COMMISSION DECISION

of 10 January 2000

on the application of Article 9 of Council Directive 96/67/EC to Oporto (Francisco Sá Carneiro)

(notified under document number C(1999) 5196)

(Only the Portuguese text is authentic)

(Text with EEA relevance)

(2000/124/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 registered by the Commission on 11 October 1999, the Portuguese authorities notified a request to approve the decision of the Portuguese Government to grant to Oporto (Francisco Sá Carneiro) airport an exemption to limit to four the number of users authorised to self-handle for the categories of services listed under point 2 of the Annex to the Directive.

This exemption is granted, on the basis of Article 9(1)(d) of the Directive, until 31 August 2001.

(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 3 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 Oporto, the Directive provides for recognition of the right to self-handle as from 1 January 1998.

(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 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) Oporto airport covers a total surface area of 319 hectares and has one passenger terminal at the southernmost point of a north/south runway 3 480 metres long. The terminal has a capacity of 3 million passengers per year which allows no gate

[1] OJ L 272, 25.10.1996, p. 36.
[2] OJ C 337, 25.10.1999, p. 5.
[3] Diário da República - 23.7.99 - I Series-A No 170, p. 4588.

parking. The freight terminal has a capacity of 40 000 tonnes with a surface area of 8 700 m^2 for handling operations plus 2 200 m^2 of office space.

(8) A total of 2,3 million passengers used the airport in 1997 (2,7 million in 1998), principally on scheduled (87 %) and international (78 %) flights. Traffic forecasts suggest average annual growth of around 6 % over the next five years.

1.3. *Situation regarding handling at Oporto airport*

(9) With between 2 and 3 million passengers and 75 000 tonnes of freight, the opening-up of the market does not apply to services for third parties before 1 January 2001. Most of these services are provided by TAP, with the exception of freight handling, which is dealt with by a second supplier at the airport. However, these freight operations account for only 1 % of movements at the airport.

(10) On the other hand, the Directive provides for the right to self-handle with effect from 1 January 1998.

(11) As regards self-handling, two users (TAP and Portugalia) have been given authorisation on the airside. On the groundside and, in particular, for the passenger handling covered by this Decision four airlines — TAP, Portugalia, KLM and GB Air — currently effectively exercise their self-handling rights. Normally, however, the Directive provides for unlimited recognition of self-handling rights for these services.

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

(12) The file presented by the Portuguese authorities shows a major lack of space for passengers checking in. In particular, traffic at the airport is irregular and the departure hall totals just 500 m^2 with only 18 check-in counters. As a result, in peak traffic periods, particularly during the traditional summer, Christmas and Easter holidays, the hall is completely overcrowded with passengers waiting to check in. To add to the congestion, most of them have several items of baggage to register and are accompanied by relatives.

(13) According to the file submitted by the Portuguese authorities, an average of three counters per flight, including one specially for business class passengers, would be needed for high-quality check-ins. According to the Portuguese authorities, it is therefore very difficult to maintain a high quality of service during peak traffic periods.

(14) Studies by the airport have shown that traffic levels would require 24 check-in counters from 1998 on and 26 in 1999. These figures are based on the counters remaining open for an average of 90 minutes for each flight, on the current growth of 6 % per year and on the assumption that there must be two check-in counters for category A aircraft (up to 160 passengers) three for category B (between 161 and 300) and four for category C (over 300).

(15) According to the Portuguese authorities, the objective of striking a balance between traffic growth at the airport and maintaining high-quality groundhandling services rules out admission of any new operators of this category of services at the moment.

3. **Reactions of the interested parties**

(16) 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.

One carrier has remarked that it is impossible in the short term to open up completely the services covered by the 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***

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

(18) The general rules governing groundhandling for the categories of service listed in the notification from the Portuguese authorities are set out in Article 7(1) of the Directive. Those rules have been included in the Decree-Law transposing the Directive into Portuguese law [4]. The Directive provides for passenger handling

[4] Decree No 275/99, Diário da República - 23.7.99 - Series-A No 170, p. 4588.

services to be opened up, without restriction, for self-handling by carriers operating at the airport.

(19) However, where specific space or capacity constraints arising, in particular, from the area utilisation rate or congestion make it impossible to authorise self-handling to the degree provided for by the Directive, the Member State in question may, on the basis of Article 9(1)(c), reserve self-handling to a limited number of airport users; these must be chosen on the basis of relevant, objective, transparent and non-discriminatory criteria. On this basis, in accordance with Article 23 of the Portuguese Decree-Law transposing the Directive ([5]), the Portuguese authorities decided to limit self-handling at Oporto airport to four users.

(20) 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.

(21) As stated by the Commission, *inter alia*, in its decisions of 14 January 1998 on Frankfurt and Düsseldorf airports ([6]), the main aim of the Directive is to liberalise groundhandling services. The restrictions imposed on third parties are restrictions on those parties' freedom to provide such services or to exercise their right to self-handle. By analogy with State measures restricting the freedom to supply services ([7]), measures likely to restrict 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.

4.1.2. ***Procedure***

(22) As stated in its two decisions on the airports at Frankfurt and Dusseldorf ([8]), 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 to overcome the constraints

— 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.

(23) 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 ([9]).

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

(25) In accordance with Article 9(4) of the Directive, the Commission has made a detailed analysis of the alleged space and capacity constraints, has considered whether the decision taken by the Portuguese authorities is appropriate to those constraints, and has appraised the measures put forward to overcome them. It based its examination on the file submitted by the Portuguese authorities, on the visit it made to Oporto airport on 5 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.

([5]) Decree No 275/99, Diário da República - 23.7.99 - Series-A No 170, p. 4588.
([6]) Commission decisions of 14 January 1998, OJ L 173, 18.6.1998, p. 32.
([7]) 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.
([8]) See footnote 6.
([9]) See footnote 7.

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

(26) At the moment Oporto airport has a rectangular terminal with a declared capacity of 3 million passengers per year. With 2,7 million passengers carried in 1997, this capacity limit should soon be reached. The strong growth at this airport will force it to produce an ambitious expansion plan. As an airport serving holiday destinations, it has to handle traffic concentrated heavily around the peak season. The terminal has 18 check-in counters, six of which are allocated permanently to TAP and two to Portugalia. These two airlines also use additional counters as and when needed. In addition, KLM and GB Air temporarily rent check-in counters to self-handle their own flights. Self-handling by these four users caters for approximately 70% of the traffic. The airport has no gate parking and all boarding is via the apron.

(27) Passenger handling services for third parties are, in turn, currently provided solely by TAP. Like Portugalia, this airline uses the counters permanently allocated to it first and then, if necessary, additional counters. As a result, the arrival of a new supplier would affect only services of this kind by TAP, the sole supplier to third parties. According to the Portuguese authorities, the conditions for these services are far from satisfactory at peak periods and there is no doubt that saturation point is reached at certain times. However, the problem is that the 500 m^2 departure hall is too small to cope with all the passengers waiting to check in at peak times and that there are not enough check-in counters. However, this is not related to the company providing check-in services, whether one of the current self-handling users or a new arrival.

There is no joint checking-in at Oporto airport, either for self-handled flights or for the flights handled for third parties by TAP, i.e. it is not possible to check in at any of the airline's counters, as can be done at some airports. Separate counters are opened for each flight two hours before take-off or even three in the case of charter flights. Passengers may check in at the allotted counters only, with the sole exception of TAP's business class counter. The airline does not move on to the next flight until check-in for the previous flight is closed. Last-minute check-ins are possible at any time at the business class counter. If the counters are opened by flight, as is the current practice, the quality of the groundhandling suppliers bears no relation, in principle, to the saturation of the check-in hall. Saturation is actually linked to the number of flights rather than the number of operators. There is therefore no need to allocate counters permanently to particular airlines.

(28) It must be checked whether, in practice, the overlap between certain flights could create particular problems if new operators were present. This cannot be ruled out since at the moment all flights handled for third parties are dealt with by TAP. However, even where flights overlap, TAP provides groundhandling services and operates its own flights at the same time at different counters. In practice, use of these counters for the same flights but by self-handling airlines poses no particular problem.

(29) The quality of service need not be taken into consideration unless other users or operators are affected. Here, however, the lack of space has nothing to do with the number of check-in operators. The services provided by any airline wishing to self-handle concern only the airline in question, since it handles only its own aircraft.

(30) The Commission bases its appraisal on the worse case scenario at the airport, i.e. the busiest day of the busiest month of the year. In 1998 this was 19 December, when 16 369 passengers checked in here. It must be added that passenger numbers exceeded 10 000 on only five days in 1998. Examination of the flight schedules shows that on the busiest day of the year there was a shortage of counters at around 09.00 and midday. However, on the one hand this problem already exists and the arrival of a new operator would have no direct impact at these particular times because there is no joint checking-in and, on the other, this situation is the direct result of having to handle charter flights at this particular time. The allocation rules place an obligation on the airport to handle scheduled flights within specified periods but leave it free to regulate the check-in times for charter flights to ensure more efficient management of the counters. In practice, all these charter flights are occasional flights accepted by the airport case by case and on which conditions may be imposed, particularly with regard to check-in times. Examination of the flight schedules shows that slots are available for flights at certain times of the day and that rescheduling of charter flights to those times would avoid problems of this type. The airport cannot, therefore, invoke a problem which it has the power to resolve itself.

(31) Analysis of the check-in counters in turn shows that six of the 18 counters are allocated permanently to TAP

and two permanently to Portugalia. These two airlines also use other counters as and when needed, as do GB Air and KLM. This mobility shows that there are no particular compatibility problems with the computer system used and that the arrival of a new operator would pose no problem in this respect.

(32) Similarly, the file submitted by the Portuguese authorities makes no mention of any particular problems with offices and rest rooms for staff. Inspection on-the-spot confirmed that space could be made available in the baggage-sorting hall just behind the check-in counters, next to that occupied by other operators.

(33) Finally, the Portuguese authorities stated that the work planned to expand the terminal should not affect the current check-in arrangements.

(34) The Portuguese authorities have thus failed to demonstrate that it is impossible to open up the market to the extent required by the Directive.

4.3. *Plan of appropriate measures*

(35) In accordance with the provisions of Article 9(2) of the Directive, the Portuguese authorities presented a schedule of measures designed to overcome the constraints cited.

(36) These measures form part of an extensive, more general renovation and expansion plan to enable the airport to cope with the increase in traffic, in particular by building a new taxiway and new aircraft positions and doubling the number of floors in the terminal building so that the arrival and departure areas can be kept separate.

(37) As regards the groundhandling services covered by this exemption, the plan is to double the number of check-in counters and to expand the departure hall, to create a new departure terminal for baggage allowing 100 % screening of baggage and to build five gates with walkways adjustable to aircraft of all types. According to the Portuguese authorities these measures should make it possible to cope with traffic growth and to overcome the constraints mentioned. They should also make it possible to open up the groundhandling market in 2001, as provided for by Article 1(2) of the Directive.

(38) However, since the constraints cited by the Portuguese authorities have not been proven, as required by Article 9 of the Directive to justify an exemption, it is not necessary to examine in closer detail the measures proposed by the airport in order to overcome them.

(39) Likewise, since there are no genuine constraints it is pointless to examine whether the action is in proportion to the aims, as specified by Article 9(2) of the Directive.

5. **Conclusion**

(40) The Commission recognises that Oporto airport is particularly overcrowded at certain times and that a development plan has been adopted to overcome this. In particular, it recognises that the baggage registration area is too small at certain peak periods, making it extremely difficult to cope with the large number of passengers all checking in at the same time for scheduled and charter flights. On the other hand, since the problem is the hall and not the check-in counters themselves and could be partly resolved by better scheduling of the flights, it has not been demonstrated that an increase in the number of users carrying out self-handling would lead to a deterioration in check-in operations and that opening-up to other users would be impossible, as defined in Article 9 of the Directive,

HAS ADOPTED THIS DECISION:

Article 1

The exemption granted to Francisco Sá Carneiro Airport in Oporto on the basis of Article 9(1)(c) of the Directive, as notified to the Commission on 11 October 1999, fails to meet the conditions laid down in Article 9 of the Directive. Consequently, Portugal may not implement the abovementioned decision.

Article 2

This Decision is addressed to the Portuguese Republic.

Done at Brussels, 10 January 2000.

For the Commission
Loyola DE PALACIO
Vice-President