

COMMISSION DECISION

of 30 October 1998

on the application of Article 9 of Council Directive 96/67/EC to Cologne/Bonn airport (Flughafen Köln/Bonn GmbH)

(notified under document number C(1998) 3336)

(Only the German text is authentic)

(Text with EEA relevance)

(98/631/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 30 July 1998, and after consultation of those authorities,

After consulting the Advisory Committee,

Whereas:

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

1. The notification presented by the German authorities

By letter of 30 July 1998, received by the Commission on 3 August 1998, the German authorities notified a request to approve the decision of the Government of the Federal Republic of Germany of 23 July 1998 to grant to Cologne/Bonn airport (Flughafen Köln/Bonn GmbH) an exemption to:

- limit self-handling to a single user for the categories of services listed under points 3 and 4, with regard to the physical handling of freight and mail whether incoming, outgoing or being transferred, between the air terminal and the aircraft, and point 5.4 (excluding the transport of crew) of the Annex to the Directive. This exemption is granted, on the basis of Article 9(1)(d) of the Directive, until 31 December 1999.

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.

In accordance with Article 9(5) of the Directive, the German Government was consulted by the Commission on the Commission's draft evaluation on 24 September 1998. The German authorities responded to this consultation with written comments dated 30 September and 1 October 1998.

Basis of the exemption

The general rules for access to the groundhandling services market are set out in Articles 6 and 7 of the Directive. These provisions clearly state the principle that most categories of groundhandling services should be opened up to the maximum possible extent. For an airport with a volume of traffic like that of Cologne/Bonn the Directive provides for recognition of the right to self-handle as from 1 January 1998 and opens up the handling market to third parties as from 1 January 1999. However, because of the specific situation and role of an airport, and in particular constraints of safety and security, but also space and capacity, which can arise in certain parts of most airports, the Directive does not impose total freedom but requires a minimum degree of opening up of both self-handling and services to third parties for four categories of services located air-side, i.e. in a particularly sensitive area of the airport. These categories concern ramp handling, baggage handling, fuel handling and certain freight and mail handling operations.

Council Directive 96/67/EC also takes account of the fact that, in certain very special cases, severe space and 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 the 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.

⁽¹⁾ OJ L 272, 25. 10. 1996, p. 36.

⁽²⁾ OJ C 267, 26. 8. 1998.

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 above-mentioned exemption in accordance with Article 3 of the German *Verordnung über Bodenabfertigungsdienste auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften*⁽³⁾ of 10 December 1997 transposing Directive 96/67/EC into national law.

2. Situation regarding handling at Cologne/Bonn airport

2.1. Presentation of the airport

Cologne/Bonn airport is 15 km to the south of Cologne. It has three runways (two parallel ones and a transversal one, the longest being 3 800 metres in length) and can receive long-haul traffic. It is owned and operated by Flughafen Köln/Bonn GmbH.

The airport has:

- a passenger terminal with two piers (B and C) each with six gate parking positions. Traffic is increasing rapidly, with 5,3 million passengers in 1996, 5,6 million in 1997 and 8,3 million forecast for 2000. The terminal was built in the 1960s and opened to traffic in 1970 for a capacity of 4 million passengers. Several extensions and adaptations of the buildings have been necessary to deal with the increase in traffic. In 1996 the decision was taken to build a new terminal (Terminal 2) as an extension of the present terminal, which should make possible an additional capacity of 6 million passengers per year; this will bring the total capacity to 14 million when the new terminal is opened in 2000, making it possible to cope with demand up to and beyond 2010;
- a large freight area parallel to the main runway which has seen an appreciable growth in the amount of freight handled, with 351 000 tonnes in 1996 (freight and mail), 400 000 tonnes in 1997 and nearly 640 000 tonnes forecast for 2000.

The airport has been fully coordinated since 1997, in particular due to capacity problems in the passenger terminal, and its runway capacity is currently 52 movements per hour during the day and 36 during the night. With alterations to the runways and taxiways this should make it possible to meet demand at least up to 2005. The airport is, however, having problems with the local population as regards noise and imposes very high taxes on aircraft that are not classified as Chapter 3.

⁽³⁾ Bundesgesetzblatt 1997 Teil I Nr 82, 16 Dezember 1997, 2885.

2.2. Groundhandling services at the airport

Some groundhandling operations are already open to competition with several service suppliers and users self-handling. This applies to ground administration (point 1 in the Annex to the Directive) (12 users and seven service suppliers self-handling), passenger handling (point 2) (five users and seven service suppliers), freight handling (point 4.1) other than operations between the aircraft and the terminal, certain air-side operations (points 5.3 and 5.7) and crew transport (part of point 5.4), aircraft services (point 6), fuel and oil handling (point 7), aircraft maintenance (point 8) and flight operations (point 9).

Surface transport as described in point 10 of the Annex does not apply since there is only one terminal, and catering services (point 11) are open to two service suppliers.

On 1 January 1999 all services will be opened up in accordance with the Directive and German legislation on services to third parties. The exemption granted by the German authorities therefore concerns self-handling only and allows only one user to be present and not a minimum of two as the Directive requires. It is also limited to baggage handling (point 3), the loading and unloading of the aircraft, the transport of passengers and baggage between the aircraft and the terminal (part of point 5.4) and freight and mail handling (point 4).

II. CONSTRAINTS REFERRED TO BY THE GERMAN AUTHORITIES

The exemption granted by the German Government is based principally on the space problems which the airport will face when the groundhandling market is opened up on 1 January 1999. This opening up of the market will coincide with the extension work planned for the airport, consisting in the construction of a rail link and Terminal 2. The German authorities consider that the space available on 1 January 1999 will allow for a second service supplier, in line with the German legislation transposing the Directive, as well as the user's right to self-handling, but will not permit the presence of a second self-handling user because of the extension work.

They base their arguments in particular on the study 'Kapazitätsauswirkungen für den Flughafen Köln/Bonn bei Zulassung weiterer Abfertiger auf dem Vorfeld für den Zeitraum von 1997 bis 2003' of 30 May 1997 conducted by the Fraunhofer Institut für Materialfluss und Logistik at the request of the Cologne/Bonn airport managing body.

1. The Fraunhofer study

Generally speaking, the study carried out by the Fraunhofer Institut highlights the fact that despite the airport's fairly large total area of nearly 1000 ha the operational area available is quite small due to statutory building restrictions. The study shows that groundhandling operations are already difficult to carry out satisfactorily with only the airport managing body supplying the services concerned to third parties.

With the large amount of equipment and number of vehicles required the airport is already obliged to use the groundhandling areas to their capacity.

According to this study it will no longer be possible to use the airport's aircraft parking areas for parking groundhandling equipment. Not only are there a large number of aircraft using the tarmac for overnight parking - particularly around the passenger terminal as a stopover area and near the cargo buildings for the night time operations of groupage services with peak times between 2 and 3 a.m. — but it is also necessary to extend handling operations to cargo aircraft on spaces normally used for groundhandling services for passenger aircraft close to the passenger terminal. In addition, the airport has to close runway 14R32L (a short parallel runway to the south) for parking and servicing a dozen Fokker-type aircraft.

During the day, on the other hand, part of this runway has to be used for parking groundhandling equipment.

According to the Fraunhofer Institut study the current shortfall in parking space for groundhandling equipment is estimated at 3 172 m² static area (for parking alone) and 4 346 m² dynamic area (including the area needed for manoeuvring the equipment) if the groundhandling services are supplied on areas reserved for this type of operation. The shortfall will therefore be filled, according to the Fraunhofer study, only by using a large number of aircraft spaces. This general overloading, which is likely to persist until the completion of the work on the tarmac of the future Terminal 2, i.e. in principle by mid-1999 and certainly by the End of 1999 for opening to passengers in March 2000, means that the areas in question can only be used to the limit of what is tolerable and acceptable under the safety standards.

The simulations made by the Fraunhofer Institut in the context of opening up the market take account of the close connection between the number of operators — suppliers or self-handling users — and the amount of equipment and the number of vehicles needed. The study

stresses that each operator must have equipment in sufficient quantities for his own needs, including during peak periods, and to meet the requirements of his contract and that these peaks vary over time as a function of the customers handled and do not therefore necessarily correspond with the airport's peaks: According to the study, admitting suppliers or self handling users under the conditions required by the Directive would mean a shortage of space of 9 420 m² static area and 12 908 m² dynamic area and an area of this size could only be freed up by closing aircraft spaces.

2. Position of the German authorities

In their notification of 3 August 1998, the German authorities stated that the amount of handling equipment at the airport was both necessary and sufficient to meet the needs of the carriers and thought that it was none the less possible to free up an area of around 2 600 m² currently used to store unused equipment. On the other hand, the reduced area needed by the airport for its own handling operations due to its loss of market share as a result of opening up to competition should also be taken into account. Added to that, according to the German authorities, is the area freed by TNT when the airline left Cologne/Bonn for Liège at the end of February 1998. This area of around 8 000 m² in office space and 2 000 m² in handling area should, according to the airport authorities, be distributed between the other two groupage services, DHL and UPS, although the airport is aware of liberalisation measures and all that these entail. The German authorities point out, in contrast, that priority for this area must go to the minimum opening-up of the market required by the regulation. They also take the view that it is possible to build or organise parking areas for the handling equipment at least on the periphery of the new west freight area which will be ready in its initial phase as from the autumn of 1998. This area is intended for freight operations whose peak periods are in the middle of the night. The handling equipment could thus be parked on the area itself during the day.

According to the German authorities, the C area, which has five aircraft spaces, is only half used, and even though the use of this C area is temporarily restricted by work on the future Terminal 2, the German authorities still feel that it is possible to park equipment or vehicles there at least until Terminal 2 is opened. By then new areas will have been freed and parking handling equipment should no longer pose any problems.

Finally, a parking area could be used for light equipment, at least temporarily, near the area for parking small aircraft (GAT 3) next to the area reserved for buses.

All this temporary allocation of space can be regularised once the area for the future Terminal 2 is ready, i.e. from the summer of 1999 if everything goes to plan and at the end of 1999 whatever the event.

The German authorities therefore take the view that, given the areas mentioned above, which can be freed up immediately by the airport, a second supplier can be admitted and the conditions concerning groundhandling services for third parties met, as imposed by the German regulation '*Verordnung über Bodenabfertigungsdienste auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften*' transposing the Directive and in particular the annex giving the number of service providers authorised at the airport for the operations covered by this notification.

This freed space also allows for the arrival of a new self handling user, but, according to the German authorities, it would not allow for the installation of a second user for the same type of activities before the end of 1999 when the end of work on the area around the future Terminal 2 will free up sufficient space for opening up in line with the requirements of the Directive.

III. REACTIONS OF THE INTERESTED PARTIES

The various interested parties have been asked to give their opinions following the publication of the notification from the German authorities in accordance with Article 9(3) of the Directive. The airlines that have submitted their opinions refute the claims of the German authorities, contesting in particular the requirements set out in the Fraunhofer study for the arrival of an extra supplier or user. The airlines are particularly critical of the estimate made in this study of 9 420 m² static area for the requirements of each new operator, given that at London Heathrow KLM Groundservices handle 19 flights a day with 6 000 m² and at Frankfurt Delta self handles 15 flights a day, most of them over a short period, with 6 000 m² for equipment and 2 000 m² for personnel. They also point out that in preparing for the increase in traffic in the years ahead, especially with the construction of new terminals, the airport is bound to have included the organisation of ancillary services in its projects and thus room for proper handling management, the need for space being measured as a function of requirements, not the number of parties involved. These airlines take the view, finally, that grouping general aviation together and optimising equipment parking areas would free up the extra space. Similarly, according to these airlines, the

configuration of baggage-handling areas permits the arrival of new operators.

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

1. The rules in force concerning groundhandling

1.1. The scope for restricting access to the market

Council 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. With an annual throughput of 5.4 million passengers in 1997 Cologne/Bonn airport must, in pursuance of Annex 5 to the '*Verordnung über Bodenabfertigungsdienste auf Flugplätzen und zur Änderung weiterer luftrechtlicher Vorschriften*' of 10 December 1997 transposing the Directive into German law, open up the groundhandling market for third parties to a second supplier from 1 January 1999 and permit two users to self-handle from 1 January 1998.

The general rules governing self-handling for the service categories listed in the German authorities' notification are set out in Article 7(2) of the Directive. Those rules have been incorporated into the provisions of paragraph 3(2) of the German regulations transposing the Directive. Under the terms of those various articles a Member State may restrict self-handling to two users. The latter must therefore be selected on the basis of relevant, objective, transparent and non-discriminatory criteria.

However, where specific space or available capacity constraints, arising in particular from the rate of utilisation or of space occupation make it impossible to authorise self-handling to the extent provided for by the Directive, the Member State concerned may, on the basis of Article 9(1)(d), abolish that right or restrict it to a single user.

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 restraints.

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.

Thus, as again pointed out by the Commission in its Decisions of 14 January 1998 on Frankfurt and Düsseldorf airports ⁽⁴⁾ the main aim of the Directive is to liberalise groundhandling services in transit. The restrictions imposed on third parties consist of restrictions of freedom of such parties to provide such services. By analogy with the State measures restricting the freedom to provide services ⁽⁵⁾, the measures likely to exclude or prohibit the activities of service providers or, in the present instance, those of users wishing to self-handle, even if they apply without distinction to national service providers or users and to those in other Member States, must be justified by over-riding public-interest requirements and not by economic factors and must, moreover, be in proportion to the aims pursued.

1.2. Procedure

The German authorities undertook to make the entry into force of the exemption decision subject to the Commission's decision.

As again stated in its two decisions on the airports at Frankfurt and Düsseldorf ⁽⁶⁾, the Commission must have its examination directed towards:

- the existence and scope of the constraints justifying the exemption and the inability to provide openings 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 referred to in Article 9(2) of the Directive.

Thus an exemption may not be granted with the objective of allowing the airport a further general adaptation period in addition to that already granted by Article 1 of the Directive. It must permit the airport to overcome the specific constraints which it may encounter when the market is opened up. Any exemption must therefore be examined in the light of the specific constraints 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 this must take account of the purpose of the measure in question.

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

In accordance with Article 9(4) of the Directive, the Commission has made a detailed analysis of the alleged space and capacity constraints, whether the decision taken is appropriate to those constraints, and the measures put forward to overcome them. Its examination drew upon the file provided by the German authorities, and upon the visit that it made to Cologne/Bonn airport after the notification and, finally, benefited from the technical assessment made at its request by Symonds Travers Morgan.

2. Constraints referred to by the German authorities

2.1. Introduction

The on-the-spot inspection by the Commission's departments and the expert assessment carried out at its request confirm that Cologne/Bonn airport is the location of two clearly distinct types of operation. During the day these concern the carriage of passengers from the passenger terminal and from some positions on the freight tarmac. During the night several aircraft are parked on those various positions. The freight tarmac is thus almost entirely occupied for freight and mail operations.

Aircraft link up with the two passenger terminal piers via a multi-position system which enables various types of aircraft to be received. It also enables certain types of equipment such as airport tugs to be dispensed with. Conversely the space available for receiving the other types of handling equipment is limited.

The apron in front of the freight terminal also permits quasi-contact (nose-in) parking which requires the use of pusher tugs on departure, and also several distant positions where the aircraft themselves may manoeuvre, when departing.

It is clear that, where possible, the search for space for handling equipment and operations must, first and foremost, be made close to the aircraft, i.e. near the terminals. However, this is only a matter of priority. The Directive provides that the Member-State authorities must show that it is impossible to open up the market to the level required. The Member State must demonstrate the lack of space for parking equipment and carrying out the operations intended without specifically setting quality criteria for each of the positions.

⁽⁴⁾ Commission Decisions 98/387/EC and 98/388/EC of 14 January 1998, OJ L 173, 18. 6. 1998, p. 32.

⁽⁵⁾ Judgments of 25 July 1991, Médiawet, [1991] ECR p. 4007 and C-76/90, Sager: Denemeyer, [1991] ECR, p. 4221.

⁽⁶⁾ See in particular judgments of 20 April 1978, joined cases 804 81/77 (1978) ECR 927, p. 945, and of 25 June 1992, British Gas, C 116/91 REC PI-4071, point 12.

2.2. *Space and capacity constraints*

While being aware that there are significant peak periods at the airport (in the morning and in the late afternoon as regards passengers and between 10 p.m. and 3 a.m. for freight operations) the Commission nevertheless feels that the German authorities did not demonstrate that all of the space currently available was in use.

(a) The available space

It is true that during the night-time peak period around 1 or 2 a.m. in the morning the number of aircraft parked for the night exceeds the number of parking positions at the airport. Indeed, for the last two years runway 14L32R has been closed at night in order to enable a dozen Fokker aircraft to park there. However, it has not been proven that, although unsatisfactory, that closure constituted a major operating obstacle for the airport, and nor did it make it impossible to open the market up to the extent provided for by the Directive. That system could, moreover, be maintained throughout the work on the airport, i.e. during the period corresponding to the exemptions. If the air transport authorities were to prohibit the use of the runway for parking aircraft, in the opinion of the German authorities the positions would be transferred to the west freight tarmac. Even in this case, such use of the tarmac would not prevent equipment from being parked around the area itself or on its extension.

The standards and practices recommended by the International Civil Aviation Organisation (ICAO) provide for the provision of space on aircraft positions reserved for safety requirements and equipment, depending on the type of aircraft in question. The inspection visit to the facilities while all of the aircraft positions were occupied i.e. around 1.30 a.m. showed that even at that time a substantial amount of space was still available for parking handling equipment around point F02 (Lageplan (layout plan) 04/11/97) near the DHL company's hangers and also ahead of the large-capacity aircraft in zone F. In addition, during the peak period most of the handling equipment is in use and thus does not need to be parked.

The same applies around the passenger terminal which receives aircraft for the night. It may be felt that parking equipment close to the aircraft was not a problem during the stopover periods, since in addition that equipment had to be used during the early-morning departures.

Furthermore the freight area is almost deserted during the day and certain aircraft positions could be used for handling equipment. Those places could be made avail-

able during the evening since the equipment is then in operation.

It can be seen from these inspections that the space additional to that mentioned by the German authorities in the notification received by the Commission can be made available for parking handling equipment close to the aircraft positions in zone F, in front of the aircraft and, at night, close to the passenger terminal.

Furthermore, as shown by the file handed over by the German authorities, the new west freight area must be ready for use from the autumn of 1998. That 40 000 m² area was planned to receive Fokker aircraft and equipment. The planning also involves the building, in the medium term, of additional freight facilities along that area. The same applies to the back-up areas extending from the new west freight area.

As pointed out in its decision on Frankfurt airport (⁽⁷⁾), the Commission feels that the aim of the Directive means that only the constraints mentioned in Article 9, which in themselves are barriers to opening up the market, may form a basis for an exemption in that this cannot include the constraints produced by the airport itself. In the decision of 23 July 1998 the German authorities themselves applied that rule by pointing out that the airport could not reduce the available amount of space that was needed to implement the Directive by assigning the premises and spaces left vacant by the departure of the TNT company to other purposes. It was thus pointed out as regards Frankfurt that it was not the lack of space in itself that would make the market opening impossible, but it was in the main the use to which the airport decided to put the areas which were to become available that could cause problems if any further operator were to arrive. This would depend upon the extent to which the additional space identified by the Commission's inspection, and referred to above, proved to be inadequate.

(b) Space requirements

The scope of the German authorities' exemption is restricted to self handling by a second user.

The size of the traffic volume handled by the user at the airport, whether passengers or freight, and in decreasing order, is one of the objective criteria for selecting users who could be authorised to self-handle if they were limited in number. In view of the German authorities' decision of 23 July 1998, of which the Commission has been notified, it can thus be considered that the biggest user in terms of traffic volume already has the right to self-handle and that, when examining the exemption introduced by the German authorities, account must be taken of the impact on equipment and space needs arising from the self-handling by the second biggest user at the airport, or by the third or fourth if the preceding users are not interested.

(⁽⁷⁾) See footnote 5.

On the basis of the flight schedules passed on by the airport authorities it emerges that if that second user were a passenger carrier it would, as part of its self-handling, deal with almost 17 flights per day with a single peak of four simultaneous flights. Basing oneself on the fact that this carrier will continue to use small-capacity aircraft during 1999 — the period intended to be covered by the exemption — the equipment needed for that number of flights could easily be parked in the positions referred to above. The equipment needs at passenger-terminal level are indeed often limited to light equipment (trolleys, starter units), and mobile equipment (gangways and buses for distant positions); most of these positions do not need any pusher tugs. However, if the carrier were to use larger aircraft with more substantial equipment the additional appliances could be parked ahead of the freight positions or by transferring some of the trolleys to the approaches to area D.

If the second operator were one of the groupage operators at the airport the extra space requirement would be minimal since the equipment could be parked on the tarmac apron allocated to it, which is free during the day and would be in use during the night.

The German authorities' notification does not point to any particular problem as regards the need for premises. Moreover, a user who is self-handling generally has premises available at the airport and could make do with those already allotted to him. This could more particularly apply to the groupage operators at the airport. If there were any extra need use, even if only temporary, could be made, in particular, of certain premises in the freight area which are currently empty.

Finally, the part of the exemption relating to item 3 of the Annex to the Directive, namely baggage handling, requires special attention. At that level, indeed, the proliferation of operators could have a major impact on the proper functioning of the airport as a whole. It is true that, in general terms, operator proliferation causes an increase in equipment and space requirements. However those requirements do not correspond to those during the airport's peak periods — as is the case where there is an operations monopoly — but to those during the peak periods of each of the operators in order that these may meet their customers' needs. However, that increase is offset by the monopoly holder's loss of market share, or that of the other operators and thus of equipment and space for parking that equipment, as in any case pointed

out by the German authorities in their decision of 23 July 1998.

In this particular case it was pointed out that the airport had enough spaces available to receive a second user. Equipment parking is thus not a barrier to the implementation of the Directive. Moreover some of the baggage trolleys are already parked on standby outside the distribution building behind positions A11 — A15⁽⁸⁾. Extra space behind positions A17 — A25 may be allotted to empty trolleys that are parked on standby. As it happens that space was completely unoccupied during the Commission experts' inspection during a part of the day when the lack of activity should have left the trolleys parked together and when the positions should normally have been occupied.

The baggage-handling system consists of automatic chutes where one or several chutes are allocated in the light of the flights handled, and of trolleys parked in front of those chutes. In general terms the number of trolleys standing before the chutes at a given point in time varies not as a function of the number of operators — i.e. service providers or self-handling users — but of the number of flights handled, namely about 50 per day. Conversely the problem may arise from the management of those trolleys within the building. The latter has a central baggage arrival point discharging into the chutes that are arranged in two parallel lines. The trolleys are guided along two parallel lines, each in one direction only. A comparison with other airports and the number of flights handled per day shows that the operators monopoly does not seem essential. Tight management of the trolley flows, such as takes place in airports that are already open to competition, would enable an excessive number of trolleys waiting in the building to be avoided since, as already stated above, these could be placed outside. It is one of the functions of the airport management to ensure that all airport activities are carried out properly. The airport possesses the powers to ensure compliance with certain rules of conduct and in particular to ensure that the number of trolleys present does not exceed requirements at a given moment. The airport may not cite constraints arising from its own management. As the Commission pointed out in its decision on Frankfurt airport the inability to open up the market must be due to a factor that is independent of the one cited.

The German authorities have thus not demonstrated that it is impossible to open the market up to the extent required by the Directive.

3. Measures planned

Article 9(2) of the Directive provides that all Member-State decisions must be accompanied by a schedule of appropriate measures that are intended to overcome the constraints cited. In 1996 the airport decided to build a new passenger terminal (Terminal 2), with the corresponding aircraft handling areas which will enable the

⁽⁸⁾ Lageplan 04/11/97 Abbildung 3 (Layout plan 04/11/97, Figure 3).

demand in the years ahead to be met via an additional capacity of six million passengers. A railway line passing under the future terminal, with a stop at that point, is also planned. The new terminal should be open to the public in the spring of 2000. This work is accompanied by the building of new parking areas enabling operating and equipment-storage areas amounting to almost 15 000 m² to be released. The airport would reserve these in order fully to meet the needs of the new service providers from the beginning of 2000 onwards.

However, since in terms of this exemption the constraints cited by the German authorities have not been proven, it is not necessary to examine in closer detail the action described by the airport in order to overcome those constraints.

Likewise, the absence of genuine constraints makes any examination of the proportionate nature of the action, as specified by Article 9(2) of the Directive, pointless.

V. CONCLUSION

The increase in traffic and the resultant extension of the airport's installations and capacity have caused Cologne/Bonn airport, quite naturally, to construct new check-in installations and thereby to reduce the areas available at certain points, including that for the groundhandling equipment. However, the available areas referred to in this decision, which are additional to those described by the German authorities, have proved to be adequate for the self-handling needs of a second user at the airport. Conse-

quently, the German authorities have not demonstrated that it was necessary to delay the arrival of a second user until 1 January 2000. They have therefore failed to demonstrate that it is impossible to open up the market to the extent provided for by the Directive for the operations referred to in the notification recorded by the Commission on 3 August 1998,

HAS ADOPTED THIS DECISION:

Article 1

The exemption decision granted to Cologne/Bonn airport on the basis of Article 9(1)(d) of the Directive, as notified to the Commission on 3 August 1998 does not meet the conditions of Article 9 of the Directive. Consequently, the Federal Republic of Germany may not implement that decision.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 30 October 1998.

For the Commission

Neil KINNOCK

Member of the Commission