COMMISSION DECISION

of 10 January 2000

on the application of Article 9 of Council Directive 96/67/EC to Funchal airport

(notified under document number C(1999) 5194)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

(2000/123/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 decision of the Portuguese authorities, as notified to the Commission on 11 October 1999, and after consulting those authorities,

After consulting the Advisory Committee,

Whereas:

1. Scope of the exemption notified by the Government of Portugal

1.1. *Notification by the Portuguese authorities*

(1) By letter received by the Commission on 11 October 1999, the Portuguese authorities notified a request for approval of the decision of the Portuguese Government to grant Funchal airport an exemption to:

— restrict self-handling to two users for the categories of services listed under point 2 of the Annex to the Directive,

— restrict self-handling to a single user for the categories of services listed under points 3, 4, 5.2, 5.3, 5.4, 5.5 and 5.6 of the Annex to the Directive.

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

(2) Pursuant to Article 9(3) of the Directive, the Commission published an extract from this notification in the *Official Journal of the European Communities* of 25 November 1999 [2] and invited interested parties to submit comments.

(3) In accordance with Article 9(5) of the Directive, the Commission consulted the Portuguese Government on its draft evaluation on 8 December 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. 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 Funchal with 1,7 million passengers in 1997, the Directive provides for recognition of the right to self-handle as from 1 January 1998. 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, corresponding in particular to points 3, 4 and 5 listed in the Annex and covered by this Decision. As for the right to 'passenger' self-handling, this is not normally restricted in the context of self-handling rights and each carrier should be able to make use of this right.

(5) However, Article 9 of Directive 96/67/EC also takes account of the fact that, in very special cases, severe space and/or capacity problems 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.

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

[2] OJ C 337, 25.11.1999, p. 4.

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 Portuguese authorities granted the exemption covered by this decision in accordance with Article 23 of Portuguese Decree-Law No 275/99 of 23 July 1999 transposing Directive 96/67/EC into national law [3].

1.2. *Presentation of the airport*

(7) Funchal airport has a passenger terminal alongside a 1 800 metre runway oriented south-west/north-east with a declared capacity of 9 movements per hour. Located in the autonomous region of Madeira, this airport is of vital importance to the economy of this outlying island region. Access is difficult, however, owing to the area's weather conditions — mainly strong winds. This difficulty is heightened by the location of the airport on the sea coast and against the mountains, which meant that the terminal had to be built on four levels to save space.

(8) In general, the number of movements grew by an average of 3% a year over the period 1990 to 1995; growth then increased substantially up to 16,5% later in the nineties.

Passenger traffic was 1,53 million in 1997 (nearly 1,7 million in 1998) and is growing at an average of 6,5% a year; connections with mainland Portugal account for 88% of that traffic. Traffic structure has not changed since the 1980s and is divided into half domestic and half international flights, two thirds of traffic being scheduled flights.

Mean annual growth is forecast at 4% for the next five years, due mainly to the larger aircraft which can use the airport since the runway was extended.

1.3. *Situation regarding handling at Funchal airport*

(9) Since traffic is less than three million passengers and 75 000 tonnes of freight, the opening-up of the market does not concern services provided to third parties. Part of these services, which account for 31% of the airport's movements, are already provided two thirds by TAP and the rest by TRIAM.

(10) On the other hand, the Directive provides for the right to self-handle with effect from 1 January 1998. TAP currently self-handles for the operations covered by the exemption, namely those relating to passenger, baggage, freight and mail handling, and ramp handling operations. Until the end of 1998 TAP benefited under a public service obligation pursuant to Article 4 of Council Regulation No 2408/92 for the service connecting the island of Madeira with the Portuguese mainland; it accounted for 66% of movements. Overall, it operates 69% of movements to and from Funchal airport, involving 85% of passenger movements and 95% of freight.

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

2.1. *Notification by the Portuguese authorities*

(11) The present position of TAP as the only company entitled to self-handle is to a large extent explained by the fact that benefited until last year under a public service obligation for the domestic routes with mainland Portugal. In 1997, total scheduled traffic accounted for 77% of movements and 88% of those movements were operated by TAP. Scheduled passenger traffic is evaluated at 66%, 78% of which is carried by TAP.

(12) According to the dossier presented by the Portuguese authorities, there are space and capacity problems for both terminal and air-side operations.

(13) For departures from the terminal, the check-in area is currently limited to 480 m^2 for 15 check-in desks (plus three desks on the side with no space for queuing). Only 10 desks, allocated to TAP, have computerised systems; the provider TRIAM, which operates charter flights only, carries out check-ins manually. The lack of space in the boarding area causes real problems for passengers travelling at peak times, forcing them to wait for a long time in cramped conditions in a terminal which has no air conditioning; the Portuguese authorities consider that it would not be possible to accommodate an additional handler.

(14) Baggage handling (point 3 of the Annex to the Directive) is carried out manually over a length of 30 metres and in premises of 350 m^2 where it is difficult to manoeuvre and it would be impossible to accommodate an additional handler.

(15) According to the dossier submitted by the Portuguese authorities, there is very little space on the apron for air-side operations (point 5 of the Annex) and the equipment of the two present handlers, TAP and

[3] Diário da República — 23.7.99 — I Series-A No 170, p. 4588.

TRIAM, fill that space completely (2 000 and 200 m^2 respectively). Moreover, the equipment maintenance sheds, although recent, seem to be already inadequate, with space of only 400 m^2 for TAP and 200 m^2 for TRIAM. Furthermore, at peak times (30 peak hour with nine movements), traffic on the apron is especially difficult and dangerous since all the aircraft positions are of the 'nose-in' type, requiring fairly heavy pusher tugs at all times. Yet the airport has a single two-way service road crossed by embarking and disembarking pedestrians.

(16) The new freight shed has an area of only 450 m^2 and is currently fully occupied by TAP which self-handles 95 % of all the airport's freight traffic.

(17) The Portuguese authorities therefore consider that it is not possible to accept an additional handler for these operations, some of which are already provided by two handlers.

3. **Reactions of the interested parties**

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

No particular opinion has been delivered on this exemption.

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***

(19) 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 (self-handling or service suppliers) and the level of traffic at the airport.

(20) The general rules governing groundhandling for the categories of service listed in the Portuguese authorities' notification are set out in Article 7 of the Directive. Those rules have been incorporated into the Portuguese regulations transposing the Directive [4]. The Directive allows a Member State to restrict self-handling of baggage, freight and mail, and air-side operations to not less than two users. The latter must therefore be selected on the basis of relevant, objective, transparent and non-discriminatory criteria. Self-handling for passenger operations is normally open to all users.

(21) 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, depending on the categories of service concerned, restrict the number of self-handlers on the basis of Article 9(1)(c) or ban self-handling or restrict it to a single user on the basis of Article 9(1)(d).

(22) 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.

(23) As stated by the Commission, *inter alia*, in its decisions of 14 January 1998 on Frankfurt and Dusseldorf airports [5], the main aim of the Directive is to liberalise groundhandling services. The restrictions imposed on third parties consist of restrictions of freedom of such parties to provide 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.

[4] Diário da República — 23.7.99 — I Series-A No 170, p. 4588.

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

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

4.1.2. ***Procedure***

(24) As stated in its two decisions on the airports at Frankfurt and Dusseldorf ([7]), the Commission must focus its examination on:

— 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 the appropriate action that is 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, as referred to in Article 9(2) of the Directive.

(25) 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 ([8]), 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.

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

(27) 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 Portuguese authorities' decision is appropriate to those constraints, and the measures put forward to overcome them. It based its examination on the dossier submitted by the Portuguese authorities, on the visit it made to Funchal airport on 8 November 1999, and on the technical assessment made at its request by Aerotec. Finally, the Commission took account of the comments made by the airport and the Portuguese Government concerning the Commission's analysis.

([7]) See footnote 5.
([8]) See footnote 6.

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

(28) The island of Madeira is a major holiday destination and Funchal airport is essential for this tourist development. Annual traffic growth is estimated at 4% for the next five years, almost all of it accounted for by passenger traffic. The airport has extended the runway and substantially enlarged the terminal. The airport's situation, especially as regards the space available on the apron, is therefore temporary and should improve, for some areas of the apron, over the next few months as the work proceeds.

(29) With 1,53 million passengers in 1997, Funchal airport must allow self-handling by carriers in order to comply with the Directive. In view of the substantial growth in traffic, from 2001 when it exceeds the threshold of two million passengers a year, the airport should also open up competition for groundhandling operations for third parties. The Portuguese authorities' exemption relates to a restriction for passenger groundhandling operations, which should be entirely liberalised, and self-handling services on the apron, covering baggage sorting, passenger and crew baggage transport and freight and mail operations.

Passenger groundhandling operations

(30) According to the Portuguese authorities there are capacity and space problems in the terminal, with serious congestion in the check-in hall. The Commission acknowledges that there may be serious difficulties in the hall since it is too small for all the passengers waiting to check in at certain peak times, in view of the number of flights that have to be processed at those times.

(31) Passenger groundhandling operations are currently carried out by two companies: TAP — which handles its own aircraft and those of third-party customers — and the independent TRIAM company which provides services to third parties consisting entirely of charter carriers. Airport users thus already have a free choice for passenger groundhandling services.

(32) However, according to Article 7(1) of the Directive, these groundhandling operations must be fully liberalised in the case of self-handling. The only grounds for restricting the number of self-handling users are space and/or capacity constraints. It is therefore necessary to check whether it is impossible to accept new operators.

(33) While there can be no doubt of the cramped nature of the present check-in hall, it must be acknowledged that

the problem is caused by the hall itself and to a lesser extent by the number of check-in desks. It is not the fault of the company processing check-ins, whether it be one of the current two providers or a newcomer. It is not the practice, as in some airports, to check-in several flights at the desks at the same time. Specific desks are assigned one at a time to each flight concerned, two or three hours in advance. Therefore, the operator only moves on to the next flight once the previous one is completely checked in. If all 18 desks are assigned to a flight, the number of operators is of no import since the number of desks remains constant owing to the system of checking in one flight at a time, and so capacity does not vary either.

(34) From a practical point of view, in the worst case, i.e. on the busiest day of the year, in actual fact the flights planned for 3 January 2000, the flight schedules show that there are only two hours when there might not be enough desks and even then, two desks would not overlap for more than 20 minutes.

(35) The Portuguese authorities argue that four desks could not be properly used owing to their poor location in the hall. However, these desks were indeed in use on the day of the Commission's visit, which was not a particularly busy day. It must be acknowledged that their position in the terminal makes them impractical and access to desks 1 and 2 is very tight. However, they would be more usable if they were used for a single flight, sharing a single check-in queue. In any case, limiting the number of operators would have no impact on present congestion in that area, nor would it reduce the need for extra desks.

(36) The flight schedules for the busiest day of the year show that between 08.00 and 10.30, five desks are free in the area currently assigned to TRIAM and that no desk is in use between 16.30 and 22.00. Similarly, on certain days in November, TRIAM is not using a single desk. The eight TAP desks are in use but, between 11.00 and 15.45, at least three of them could be freed according to the flight schedules and the usual practice for assigning desks.

(37) The lack of computer equipment at the desks currently used by TRIAM is certainly a drawback for users but does not rule out the admission of a new operator. The decision to self-handle or not is an economic one for each user to take once he has weighed up all the advantages and disadvantages of operating such services, including the airport's equipment problems.

(38) In view of the flight schedules and check-in practices, the admission of new self-handling users would not aggravate the airport's difficulties; these are real but related to the waiting area. The airport should therefore assign the desks to the various operators on a clear and fair basis according to their individual needs.

Baggage

(39) Based on the Portuguese authorities' arguments in the dossier, the baggage sorting and loading area is very small. Baggage is processed manually from a straight 30 metre conveyor by two service providers. It would be quite impractical to admit an additional operator for baggage sorting. The same applies to baggage transport in and out of that hall, owing to its restricted access.

Air-side operations

(40) With the exception of baggage transport, where it is impossible to admit an additional operator into the sorting areas, there does not seem to be an acute space or capacity problem for other air-side operations. On the day of the Commission's visit, space could easily have been made for additional equipment, especially on the western part of the apron. Even at the calmest time of the day, i.e. when the equipment was not in use and parked, it was clear that these parking areas were far from crowded. Moreover, the current layout of those areas is temporary and it should be possible to make more space available from spring 2000 when the aircraft positions on the west side of the apron are rearranged. Apart from this improvement, according to the standards and practices recommended by the International Civil Aviation Organisation (ICA), 'nose-in' parking of aircraft allows groundhandling equipment to be parked between the noses of aircraft, notably around positions 2-4, A06-A04 and A01-A03. The Portuguese authorities have therefore failed to demonstrate that it is impossible to recognise the right to self-handle in accordance with the provisions of the Directive.

Freight handling

(41) A new terminal has recently been built. This terminal covers 450 m^2 (350 m^2 of which is for operations and 100 m^2 for offices) and is currently occupied by TAP. It

is divided into two parts, for imports and exports, each having a single access door to the runway. TAP is the airport's only operator for freight services and over 95% of its business relates to self-handling. Services to third parties, representing only 5% of traffic, need not necessarily be opened up until the airport reaches the threshold of two million passengers a year, as provided for in the Directive. It is unlikely that any operator will apply to self-handle for a mere 1 or 2% of traffic. However, in line with Article 9 of the Directive, it must be proved that it is impossible to accommodate a second operator who would be allocated space proportional to its freight traffic. It does not appear impossible to find such a space in the building as the need is very small. However, the arrangement of the doors would not seem to allow a second operator to enter and leave efficiently. Furthermore, the layout and size of the offices earmarked for the staff in the building would rule out a second operator.

(42) The Portuguese authorities' dossier also claims that the maintenance sheds and rest rooms are cramped. Firstly, these buildings are very new and should have been designed with enough space to take account of the requirements of the Directive. Secondly, an examination of the areas allocated shows that TAP has 2 000 m^2 of space on the apron to park its equipment and 400 m^2 to maintain it; this enables it to handle 70% of the traffic without major difficulty. For the remaining 30%, TRIAM has 200 m^2 on the apron and half of the maintenance installations and rest rooms. The installations allocated to TRIAM could therefore be regarded as generous in relation to the volume of traffic handled and so it has not been proven that space could not be found for a new operator.

5. **Plan of appropriate measures**

(43) In accordance with the provisions of Article 9(2) of the Directive, the dossier submitted by the Portuguese authorities identifies a plan of appropriate measures to overcome the constraints cited.

(44) This plan is part of the comprehensive airport extension project in response to growing traffic, designed to improve access to the island of Madeira; it should eventually allow larger capacity aircraft on intercontinental flights to be accommodated with improved safety conditions.

(45) The project consists firstly of an extension to the runway on piles and a change of orientation to avoid having to build in too deep water. This will be accompanied by an extension of the apron and an increase in the number of positions from nine to 14, including four positions for large-capacity aircraft. This extension and the new positions will of course allow more space for loading and unloading operations and almost 7 000 m^2 of new space for parking equipment. Space restrictions will not enable the terminal service road to be doubled up, however. On the other hand, the plan includes a major extension of the terminal, including a new baggage sorting hall and a check-in hall of some 4 400 m^2, with 40 fully computerised check-in desks. A 1 250 m^2 vehicle maintenance building and a 3 000 m^2 covered area for freight will also be built.

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

(46) Article 9 of the Directive states that an exemption may be granted only where space and/or capacity constraints make it impossible to open up the market to the extent provided for by the Directive. The Commission's examination shows that this is indeed quite impossible as regards baggage sorting and transport activities owing to the cramped premises which already make working with two companies very difficult and lack sufficient space for any additional operator. The same applies to freight and mail handling activities, where the layout of the premises and inadequate office space for staff would not allow for an additional operator at present. On the other hand, this has not been proved to be impossible for other services, either because simple discomfort is not sufficient reason or because the reason given is not related to the number of operators. The scope of the Portuguese authorities' exemption is therefore broader than necessary.

(47) As regards the duration of the exemption, the space needed to allow the Directive to be applied in areas where constraints have been observed cannot be made available before the new baggage sorting hall opens in late 2000. Similarly, the plan of measures submitted includes a covered freight area around the same time. The exemption therefore appears to comply with the principles of Article 9(2) in this respect.

7. **Conclusion**

(48) Traffic at Funchal airport is growing fast, requiring major work in order to be able to handle safely all types of aircraft, including large-capacity ones, and also to handle passengers properly. However, the problems

with checking in passengers are caused by the cramped hall and not by a particular problem with the check-in desks or staff. Sufficient space can be freed on the apron to enable an additional user to self-handle for air-side operations, especially when the western side has been reorganised in the early part of 2000.

On the other hand, in view of the cramped premises it is impossible to accept an additional operator in a space where the two suppliers' equipment already has great difficulty manoeuvring for baggage sorting and transport operations. According to the Commission's examination, it would also be impossible to have a new operator in the freight shed at the moment,

HAS ADOPTED THIS DECISION:

Article 1

The exemption granted by the Portuguese Republic for Funchal airport, as notified to the Commission on 11 October 1999, must be limited to the operations defined in points 3, 4 and 5.4 of the Annex to the Directive as regards baggage transport between aircraft and the airport buildings.

Article 2

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

Article 3

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 10 January 2000.

For the Commission

Loyola DE PALACIO

Vice-President