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COMMISSION DECISION 98/190/EC

of 14 January 1998

relating to a proceeding under Article 86 of the EC Treaty
(IV/34.801 FAG - Flughafen Frankfurt/Main AG)

(Only the German text is authentic)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty¹, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 3 thereof,

Having regard to the complaint lodged with the Commission on 20 July 1993 by KLM Royal Dutch Airlines N.V., Air France Compagnie Nationale S.A. and British Airways plc asking the Commission to find, pursuant to Article 3 of Regulation No 17, that Flughafen Frankfurt/Main AG has infringed Article 86 of the Treaty,

Having regard to the Commission's decision on 10 May 1994 to initiate proceedings in the case,

Having given the undertaking concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with the provisions of Article 19(1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17², and in particular at three hearings,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

¹ OJ 13, 21.2.1962, p. 204/62.

² OJ 127, 20.8.1963 p. 2268/63.

Whereas:

I. THE FACTS

A. Frankfurt airport

A.1. *Flughafen Frankfurt Main AG - The Party against which is the subject of the complaint*

1. Flughafen Frankfurt Main AG ("FAG") is the company which owns and operates Frankfurt airport.
2. According to FAG's 1995 annual report, Frankfurt airport is the largest airport in Germany and one of the largest in Europe in terms of flight movements, passenger volume and freight volume.

In 1995, it had 372 587 commercial aircraft movements, a volume of 38 191 247 passengers and a volume of 1 327 865 tons of freight. Compared to the total traffic in Germany, this represented 23.7% of commercial aircraft movements, 34.6% of passengers and 70.7% of freight. Compared to other European airports, Frankfurt is the second largest in terms of passengers and aircraft movements (after London Heathrow) and the largest as regards freight.

3. In 1995, FAG achieved total sales of DM 2 316.7 million, 37.7% of which (DM 873.0 million) is derived from ground-handling services charges.

A.2. *Legal framework for the operation of Frankfurt airport*

4. The legal framework for the operation of airports in Germany is set out in the Air Traffic Act ("Luftverkehrsgesetz" - "LuftVG") of 14 January 1981 and in the Air Traffic Licensing Decree ("Luftverkehrs-Zulassungs-Ordnung" - "LuftVZO") of 13 March 1979. According to Article 6 LuftVG, the construction and operation of airports is subject to prior authorization. Article 39 LuftVZO specifies the competent authority for authorization purposes. Authorization covers both the construction of an airport as well as its operation (Article 42 LuftVZO).

Under Article 45 LuftVZO, dealing with the duties of the airport operator, the airport operator is required to maintain the operational safety of the airport and has a duty to operate the airport properly. The airport operator is obliged to submit to the competent authority rules governing the use of the airport ("Flughafenbenutzungsordnung") for authorization (Article 43 LuftVZO); these rules are subsequently published by the competent authority.

5. The rules governing the use of Frankfurt airport entered into force on 12 April 1984; authorization by the Hessian Ministry for Economic Affairs and Technology was granted on 16 February 1984.

They contain a provision according to which ground-handling services, defined as "traffic handling of aircraft" ("Verkehrsabfertigung der Luftfahrzeuge"), may be provided by the airport operator against remuneration, unless the parties have agreed otherwise (Section 2.5). In that case, handling equipment and vehicles are to be parked where specified by the airport operator against payment of a charge. Furthermore, the airport operator may request payment for the use of the airport and its facilities in such cases.

Special provisions in the rules governing the use of Frankfurt airport deal with refuelling (Section 2.8) and with maintenance and exterior cleaning of aircraft (Section 2.9). As regards refuelling, it is provided that companies which refuel aircraft must be admitted by the airport operator. Those companies and air carriers have to comply with the security provisions. As regards substantial maintenance work on aircraft and the washing of aircraft, the only provision is that those activities are to take place only in areas indicated by the airport operator.

6. Section 4.1 of the rules governing the use of Frankfurt airport provides that any commercial activity at the airport is subject to an agreement with the airport operator which may in principle also entail payment to the airport operator. The provision specifies that the activities of air carriers in direct connection with the operation of their aircraft is not considered to constitute a commercial activity.
7. The management of Frankfurt airport will also be influenced by Council Directive 96/67/EC of 15 October 1996 on access to the ground-handling market at Community airports³. The Directive provides that, in the case of airports whose annual traffic is not less than three million passenger movements and of certain categories of services,
 - Member States are required to take the necessary measures to ensure free access by suppliers of ground-handling services to the market for the provision of ground-handling services to third parties as from 1 January 1999 (Article 6 of the Directive); however, they may limit the number of authorized suppliers (to no fewer than two);
 - Member States have to take the necessary measures to ensure the freedom to self-handle as from 1 January 1998 (Article 7 of the Directive); however, they may reserve the right to self-handle (to no fewer than two airport users), self-handling being narrowly defined; joint handling is not covered by liberalization measures;
 - where specific constraints imposed by the availability of space or capacity make it impossible to open up the market and/or implement self-handling, the Member State in question may, subject to Commission approval, decide to limit the provision of ground-handling services to one supplier (for a two-year period renewable once) and to ban self-handling or to

³ OJ L 272, 25.10.1996, p. 36.

restrict it to a single airport user (for a three-year period, renewable). Member States shall notify the Commission, at least three months before they enter into force, of any exemptions they grant (Article 9(3) of the Directive).

By letter dated 15 October 1997, the German Government informed the Commission that, on 29 September 1977, it had taken a decision (hereinafter referred to as “the German Government’s decision of 29 September 1997”), pursuant to Article 9(1) of Directive 96/67/EC, to grant a derogation to FAG from the requirements laid down in Articles 6 and 7 of the Directive for a two-year and three-year period respectively. In the same letter, Germany also proposed measures to overcome the constraints cited. The letter was registered with the Commission on 20 October 1997. A summary of that decision was published in the *Official Journal of the European Communities* in accordance with Article 9(3) of Directive 96/67/EC⁴.

B. Operations at Frankfurt airport

B.1. Airport layout

8. Frankfurt airport has a longitudinal shape. The airport area is surrounded by motorways (to the North and East), railways (to the South) and by a forest which is protected on environmental grounds (to the West). This means that the surface of the airport cannot be extended, which hampers the development of the airport. The scope for increasing the useful surface area of the airport is also limited by the fact that 229 hectares of wooded area to the South West are protected for environmental reasons and that 179 hectares are currently occupied to the South by the United States Air Force (USAF).

9. The airport landing and take-off facilities consist of two parallel runways (North and South) and a take-off only runway (West), almost perpendicular to the former.

The area to the north of the major runways hosts the main airport buildings. These include two Terminals (Terminal 1 and Terminal 2), the Deutsche Post, an area dedicated to Lufthansa cargo and Lufthansa operations and a tanker area (for the storage of fuel). The North East area contains the commuter area and the Little League area, which has recently been returned to FAG and which has been allocated to USAF Mail.

The smaller area South of the major runways has been occupied by the United States Air Force since the end of World War II. However, a portion of this area has recently been handed back to FAG, which has moved its freight activities there.

⁴ OJ C 335, 6.11.1997, p. 7.

10. Terminal 1 and Terminal 2 differ significantly in their shape, in particular to the extent that the first one comprises two *culs-de-sac* whereas Terminal 2 is linear. Terminal 1 consists of three piers (A, B and C), while Terminal 2 is divided in two areas (piers D and E).

Some [...] % of passenger aircraft movements and [...] % of passengers flow through Terminal 1⁵.

11. There are currently⁶ 142 stands at Frankfurt airport: 49 gate stands (36 in Terminal 1 and 13 in Terminal 2), 57 remote stands (18 facing Terminal 2, 11 facing pier A and 28 towards the western part of the airport), 11 commuter stands and 25 freight stands. As a general rule, the remote stands facing Terminal 2 serve flights allocated to Terminal 2 while all other remote stands serve flights allocated to Terminal 1. Exceptions to this rule may, however occur.
12. Frankfurt airport is equipped with a central fully automatic baggage conveyor system which is situated within the Terminal area. This system is used for the sorting and transporting of baggage from the check-in counters in the Terminal to loading stations on the ramp, and for the sorting and transporting of baggage in transit from ad hoc transit stations to the loading stations on the ramp.
13. Traffic on the apron at Frankfurt airport is heavy. This is due to a series of factors, *inter alia* the shape of the airport and the relatively high number of remote stands.

B.2. Airport capacity

14. Frankfurt airport faces growing demand for landing and take-off facilities. This growing demand stems from the growth of passenger traffic (both point-to-point and transit) and freight traffic as well as from FAG's attempt to serve the courier and mail markets. The limit on FAG's response to this demand is set by airport capacity.
15. The capacity of an airport is dictated *inter alia* by the following three elements: the runway capacity, the capacity of the stands and the capacity of the Terminal buildings. Since it cannot develop outside its current boundaries, FAG has entered into a process of continuing improvement of the existing facilities, re-shaping the airport layout and rebuilding the premises.
16. The runway capacity seems to have historically constituted the limiting factor at Frankfurt airport. Given the impossibility of building a second runway system to match the growing demand (due to the impossibility of extending the airport surface), FAG built an additional take-off only runway (operational since 1984) and worked to develop a more efficient use of the existing runways. FAG's goal is to increase the number of maximum movements per hour from 48 (in the 'Seventies) to 74 (1997) and to 80 (in the year 2000).

⁵ Information provided orally by FAG.

⁶ Source: Fraunhofer Institut für Materialfluß und Logistik, 27.6.1997, p. 17.

17. As regards Terminal capacity, FAG built a second Terminal and is currently building an extension to Pier A (Terminal 1) towards the West.

Accordingly, the number of stands available is planned to rise to 156 in the year 2000, together with a reduction in the dependence on remote stands. New stand development at Frankfurt airport includes 18 additional gates at the extension of Pier A and 4 additional stands at the link between Terminal 1 and Terminal 2.

The resulting Terminal and stand capacity will be sufficient to match the increased runway capacity.

C. Ground handling services

C.1. Definition

18. Ground-handling services comprise all the activities performed on the occasion of a stopover of an aircraft at an airport in respect of the aircraft itself, the passengers and the cargo. These activities are listed in the IATA Standard Ground Handling Agreement.
19. In general, ground-handling services may be provided for airlines by the airport operator, by another airline or by an independent specialized ground-handling company (third-party handling). Air carriers may also provide their own handling services either individually (self-handling) or in a pool (joint handling).
20. The ground-handling services concerned by this Decision are the ones that take place on the ramp (or apron) of the airport. They consist substantially of the following:
- provision and operation of equipment for the embarkation and disembarkation of passengers;
 - transport of passengers between the Terminal and the aircraft position and vice versa;
 - crew transport;
 - loading and unloading of baggage, cargo and mail;
 - transport, sorting and transfer of baggage;
 - transport of cargo and mail on the ramp;
 - cabin cleaning;
 - toilet and water services;
 - push-back/towing of aircraft;
 - provision and operation of equipment to carry out the above activities;
 - fuelling of aircraft;

- the transport of catering supplies to and from the aircraft.

C.2. *Ground-handling at Frankfurt airport*

21. FAG draws a general distinction between services provided on the land-side, in particular passenger handling in the Terminal building and freight handling, and air-side activities, that is to say, all activities on the ramp. Apart from those services, FAG also mentions "other supply services", namely fuelling of aircraft and catering, which are also generally understood to belong to ground-handling services.

22. On the land side, FAG has allowed air carriers the right of self-handling and/or third-party handling.

As regards passengers, air carriers may self-handle their land-side activities at Frankfurt airport. In addition, all airlines have the right to handle the passengers of other airlines. Airlines may also use FAG for the provision of handling services. Independent handling operators have not been admitted by FAG for the provision of passenger handling services.

As regards freight handling in so far as it takes place on the land-side, self-handling is possible as well as third-party handling services to other airlines. Several airlines make use of the services of FAG in this area. Independent operators have been admitted.

In addition, FAG has granted concessions to third parties for the fuelling of aircraft, for catering and for certain limited ramp-side activities, such as snow and ice removal. Those services are not provided by FAG.

23. As regards the provision of the other ramp-side activities (namely the ones listed in paragraph 20 except fuelling, catering and snow and ice removal), FAG has refused to allow self-handling or to admit third-party handlers. FAG is consequently the only provider of those services at Frankfurt airport.

In its reply to the statement of objections, FAG confirmed that it had refused potential competitors the right to provide such ramp-handling services.

24. The provision of ground-handling services by FAG to air carriers is based on a contract concluded with air carriers. These ground-handling contracts are based on FAG's standard ground-handling agreement dated 1 March 1983. Many of them were amended after 1995.

The Annexes to the standard ground-handling agreements list the services to be provided by FAG to the carrier and the charges to be applied. The list of service activities is similar but not identical to that contained in Annex A to the IATA Standard Ground Handling Agreement.

Article 3, paragraph 2 of the standard ground-handling agreement contains a provision under which the air carrier shall not appoint any other person, company or organization to provide the ground-handling services which FAG has agreed to provide by virtue of the agreement, except in such special cases as shall be mutually agreed between the parties.

25. Certain exceptions to FAG's monopoly for the provision of ramp-handling services have existed for "historical reasons":
- The US airline Delta Air Lines, which had reserved its right to provide self-handling services with regard to those flights it took over from the US airline Pan Am in 1991. The former right of Pan Am to self-handle dates back to the period following World War II. Delta ceased to exercise this right in 1997.
 - The airline SAS, which arranged for its own personnel to perform manual loading and unloading activities on the ramp. This right has its historic origins, in that SAS was the first airline after World War II to start purely commercial air transport services. SAS gave up self-handling of its aircraft in 1995.
 - The express delivery company Federal Express which has the right to self-handle a limited number of activities on the ramp.
26. The scope of this Decision is limited to the ramp-side activities for which FAG has neither allowed self-handling nor admitted independent third-party service suppliers (hereinafter "ramp handling").

D. Physical possibility of admitting competition on the ramp

D.1. General

27. FAG has submitted that the space available on the ramp is not sufficient to allow self-handling or to accommodate additional suppliers of ramp-handling services. In FAG's view, its monopoly is justified for the following reasons:
- there is currently insufficient space on the ramp for parking the handling equipment of more than one handler; the admission of self-handling or of competition would lead to the closure of stands and therefore result in reducing the airport capacity. This would also affect its ability to meet future demand;
 - traffic density would rise to an intolerable level, which would adversely affect the safety level and the Minimum Connection Time (MCT) - currently 45 minutes.
28. FAG submitted several consultants' reports, drafted by Netherlands Airport Consultant BV (NACO) and Fraunhofer Institut für Materialfluß und Logistik (Fraunhofer).

The Commission set up a group of technical experts (hereinafter “TEG”), consisting of representatives of FAG and of the complainants. The group was chaired by an expert appointed by the Commission, Mr Penwarden. Since no unanimous conclusion could be reached, the TEG chairman submitted a report under his sole responsibility (hereinafter “Penwarden report”). FAG submitted a separate report.

Thereafter, the Commission appointed Professor Doganis, Head of the Air Transport Group of the College of Aeronautics at Cranfield University as a new independent expert. Professor Doganis submitted a report (hereinafter “Cranfield report”).

The conclusions on the relevant issues and the results of the reports are summarized below.

D.2. Parking areas

D.2.1. General

29. FAG has argued that the introduction of competition at Frankfurt airport should not be envisaged on a dedicated-stand basis (whereby each handler would be allocated a predetermined set of stands), but should be envisaged on a flexible allocation basis. This is not disputed.
30. On this assumption, the admission of self-handling and/or further third-party handlers may lead to additional parking space requirements. The main reason is that the total amount of equipment necessary for the supply of ramp-handling services is often higher with multiple handlers than with a monopoly (and that more parking space is accordingly needed to park such equipment).

The need for additional equipment is linked to diseconomies of scale and of scope. The total amount of ground-handling equipment is closely related to the volume of traffic at the peak. In monopoly conditions, the size of equipment is determined by the requirements at the airport peak. Conversely, the size of equipment under competitive conditions is determined by the sum of each handler’s equipment, which is determined by the respective requirements at each handler’s peak. Clearly, the handlers’ peaks do not necessarily coincide with the airport peak and the resulting total number of equipment items will be higher. In other words, competition leads to structural “over equipment” which results into additional parking space requirements.

In addition, FAG has argued that the admission of self-handling and/or further third-party handlers would lead to a reduction in the space available for parking (in particular due to reduced scope for using preparation areas as parking space). Accordingly, reference will be made below where appropriate to gross additional space requirements and net additional space requirements, with the latter taking into account this reduced availability of space.

31. FAG has submitted that the admission of self-handling or of additional ground-handlers on the ramp is not possible since there is not enough space to park their equipment. To assess the latter, it is necessary to estimate the balance between the parking space requirements (hereinafter “space requirements”) and the area available for parking (hereinafter “space available”).

It is noteworthy that the various reports submitted to the Commission either come to contradictory conclusions or, at least, are not fully consistent one with another. This is not surprising, since these estimations rely on a number of assumptions (particularly in terms of client portfolios) which strongly influence their outcome.

It has accordingly been necessary to take into account a number of further considerations in arriving at a final view (see legal assessment).

D.2.2. The experts’ reports

D.2.2.1. *The experts appointed by FAG*

32. NACO comes to the conclusion that there is not enough parking space at Frankfurt airport to admit one or several additional handlers.

NACO estimates that the space available amounts⁷ to some [...] m² while the space requirements amount to some [...] m² under monopoly conditions and to some [...]m² if one additional handler were to be admitted⁸.

The calculation of the [...] m² of space available was made on the basis of theoretical availability according to maps of the area. They result from [...] m² available parking areas, [...] m² on preparation areas, [...] m² of wheeled storage near cargo halls and [...] m² of buffer area. This figure also takes into account a reduction of space available of some 4 300 m² (2 697 + 1 630) for parking which are now used as cargo buffer areas, following the move of cargo activities to the South⁹.

To calculate the space requirements, NACO estimates the total equipment required respectively in monopoly conditions and in competitive conditions. Then, it calculates the surface occupied by such equipment. Finally, the total parking space requirement is calculated by multiplying the latter surface by two factors (respectively 1.30 and 1.34 for a total of 1.75) in order to take into account the spare area necessary around the pieces of equipment and the area necessary to manoeuvre them.

⁷ NACO, presentation at the oral hearing. Former NACO studies came to other figures ranging from ca 130 000 m² to ca 148 000 m². NACO also implicitly considered that the total space available depends on market conditions (i.e. monopoly or competition).

⁸ NACO 14.5.1997 and presentation at the oral hearing.

⁹ NACO 14.5.1997, p. 11.

The figure of space requirement of [...] m² takes into account the fact that, in 1997, Delta reduced its flights to Frankfurt and is now handled by FAG. Former Delta slots have been occupied by other airlines, which NACO assumes to be handled by FAG. Before Delta's decision to reduce its flights and to stop self-handling in 1997, the space requirements were estimated at some [...] m².

The amount of space which would be required under competitive conditions is calculated as the sum of the space currently required by FAG ([...] m²) plus the net additional space requirements of an additional handler (32 000 m²)

NACO also estimates the space required and available in the year 2000. None of the estimations refers specifically to a situation where FAG and one or two independent handlers would operate. However, all the simulations show that, in all cases, the space balance will worsen by 2 000 - 3 000 m² in the year 2000.

33. Fraunhofer assesses the situation which was implicitly recommended by Cranfield University (FAG plus two handlers in Terminal 2) and comes to the conclusion that there is not enough space in Terminal 2.

Fraunhofer adopts the same method as NACO. It estimates that the space requirements would rise from some [...] m² under monopoly conditions to some [...] m² if two additional handlers were admitted¹⁰. This additional demand for space is concentrated in Terminal 2, where the need for parking areas would rise¹¹ from some [...] m² to some 29 000 m² compared to an available area of some [...] m². The resulting space deficit of some 11 000 m² is to be added to the space deficit of some 1 000 m² in the freight area.

In addition, Fraunhofer notes that this deficit in Terminal 2 will have repercussions in Terminal 1. The reason is that there is currently a structural space deficit in Terminal 1 (some 2 000 m² in the passenger area plus 6 000m² in the freight area) which has been compensated, until now, by the use of stands and/or by the use of spare areas in Terminal 2. Such a compensation would accordingly no longer be possible.

D.2.2.2. The experts appointed by the Commission

34. Mr Penwarden comes to the conclusion that the admission of competition on the ramp is possible¹². However, since his report dates back to 1995 and since FAG continuously renovates the airport layout, these conclusions may now prove to be out of date.

Mr Penwarden does not make an estimate of space requirements but accepts that they range between FAG's estimation (some [...] m²) and the complainants' estimation (some 120 000 m²). He accepts FAG's figure as the "worst case" and states that the former would be met by some 285 000 m² space available.

¹⁰ Fraunhofer 27.6.1997, p. 41 and Annex 15.

¹¹ Fraunhofer 27.6.1997, pp. 38, 41 and oral presentation, chart p. 8.

¹² Source: Penwarden report, April 1995.

The 285 000 m² are calculated as the sum of [...] m² (as estimated by FAG in 1995) plus 25 300 m² additional parking space (in the following areas: Cargo centre, Area 22, Commuter ramp, area adjacent LCC, grass area south of Cargo and Terminal 2) plus 94 460 m² on preparation areas. In addition, Mr Penwarden noted that potential available space can be found in the US Military mail area (5 000 - 6 000 m²), in the Little League area (20 000 m²) and in the southern USAF base portion (an extensive area).

35. Cranfield University comes to the conclusion that there is enough space to admit multiple ramp handling at Frankfurt airport¹³.

Cranfield estimates the parking space requirements under competitive conditions on the ramp at some 104 000 m². This figure results from a standard calculation empirically applied by a major UK airport. The latter is based on the assumption that parking space requirements correspond to a certain percentage of the aircraft stand areas (12% for narrow-body stands and 22% for wide-body stands).

Space available for parking is estimated at 174 000 m². This area has been calculated on the basis of a figure supplied by FAG which was adjusted following a visual inspection of the site. The figure of 174 000 m² results from [...] m² of declared current parking space plus [...] m² that will become available in the near future (area North to Pier A extension, V4 and cargo areas 4, 5 and 6) minus [...] m² that will be needed for the construction of new facilities.

Cranfield adds that in any case, even if - as was suggested by FAG and its consultants - a certain number of stands were to be closed to “create” additional parking space, such closure would not have an impact on the overall airport capacity, since the current capacity constraint is the runway capacity (experience has shown that the number of stands is sufficient to meet the demand corresponding to 85 to 90 movements per hour¹⁴).

Finally, as regards the future, Cranfield is of the opinion that no dramatic change will occur until 1999 and that any additional space requirement will be matched *inter alia* thanks to the reduced dependence on remote stands.

D.2.3. Commission evaluation of the reports

D.2.3.1. NACO

36. As regards the calculation of space requirements, the multiplication factors of 1.30 and 1.34 (totalling 1.75) adopted by NACO have not been explained.

During the hearing, the NACO representative acknowledged that these factors do not represent any industrial standard, but have been developed for the present case instead. No further explanation was provided other than the fact

¹³ Source: Cranfield report, June 1997.

¹⁴ Source: Oral hearing, see report p. 43.

(communicated by FAG at a later stage) that these factors result from a (weighted) average of the factors applicable to each individual piece of equipment.

As a comparison, NACO noted that Cranfield University implicitly adopted a lower factor of 1.24, which is not an industrial standard either. This shows that these factors are arbitrary anyway.

37. NACO's methodology leads automatically to an overestimation of the space requirements.

Its method is based on the assumption that parking areas must be designed to park all the equipment at the same time. In other words, it is assumed that it happens during the day that all the equipment is at rest in the parking areas, while all the stands are occupied by aircraft, none of which is served by a handler. Clearly, this situation is very unlikely to occur. The reality is that in the course of the day a major share of the equipment is either in transit or is serving the aircraft. This is particularly true in an airport like Frankfurt, which is busy the whole day long. The only time where a lot of equipment is at rest is during the night. However, during the night equipment could be easily parked on, for example, unoccupied stands.

38. NACO also overestimates the impact of competition (32 000 m²).

- First, NACO's estimate of the net additional space required if an additional handler is admitted as compared to the monopoly situation (32 000 m²) is not correct. The 32 000 m² do not represent the net additional space requirements of one additional handler only, but the net additional space requirements of the situation whereby both Delta and an independent handler operate, as compared to the monopoly situation¹⁵. The net additional space requirements attributable to Delta ([...] m²) should not be counted together with the net additional space requirements attributable to the additional handler, for two reasons. First because they do not result from the presence of the independent handler but of Delta; second because in any case Delta has ceased self-handling and the space requirements attributable to the handling of Delta flights are already comprised in the [...]m² required by FAG. The net additional space requirements of an independent handler as compared to the monopoly conditions should accordingly be some 18 500 m² = [...].

It should also be noted that NACO had previously estimated that where Delta was self-handling, the presence of a third independent operator would have resulted in gross additional space requirements of some [...] m² ([...] m²)¹⁶.

¹⁵ NACO 14.5.1997, p. 19 - unless otherwise stated, all the figures quoted in this paragraph refer to this source.

¹⁶ NACO 27.10.1995, pp. 32-33.

In the present situation (where FAG is the only operator, since Delta has ceased its ground-handling activities), one would accordingly expect the total space requirements to rise - all other things being equal - to less than 165 000 m² ([...]) and not to NACO's figure of [...]m² (which is even higher than the hypothesis FAG plus Delta plus a third handler).

- Secondly, even NACO's original estimation of gross additional space requirements of [...] m² appears to be excessive.

It appears from the various NACO estimations that the gross additional space occupied by Delta before it reduced its flights was [...] m² (calculated as the total space required where Delta was self-handling: [...] m² minus the total space required if FAG alone handled the same number of flights¹⁷: [...] m²).

Delta handled some 3% of the aircraft, but this figure rose to some 13.4% if measured at its peak¹⁸ (Delta used to operate between 8 a.m. and 2 p.m. and did not operate during the afternoon). These figures compare quite well with the expected market shares and peaks of a new entrant handler (respectively 7.8% and 12.4%, where the latter figure is the one that influences the level of total equipment required).

In view of the above and unless it is assumed that the new handler would handle all types of different aircraft (so that the new handler would have to possess all kinds of equipment), which is unlikely, the estimate of [...] m² seems excessive.

39. Finally, it is noted that the situation towards the end of the century will not significantly differ from the present one.

D.2.3.2. Fraunhofer

40. Since Fraunhofer studies rely on the same assumptions as NACO's, the same comments made with respect to NACO's methodology apply to Fraunhofer.

41. In addition, Fraunhofer estimates that the presence of two handlers whose aggregate market share will range between 30 and 35 % (measured on the basis of the number of movements or number of passengers handled) would lead to a rise in total equipment required in Terminal 2 of 107% (measured on the basis of the surface occupied). This estimation is probably too pessimistic.

Depending on the assumptions made - for example, if each ground-handler's peak coincides with the other ground-handler's off-peaks - this increase is physically possible. However, such a situation is highly unlikely, since, in an open market,

¹⁷ NACO 14.5.1997, p. 2 - unless otherwise stated, all the figures quoted in this paragraph refer to this source.

¹⁸ NACO 27.10.1995, p. 7.

the economic rationale will lead the new entrants to select their clients in such a way that they can optimize the use of their equipment (and hence with limited fluctuation of their activity).

42. Finally, Fraunhofer's approach, which calculates the balance at Terminal level (namely two separate balances for Terminal 1 and Terminal 2), is questionable. In reality there are no physical barriers between the two Terminal zones. This means that equipment needed for one Terminal can be parked in the other Terminal area (as is currently the case according to Fraunhofer). Fraunhofer's approach accordingly goes into unnecessary detail.

D.3.3.3. Penwarden

43. In view of the time that has elapsed, the Penwarden report seems to be out of date and no major comment is needed. However, the issue raised by Mr Penwarden with respect to the use of preparation areas deserves comment.
44. The extensive use of preparation areas for long-term parking of equipment - as suggested by Mr Penwarden - would be problematic at Frankfurt airport in competitive conditions. The reason is that the use of preparation areas as parking areas is relatively easy to organize if the handlers work on an "allocated stand" basis (which is excluded for flexibility reasons), but more difficult otherwise.

However, it appears from the flight plan simulation provided by Fraunhofer¹⁹ that a certain number of stands are *de facto* allocated to Lufthansa: [...] fully allocated and [...] almost fully allocated (only one non-Lufthansa flight in a week). This number could most probably be increased by the airport operator without having a major effect on airport efficiency. This means that (parts of) the preparation areas corresponding to these stands could be used as parking area by the company in charge of handling Lufthansa. This view seems to be shared by NACO, which includes some preparation areas among the parking areas.

D.3.3.4. Cranfield University

45. Cranfield University overestimates the parking space available.

This is not due to the fact - put forward by FAG - that Cranfield counted twice the [...] m². The reason is that, when making the calculation of space available today plus/minus developments in the near future, Cranfield should have taken as basis the figure quoted by FAG²⁰ of [...] m² instead of the figure calculated by NACO of [...]m². It is the figure provided by FAG that best matched the reality at the time when Cranfield inspected the apron at Frankfurt. The total space available should accordingly read 164 000 m².

¹⁹ Fraunhofer 27 June 1997, last Annex.

²⁰ FAG letter of 16 May 1997.

46. As regards space requirements, the same criticism made of NACO at paragraph 36 also applies to Cranfield, since it does not appear that the calculation method adopted is recognized as an industrial standard.

D.3. *Traffic density and safety*

47. FAG argued that the admission of competition on the ramp would lead to an increase in traffic density. Higher traffic density would result in greater delays (due to longer travel times on the apron) and in lower safety (due to a higher number of accidents).

48. To support this statement, FAG referred to computer simulations.

The first simulation submitted by FAG²¹ compared the monopoly situation with a 4-handlers situation. It showed *inter alia* that the number of movements (measured at the 20 busiest crossings) would grow by an average of 18% (the variation at each crossing ranging from -13% to +40%).

However, FAG subsequently submitted a second simulation²² comparing (FAG + Delta) to (FAG + Delta + one independent handler), which concluded that no significant change occurred from one situation to the other. Further simulations submitted by FAG did not show any significant change due to the introduction of competition either.

49. The latter tends to confirm Cranfield's view that, even if the presence of additional ground handlers most probably will lead to higher equipment levels, these higher levels should not lead to higher traffic. On the contrary a reduction in traffic flows will most probably occur in the future, thanks to the expected reduced dependence on remote stands.

50. Cranfield noted, however, that the admission of an excessive number of handlers could give rise to a deterioration in safety. The reason is that safety is linked to the level of staff training, and that a handler with too small a market share will tend to train its staff insufficiently. Cranfield therefore recommended that a cap on three handlers (FAG + 2) be set in order to allow a sufficient market dimension for everyone.

51. Cranfield finally noted that particular attention should be paid to the core of Terminal 1 (namely the whole of the Terminal with the exception of the link with Terminal 2 and of the North of Pier A), where the roadway system is constrained (and congested), because of the Terminal design. The presence of a second handler with a small market share in the portion of Terminal 1 where non-Lufthansa flights are handled (particularly in the cul-de-sac formed by the eastern edge of Pier B and Pier C) would give rise to equipment movement which could block the roadway system.

²¹ NACO 18 June 1994, p. 50.

²² NACO 17 February 1995, p 44.

D.4. Minimum Connection Time (MCT)

52. MCT is the minimum time which is necessary for a passenger and his or her luggage to be able to catch a connecting flight. A short MCT is an important competitive tool for a transit airport like Frankfurt.

FAG guarantees an MCT of 45 minutes, one of the shortest MCTs in Europe. The automatic luggage conveyor system plays a central role in this context, since it is able to convey one item of luggage from one end of the airport to the other end in 20 minutes.

53. FAG argued that the introduction of competition will adversely affect the MCT. In FAG's view, the independent handlers would not be able to transfer the passengers and their luggage as quickly as FAG.

II. LEGAL ASSESSMENT

A. The markets and the dominant position

54. There are two markets involved in this Decision. First, the market for the provision of airport facilities for the landing and take-off of aircraft in the Frankfurt area (namely Frankfurt Airport), on which FAG abuses its dominant position. Second, the market for the provision of ramp-handling services within Frankfurt airport on which the effects of such abuses are observed.

A.1. The market for the provision of airport facilities at Frankfurt airport

A.1.1. Market definition

55. The relevant service market is the provision of airport facilities, which allow the aircraft to land and take off. These facilities are supplied by the airports operators, who charge fees in return.

56. The relevant geographic market is Frankfurt airport.

- An airline wishing to provide a point-to-point air transport service to or from a specific city or a region - here the city of Frankfurt and its surrounding catchment area - cannot choose between different airports into which or from which to operate the service in question. There are no other international airports in the near vicinity of Frankfurt which could be considered substitutable for the provision of point-to-point air transport services to and from Frankfurt and its surrounding region. Beyond a certain distance, airports cannot realistically be considered to be substitutable in so far as point-to-point traffic is concerned. This is the case with the international airports closest to Frankfurt (Amsterdam-Schiphol and Zurich), which are located more than 300 km away.

- Competition between airports is significant only in so far as an airport constitutes a hub, i.e. a transfer point for connecting flights. FAG has pointed to its importance as a hub airport, stating that [...] % of all passengers at Frankfurt airport are transfer passengers.

In that context, a competitive relationship exists between a number of large European airports for part of the overall traffic, i.e. non-direct traffic using an airport as a transfer point.

However, connecting traffic does not account for the total traffic at an airport, and the majority of such traffic will be traffic for which the airport in question is relevant as point of origin or point of destination. This is also the case for Frankfurt airport, considering that - on the basis of the above figure provided by FAG - roughly [...] % of passengers at the airport are point-to-point passengers.

- Furthermore, the Commission considers that even with regard to non-direct traffic where a particular airport is used as a hub, the degree of substitutability is nevertheless limited to a small part of the total traffic at that airport. A larger degree of substitutability will exist for non-European airlines than for European airlines, because the latter will tend to establish their hub in their country of origin. It appears for instance unlikely that Lufthansa would establish its hub outside Germany since this carrier's network naturally includes several domestic routes, and there appears to be no suitable alternative German airport to host the Lufthansa hub (at least in the short term).

Taking into account the fact that more than 60% of all transfer passengers at Frankfurt airport are Lufthansa passengers, the substitutability between Frankfurt and other large European airports can be estimated at roughly 15 to 20 % of total passengers at Frankfurt airport.

A.1.2. Substantial part of the common market

57. Frankfurt airport constitutes a substantial part of the common market. It has been accepted by the Court of Justice in its ruling of 10 December 1991 in Case C-179/90 *Port of Genoa*²³ that the market for the organization of port activities relating to ordinary freight in the port of Genoa and the carrying-out of such activities could be considered to be a substantial part of the common market. In that ruling the Court took particular account of the volume of traffic in the port and its importance in relation to the overall volume of imports and exports by sea to and from Italy, the Member State concerned.

²³ [1991] ECR I-5889.

58. Frankfurt airport may be considered to constitute a substantial part of the common market. It is the largest international airport in Germany, accounting for the largest volume of traffic in terms of passengers, freight or commercial aircraft movements (see paragraph 2).

A.1.3. The dominant position

59. On the basis of the relevant German legislation, FAG holds a monopoly for the operation of Frankfurt airport as a facility for the landing and take-off of aircraft.

The Court of Justice has held, in Case 311/84 *Télémarketing* of 3 October 1985²⁴, that Article 86 applies to an undertaking holding a dominant position on a particular market, even where that position is due not to the activity of the undertaking itself, but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market.

A.1.4. Conclusion

60. FAG holds a monopoly on the market for the provision of airport facilities for the landing and take-off of aircraft at Frankfurt Airport. It holds a dominant position within a substantial part of the common market.

In its reply to the statement of objections, FAG agreed that it holds a dominant position on the market for the provision of airport infrastructure and that Frankfurt airport on the one hand constitutes the relevant geographic market and on the other is a substantial part of the common market.

A.2. *The market for the provision of ground-handling services at Frankfurt airport*

A.2.1. Market definition

61. For the purposes of this Decision, the other service market under examination is the market for the provision of the ramp-handling services provided by FAG, namely the ramp-handling services listed in paragraph 20, excluding fuelling and catering services.

62. Since ramp-handling services include various activities (see above), they do not form a homogeneous whole. The services concerned, although all taking place on the ramp, require, as a general rule, a distinct technical and operational know-how and respond to different demands. It is therefore not out of the question that each service could be regarded as a separate service market.

However, the scope of this Decision covers all the services provided by FAG on an exclusive basis, and the fact of considering these services as a single market does not affect the assessment of the abuse of a dominant position. Accordingly, reference will be made to “ramp-handling services” as a whole.

²⁴ [1985]ECR 3261.

63. The vast majority of ramp-handling services has to be provided on the occasion of each stopover of an aircraft at an airport and therefore cannot be shifted to another airport. Certain exceptions may, however, be imagined; for example, it may not be necessary in the case of two consecutive short-haul flights to have water and/or toilet services provided at the stop-over airport. However, this appears to be a very limited exception only, and the choice will in all likelihood also be influenced by other factors, such as, for instance, the flight schedule of the airline in question, in itself influenced by the availability of particular slots at a particular airport. It follows therefrom that there is not sufficient substitutability as regards the market for the provision of ramp-handling services, and the relevant geographic market to be considered in this respect is therefore Frankfurt airport.

A.2.2. Provision of ramp-handling services as a separate market

64. FAG has argued that the delineation of two separate markets is incorrect. In its view, the provision of airport facilities for landing and take-off of aircraft cannot be separated from the provision of ramp-handling services, since the one complements the other. Both services would accordingly constitute a single market.

65. The substitutability test supports the thesis that the provision of ramp-handling services and the provision of airport facilities for the landing and take-off of aircraft constitute two separate (neighbouring) markets.

- As regards the demand side (the air carriers), there is no possibility of substitution between the two services and consequently no cross-price elasticity of demand between them. From their viewpoint, the services relating to the provision of facilities for the landing and take-off of aircraft are distinct from and not interchangeable with ramp-handling services.

This view is further supported by the fact that the airport customers (the airlines) do not pay a lump sum for the whole of the services received but are charged two separate charges (landing fees and ground-handling charges). In addition, FAG has recently introduced a new charging system, whereby the airlines may select the services they want to receive and are charged accordingly.

As was correctly pointed out by FAG, the reason for non-substitutability is that the provision of landing and take-off facilities and the provision of ramp-handling services are two complementary or ancillary functions. However, their degree of complementarity is not such that these services have to be purchased from the same supplier.

- As regards the supply side, it appears that the markets for the provision of airport landing and take-off facilities and for the provision of ramp-handling services are significantly different in this respect. The provision of airport facilities for the landing and take-off of aircraft often

presents the characteristics of a natural monopoly (due to lack of supply-side substitutability). Conversely, competition is possible as regards the provision of ramp-handling services, provided that alternative suppliers are allowed on the ramp.

Indeed, ramp-handling services may be but do not necessarily have to be provided by the airport operator as provider of the facilities. They can also be provided by others, namely airlines or independent operators, as happens in several other European airports.

In that respect the ICAO Airport Economics Manual (Document 9562 - First Edition 1991, Annex 1), describes in chapter 2, point 2.11, the scope of the services and areas for which an airport operator is to be responsible as normally including: “*most or all of the following: aircraft movement areas, passenger Terminal facilities, cargo facilities, aircraft parking areas, hangar facilities, air traffic control including communications, and sometimes, meteorological services*”. The provision of ground-handling services is not mentioned in this list.

However, the Commission accepts that the automatic conveyor system for sorting and transporting the baggage is an efficient tool which allows optimal use of the infrastructure. It is unlikely that alternative suppliers would be able to offer efficient alternative means of conveying baggage from the Terminal to the ramp and vice versa. FAG’s monopoly in this area is accordingly not challenged.

66. FAG argued that the complementarity of the provision of ramp-handling services with respect to the provision of airport facilities for the landing and take-off of aircraft is evidence against the existence of two separate markets and that the fact that independent handlers supply ramp-handling services in other airports cannot be used as evidence in this context.

67. FAG’s arguments fail in both aspects.

The Court of First Instance has already given a ruling in a similar case, taking a different view from that adopted by FAG. This was the judgment in Case T-30/89 *Hilti* of 12 December 1991²⁵. That case related to the market for fastening systems used in the building industry. One of the questions examined by the Court was whether the market for nails was separate from that for nail guns, particularly as the products are complementary and as the manufacture of nail guns is protected by patents.

²⁵ [1991] ECR II-1439, at paragraphs 65 to 69.

The Court held that “with particular regard to (...) nails (...), it is common ground that since the 1960s there have been independent producers (...) making nails intended for use in nail guns. Some of those producers are specialized and produce only nails, and indeed some make only nails specifically designed for Hilti tools. That fact in itself is sound evidence that there is a specific market for Hilti-compatible nails.”

68. Finally, it should be noted that FAG’s position in this case is not consistent with FAG’s own view of its business, as described in the company’s 1995 annual report. According to the latter, FAG’s revenues stem from four business segments: ground-handling services (which account for 37.7% of total business), airport fees (30.8%), rental and concessions (20.2%) and others. More specifically, it is stated at p. 30 that “FAG’s main business pillar is ground-handling services. These comprise airside services - i.e. handling activities on the ramp - and land-side services.”

It is therefore plain that, in FAG’s view too, handling services represent a market separate from the market for the provision of airport facilities for landing and take-off of aircraft.

A.2.3. The dominant position

69. As sole supplier of the services concerned, FAG holds a dominant position on the market for the provision of ramp-handling services at Frankfurt airport. Potential alternative suppliers are not in a position to assail FAG’s monopoly as long as the airport operator continues to deny them access to the ramp where these services have to take place.

B. Abuse of a dominant position

B.1. Description of the abuse

70. FAG holds a dominant position on the market for the provision of airport facilities for the landing and take-off of aircraft. The provision of ramp-handling services is complementary or ancillary in that respect and constitutes a neighbouring but separate market (see above).
71. In its *Télémarketing* case²⁶, the Court of Justice ruled that "an abuse within the meaning of Article 86 of the EC Treaty is committed where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking".

²⁶ See footnote 24.

Similarly, the Court has consistently held - for example, in its judgments of 31 December 1991 in Case-C-18/88 *RTT v GB-INNO-BM*²⁷ and 17 November 1992 in Joined Cases C-271/90, C-281/90 and C-289/90 *Spain v Commission*²⁸ that the extension of a monopoly in a given market to a neighbouring market, without any objective justification, is prohibited as such by Article 86, or by Article 90(1) in conjunction with Article 86, where that extension results from a measure adopted by a State.

72. FAG has made use of its power as exclusive provider of airport facilities to deny potential competitors (in the market for the provision of ramp-handling services) access to the ramp. FAG has thereby prevented potential suppliers of ramp-handling services from entering the market for the provision of those services. This applies both with regard to airlines and to independent suppliers. FAG has thereby monopolized the market for the provision of ramp-handling services. In deciding to retain for itself the market for ramp-handling services at Frankfurt airport, FAG has extended its dominant position on the market for the provision of airport landing and take-off facilities to the neighbouring but separate market for ramp-handling services.

FAG has furthermore made use of its power as exclusive provider of airport facilities to deny airlines the right to self-handle. FAG has thereby obliged the users of its airport facilities also to purchase from it the ramp-handling services that they need.

73. In the absence of objective necessity (see below), such behaviour infringes Article 86 of the Treaty.

B.2. Objective justification

74. FAG seeks to justify the extension of its dominant position to ramp handling by four main arguments: congestion of the airport, property right, organizational right and historical right.

B.2.1. Space and capacity constraints

B.2.1.1. FAG's argument

75. FAG argued during the proceedings that its refusal to authorize self-handling and independent ramp-handlers was objectively justified by the lack of space at the airport: on the one hand, because there was not enough parking space for the various suppliers' items of equipment and, on the other, because traffic density would become too great as a result of the inadequate runway system, which would have repercussions on safety and Minimum Connection Time (MCT).

²⁷ [1991] ECR I-5941, at paragraph 24.

²⁸ [1992] ECR I-5833, at paragraph 36.

76. FAG's argument is not well-founded. In the first place (see paragraphs 77 to 85), that is so because the experts' technical reports show that the constraints on space at Frankfurt are not such as to make it impossible to authorize self-handling or the admission of independent ramp-handlers (with the exception, however, of the *cul-de-sac* which forms the eastern part of Terminal 1, where the presence of several service providers could create traffic congestion). Secondly (see paragraph 86 ff), it is so because, even supposing that such constraints do exist, they would not be insurmountable.

B.2.1.2. Technical assessment of the arguments put forward by FAG

77. It appears from the various reports submitted that the arguments put forward by FAG are not substantiated to such an extent as to justify FAG's monopoly on the ramp.
- In particular, there is enough equipment parking space on the apron at Frankfurt airport to admit competition in the provision of ramp-handling services; and safety and MCT will not be affected by the introduction of competition on the ramp.
 - However, the core of Terminal 1 is congested and likely to remain so. Admission of competition in this area (or part of this area) could prove problematic. In addition, physical constraints may hinder the coexistence of "extensive" self-handling and independent third-party handling.

(a) Parking space for the equipment

78. The estimates of the balance between space available and space requirements in the event that self-handling and/or competition is admitted at Frankfurt airport depends heavily on the assumptions made by the experts (particularly in terms of client distribution among the handlers) and on the period during which the evaluations were done (owing to the continuous works being carried out on the apron). It is therefore not surprising that the various reports submitted to the Commission provide estimates which are very different from one another.

In practice, however, it appears that the various estimates are comprised within the following ranges:

- space requirements would range (after correction of calculation failures) between 104 000 m²²⁹ and [...] m² (with one additional handler)³⁰ or [...] m² (with two additional handlers)³¹;

²⁹ Estimate by Cranfield, ref. paragraphs 34 and 35.

³⁰ Estimate by NACO +/- correction, ref. paragraphs 36 to 39.

³¹ Estimate by Fraunhofer, ref. paragraphs 32 and 33.

- space available for parking equipment would range (after correction of calculation errors) between [...] m²³² and 164 000 m²³³.

79. This implies that, in the worst case (that is, using the figures put forward by NACO), the space available would allow the parking of 90% of all the equipment present at Frankfurt airport if one additional handler were admitted ([...]). This coverage is far more than sufficient, since it is very unlikely that during the day there is any period when less than 10% of the equipment is being used to handle aircraft or passengers, in an airport where according to the airport operator there are no off-peak periods.

In addition, it appears from paragraphs 36 to 46 that in reality space requirements are much lower and that space available is higher than in this worst case. NACO estimates are based on the assumption that the additional gross space requirements of an independent handler would amount to some [...] m² ([...])³⁴ whereas Delta's additional gross space requirements amounted to some [...] m² ([...])³⁵ before its flights were reduced. This divergence between the impact of Delta and that of an independent handler is surprising for two reasons. First, because the independent handler's and Delta's respective market shares at their respective peaks are quite similar (respectively 12.4% and 13.4% as estimated by NACO) and because the overall level of space required is linked to the market share at the peak. Secondly, because whereas Delta did not operate during the afternoon (so that it had to park all its equipment at the same time) an independent handler would operate during the whole day (which implies that some of its equipment would not need to be parked). Consequently, such handler's gross parking requirements should - all other things being equal - be lower than Delta's.

80. This technical assessment is further sustained by the following empirical evidence:

- First, the withdrawal of Delta from the self-handling business frees sufficient space to allow the admission of at least one independent handler.

Delta airlines exercised its right to self-handling until mid-1997. Delta's equipment was sufficient to handle 13 flights per hour (compared to FAG equipment which is sufficient to handle 75 flights per hour³⁶). Unlike FAG's equipment, the whole of Delta's handling equipment had to be parked during the afternoon when Delta was not operating.

³² Estimate by NACO, ref. paragraphs 32 and 33.

³³ Estimate by Cranfield +/- correction, ref. paragraphs 45 and 46.

³⁴ NACO 27.10.1995 pp. 32-33.

³⁵ NACO 14.5.1997, p. 2.

³⁶ NACO 27.10.1995, p. 5.

Delta has now stopped self-handling. As a result, an independent handler could be admitted, because of the three following considerations. First, the space Delta occupied could be utilized to admit an independent handler. Secondly, the latter would use the space available in a more efficient way (since an independent handler would not operate only from 8 a.m. to 2 p.m. but throughout the day). Thirdly, the presence of this handler will reduce FAG's handling business and will subsequently lead to a reduction of the space required by FAG to park its own equipment.

This evaluation is not contradicted by the fact that Delta's equipment served only specific planes and not wide-body aircraft such as B747s.

- Secondly, the limiting factor at Frankfurt airport is the runway capacity and not the stand capacity (it is rather the number of gate stands as opposed to remote stands that may constitute a problem)³⁷. This evidence is supported *inter alia* by the fact that remote stands are not fully utilized during the day, even at peak hours (as an example, Fraunhofer's flight plan simulation show that stands V167 to V173 are utilized less than once a week). This means that closing a certain number of stands (which would provide additional parking space) would not lead to a reduction in airport capacity.
- Thirdly, the supposed lack of space invoked by FAG could easily have been overcome if FAG had taken into account the need for space to park handling equipment when it re-designed the airport layout and had allocated some of the space that recently became available (Little League area, USAF area, etc.) to parking areas (see below).
- Finally, one should take note that, when both FAG and Delta were providing ramp-handling services, the airport was operational and maintained its high standards of quality despite the fact that the balance of space available versus space required showed a deficit (of [...] m² according to the latest NACO report³⁸). This demonstrates the fact that a negative balance does not necessarily mean that a certain situation is not possible. Accordingly, the "mathematical" approach proposed by FAG to support its statement that space constraints justify the monopoly is not necessarily the most accurate one.

81. It therefore appears that FAG's monopoly on the ramp cannot be justified by a lack of equipment parking areas.

(b) Traffic density

82. The studies submitted by the experts appointed by the Commission concluded that:

³⁷ Source: Cranfield report, June 1997, p. 15.

³⁸ NACO 14.5.1997, p. 2.

- the admission of competition on the ramp will not result in a significant increase in the level of traffic;
- the presence of a second handler with a small market share in the core of Terminal 1 may lead to congestion problems;
- the reduced dependence on remote stands will result in a reduction of traffic.

It therefore appears that neither traffic density nor the safety level would be appreciably affected by the admission of self-handling or competition on the ramp in most of the airport.

83. The situation is different as regards the core of Terminal 1, where it appears that the presence of more than one handler in each of the two culs-de-sac might result in major problems. However, the latter should not be interpreted as a justification for FAG's monopoly in the whole of that Terminal, but only as a justification of FAG's monopoly in the area lying between Stands B42 and C15.

Deutsche Lufthansa has been allocated to the western part of Terminal 1 (that is to say, all the remote stands of Terminal 1, Pier A and the Western edge of Pier B) on an almost exclusive basis. According to the flight plan simulation submitted by FAG³⁹, [...] % of the movements in that area are attributable to Lufthansa and Condor, while other airlines account for [...] weekly movements only (approximately one movement every three days on each stand in this area). Conversely, Lufthansa flights outside this area are very limited, with the exception of stand B2, which is almost fully allocated to Lufthansa.

This means that in this area essentially only one handler would operate in any case (be it FAG, an independent handler or Lufthansa as a self-handler). Accordingly, there are no technical obstacles for Lufthansa to be handled by a different handler than the one operating in the Eastern part of Terminal 1.

(c) MCT

84. The MCT will not be affected by the admission of competition on the ramp.

First, as described above, the traffic density will not be affected by competition (and therefore will not affect the passengers' and luggage travel time on the apron).

Secondly, as regards luggage, the automatic conveyor system will continue to play its central role in achieving the MCT. The independent handlers and self-handlers should have access to this central infrastructure, as is the case in several other European airports. The presence of competition on the ramp will not affect the efficiency of the conveyor system, in particular having regard to the fact that the loading and unloading of the system will remain in FAG's hands.

³⁹ Fraunhofer 27 June 1997, last Annex.

Thirdly, MCT at Frankfurt airport is primarily dictated by the time required by the passenger to move from one gate to the other. The MCT is easy to achieve when a passenger transits within the same Terminal, but is more difficult to achieve when the passenger arrives at a remote stand, and has to change Terminal. This consideration is clearly independent from the number of handlers on the ramp.

(d) Self-handling

85. Self-handling may have a cost in terms of space requirements. This is particularly true when the self-handling airline flights are not evenly distributed throughout the day. It is therefore conceivable that FAG may limit the right to self-handle when it can be proved that such a self-handler would render it impossible to admit an independent third-party handler. This does not, however, mean that FAG would be justified in prohibiting self-handling extensively, but that each situation should be assessed on a case-by-case basis.

B.2.1.3. Legal assessment of the arguments put forward by FAG

86. In addition to not being borne out by the facts, the arguments put forward by FAG to justify its monopoly (namely the impossibility of admitting competitors to the ramp because of the lack of space) are not such as to constitute an objective justification within the meaning of the Court's judgments, since there are solutions which would allow any lack of space to be overcome.
87. FAG has maintained that its refusal to authorize self-handling and to admit independent handlers was justified by the lack of space at the airport. However, as FAG itself admits, this constraint (supposing it to be real) is not insurmountable. Following the communication of the statement of objections in 1994, FAG, which had been informed of the fact that its monopoly could infringe Article 86 of the Treaty, should therefore have taken appropriate measures to solve the problems associated with the lack of space at the airport, for example:
- FAG could have carried out adjustments to the existing infrastructure. This option was put forward by FAG itself in its reply to the statement of objections⁴⁰, but was not put into effect by FAG, notably because of the cost of the necessary investment (DM 35 million to DM 70 million), which would be passed on to airport users. On the contrary, FAG stated⁴¹ that the airport had been designed and built with FAG's monopoly in mind and it had continued accordingly when successive adjustments were carried out.
 - FAG could have closed a limited number of stands (2, 3 and 4) in order to obtain the necessary space (see above). This option was not pursued because, according to FAG, such closure would have led to the loss of [...] slots, to the detriment of airport users.

⁴⁰ Sache IV 34.801 Stellungnahme der FAG zu den Beschwerdepunkten der EG-Kommission, page 44.

⁴¹ Sache IV 34.801 Stellungnahme der FAG zu den Beschwerdepunkten der EG-Kommission, page 21.

- More recently, FAG could have avoided reducing the space available for parking by more than [...] m² (over the period 1995-97), as a result of adjustment work on the airport, and by more than [...] m², lost through the creation of buffer zones for cargo, following the relocation of cargo-handling activities to the south.

FAG could have allocated to ramp-handling activities part of the Little League area, which had recently become available, instead of allocating it to USAF Mail. Alternatively, FAG could have given over to handling services part of the area which it occupied in the freight area, instead of allocating it to Lufthansa (while the rest of freight activity moved to the southern area given up by the USAF).

88. Thus, FAG's decision not to authorize self-handling and not to admit independent handlers is not the result of an overriding need, but was a matter of choice for FAG, which did not take the measures which would have obviated the constraints imposed by the lack of space at the airport.

B.2.2. Property right

89. FAG's decision not to open up a market for the provision of ramp-handling services is not justified by the consideration that it is the owner of the airport and as such is entitled to determine to what use its property is put.

90. In its ruling in Case 44/79 *Hauer v Land Rheinland-Pfalz* of 13 December 1979⁴², the Court of Justice has acknowledged the existence of a fundamental right to property also in the Community context. However, the Court also declared that it is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States. In this context, the Court found that in the constitutions of all Member States it is recognized that the exercise of the right to property may be restricted in the general interest and to the extent necessary in that regard.

The competition rules of the EC Treaty may accordingly be considered to constitute restrictions on the right of property which correspond to objectives of general interest pursued by the Community.

91. In this instance, any potential independent operator is obliged to encroach (against remuneration) on FAG's right to property, because of the lack of alternatives. Ramp-handling services can be carried out only on the apron itself, since it is not feasible for aircraft to leave the airport area to receive such services. Limiting FAG's right to property would therefore be neither disproportionate nor excessive, but simply the result of the lack of alternatives.

⁴² [1979] ECR 3727, paragraphs 17 ff.

92. The application of Article 86 of the EC Treaty would not constitute an excessive and intolerable interference with the rights of FAG as owner of Frankfurt airport, violating the very substance of its right to property: the imposition of an obligation on FAG to open up the market for the provision of ramp-handling services does not deprive it of the property as such, but restricts the exercise of those rights to what is compatible with the competition rules of the EC Treaty. It should be noted in particular that the application of Article 86 would not prevent FAG from continuing to offer ramp-handling services in competition with other suppliers of those services. It could also ask ground-handling operators to make adequate payment for use of the facilities provided by it in the form of rents, as long as such amounts were within the limits imposed by the competition rules.

B.2.3. Organizational right

93. FAG's decision not to open up the market for the provision of ramp-handling services is not justified by the consideration that it is the airport operator and as such is entitled to determine how to organize the activities that take place within the airport area. The airport must exercise its organizational rights in accordance with the rules on competition.
94. FAG has argued that its decision not to open up the market for the provision of ramp-handling services is based on its organizational rights as an undertaking and its obligation under Article 45 LuftVZO to operate the airport properly and safely (see paragraph 4). According to FAG, this obligation consolidates its organizational rights as a duty to organize the airport in an optimal way. The latter includes the duty to ensure an efficient organization of ground-handling services.

In this context, FAG submitted that ramp handling consists of services that must be regulated, organized and controlled by the airport operator. This does not mean that ramp handling must be performed by the airport operator. It is sufficient to point out that the airport operator is in a position to formulate and dictate the rules with which any service provider will have to comply and that, in any event, once Directive 96/67/EC is in force and effect such rules will be laid down by the competent Member State.

95. FAG also submitted that since ramp handling is a complementary function to the landing and take-off of aircraft and subsequently influences the overall quality of the service provided by the airport, the airport operator has the obligation to control these activities. Again, this does not mean that the airport operator may retain these activities for itself, since the airport operator has the means to impose on competitors the rules that they will be bound to follow.
96. Finally, FAG argued that its monopoly on ramp-handling serves the interests of the airport customers, since FAG supplies its services on a non-discriminatory basis. This point is not relevant since, independently of any consideration regarding the alleged bias of potential competitors, it is clear that the opening-up to competition of the market of ramp-handling services would not prevent FAG from continuing to supply its services on a non-discriminatory basis.

B.2.4. Historical rights

97. FAG has also argued that its monopoly on the ramp-handling market derives not from any extension of a dominant position, but from historical developments. FAG stresses that its presence as an exclusive supplier of ground-handling services is not the result of diversification, but that FAG has been supplying this type of services since the immediate post-war period. At that time, Frankfurt airport had just been rebuilt and, as was the case with all German airports, ramp-handling was provided only by the airport itself, since there was nobody else to do so. According to FAG, the question of access by potential competitors to the ramp-handling market arose only when it became apparent that the market offered attractive economic opportunities that involved little risk.

98. This argument cannot in any way justify FAG's decision to reserve for itself the market for ramp-handling services.

Given the lack of alternative would-be suppliers, FAG's monopoly on the ramp-handling services market was the result of market conditions and was therefore not illegal. However, an infringement of Article 86 within the meaning of the *Télémarketing* judgment⁴³ arises as soon as FAG's monopoly is maintained by a refusal on its part to authorize self-handling or third-party handling. In that case, FAG's monopoly is no longer the result of market conditions, but is a decision taken by FAG itself (as an airport operator in a dominant position on the market for the provision of airport facilities for the take-off and landing of aircraft) to reserve for itself the neighbouring market for ramp-handling services.

The fact that, in contrast to CLT in the *Télémarketing* case, FAG held a dominant position on the ramp-handling market prior to committing the infringement cannot be adduced as grounds for arguing that FAG's decision to reserve for itself the market in question by denying ramp access to potential competitors does not constitute an abuse. The objective pursued would then not be the extension of a dominant position, but the protection of a dominant position by abusive means.

B.3. *Article 90(2) of the EC Treaty*

99. FAG maintained, in its reply to the statement of objections of 10 May 1994, that, in its capacity as operator of Frankfurt airport, it had been entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the Treaty. FAG went on to argue that the revenue generated by ground-handling services are necessary to its financial equilibrium and, hence,

⁴³ See footnote 24.

necessary for maintaining the provision of the service of general economic interest. Such an exception was, it argued, accepted by the Court in its judgments in Cases C-320/91 *Corbeau* of 19 May 1993⁴⁴ and C-393/92 *Almelo* of 27 April 1994⁴⁵.

100. Regarding the scope of Article 90(2) of the Treaty, the Court held, in its judgment in Case 127/73 *BRT v SABAM* of 21 March 1974⁴⁶, that “as Article 90(2) is a provision which permits, in certain circumstances, derogation from the rules of the Treaty, there must be a strict definition of those undertakings which can take advantage of it” and that “private undertakings may come under that provision, but they must be entrusted with the operation of services of general economic interest by an act of the public authority” and that “that is not the position in the case of an undertaking to which the State has not assigned any task and which manages private interests”.

Furthermore, the Court has also held in Case 41/93 *Italy v Commission* of 20 March 1985⁴⁷ that “the application of Article 90(2) of the Treaty is not left to the discretion of the Member State which has entrusted an undertaking with the operation of a service of general economic interest. Article 90(3) assigns to the Commission the task of monitoring such matters, under the supervision of the Court”.

In the light of these considerations, FAG’s arguments do not appear to be well-founded.

101. The German authorities have not given FAG a monopoly on ramp-handling services, nor have they entrusted it with a service task in the general economic interest as regards the provision of such services. On the contrary, the Flughafenbenutzungsordnung itself provides that the services may be carried out by entities other than the airport itself.

As regards the market for the supply of airport facilities for aircraft take-off and landing, it is evident from the rules and regulations governing operations at Frankfurt airport that the German authorities, which authorized FAG to build and manage the airport, did not impose on it any public service obligations that would allow the exceptions provided for in Article 90(2) of the Treaty to be pleaded.

FAG cannot therefore argue that its monopoly is justified by State measures, the exclusion of all competition on the ramp not being due to the Member State, but being the result of FAG’s own decision.

⁴⁴ [1993] ECR I-2533.

⁴⁵ [1994] ECR I-1477.

⁴⁶ [1974] ECR 313, at paragraphs 19, 20 and 23.

⁴⁷ [1985] ECR 873, at paragraph 30.

102. At all events, in its judgment in the *Corbeau*⁴⁸ case, the Court stated that “the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs (...) and which call for certain additional services (...), in so far as such specific services, by their nature and the conditions in which they are offered (...), do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right”.

In this instance, the ramp-handling services are specific services which are clearly dissociable from the service consisting of the provision of airport facilities for aircraft take-off and landing.

In addition, it has not been demonstrated that the opening-up of the market for ramp-handling services compromises the economic equilibrium of FAG. Not only has FAG not provided evidence of the unavoidability of financial losses resulting from the opening-up to competition of the ramp-handling services market, nor that such losses would be incurred through the loss of FAG’s monopoly; it is also clear that other airports are able to achieve financial equilibrium even though they allow competition on the ramp-handling services market.

Consequently, the financial-equilibrium argument put forward by FAG, namely the offsetting of losses in the landing and take-off facilities sector by profits in the ground-handling sector, is not relevant in this context.

B.4. *The consequences of Directive 96/67/EC*

103. FAG has argued that its refusal to authorize self-handling and to admit independent ramp-handlers is justified following the adoption of Directive 96/67/EC and Germany’s decisions of 29 September 1997 to exempt it from the liberalization requirements stemming from the Directive.

This argument cannot be accepted.

104. In the first place, Germany’s decision of 29 September 1997 will not take effect before 20 January 1998 (three months after the date on which the Commission received the Member State’s letter). Furthermore, that decision will become effective only if the Commission does not oppose it under Article 9(5) of the Directive, as the German State clearly indicated in its communication to the Commission⁴⁹.

⁴⁸ See footnote 44, paragraph 19.

⁴⁹ “die Freistellungsentscheidung wird gegenüber dem Flughafen Frankfurt wegen der damit verbundenen Rechtsfolgen erst dann wirksam, wenn die Zustimmung der Kommission vorliegt.”, Notice of the Federal German Government to the Commission, dated 29 September 1997.

It should be noted in this respect that the Commission is adopting today a Decision pursuant to Article 9(5) of Directive 96/67/EC requiring Germany to amend substantially the scope of its decision granting an exemption to FAG. In practice, the scope of Germany's decision of 29 September 1997 will be restricted (as far as the analysis under this Decision is concerned) to the reserving for FAG, until 31 December 2000, of the market for third-party handling in the eastern *cul-de-sac* in Terminal 1.

105. In the second place, Directive 96/67/EC is without prejudice to the application of the rules laid down in the Treaty, as is stated in the twenty-eighth recital of the Directive itself, which stipulates that the Directive “does not affect the application of the rules of the Treaty” and that “the Commission will continue to ensure compliance with these rules by exercising, when necessary, all the powers granted to it by Article 90 of the Treaty”.

C. Effect on trade between Member States

106. Ramp-handling services are offered to airlines operating intra-Community air transport services. The cost of ramp-handling services is liable to affect the cost of services for the transport of passengers and goods and to bring about alterations in the levels and direction of transport flows in the Community.

Therefore, the abuse by FAG of its dominant position is liable to affect trade between Member States.

107. FAG has argued that the fact that FAG retains for itself the provision of ramp-handling services would affect trade between Member States only to the extent that the prices charged by it for the provision of such services were too high. This argument is not relevant since an effect on inter-State trade is not dependent on whether prices for the relevant services are too high or not,

HAS ADOPTED THIS DECISION:

Article 1

Flughafen Frankfurt/Main AG (FAG) has abused its dominant position in breach of Article 86 of the EC Treaty by denying, without objective justification, potential third-party handlers access to the ramp and airport users the right to self-handle, thereby reserving for itself the market for the provision of ramp-handling services at Frankfurt airport. This finding does not apply to the eastern part of Pier B, from Gate B2 to Gate B42, nor to Pier C up to Gate C15, where FAG's monopoly is objectively justifiable.

Article 2

FAG shall bring the infringement referred to in Article 1 to an end.

For that purpose, FAG shall submit to the Commission within three months of the notification of this Decision a precise plan for the reorganization of the market for the provision of ramp-handling services at Frankfurt airport so as to open up market access for air carriers and independent providers of ramp-handling services.

Article 3

This Decision is addressed to:

Flughafen Frankfurt/Main AG
Flughafen Frankfurt
D - 60547 Frankfurt am Main

Done at Brussels, 14 January 1998

For the Commission

Karel VAN MIERT
Member of the Commission