of 14 January 1998, p. (OJ L 173, 18.6.1998, p. 32).

([6]) Judgments of 25 July 1991 in Cases C-288/89 *Mediawet* [1991] ECR I, p. 4007 and C-76/90 *Säger v. Dennemeyer* [1991] ECR I, p. 4221.

([7]) See 5.

— conformity with the principles of compliance with the aims of the Directive, absence of distortions of competition, and the extent of the measure, as referred to in Article 9(2) of the Directive.

(35) The aim of granting an exemption is not to give the airport a further adaptation period in addition to that already granted by Article 1 of the Directive. It is to permit the airport to overcome the specific constraints which it may encounter when the market is liberalised. Any exemption must therefore be examined in the light of the specific constraints put forward in justification of the impossibility of opening up the market within the time allowed. In addition, in accordance with the case-law of the Court of Justice of the European Communities, any exception must be interpreted strictly and when the scope of an exemption is determined account must be taken of the purpose of the measure in question ([8]).

(36) This exemption must be examined in the light of these considerations.

(37) In accordance with Article 9(4) of the Directive, the Commission has made a detailed analysis of the alleged space and capacity constraints, whether the decision taken is appropriate to those constraints, and the measures put forward to overcome them. Its examination drew upon the studies provided by the German authorities, its visit to Berlin Tegel airport, and the technical assessment made at its request by Aerotec. Finally, the Commission took account of the comments made by the airport and the German Government concerning the Commission's analysis, and in particular those concerning space constraints in the staff rest areas adjacent to the baggage halls. According to the German authorities, the Commission appears to have underestimated these constraints. They restated their view that it is not possible to accommodate a second service supplier in the baggage halls. They dispute the Commission's assessment of the space requirements of a second service supplier, estimated at 1 200 m^2.

([8]) See 5.

2. ***Examination of the constraints referred to by the German authorities***

2.1. **Available space**

A. *Space for parking equipment*

(38) The layout of the terminal gate parking positions and their use for various types of aircraft show that the best possible use is made of this space for parking groundhandling equipment and that it is not possible to make additional space available. However, when we visited the airport we discovered that a large number of private vehicles were parked alongside the terminal and the baggage cellars. It is difficult to claim that these vehicles serve operational objectives such as the supervision of ramp handling, as on the day of our visit we observed that these vehicles had not been moved for at least five hours, i.e. for most of the working day between 10.00 and 15.00. It would therefore be perfectly feasible to park waiting baggage trolleys here.

(39) Likewise, as regards the freight and mail handling installations, the groundhandling equipment parked here had not been used between at least 10.00 and 15.00. Moreover, on the afternoon of the Commission's visit to the airport installations and apron, no aircraft movement or handling was recorded. As the airport authorities stated that the groundhandling equipment was allocated, i.e. the equipment parked here was used only for freight and not for handling passenger operations (baggage transport), we can deduce that all the freight and mail handling equipment was parked during this completely slack period. Our examination of equipment parking areas showed that scarcely more than half of the space was then being used.

(40) The study carried out on behalf of the Commission compared with similar situations in other airports and the standards and practices recommended by the International Civil Aviation Organisation contradict the report submitted on the shortage of space on the apron. These standards and practices specify which areas and positions can be reserved for safety requirements and equipment at aircraft positions, according to the type of aircraft. They show that, in the case of TIPO positions (requiring the use of pusher tugs on departure), and taking account of the category of aircraft positions in this area, some 200 m^2 could be made available on each side of the aircraft nose. Using just two of the six positions in this area of the airport, an area of nearly 800 m^2 could thus be made available

without infringing the safety standards defined by the ICAO. The airport comprises more than 20 remote TIPO positions where these arrangements could be applied. Thus it appears to be possible to make space available, but this requires rigorous management of operations on the apron, and in particular clear markings on the tarmac and strict use of positions and movements around the aircraft.

(41) Thus the German authorities have failed to demonstrate that there is insufficient space to park the groundhandling equipment required by a second operator on the apron.

B. *Baggage handling*

(42) Baggage transport between the aircraft and the terminal does not in itself appear to pose any specific problems. There are seven baggage cellars on level zero of the terminal, plus two cellars equipped with a double conveyor permitting simultaneous transport of arriving and departing baggage. The other seven cellars each have two conveyors for departures and one conveyor for arrivals. The surface of each cellar varies between 300 m^2 and 450 m^2. Each cellar — except those equipped with double conveyors, which handle only remote positions — has to handle baggage from the two immediately adjacent gate parking positions and a number of remote positions. Thus the transport time between the gate parking position and the system itself is very short, so there is a large and rapid rotation of trolleys and relatively few trolleys are required.

(43) Inside each of the terminal cellars, the space allocated and the one-way traffic system make it easier to accommodate a second operator than is the case in other airports. According to the assessment made on behalf of the Commission, at Berlin Tegel waiting trolleys are parked inside the system. As was stated in the Commission decision concerning the Cologne/Bonn airport [9], the number of trolleys which a system needs depends on the number of flights to be handled at a given time and not on the number of operators. It is for the airport authority to manage in an appropriate and non-discriminatory manner the number of trolleys needed for transport operations. Space on the apron, including part of that alongside the terminal currently reserved for private vehicles referred to above, can be used to park waiting trolleys.

(44) Likewise, traffic inside each cellar is such that the arrival of a second operator for baggage transport will not cause serious problems. Luggage unloading takes only a few minutes, largely because of the proximity of the gate parking positions, and the simultaneous handling of departing and arriving flights appears to be entirely feasible. It has not been shown, on the basis of flight schedules, that it is impossible to handle two arrivals and one departure at the same time. Compared with other airports with the same type of system, such as London Heathrow, the space inside the cellar — and in particular the traffic lane in the middle — and the one-way traffic system allow two or even three tractors belonging to two different companies to pull trolleys at the same time. There is sufficient room for trolleys to pass each other.

C. *Other ramp handling operations*

(45) The report submitted by the German authorities makes no specific reference to other ramp handling operations. We have already noted that there is sufficient space on the apron to park the equipment of a second service supplier. The buses used to transport passengers to and from remote positions do not need to be parked near the terminal, as they can travel quickly across the apron and can therefore wait or be parked on remote areas, e.g. near the remote positions, as is the case at many other airports, including London Heathrow.

(46) It is clearly preferable for the space allocated to handling equipment and operations to be located close to the aircraft or terminal buildings, according to the type of operation. However, this is not essential. The Directive lays down that the Member State authorities must show that it is impossible to open up the market to the degree required. The Member State must show that there is insufficient space to park the equipment and carry out the intended operations, without specifically setting quality criteria for each of the positions. In the case of Berlin Tegel airport, such equipment could be parked near positions 33, 34 and 35, where the airport authorities intend in any case to free up space. This might in some cases

[9] Commission Decision of 30 October 1998 concerning Cologne/Bonn airport (OJ L 300, 11.11.1998, p. 25).

complicate management tasks, but it does not make it impossible to open up the market. It is up to the applicant to familiarise himself with the constraints under which he will have to operate and to decide whether it is in his interest to operate at this airport.

D. *Rest areas*

(47) The file submitted by the German authorities refers to the rest areas located in each baggage handling room. There are at least seven such areas, each of approximately the same size as the baggage handling rooms. Thus an area of between 1 800 m^2 and 2 000 m^2, or more, is reserved for staff. The German authorities have nevertheless stated that these areas serve not only the current sole operator of baggage handling services but also the other service providers and carriers performing certain groundhandling operations at the airport, and that because of the distance between certain rest areas and the corresponding operational areas (at the other end of the terminal building), baggage handling staff in the remote cellars take their rest periods in their operational areas, by agreement with the airport management.

(48) However, even if these rest areas serve staff performing all groundhandling operations, and taking the rules on the size and management of staff common rooms into account, the space available in the terminal might be sufficient to accommodate the staff which a second operator would need to handle and transport baggage, who, given their function, would be working close to the existing rest areas. However, there is not sufficient space to accommodate more than one additional operator.

(49) As regards the accommodation of staff responsible for passenger transport operations, it has not been shown that it is impossible to install temporary buildings such as Algeco containers near certain remote areas, in particular positions 33, 34 and 35, where the airport authorities intend in any case to make additional space available for groundhandling operations. It is therefore up to the applicant service supplier to familiarise himself with the constraints within which he will have to operate and to take these constraints into account when assigning his staff.

The same reasoning can be applied to the transport of crews.

(50) Whereas there is no need for the staff responsible for passenger and crew transport operations to be stationed in the immediate vicinity of the terminal building or their operating areas, stationing the staff responsible for loading and unloading the aircraft at a substantial distance would be much more problematical, and the lack of sufficient space in the vicinity would make it impossible to accommodate a second operator on the apron.

(51) The problem of freight and mail handling operations is quite separate, as these operations are carried out in a separate part of the airport using dedicated equipment and installations, which include a rest area for staff carrying out certain freight handling operations. The absence of additional space for staff who have to stay reasonably close to their operating area means that any new operators must already have rest areas for their staff and not require new rest areas. Given the current absence of service providers in this part of the airport, and taking into account the space available for equipment and the absence of space in the vicinity for staff, the Commission accepts the refusal to allow a new service supplier but rejects the exemption banning self handling for freight and mail handling operations.

2.2. **Accommodating new operators**

(52) In general, the Commission agrees with the German authorities that the study presented by the airport fails to take account of the effect on the current sole operator of the new entrant winning market share, and that this will permit space to be made available.

(53) However, the Commission recognises that if the transfer of market share is relatively small — around 10-15 %, as assessments of other airports covered by exemptions have shown — the reduction in the space requirements of the existing sole operator may be minimal, and the equipment of the new service provider must simply be added to that of the existing sole operator.

(54) The figures given in the study of the impact of new operators are substantial overestimates.

(55) Taking as an example self-handling by the largest carrier operating at the airport, on the basis of the current flight schedules supplied by the airport, equipment requirements would be equivalent to some 70 % of the equipment currently used by the airport (for an area of approximately 5 600 m^2). The amount of new equipment introduced by the second operator will inevitably be greater than the reduction in the equipment — and therefore space — requirements of the current sole operator, which

the Commission's assessment estimates at about 40 % (or 4 000 m^2). The net increase in space requirements is therefore estimated at 30 % or 2 400 m^2. On the same basis, the arrival of a service supplier taking a 10 % to 15 % market share, which corresponds to the assessments habitually made in the studies carried out by other airports which have been granted exemptions, and assuming that there will be no reduction in the equipment requirements of the current sole operator, the increase in space requirements can be estimated at 1 200 m^2. As stated above ([10]), this amount of space could be made available, in accordance with the standards laid down by the ICAO, around only three or four, or perhaps five of the 20 or so TIPO positions, taking account of the German authorities estimated requirement of 2 000 m^2. Requirements on this scale are possible only in the extreme and highly unlikely hypothesis that the new operator would also operate during all the peak periods of his competitor.

(56) The detailed requirements associated with the arrival of certain companies, as supplied by the airport, suggest that the new operators would carry out all the operations currently carried out by the sole operator, which is unrealistic. The figure of 1 200 m^2 estimated by certain interested parties is more realistic, and our analysis has shown that such requirements can be met.

(57) The Commission recognises the problem of traffic growth over the next few years and the need for extra positions and terminal installations. However, the impact of the arrival of a new operator on the number of movements on the apron is overestimated. The number of movements on the apron depends above all on the number of aircraft movements and, with a maximum of 18 arrivals and departures per hour, as indicated, traffic from remote positions can cross the taxiways without affecting traffic. During peak periods, operators will have to be very careful, and it is up to the airport authority to enforce the standards for traffic on the apron. A number of European airports with a large number of movements around far more congested terminals cope with traffic crossing taxiways in strict compliance with safety standards.

([10]) See 2.1.A.

Thus there is sufficient space available at the airport to accommodate the equipment of a second supplier of groundhandling services, whether this space is found alongside the terminal building or at the head of aircraft positions, or at remote positions in the case of the buses used to transport passengers. An applicant service supplier will assess his interest in operating at the airport on the basis of the space constraints of which he is informed in accordance with the Directive. However, the space available for staff rest areas is not sufficient to accommodate a new service supplier for all operations on the apron. Thus the concentration of rest areas in the terminal building should allow the market to be opened up to a second service supplier for baggage transport operations, and the bus drivers can be accommodated in remote areas. For the other operations concerned by the exemption, the principles laid down in the Directive can be applied only to self handling by a carrier not requiring additional space for his staff.

The fifth recital of the Directive states that 'the opening-up of access to the groundhandling market should help reduce the operating costs of airlines and improve the quality of service provided to airport users'. However, the Directive will only be effective if such access is real. *De jure* liberalisation which is not translated into *de facto* liberalisation, as has been the case since 1 January 1998 for self handling, would hinder the achievement of the aims of the Directive. In contrast, liberalisation which also helped to improve the services provided to, and the prices paid by, many users, as referred to in the fifth recital, would help to achieve the aims of the Directive by introducing competition between providers. As the airport has sufficient space to allow the market for certain categories of services to be opened up only to one new operator, the presence of a supplier of services to third parties would be the only way to achieve these objectives.

3. ***Plan of appropriate measures***

(58) In accordance with the provisions of Article 9(2) of the Directive, the file submitted by the German authorities identifies measures to overcome the constraints cited.

(59) The airport manager has adopted an extension plan. The first step in the plan is to extend the airport's capacity by building a new terminal. The new terminal would be situated to the east of the existing terminal. The existing parking areas would be redeveloped, a new apron built, and the main access transferred to the eastern side of the tower, which would reduce the current congestion at the runway intersection point in the northern part of the airport.

(60) However, the final decision to build the new terminal still depends on the obtention of the requisite administrative authorisations and on the readiness of investors in the planned future Berlin Brandenburg airport.

(61) As mentioned above, the plan of measures to overcome the constraints cited must be credible and unconditional, and be accompanied by a timetable for its implementation. The Commission cannot consider a plan whose very implementation is uncertain, not to mention its date of implementation, to constitute a plan of appropriate measures within the meaning of Article 9 of the Directive.

(62) However, the German authorities also referred to two other measures:

— transformation of five areas (numbered on the plan annexed to this Decision) which are currently grassed over into areas for the operation and parking of groundhandling equipment; these areas, which are located close to the operational areas, and are referred to in the 'Lageplan: Planzustand BZW Anderung: Alte Beststandplan Nr 62', which is based on the situation at 6 November 1998, will provide 6 300 m^2 for groundhandling operations by autumn 2000, thus allowing new operators to be accommodated in accordance with the Directive and the national rules transposing the Directive for German airports,

— conversion of the building which currently houses the car hire services: a storey will be added to the building in order to make the ground floor available for the parking of groundhandling equipment and to solve the baggage handling problem.

(63) As no specific administrative approval is required for the conversion of the building, and the German authorities have undertaken to carry out this work in order to allow full compliance with all the requirements of the Directive by the end of the period of validity of the exemption, these measures can be considered to conform to the definition of a plan of appropriate measures set out in Article 9 of the Directive.

4. *Compliance with the criteria set out in Article 9(2) of the Directive*

(64) The fact that there is sufficient space to accommodate the equipment and staff of an operator other than the current sole operator for the categories of groundhandling services covered by the exemption shows that the scope of the exemption is wider than necessary. However, as the work intended to allow the market to be opened up to the degree laid down in the Directive and the German regulations transposing it for the groundhandling categories in question, i.e. to two service providers and two users authorised to carry out self-handling, is scheduled for completion in autumn 2000, the exemption does not cover a longer period than is necessary.

V. **CONCLUSION**

(65) The German authorities have failed to show that it is impossible to open up the market to a second service supplier for all the categories of services covered by the exemption. There is sufficient space available for parking equipment and for staff on the apron and in the terminal to allow the market to be opened up to a second service supplier, without, however, allowing a user to carry out self-handling during the period of the exemption, for baggage handling and the transport of baggage, passengers and crew. However, the absence of adequate infrastructure in other parts of the apron or the terminal to accommodate staff obliges the airport to open up the market for freight and mail handling operations only to carriers not requiring additional staff accommodation in order to carry out self handling in this part of the airport. Likewise, the shortage of space on the apron and the fact that additional space for rest areas for staff responsible for loading and unloading operations and aircraft movements cannot be made available near their operating areas justifies the reservation of these operations only to a sole operator during the period of the exemption,

HAS ADOPTED THIS REGULATION:

Article 1

The decision of the German authorities of 26 January 1999 to grant an exemption to Berlin Tegel airport, of which the Commission received notification on 29 January 1999, is hereby approved provided that the Federal Republic of Germany adds the following restrictions:

— ban on self-handling until 31 December 2000,

only for the categories of services referred to in points 3, 5.4 (in respect of the transport of passengers, baggage and crew) and 5.6 of the Annex to the Directive,

— reservation until 31 December 2000 for Berlin Tegel Airport (Berliner Flughafen GmbH) of the provision of services to third parties,

for the categories of services referred to in points 4, 5.4 (in respect of the loading and unloading of the aircraft) and 5.6 of the Annex to the Directive.

Article 2

The Federal Republic of Germany shall notify the Commission of the exemption decision amended in accordance with Article 1 before it enters into force.

Article 3

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 27 April 1999.

For the Commission

Neil KINNOCK

Member of the Commission