COMMISSION DECISION

of 5 January 2000

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

(notified under document number C(1999) 5067)

(Only the German text is authentic)

(Text with EEA relevance)

(2000/122/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 of 5 October 1999 for approval of the decision of the German authorities, and after consulting those authorities,

After consulting the Advisory Committee,

Whereas:

1. Scope of the exemption notified by the Government of the Federal Republic of Germany

1.1. *Notification by the German authorities*

(1) By letter received by the Commission on 5 October 1999, the German authorities notified a request for approval of the decision of the Government of the Federal Republic of Germany of 30 September 1999 to grant Düsseldorf airport (Flughafen Düsseldorf GmbH) an exemption to:

— ban self-handling, and

— reserve for Düsseldorf Airport (Flughafen Düsseldorf GmbH) the provision of services to third parties,

for the categories of services referred to in items 4.1 (with regard to the physical handling of freight, whether incoming, outgoing or being transferred, between the air terminal and the aircraft), 5.4 (with regard to the loading and unloading of the aircraft and the transport of passengers and baggage between the aircraft and the terminal), 5.5 and 5.6 of the Annex to the Directive.

This exemption is granted, on the basis of Article 9(1)(b) and (d) of the Directive, from 1 January 2000 until 31 December 2001. It follows the Commission Decision of 14 January 1998 [2] concerning a derogation granted by the authorities of the Federal Republic of Germany on 9 October 1997.

(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* of 26 October 1999 [3] and invited interested parties to submit their comments.

(3) In accordance with Article 9(5) of the Directive, the Commission consulted the German Government on its draft evaluation on 24 November 1999 and the German authorities gave their comments by letter of 29 November 1999.

Basis of the exemption

(4) The general rules on 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. For an airport with a volume of traffic like that of Düsseldorf the Directive provides for recognition of the right to selfhandle from 1 January 1998 and opens up the handling market 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

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

[2] OJ L 173, 18.6.1998, p. 45.

[3] OJ C 307, 26.10.1999, p. 3.

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 selfhandling and the supply of services to third parties. These categories concern ramp-handling, baggage-handling, field-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 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 granted an initial exemption on 9 October 1997. A Commission Decision of 14 January 1998 ([4]) confirmed that exemption, but restricted it to a period ending no later than 1 January 2000.

This is also the basis, in conjunction with Article 9(6) of the Directive, on which the German authorities have granted the exemption to which this Decision refers, in accordance with Article 3 of the German 'Verordnung über Bodenabfertigungsdienst auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften' ([5]) transposing Directive 96/67/EC into national law.

1.2. *Situation regarding handling at Düsseldorf airport*

(7) Pursuant to the exemption granted by the German authorities on 17 April 1998 following the Commission Decision of 14 January 1998, the activities covered by the exemption to which this Decision refers are already covered by an exemption allowing the airport to prohibit selfhandling and to reserve to itself freight-handling, the transport of passengers and baggage between the aircraft and the terminal (5.4), engine starting (5.5), and aircraft movements (5.6). Thus the exemption to which this Decision refers extends the exemption granted with respect to such services.

([4]) OJ L 173, 18.6.1998, p. 45.

([5]) Bundesgesetzblatt 1997, Part I, No 82, 16 December 1997, p. 2885.

(8) No new exemption has been requested extending the exemption granted by the decision of the German authorities of 17 April 1998 which hitherto permitted the restriction of aircraft cleaning (6.1), cabin cooling and snow removal (6.2), and the rearrangement of the cabin (6.3) to two users and two service-providers, so these services will be opened up to unrestricted competition from 1 January 2000.

2. **Constraints referred to by the German authorities**

(9) The exemption granted by the German authorities is based on space and capacity constraints resulting from the fire in the terminal on 11 April 1996, the increase in space requirements which would result from the opening-up of the market to more than one operator, and problems encountered in implementing the proposed reconstruction and restructuring plan.

(10) It relies on the arguments presented in the file drawn up by Düsseldorf airport:

— Nachtrag zum Maßnahmenplan des Antrages auf Verlängerung der Freistellung der Flughafen Düsseldorf GmbH, September 1999

— Antrag auf Verlängerung der Freistellung der Flughafen Düsseldorf GmbH, Juli 1999

— Dokumentation des Maßnahmenplans, Oktober 1998 und April 1999

— Netherlands Airport Consultant BV study entitled 'Consequences of liberalising groundhandling to permit several service providers', July 1997.

(11) There is no need to go back over the fact, already recorded in the Commission Decision of 14 January 1998 ([6]), that the data indicating a shortage of space relate exclusively to the 1996 fire and that no structural problem is cited in justification of the present situation and the resulting exemption.

2.1. *The aftermath of the fire of 11 April 1996*

(12) The fire destroyed the central terminal building and rendered the three piers (A, B and C) unusable. As it is not possible to transit through the central building:

([6]) OJ L 173, 18.6.1998, p. 45.

— several gate positions, including all those on pier B, have to be used solely as remote positions, thus generating a substantial increase in the bussing of passengers across the apron,

— all arrivals initially had to be concentrated in pier C, the only pier with an operational baggage reclaim system,

— passenger embarkation modules (D and E) had to be installed to the east and west; these structures took up space on the ground and resulted in rather long bus transfers,

— three positions (50, 51 and 60) had to be closed completely to allow the rebuilding of pier B and the storage of equipment used in the building works.

(13) However, it was possible for pier C and the corresponding part of the central building to be reopened in November 1996, thus permitting the reactivation of the baggage reclaim system. Three additional luggage belts were installed here by suppressing equipment parking areas on the airport apron.

(14) According to the file presented by the German authorities in support of the initial exemption request, pier A was to be opened in spring 1998, with the full reopening of 7 to 8 positions, thus ending the need for some of the passengers arriving at this pier to be bussed to pier C to reclaim their baggage and reducing the frequency of passenger bussing. At the same time, there would be a substantial reduction in the equipment needed for the embarkation of passengers at pier A, thus reducing congestion on the apron and freeing space for the parking of new handling equipment.

(15) Work on pier B, on the other hand, is scheduled to finish in June 2001. These are major works concerning most of the airport. Pier B had to be completely demolished, along with a large part of the corresponding terminal. This pier and the central part of the terminal will be completely rebuilt, the terminal being enlarged, the pier widened along its entire length, and an extra level added in order to accommodate Schengen and non-Schengen passenger flows. Although the fire occurred in 1996, the time required for insurance assessments, project studies and demolition works have resulted, three years later, in a situation which is still temporary and which causes considerable disruption both to passenger access to gate lounges and to the transport of groundhandling equipment across the apron. The use of numerous gate parking positions as remote positions obliges the airport to make a large number of bus transfers. Additional baggage transport equipment was also needed, which affected traffic and parking. The multiplication of equipment and the need to divert around the works area each time equipment is moved causes traffic problems in the vicinity of the terminal. Moreover, in this part of the airport, all available space is fully used, in particular in the two temporary departure modules (D and E).

(16) The comprehensive restructuring plan presented by the German authorities in support of the initial exemption request in 1998 provided for this infrastructure to come into operation in 2002, but was nevertheless supposed to allow the groundhandling market to be opened up at the beginning of 2001. The Commission Decision of 14 January 1998 forced the airport to open the market up early, as from 1 January 2000, on the grounds in particular of the space which should have been freed up when piers A and C were opened, the progress of work on pier B, and the new west apron.

(17) According to the German authorities, it is no longer feasible to open up the market within the time allowed on account of problems which have arisen in connection with the schedule for the various works.

2.2. *Difficulties encountered during the reconstruction works*

2.2.1. ***Pier A***

(18) According to the report presented by the German authorities, although a large part of pier A was brought back into operation in April 1998, as provided for in the restructuring plan, demolition of the provisional departure area could not begin until pier A came into operation, so that, step by step, as areas became available, work on the apron level of pier A and the corresponding passenger bridges could be completed.

(19) Moreover, to enable passengers to reach the airport terminal via pier A, without having to transit through terminal C, and because the progress of the works resulted in belts 9 to 12 being moved, it was necessary to create an arrivals structure at pier A. These measures were taken largely in response to intense lobbying from Lufthansa and its partners, the main users of this pier, in order to improve conditions for their passengers.

(20) To fit out this eastern part of pier A it was necessary to convert aircraft stand 80 into a baggage reclaim hall and to construct a collection hall open to passengers here. The arrivals hall was then connected to the rest of the terminal by a passenger tunnel at gate 37 (halls 5/6).

(21) The construction of these additional structures on the apron caused a deterioration in the traffic situation in this area, mainly affecting baggage transport, as the traffic generated by the reopening of the positions increased.

(22) According to the German authorities, this unplanned reorganisation of pier A, at the request of the carriers, prevented the improvement in the situation forecast by the first Commission Decision. External circumstances and operational requirements resulted in a reduction of 500 m^2 in equipment storage areas. Moreover, this reduction was accompanied by the closure of aircraft stand 80 and a reduction in the size of the adjacent stand.

2.2.2. ***Pier B***

(23) The construction site plans presented in support of the first exemption, relating to the construction of pier B and the associated part of the central terminal, no longer correspond to the current situation. It was planned to limit the works area in order to maximise the area available for parking groundhandling equipment.

(24) The measures planned to overcome the constraints relating to groundhandling services form part of the wider-ranging 'Airport 2000 plus' reconstruction and enlargement plan. As the works progressed, it proved necessary for the airport authorities to adapt the plans in order to meet passenger service requirements. This resulted in the reconfiguration of pier B and the ensuing increase in the shortage of space for storing equipment during the rest of the works. The shortage of space at this pier is estimated at 3 000 m^2. This reorganisation also makes it impossible to reopen the road junction under this pier, an essential step towards improving traffic on the apron, within the time allowed.

(25) According to the German authorities, the new exemption for the period up to 31 December 2001 is justified by this extension of the work on pier B, which cannot be completed before July 2001, and which cannot therefore be truly operational until late autumn 2001.

2.2.3. ***Apron extension west***

(26) The 'Airport 2000 plus' project also comprises an extension of the apron which should allow new aircraft positions to be developed, but should also provide space for parking handling equipment. The main extension consisted in the construction of an apron extension to the west, half of which would be used to create new aircraft positions, the other half being used to store handling equipment on over 14 000 m^2. However, these works were referred to in the plans presented at the time as merely complementary to the other measures intended to overcome the identified constraints, as, according to the file presented at the time, these works were not due to be finished until the end of 2000, i.e. after the period of exemption granted by the Commission in its Decision of 14 January 1998.

(27) However, construction of this new area has been delayed both by technical problems relating to drainage and by administrative complications regarding the authorisation from the Ministry responsible for water protection. According to the file presented by the German authorities, these delays mean that the new infrastructure cannot be brought into service until the end of 2001 at the earliest.

(28) Thus the exemption is based on the fact that the airport cannot, in general, find additional space on account of the adaptations made necessary both by the additional infrastructure in pier A to improve passenger conditions at the request of the users and by the reorganisation of pier B.

(29) Compared with the initial forecasts, the total space shortage for the three piers has risen by more than 3 500 m^2. On the other hand, some 1 600 m^2 has been gained by restructuring the apron around the administrative buildings, plus 2 000 m^2 at the deicing area on the western apron (cargo area) and 300 m^2 on the eastern part of the apron. For the airport as a whole, a net gain of just 350 m^2 has been possible, compared with the situation at the beginning of 1998 ([7]), which is insufficient to permit the market to be opened up to the extent planned.

3. **Reactions of the interested parties**

(30) Following the Commission's publication of an extract from the notification by the German authorities, and in accordance with Article 9(3) of the Directive, the various interested parties were invited to submit comments.

One carrier felt the figures given in the airport's exemption file failed to demonstrate either the need to alter the plan of appropriate measures or the shortage of space. It was astonished that the airport had not reported a shortage of office space, and believed additional space could be found by making use of the vacated army huts and the area freed by the reduction in the airport's own equipment needs following the arrival of a second service-provider. According to the same user, it will not be possible to provide much space for the new service-provider, which will therefore have

([7]) Antrag auf Verlängerung der Freistellung der Flughafen Düsseldorf GmbH, July 1999, Table 2, p. 11.

to employ only a reduced amount of specialised equipment in certain types of aircraft, something which will limit its market opportunities. The user also proposes that certain equipment be pooled, or that the newcomer buy existing equipment. Lastly, it finds the 40 % market share suggested by the NACO study at the time of the Commission's first Decision to be far too optimistic, and believes a scenario based on a mere 1 % market share for the second service-provider is plausible.

4. **Evaluation of the exemption in the light of the provisions of Directive 96/67/EC**

4.1. *The rules in force concerning groundhandling*

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

(31) Council Directive 96/67/EC provides for the market to be opened up to different extents as a function of the way groundhandling services are provided (selfhandling or service suppliers) and the level of traffic at the airport.

(32) 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 allows a Member State to restrict selfhandling to not less than two users. The latter must be selected on the basis of relevant, objective, transparent and non-discriminatory criteria. Likewise, the number of groundhandling service suppliers may be restricted to two, in which case the suppliers must be chosen through a public tender procedure. On this basis Düsseldorf airport is required, pursuant to Annex 5 to the Verordnung über Bodenabfertigungsdienste auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften of 10 December 1997 ([8]), which transposes the Directive into German law, to open up the market for groundhandling services to a second service supplier and to permit selfhandling by two users for the services in respect of which the number of service suppliers or selfhandling users can be limited pursuant to Articles 6(2) and 7(2) of the Directive.

(33) 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 selfhandling 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 selfhandling or restrict it to a single user.

(34) Article 9(6) of the Directive restricts the duration of the exemptions granted and provides that any further exemption must be the subject of a new procedure. Exemptions granted pursuant to Article 9(1)(d) may not exceed three years. Those granted pursuant to Article 9(1)(b), which reserve the provision of services to a single supplier, may not exceed two years and may be extended by a single period of not more than two years. This is the framework within which this exemption has been granted by the German authorities.

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

— specify the category or categories of groundhandling 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.

(35) As stated by the Commission, *inter alia*, in its Decisions of 14 January 1998 on Frankfurt and Düsseldorf airports ([9]), 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 ([10]), measures likely to exclude or prohibit the activities of service suppliers or, in the present instance, those of users wishing to selfhandle, even if they apply without distinction to national service suppliers or users and to those from other Member States, must be justified by

([8]) Bundesgesetzblatt 1997, Part I No 82, 16 December 1997, p. 2885.

([9]) Commission Decisions of 14 January 1998 (OJ L 173, 18.6.1998, pp. 32 and 45).

([10]) Judgments of 25 July 1991, *Médiawet* [1991] ECR I-4007 and C-76/90, *Säger*: *Dennemeyer*, [1991] ECR I-4221.

overriding public-interest requirements and not by economic factors and must, moreover, be in proportion to the aims pursued.

4.1.2. ***Procedure***

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

(37) As stated in its two Decisions on the airports at Frankfurt and Düsseldorf ([11]), 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,

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

(38) 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 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 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 the scope of any exemption must be determined on the basis of the purpose of the measure in question.

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

(40) 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 Düsseldorf airport on 20 October 1999, 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 its analysis, and in particular those concerning space constraints due to the delay in the reorganisation of the terminal on account of the changes which had to be made to the working plan.

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

4.2.1. ***Background***

(41) As stated above, there is no need to go back over the absence of structural space problems at Düsseldorf airport and the fact that the impossibility of opening up the market to the extent provided for in the Directive, to which the German authorities refer, is a result exclusively of the problems caused by the fire in April 1996.

(42) In its Decision of 14 January 1998, the Commission recognised that at that time there was a shortage of space at the airport which justified the granting of an exemption in respect of the services for which exemption was requested.

(43) Unlike the earlier exemption, which was the subject of the Commission Decision of 14 January 1998, this exemption does not cover the categories of services listed in item 6 of the Annex to the Directive relating to the external and internal cleaning of the aircraft and the removal of snow and ice. The fact that the airport authorities can now use certain old British army huts adjacent to the airport and the creation of the deicing area on the eastern part of the apron enables them to comply with the conditions of the Directive by fully liberalising the market for these services. The decision to open these services up to competition, but not those covered by this exemption, is justified by the new deicing area, the small size of the area freed up, and the mobility of the equipment used for these services. The old military huts are located outside the airport boundary and the vehicles have to cross a very busy road, which would be inconceivable for the heavy, slow equipment used for ramp-handling services such as pusher tugs.

(44) The Commission's examination of this exemption must therefore be limited to changes in space and capacity

([11]) See footnote 9.

since its Decision of 14 January 1998 and the reasons for which the German authorities claim that it is impossible for Düsseldorf airport to fully implement the proposed plan and the conditions laid down in that Decision.

4.2.2. ***Implications of changes in the reconstruction of the airport***

(45) As stated above, the problems mentioned by the German authorities are the result of the fire of April 1996 and of the works in progress which, while forming part of a wider-ranging plan to extend the airport, are a direct result of that fire. These works do not extend the airport by simply adding new infrastructure or renovating an existing terminal, they primarily concern the almost total reconstruction of a building which was destroyed by fire. This brings with it quite specific constraints, due in particular to the need:

— to first demolish the existing buildings, which in turn requires most of the existing infrastructure to be evacuated, before starting to rebuild (this is true in particular of pier B and the corresponding central part of the terminal building),

— to proceed in stages (pier B and the adjacent part of the terminal building must be rebuilt before the central part of the terminal can be demolished) and combine demolition and building works on a single site,

— carry out these works in the middle of an airport which must continue to operate.

(46) The entire works programme requires advanced logistics, and problems arising in part of the works or part of the terminal can have an impact on the programme as a whole. It is clear, following the Commission's visit in connection with this exemption on 20 October 1999, that the entire operation of the airport is affected by these works and that all the space left free by the works on the apron has been used to build temporary structures in order to provide basic services to carriers and their passengers. In addition to departure modules D and E, structures facilitating the arrival of passengers and their baggage have been added, in particular at point A, at the request of carriers. Baggage transfer is effected in large part by vehicles with integral conveyor belts which nose onto the baggage reclaim belts alongside the terminal building. These vehicles are large and heavy, but they reduce the congestion of roadways and unloading areas caused by conventional trolleys.

(47) The space requirements for groundhandling operations must be examined in detail for each of the piers and parts of the terminal affected by the works and for the western part of the apron.

Pier A

(48) The file presented by the German authorities in support of the first exemption indicated that this pier was scheduled to be brought into operation in spring 1998. The reduction in operations on this part of the apron was expected to free up space which could be used to store groundhandling equipment. However, the new possibility for passengers to disembark at pier A made it necessary, in response to intense lobbying from the companies operating at this pier, to provide a passenger arrivals facility at this point. The Commission recognises that this not only meets an operational requirement by facilitating passenger access but also helps to reduce congestion on the apron by ending bus transfers to pier C as had been necessary since the fire.

(49) However, this arrangement made it necessary to build the arrivals structure, which in turn made it necessary to close the nearest position (aircraft stand 80). Moreover, the arrival of passengers at the new structure at pier A means that their baggage also arrives here rather than at pier C, thus replacing passenger bus traffic on the apron with baggage traffic here. During its visit the Commission verified that full use is made of the space available, in particular at former aircraft stand 80.

(50) Thus the reduction in the number of bus movements achieved as a result of direct access to pier A has to a large extent been offset by the arrival of baggage at the new facility. This has been compounded by the closure of aircraft stand 80 and a reduction in the corresponding space in the adjacent area. Thus the situation at this part of the airport has deteriorated.

Pier B

(51) Reconfiguration of the pier following the decision to adapt the 'Airport 2000 plus' project to the changing needs of carriers and their passengers and in order to facilitate passenger transfer has involved an extension of the pier, and therefore of the building site. The Commission's assessment shows that:

— the state of the works will not allow even part of the area currently occupied by the building site to

be used to park groundhandling equipment by 1 January 2000, the date on which the current exemption expires, as foreseen by the Decision of 14 January 1998; the rebuilding of the pier has only just started, and it will not be possible to open the road junction to traffic for many months,

— the buildings site has been kept as small as possible while ensuring safe conditions; apart from the roadway used by construction plant, there is only enough space to store a very small amount of building equipment,

— the aircraft are separated from the building site only by the service road used by groundhandling equipment, and there is no room for any additional parking at this point.

(52) It is therefore clear that it is not now feasible to free up any extra space at pier B at least until the end of the works, i.e. early summer 2001, before work starts on finishing the inside of the pier in preparation for its planned opening in autumn 2001.

(53) Completion of construction work on pier B is to be followed by the construction of passenger bridges on the ramp, and this will significantly restrict the movement and storage of equipment at this point for an estimated period of five months.

(54) It is therefore not possible to free up any space at pier B beyond the 7 500 m^2 which have already been made available.

Apron

(55) Extension of the apron formed part of the plan of appropriate measures presented in support of the first exemption.

(56) The apron was initially to be extended to the east during 1999 with the main aim of creating a deicing area. However, the extra 4 000 m^2 this has provided cannot be allocated to the parking of groundhandling equipment during periods when deicing is required. Only a few hundred square metres can be used throughout the year. As stated above, the creation of the deicing area and the occupation of certain old British army huts have enabled the airport authorities to open up aircraft cleaning and deicing operations to competition. The choice of these operations, which are covered by item 6 of the Annex to the Directive, is justified by the creation of the deicing area, the small size of the area freed up, and the mobility of the vehicles concerned, which have to be parked outside the area and cross a busy road.

(57) The plan of appropriate measures presented in support of the first exemption also provided, in a second stage, for the creation of a new apron to the west. Half of the new apron, which is to be of a considerable size, will accommodate new aircraft positions, while the other half can be devoted to the storage of groundhandling equipment (on more than 14 000 m^2).

While the authorisation to build this apron extension does not in itself pose a problem, the scale of the works requires a major modification of the entire drainage system on the whole of the western part of the airport. This not only holds up the building works as such, it also requires authorisation from the authorities responsible for water protection, which in turn depends on the results of environmental tests. The time needed to perform these tests and to assemble the required documentation means that the authorisation is unlikely to be obtained before spring 2000.

4.3. *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 a plan of appropriate measures to overcome the constraints cited.

(59) The construction of the new apron to the west, which had originally been planned for the end of the year, would provide more than 14 000 m^2 for the parking of groundhandling equipment. However, the problems which have arisen in connection with the need to reorganise the drainage make the schedule for these works on the apron uncertain.

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 implementation within the time allowed is uncertain to constitute a plan of appropriate measures within the meaning of Article 9 of the Directive.

(60) However, the German authorities have presented other measures aimed at overcoming the constraints. These measures are linked to the completion of the work on pier B and the central part of the terminal. The freeing-up of the space needed for future groundhandling equipment depends on the commitment by the consortium overseeing the construction works to finish those works by autumn 2001. This commitment is firm and is subject to very substantial penalties for late completion. Work on the building site is currently continuing 24 hours a day, and occupies 600 persons per day. This number is set to rise to 1 000 persons per day in January 2000. As soon as the terminal is operational, at the end of the period covered by the exemption, the space freed up not only around pier B

will be able to accommodate groundhandling equipment. However, the airport authorities no longer plan to demolish the two temporary departures modules (D and E) but to convert them into accommodation for groundhandling equipment. The surface area and height of these modules will allow their rapid conversion.

(61) This alternative solution, irrespective of the completion of the western apron extension and of any other administrative authorisation, will allow the market to be opened up to the extent provided for in the Directive at the end of the period covered by the exemption and can therefore be considered to constitute a plan of appropriate measures within the meaning of Article 9(2) of the Directive.

4.4. *Compliance with the criteria of Article 9(2) of the Directive*

(62) The exemption notified by the German authorities covers freight loading and unloading and the various ramp-handling operations such as marshalling aircraft, assistance to aircraft parking, moving aircraft, engine starting, and the transport of passengers and baggage. Most of these operations require a large number of pieces of equipment, some of them slow and heavy (such as pusher tugs), which have to be parked near the aircraft positions and cannot, as has been suggested, be parked near the old army huts, i.e. outside the airport's reserved area and on the far side of a busy road. It is also necessary to take account of the impact which the arrival of a second service supplier will have on the already highly congested traffic around the piers.

(63) Examination of flight schedules and of the groundhandling operations concerned leads the Commission to estimate that the arrival of a second service supplier would require nearly 22% additional space in the most realistic hypothesis of that supplier handling some 15% of the market. If the decision is taken to effectively open up the market, it would not be for the Commission to officially restrict the future service-provider's market share, as has been suggested, by imposing the limitation and specialisation of its equipment on grounds of insufficient space. All it can do is evaluate the impact of the arrival of operators. Moreover, as it has reiterated in its various Decisions, the arrival of a new operator only affects the equipment requirements of an existing operator when the incoming operator has a market share of something between 10 and 15%. Below that threshold, all the equipment of the new operator must be considered additional to that of the airport.

In the case of selfhandling by one user, 25% additional space would be required for LTU to cover its peak loads (with a reduction of just 5% in airport equipment). If Lufthansa were to selfhandle, it would require approximately 50% of the equipment currently used by the airport. The reduction in the airport's requirements would be of the order of 25%, so 25% additional space would be required.

(64) Thus it is not possible, given the acute space problems at the airport, to allow a second service supplier to operate or a user to selfhandle at the airport in respect of the operations covered by the exemption, and the restriction of liberalisation to aircraft cleaning and deicing is perfectly justified. Thus the exemption granted by the German authorities does not extend further than necessary in relation to these services.

Likewise, in view of the difficulties encountered in carrying out the various works and the substantial modifications which these have entailed, the schedule of works presented, in particular the part concerning pier B and the central part of the terminal, is an adequate response to the known constraints and the period of exemption.

Thus the principles set out in Article 9(2) of the Directive are respected.

5. **Conclusion**

(65) The exemption granted by the German authorities to Düsseldorf airport is based on the consequences of the fire which destroyed most of the terminal in April 1996 and completely disrupted the operation of the airport. Reconstruction, which forms part of a more ambitious development plan, is made particularly difficult by the need to proceed in stages, the need to demolish the damaged buildings first, and the fact that the works are located in the middle of an airport which must continue to operate.

(66) The scale and complexity of the works and the essential link between the various stages are compounded by technical and operational difficulties which have delayed the full entry into service of the various piers and prevented the freeing-up of space for groundhandling equipment as previously planned. The full use of the space available, either by groundhandling equipment or by essential building materials, and the existing difficulties with regard to parking and traffic on the apron make it impossible to accommodate a new

operator, whether a selfhandler or a service-provider, before the end of the period covered by the exemption,

HAS ADOPTED THIS DECISION:

Article 1

The exemption granted on 30 September 1999 to Düsseldorf airport on the basis of Article 9(1)(b) and (d) of the Directive, as notified to the Commission on 5 October 1999, is hereby approved.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 5 January 2000.

For the Commission
Loyola DE PALACIO
Vice-President