II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 April 1992

concerning aid granted by the Land of Berlin to Daimler-Benz AG Germany (C 3/91 ex NN 5/91)

(Only the German text is authentic)

(92/465/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having given the parties concerned the opportunity to submit their comments, in accordance with the above-mentioned Article [1],

Whereas :

I

In early July 1990 it became known that Daimler-Benz AG (DB) intended to purchase from the Berlin Senate, for DM 92,9 million, a large piece of land near the former Potsdamer Platz, where until recently part of the Berlin Wall stood.

On 13 July 1990 the Commission received a complaint concerning the low price at which the land was being sold to DB.

This position was also confirmed by press reports claiming that the market price exceeded the price fixed by the Berlin Senate by more than 400 % (corresponding to a subsidy of some DM 400 million). The letter of 13 July 1990 was later withdrawn.

In response to the Commission's requests for information by letters dated 26 July and 9 October 1990, the German authorities supplied detailed information on the transaction by letters dated 25 July, 5 September, 20 September and 28 November 1990, providing :

— a copy of the valuation report by the Senatsverwaltung für Bau- und Wohnungswesen (SBW — Senate Administration for Construction and Housing) dated 28 May 1990,

— a copy of the contract of sale,

— copies of extracts from German laws and regulations relating to property transactions by public authorities,

— copies of the relevant maps prepared by the Gutachterausschuß für Grundstückswerte in Berlin (GGB — Expert Group on Land Valuations in Berlin) which contain land values as at 31 December 1988 for parts of Berlin,

— some explanations of the practice of land valuations,

— data on other land sales in the same area,

— two valuations performed in 1990 for comparable land sales in the same area,

— background information on the trend of rental values in Berlin.

Under the contract of sale of 16 July 1990, the 61 710 m² site was sold by the Land of Berlin to DB free from all encumbrances for DM 92 873 550. The price is based on a floor area indicator of 4,0, with the purchase price rising or falling by DM 25/m² for each increase or decrease of 0,1 in the floor area indicator (with a lower limit of 3,5). Building on the land is to be carried out in accordance with the result of a competition involving ideas for the

[1] OJ No C 128, 18. 5. 1991, p. 5.

development of the site, with the objective of a gross floor area of 265 000 m², of which 20 to 30 % would be for outside use (shops, cultural facilities, restaurants, recreational facilities, apartments, etc.) and the rest for office use. The purchase price was to be paid within two weeks of conclusion of the contract. In the event that planning permission had not been obtained within four years, DB may cancel the contract. The Land of Berlin may cancel the contract if certain planning requirements and building deadlines are not complied with by DB.

In its comments the Federal Government stated that the price was based exclusively on the market value of the land, which had been established by the SBW in line with the relevant laws and regulations, and therefore did not contain any State aid. Speculative price increases linked to the unification of the two parts of Berlin and the future reorganization of that part of the city could not, in the German Government's view, be included in the valuation of the market price, and indeed should not be included under current law. In establishing the market price, the following price-reducing factors had been taken into account:

— part of the land cannot be built upon because of the need to preserve old trees growing there,

— permanent access must be given to public utilities,

— the purchaser must bear the costs of making the site ready for development,

— the purchase price had to be paid within two weeks of the contract being signed, even though building work cannot actually start for some while.

On 28 February 1991 the Commission decided to initiate the procedure provided for in Article 93 (2) of the EEC Treaty in respect of the land purchase contract of 16 July 1990 between the Land of Berlin and DB, analysis of the facts then known to the Commission having shown that the sale price was very probably substantially less than the market value of the land, since the valuation carried out by the SBW was in many respects unusual and very much open to criticism. In addition, the Commission had misgivings regarding the administrative procedure which the Berlin Senate had carried out in the case. As a result of the sale price being set at less than the market value, it was possible for the sale to contain indirect aid to the purchaser. Since the investments that are to be carried out on the land involve trade in services relating to DB's motor vehicle and other activities, in which there is intensive intra-Community trade, the Commission took the view that the aid threatened to distort intra-Community trade within the meaning of Article 92 (1) of the EEC Treaty. In addition, it appeared doubtful to the Commission that any exemption under Article 92 could be granted for any State aid connected with the sales transaction.

As part of the Article 93 (2) procedure, the Commission called upon the relevant German authorities, in accordance with Articles 198 and 199 of the Bundesbaugesetz (Federal Building Law) of 12 December 1986, to have a completely independent, neutral group of experts such as the GGB carry out a second expert opinion on the market value of the land as at May 1990, taking account not only of the first valuation and the facts on which it was based, but also the questions raised by the Commission during the procedure.

By letter dated 20 March 1991, the Commission gave the Federal Government notice to submit its comments within one month and to provide all the information necessary for the appraisal of the case. The other Member States and interested parties were also given notice to submit their comments.

II

As part of the Article 93 (2) procedure, the Federal Government submitted its comments by letter dated 17 April 1991. It considered that the following information was crucial to assessment of the case:

— DB had announced as early as 1988 that it was interested in investing in Berlin. Its decision to opt for the Potsdamer Platz site was taken in September 1989. While the area in question is the geographical centre of Berlin, it is at present still a derelict part of the city.

— The market value of the site was determined on the basis of a floor area indicator of 4,0. This can mean, for example, 100 % utilization of the surface area of the site for buildings having four floors, or 25 % use of the site for buildings having 16 floors, etc. The floor area indicator merely indicates a ratio. Any change in the indicator means a change in the purchase price.

— Since July 1990 a total of 15 sites have been sold in the vicinity of the former Berlin Wall: one site is within a comparable central area, eight are in residential or mixed areas and six are in the commercial and industrial area.

— DB is not receiving any public funding for the purchase of the land. It has not yet been decided whether DB's building project (initially estimated at DM 700 to 800 million) will receive assistance.

— Except in the case of expropriation (cf. Federal Building Law), valuations of land sold by the Berlin Senate do not have to be carried out systematically by independent groups of experts, but may, as in the present case, be carried out by the relevant administration of the Berlin Senate, i.e. the SBW.

— The contract provides that no building may be carried out in the vicinity of the former Potsdamer Straße.

— The negotiations with the Verein für bergbauliche Interessen (Association of Mining Interests) referred to when the procedure was being initiated are still being carried out.

— The Land of Berlin must not act speculatively in selling sites belonging to the Land, but must try to give impetus to the development of the city and the economy.

The Commission was simultaneously informed that the Berlin Senate had asked the GGB by letter dated 11 April 1991 to determine once again the market value of the area acquired by DB in the vicinity of the Potsdamer Platz as at April and May 1990 and to give its views on the misgivings regarding the first valuation expressed by the Commission when initiating the procedure. This work would take two months. By letter dated 24 May 1991, the German authorities promised that the second valuation would be ready by mid-July.

The German authorities transmitted the official second valuation of 9 July 1991 by letter dated 25 September 1991. Attached to the letter were an opinion dated 22 July 1991 by the SBW (which had undertaken the first valuation), a background memo by the Berliner Senatsverwaltung für Wirtschaft und Technologie (Berlin Senate Administration for Economic Affairs and Technology), the opinion dated 18 September 1991 by DB within the framework of the Article 93 (2) procedure and a further valuation, similarly dated 18 September 1991, which a private expert had carried out on behalf of DB.

Two other Member States (France and Denmark) submitted comments supporting the Commission's action. The comments were communicated to the German Government. Referring to the French comments, the German Government stated in its reply that the Community framework on State aid to the motor vehicle industry was not applicable in this case, since DB was going to use the site to locate its subsidiary Daimler-Benz Interservices AG (Debis), which was completely independent of its motor vehicle subsidiary Mercedes-Benz AG. There was no question of motor vehicle production on the site.

In its comments, DB states that the land purchase contract does not contain any element of State aid to DB within the meaning of Article 92 of the EEC Treaty. DB puts forward the following arguments in support of this :

— in April/May 1990 the reunification of Germany was by no means certain, and the land sold was in an area marked by its proximity to the Berlin Wall, which was then still in existence,

— DB agrees with the criticism levelled by the SBW and the private expert at the GGB's rough division of the site into three sections, the choice of the central area used for comparison and the fact that the additional costs involved in maintaining and renovating a building listed as a historical monument were not taken into account,

— it is evident from the various calculations that the market value can be estimated only approximately and consequently involves a certain spread within which the agreed purchase price lies,

— assessment of any aid elements cannot be based on the market value alone, but must take account also of the particular contribution being made to the development of the city and the pointer being given to subsequent investors, and also DB's willingness to acquire at well above market value a piece of land within the larger undeveloped section and an adjoining building alongside the smaller undeveloped section, both of which are not required for DB's purposes,

— DB estimates its additional obligations and costs arising from the contract of sale (acquisition and demolition of the Bellevue Tower adjacent to the smaller undeveloped section, financial costs until such time as the site is ready for building upon, costs of the architectural competition, loss arising from allocating 25 % of the net usable floor space to third parties for use other than office use) at DM 207,8 million, i.e. more than the market value estimated by the GGB,

— all the abovementioned aspects of the land purchase (contribution by DB to the development of the city) make the land purchase contract a special transaction that cannot be compared with a normal land purchase contract for industrial purposes.

Nor, it is argued, is it evident how a (hypothetical) State aid could influence DB's competitive position, since only some 35 % of the converted site is to be used for the firm's own offices (Debis), so that it is unclear how trade between Member States would be affected. Furthermore, the advantage to DB of having its offices in this area of Berlin and not in another area is irrelevant in terms of the market and competition and has no bearing on trade between Member States.

Lastly, if the Commission were to find that State aid had been granted, it would have to consider whether such aid could be allowed under Article 92 (2) (c) and 3 (c). Berlin was one of the areas of Germany most affected by the division of Germany and was still suffering the effects of it. State aid for the reconstruction of the relevant part of Berlin with the aim of promoting the development of the city would have to be deemed compatible with the Treaty.

After initial examination of the German Government's views summarized above, the Commission in December 1991 accepted the German authorities' proposal that the various aspects of the case be discussed jointly. It was decided to set up an *ad hoc* group of experts that would quantify the additional cost and benefit in connection with the later purchase of an adjacent site for DB's project. This would allow the Commission to gain fuller knowledge of all the facts connected with the case. By letter dated 21 February 1992, the German authorities transmitted all the necessary calculations and supplementary information on which the group of experts had agreed.

III

The expert opinion by the GGB of 9 July 1991 was drawn up and signed by all seven independent experts of the GGB. The expert opinion concluded that the market value of the land as at April 1990 amounted to DM 179 706 000. The market value as at May 1990 was the same, since trends on the land market could be determined only over a longer period than one month. In determining this market value, the GGB took the following aspects into account:

— the legal circumstances, which include not only the land registry description of the land and the contract of sale, but also building law provisions and regulations,

— the position, physical properties of the site and other characteristics militating in favour of division into three separate sections, namely the developed section with the historical Weinhaus Huth, the undeveloped section between Potsdamer Straße, Einhornstraße and Linkstraße (excluding the 500 m² in private ownership) and the undeveloped section between Einhornstraße, Linkstraße, Schellingstraße and Reichpietschufer (excluding the developed section with the Bellevue Tower),

— the criteria governing determination of the market value of the three sections of the site, which, in addition to the standard criteria laid down by law, take account of the new town planning concepts that are being developed as a result of the town planning competition being held for this part of the town; the contractual requirement that parts of the converted site be used for purposes other than office use is in this respect deemed to be the standard rule in core areas, while the unbuilt-up land is regarded as being exempt of any contribution to development.

The valuation may be summarized as follows. The market value of the first undeveloped section (46 363 m²) was determined in the following analytical steps:

— the Potsdamer Platz will probably later be similar in quality to the area round the Ernst-Reuter-Platz, Hardenbergstraße and Fasanenstraße, so that the average standard land value of these areas at the end of 1988 (DM 2 335/m²) can be taken as the starting value,

— an estimate of the average rise in land values between the end of 1988 and April 1990, with the application of regression analysis, gives a rise in value of 65 % (DM 3 853/m²),

— correction for locational differences such as technical and social infrastructure, transport links and future expected utilization, applying a multifactor analysis, gives a reduction in land value of 10,7 % (DM 3 441/m²),

— correction for variation in building use, applying conversion coefficients, gives an increase in value of 20,2 % (DM 4 136/m²),

— the usual correction for large building sites has not been applied because of the ideal planning possibilities and the rarity value of the purchase opportunity,

— correction to take account of the need to preserve the historical Potsdamer Straße and the planning uncertainty regarding the small piece of land in private ownership gives a reduction in the value of the land of 5 % (DM 3 929/m²),

— correction for unexpected building delays until such time as the mandatory town-planning conditions have been met, applying a three-year discount factor and an interest rate of 8,7 %, gives a reduction in value of 22,2 % (DM 3 059/m²),

— multiplying the final land value of DM 3 059/m² by the total area of 46 363 m² gives a market value of DM 141 824 417.

In assessing the second undeveloped section (14 285 m²), the following analytical steps were applied:

— correction of the final land value of the first section (without the 5 % correction for the need to protect historical monuments, i.e. DM 3 220 m²) because of the less central location compared with the comparative sites chosen for the first sections gives a 25 % decrease in value (DM 2 415 m²),

— correction for the adjoining Bellevue Tower in view of compliance with the prescribed distances between two buildings is not necessary, since the floor area indicator of 4,0 can still be complied with,

— multiplying the final land value of DM 2 415 m² by the total area of 14 285 m² gives a market value of DM 34 498 275.

Assessment of the historical wine tavern (1 062 m²) was carried out on the basis of the following analytical steps :

— the starting point is the annual rental income after adjustment to take account of certain sections with artificially low rents (DM 247 267),

— from this gross income, annual administrative costs must be deducted, giving an annual net income of DM 111 217,

— the capitalized-income value is calculated by dividing the annual net income by the standard real property interest rate of 3 % (DM 3 707 233),

— after adjustment to take account of the cost of renovating two offices, borne by the tenants, the final market value is DM 3 383 763.

Adding together the market values of all three sections, the market value of the total site in round figures is DM 179 706 000.

With regard to the Commission's comments when it initiated the procedure, the GGB puts forward the following reasons for the differences in the SBW's valuation and its own expert opinion :

1. use of a different comparative area, where the standard land value amounts to between DM 2 000 and 2 500/m² instead of DM 900 to 1 100/m² ;

2. inclusion of the price trend beyond April/May 1990 to include the period up to the beginning of 1991 ;

3. so as take account of the anticipated increase in the degree of utilization, new conversion coefficients were applied on the basis of land sales in the period 1989/90. These coefficients have not yet been published ;

4. the northern undeveloped section was not divided into six assessment units but was assessed as a single piece of building land. The route of the former Potsdamer Straße was incorporated as building land and was not assessed as a separate piece of land dividing the building site ;

5. in determining the market value of the developed piece of land (wine tavern), use was made not of the comparative value procedure, but of the capitalized income value procedure.

In its comments of 22 July 1991 on the GGB's expert opinion, the SBW defends the assumption underlying its initial valuation and in particular does not share the GGB's view regarding the consequences of the former Potsdamer Straße on the valuation. The SBW accordingly included in an annex a variant on the GGB's valuation with differing assumptions regarding the former Potsdamer Straße, reaching the conclusion that the result of the GGB's assessment should accordingly be DM 8,2 million lower.

The study carried out by the private expert on 18 July 1991 at DB's request criticizes the GGB's expert opinion for treating the entire site as building land, the comparison made with sites in the Ernst-Reuter-Platz/ Hardenbergstraße business district and a number of detailed aspects of the GGB's chosen method. The private expert assesses the market value at DM 99,24 million.

The group of experts referred to in Part II looked at the question of how high the assessment should be of the additional costs and benefits for DB's building project as at 1 January 1991 arising from the private site at Eichhornstraße 5-6 with the Bellevue Tower acquired in December 1990 (i.e. six months after the land transaction with the Senate). In the Commission's view this purchase decision entailed not only obligations and costs for DB, but also future financial benefits, since the inclusion of this site improved DB's chances of increasing the floor area indicator of 4,0 provided for in the contract of sale, since no distances between buildings had to be taken into account for buildings to be constructed on the abovementioned second piece of land. In the event, by decision of the Berlin Senate of 11 December 1991, the floor area indicator for DB's project and other building projects in the vicinity of the Potsdamer Platz was increased to 5,0.

The additional costs for DB's building project arising from this transaction were assessed at DM 59,1 million, whereas the additional benefits associated with it were put at DM 6,1 million, so that the aggregate result was additional net expenditure of DM 53 million. This calculation may be summarized as follows :

— the additional price of DM 42,5 million which DB paid for the purchase of the Bellevue Tower corresponds to the difference between the purchase price (DM 64,2 million) and the market value of the land according to the GGB's standard land map as at 31 December 1990 extrapolated to take account of a floor area indicator of 5,0 (DM 21,7 million),

— the financial costs amounting to DM 5,7 million correspond to the difference between the interest burden on the basis of the official interest rate of 8,9 % for a period of 2,5 years up to mid-1993, discounted to 1 January 1991, the date set for the demolition of the building (DM 8,2 million), and the value of rental income as at 1 January 1991 (DM 2,5 million),

— the costs of vacating the building and resettling its present inhabitants, amounting to DM 7,1 million, correspond to the sum of the discounted interest cost subsidy, which DB will have to pay to the university administration, which will have to accommodate some

300 students in a new student residence as from 1993 (DM 6,3 million), and the discounted rental costs which DB will have to pay for the accommodation of some 250 migrants and refugees until the current leasing agreement expires (DM 0,8 million),

— the demolition costs amounting to DM 3,8 million correspond to the discounted amount of the current best demolition tender, which is based on average demolition costs of DM 110/m³,

— the increase in value of the Senate's site as a result of the inclusion of the Bellevue site is estimated at DM 6,1 million; this amount is determined by multiplying the surface area by the difference between the value adjustment per m² corresponding to the GGB's conversion coefficients in connection with an increase in the floor area indicator from 4,0 to 5,0 (DM 348,10) and the adjustment payment already provided for in the contract (DM 250).

IV

The Daimler-Benz Group is one of the largest industrial undertakings in Europe. In 1990 it had a worldwide turnover of DM 85,5 billion, DM 55,6 billion of which was achieved on the Community market. Mercedes-Benz (cars and utility vehicles) accounts for more than two thirds of this turnover, while AEG and Deutsche Aerospace each account for 15 % and DB Inter-Services (Debis) 3 %.

Debis, which was established on 1 July 1990, comprises all of the group's service activities (data processing, financial services, insurance, offset transactions and marketing services), some of which are carried out direct with other parts of the DB Group. The main focus of the financial service activities, for example, is leasing agreements with Mercedes-Benz customers.

In 1990 Mercedes-Benz sold 823 700 vehicles worldwide. The 535 400 vehicles sold in the Community account for 3,1 % of cars and 15,6 % of utility vehicles (vans and lorries) registered in the Community. The decision to move parts of Debis to Berlin is intended to strengthen the firm's position in eastern Europe. According to its own statements, DB wants to play a key role in the reconstruction of East Germany and the rest of the Comecon countries.

V

As the Commission stated when initiating the procedure, 'the question of the existence or not of State aid centres on whether the terms and conditions of sale of the site to DB by the Land of Berlin depart from normal commercial practice to such an extent as to constitute State aid within the meaning of Article 92 (1) of the EEC Treaty'. This remains the basis for considering the case (1).

According to Berlin regional legislation (Landeshaushaltsordnung und Grundstücksordnung), land may be sold only at its full value. In the Federal Building Law, the market value of land is defined as the price which at the time to which the determination of price relates could be obtained in the normal commercial market considering the legal circumstances, the physical characteristics, the other qualities and the location of the land or of any other object of valuation without taking into consideration extraordinary or personal circumstances. This Federal Building Law further provides that the valuation should be performed by an independent group of experts whose principal task is not the administration of the land owned by the regional public authority for which the valuation exercise is being carried out. If necessary, the regional public authorities can request one or more higher-ranking groups of experts to provide a second valuation.

In view of the above, the Commission had some doubts, in initiating the procedure, on the administrative procedure followed by the Berlin authorities in the case. The selection of the SBW as the expert body for the valuation of the site is open to criticism due to the fact that this public entity may, in cases of land sale by the Berlin Senate, not constitute the independent expert group required by the Federal Building Law, since it is part of the administration of the Berlin Senate and has no independent status. Moreover, the Commission is concerned that no second opinion by one or more higher-ranking groups of experts was requested, particularly given the discretionary decisions on the underlying assumptions that had to be made and the subsequent public controversy surrounding the SBW's valuation. In this context, the Commission also pointed out that a fully autonomous public body existed in the form of the GGB.

(1) In examining the question of whether this land transaction contains any elements of State aid, the Commission applied arguments similar to those in Decision 92/11/EEC of July 1991 (Toyota) (OJ No L 6, 11. 1. 1992, p. 36).

In their letter of 17 April 1991, the German authorities stated that, in the case of the Land of Berlin, determination of the market value of land did not necessarily have to be carried out by an independent group of experts. As evidence of this, various copies of legislative provisions relating to the Land of Berlin were sent. Although it may be the case that there was no legal requirement that the GGB be involved as far as the Land of Berlin is concerned, the Commission remains convinced that, in view of the exceptional size and nature of the land sold, the lack of any reference value and the difficulties involved in assessing how this part of the city is to be integrated into future town planning, the Senate could not assume with sufficient certainty that the land would be sold at its full value.

The Commission accepts that the lack of an independent valuation merely indicates the possibility that the commercial value of the land has been underestimated. Confirmation that this has been the case and an objective determination of the commercial value would, in the Commission's opinion, be possible only if a second valuation were requested which, in accordance with the Federal Building Law of 12 December 1986, should be carried out by a completely independent and neutral committee of experts. For this purpose, the Commission, when initiating the procedure, asked the competent German authorities to have such an independent alternative valuation carried out.

By letter dated 11 April 1991, the Berlin Senate asked the GGB to recalculate the commercial value of the land, taking account not only of the first valuation and the facts underlying it, but also the questions raised by the Commission when it initiated the procedure. The only difference of opinion with the Commission regarding the terms of the revaluation was the time to which the valuation related, with the Berlin Senate, as in the case of the first valuation, preferring April 1990, whereas the Commission suggested May 1990. The Berlin Senate accordingly asked for the valuation to be carried out in respect of two months, once in respect of April 1990 and once in respect of May 1990. Requesting the GGB to comment also on the Commission's expressed misgivings regarding the method of the first valuation, the Senate stressed the need for a more uniform and an impartial valuation method.

The Berlin Senate and the Commission were accordingly from then on in agreement as to the choice of the expert and the terms of the second valuation, with the exception of the time to which the valuation related, a question on which there remained a difference of opinion.

Irrespective of the result of this independent second valuation, the two parties were accordingly implicitly in agreement that the GGB would give an unbiased and professional expert opinion on the full value of the land acquired by DB. The question whether the purchase price contained an element of State aid would therefore from now on be determined entirely in accordance with the result of the second valuation.

In its expert opinion of 7 July 1991, the GGB put the commercial value of the land as at April and May 1990 at DM 179 706 000. The only remaining difference of opinion between the Commission and the Berlin Senate regarding the terms of the second valuation thus became irrelevant, since the two valuations relating to April and May reached the same conclusion. The result of the second valuation means that the purchase price of DM 92 873 550 is DM 86 832 450 less than the full value of the land.

The German authorities transmitted the second valuation by letter dated 25 September 1991. Attached to the letter were the comments of the SBW justifying the initial valuation, the comments of DB as part of the Article 93 (2) procedure (in which DB also quantified its town planning obligations) and the private expert opinion.

As regards the arguments which the SBW, the private expert and DB made on the GGB expert opinion, the Commission would like to begin by noting generally that such arguments would have been more persuasive if they had been put forward before the Berlin Senate accepted the terms of the second valuation requested by the Commission and before the GGB presented its expert opinion. As far as the alternative assessment commissioned by DB on its own initiative after receiving the GGB expert opinion is concerned, the Commission refuses to give any preference to a second calculation for which one of the parties wishes after the event to replace an officially appointed seven-man committee of experts without any good reason by a private expert. Moreover, the Commission does not take the view that the content of this less detailed valuation justifies rejection of the official expert opinion.

As far as criticism of various aspects of the method applied by the GGB is concerned, the Commission is of the opinion that the officially appointed expert committee had access to all the statistical information and the latest methods used by professional experts in land valuations. As regards DB's argument that the commercial value must also take account of the obligations and

charges which the undertaking has agreed to as part of the planning requirements for this part of the city, the Commission would point out that the GGB's expert opinion takes account of all DB's contractual obligations, including those which partly restrict the commercial use of the land. Reference should be made here to the remarks in the expert opinion on the key criteria for determining the commercial value (see above).

The only additional obligations expressly provided for neither in the sale contract nor in the two valuations and now quantified by DB stem from the purchase and demolition of the Bellevue Tower and the inclusion of the Bellevue site in the construction project. However, these additional costs, which were not known at the time of the purchase and were obviously taken on by DB only later, could not have influenced the commercial value in April/May 1990 and consequently could not have influenced the purchase price.

Consequently, the Commission concludes that the difference of DM 86,8 million between the land valuation carried out by the GGB and the purchase price paid by DB constitutes aid by the Land of Berlin to DB.

When initiating the procedure, the Commission stated that the aid which enabled DB to acquire the land at less than its full value constituted aid to DB within the meaning of Article 92 (1) of the EEC Treaty. Since the investments to be carried out on the land affect trade in services associated with the group's motor vehicle and other activities, in respect of which there is intensive intra-Community trade, the aid threatens to distort intra-Community competition.

It is irrelevant in this respect whether parts of the area, once rebuilt, can be relet, since such lettings are commercial lettings which can afford DB profits. Nor can the Commission agree with DB's analysis that the subsidized purchase price is irrelevant in terms of the market or competition, because DB would have tried to acquire another site in Berlin on similar terms if it had not been able to acquire the Potsdamer Platz site under the terms of the contract of 16 July 1990. The GGB has pointed out that DB's opportunity to buy the site was an extremely rare one, so that DB had virtually no alternative opportunities to buy land of this size in the centre of the city. The State aid consequently did not necessarily influence DB's locational choice, but can rather be regarded as an unexpected benefit which threatens to distort competition, since it may lead to an increase in DB's profit margins in its service and/or industrial activities.

VI

The aid, which does not fall within the scope of an approved aid scheme, should have been notified to the Commission in accordance with Article 93 (3) of the EEC Treaty. Since the Federal Government did not notify the aid in advance, the Commission was not able to submit its comments on the measures before they were implemented. The aid is consequently unlawful, since it was granted in breach of Article 93 (3).

Since the procedural provisions of Article 93 (3), which are also of significance for public order, are mandatory and since the Court of Justice confirmed their direct effect in its Judgment of 19 June 1973 in Case 77/72 [1], the illegality of the aid cannot be remedied after the event.

VII

In its comments, DB argued that any aid granted under Article 92 (2) (c) was compatible with the common market.

Article 92 (2) (c) does indeed provide that 'aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division' is compatible with the common market.

West Berlin is certainly one of the areas covered by that provision. Thus, the Commission has on previous occasions, and most recently in March 1989 (cf. State aid N 266/88) authorized numerous grants of aid for the economy of West Berlin provided for in the Berlinförderungsgesetz (Berlin Promotion Law), on the basis of Article 92 (2) (c) and in accordance with the joint declaration of the six founding Member States of the Community regarding the special position of Berlin and the need to afford it the support of the free world.

In its Communication on the Community and German unification of 21 August 1990 [2], the Commission took the view that the economic justification for continued subsidization of Berlin had ceased to exist. The Commission, which welcomed the intention of the Germany authorities to phase out such aid totally, stated that, in its own re-examination of aid to the Zonal Border Area and West Berlin, which was in progress, it would take a decision on the phasing-out period which it considered necessary and justified for such aid.

[1] Capolongo v. Maya, [1973] ECR 611.
[2] COM(90) 400/1 final, 21. 8. 1990, p. 70.

However, the German authorities and DB have pointed out that DB made it clear as early as 1988 that it was interested in investing in Berlin and that the Potsdamer Platz was selected in September 1989, i.e. before the Berlin Wall was opened up. Even in April 1990, when the valuation of the chosen site was undertaken, no decision had yet been taken on the reunification of Germany and the timing of any such reunification was highly uncertain. At that time, the area round the Potsdamer Platz was not in any way integrated into West Berlin ; nor were there any specific plans for the development of that part of the city.

A particular complicating factor for any investor interested at that time in acquiring a large piece of land in that part of the city was the uncertainty as to the ownership of certain sites and the impossibility of combining larger pieces of land without the usual disadvantage of having smaller pieces within the sites belonging to private individuals unwilling to sell. It is therefore not surprising that each of the three alternative pieces of land which were offered to DB by the Berlin Senate in January 1990 had these shortcomings.

The demolition of the Berlin Wall at the beginning of 1990 did not by any means eliminate the obvious disadvantages of the division of Germany and in particular the disadvantages for this part of the city. This situation confronted any specific interest on the part of large private investors (leaving aside DB), since any private project would have had to take account of a new town planning policy, as yet unspecified building regulations and public investment relating to transport links and public utilities. These circumstances and in particular the fact that the town planning requirements had not yet been determined not only created a large degree of uncertainty, but also meant that any potential investor had to be prepared to accept financial risks that were virtually unquantifiable.

The Commission consequently concedes that the Berlin Senate would have had sufficient arguments to demonstrate that specific aid was necessary and justified in order to offset the abovementioned disadvantages and to win over a pioneering investor who would be willing to accept the associated risk and undertake a large building project that would contribute to the town planning objectives for this part of the city.

In addition, the contract of sale imposes various specific obligations on DB that still have to be determined in detail once the town planning policy has been finalized and an implicit additional obligation on DB to acquire, if possible, the Bellevue Tower, to demolish this 'eyesore' and to include the site in the building project. After examination of the information transmitted to it by letter dated 25 September 1991, the Commission continued to take the view that the contract of sale contained a State aid element, but conceded that the Berlin Senate could grant State aid and that such State aid was necessary in order to offset the disadvantages created for DB by the circumstances surrounding the contract of sale at that time before unification. However, in so far as such circumstances were not expressly reflected in the contract, they could not be taken into account in the valuation of the land, though they justified State aid to offset such disadvantages.

The Commission therefore declared itself willing at the end of 1991 to examine, together with the Berlin Senate's experts and with DB, the financial consequences of the additional obligations and charges imposed on DB in the sale contract. For this purpose, the Commission determined the net expenditure which DB would incur as a result of its decision to include the land at Eichhornstraße 5-6 in the building project. Such net expenditure could be regarded as a reflection of the economic disadvantages created in July 1990, i.e. before German unification, by the division of the country. Aid to offset these additional real economic costs could accordingly be justified on the basis of Article 92 (2) (c). However, the Commission emphasized that it could not declare itself in agreement with the net expenditure specified by DB in its comments during the procedure, which DB had estimated at DM 112,5 million out of the total of DM 207,8 million arising from obligations and charges under the contract of sale.

As stated above, the technical examination undertaken in January and February 1992 reached the conclusion that the net expenditure incurred by DB as a result of the purchase of the Bellevue Tower and the inclusion of the Bellevue site in the building project should be put at DM 53 million. The Commission therefore takes the view that aid to DB amounting to a maximum of DM 53 million is compatible with the common market under Article 92 (2) (c).

The remaining aid amounting to DM 33,8 million contained in the contract of sale is, however, incompatible with Article 92 of the EEC Treaty.

Article 92 (3) specifies the types of aid that may be considered compatible with the common market. Compatibility with the Treaty must be determined here in a Community context and not with reference to a single Member State. So as to ensure the proper functioning of the common market and take account of the principles of Article 3 (f), the derogations provided for in Article 92 (3) from the basic ban on aid laid down in Article 92 (1)

must be interpreted strictly in examining aid schemes or individual aid. In particular, they must be applied only if the Commission is convinced that market forces alone are not sufficient to cause potential aid recipients to act, without aid, in such a way as to contribute to achieving one of the objectives specified in Article 92 (3).

As regards the derogation provided for in Article 92 (3) (a), it should be noted that the Commission has always taken the view that none of the regions of West Germany has such a serious economic and social situation as to allow application of this derogation from the basic ban on aid under Article 92 (1) (under this derogation, aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered to be compatible with the common market).

As regards the derogation provided for in Article 92 (3) (b), the indirect aid for the purchase of the land in question is not intended either to promote an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.

Under Article 92 (3) (c), aid to facilitate the development of certain economic activities or of certain economic areas may be authorized, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

On the regional aid aspect, it should be noted that, in DB's view, Berlin should continue to be included amongst the German regions requiring assistance because the effects of the division of Germany are still evident. However, the aspect of the division of Germany is an argument that must be examined within the framework of Article 92 (2) (c). With regard to the eligibility of a region to receive regional aid under Article 92 (3) (c), the Commission has drawn up and published an analytical method involving two stages of analysis [1]. Under the criteria applying in the first stage of analysis, the region in question must, on the basis of the thresholds (1990) applying for Germany, have either a gross domestic product per head of population of a maximum of 74 % of the (West German) national average or an unemployment rate of more than 143 % of the national average. However, West Berlin does not come near these thresholds (gross domestic product 1986 : 102 % ; unemployment 1987 to 1990 : 119,4 %).

Other economic indicators may be applied in the second stage of analysis ; in some circumstances, and especially for regions which are at the margin of the thresholds applied in the first stage of analysis, it is possible that the second stage may reveal an adequate justification for regional aid.

However, West Berlin is far from satisfying the thresholds established in the first stage of analysis. Furthermore, it must be noted that, when the new list of West German assisted areas was established on 25 January 1991, West Berlin was not included as requiring regional assistance under the joint task on the 'improvement of regional economic structures', which represents the main German regional aid scheme.

As the following economic indicators show, Berlin is near the (West German) national average. Gross wages in the West Berlin region amount to 98 % of the West German average, which, given the substantial tax advantages existing for West Berlin, corresponds in net terms to a wage level that is above the West German average. Furthermore, West Berlin's infrastructure endowment is 99 % of the West German average.

In view of the observations set out above, regional aid for West Berlin cannot be considered to be compatible with the common market within the meaning of Article 92 (3) (c).

It should also be mentioned that indirect *ad hoc* aid that is granted outside any transparent aid scheme cannot in principle be deemed to be compatible with the common market within the meaning of that Article.

On the basis of the above observations, the derogation provided for in Article 92 (3) (c) (regional aspects) cannot be applied to the aid.

As far as the derogation provided for in Article 92 (3) (c) for 'aid to facilitate the development of certain economic *activities*' is concerned, the Commission can consider certain aid to be compatible with the common market if such aid does not adversely affect trading conditions between Member States. The development of DB's service activities does not qualify for such a derogation, since there are no grounds for assisting undertakings in this sector, and since such economic activity cannot be regarded as essential to the Community as a whole.

[1] OJ No C 212, 12. 8. 1988, p. 2.

VIII

In the case of aid that is incompatible with the common market, the Commission has the power under Article 93 (2) of the EEC Treaty, as confirmed by the Court of Justice in its Judgment of 12 July 1973 in Case 70/72 [1] and in a further Judgment of 24 February 1987 in Case 310/85 [2], to require Member States to compel recipients to repay the aid granted. The German authorities must therefore within two months recover the unlawful aid granted to DB by the Land of Berlin. The recovery of the aid must take place in accordance with the relevant national provisions, including the provisions on the payment of interest on arrears in the case of liabilities to the State, if the repayment occurs after expiry of the deadline set by the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The land purchase contract of 16 July 1990 between Daimler-Benz AG and the Land of Berlin concerning a site of 61 740 m² at the Potsdamer Platz in Berlin contains State aid amounting to DM 86 832 450, such aid being illegal, since it was granted to the undertaking in breach of Article 93 (3) of the EEC Treaty. Of this aid, an amount of DM 53 million is compatible with the common market under Article 92 (2) (c) of the EEC Treaty. However, the remaining DM 33 832 450 of the aid is incompatible with the common market within the meaning of Article 92 of the EEC Treaty.

Article 2

The Federal Government is hereby required to ensure that the aid which is incompatible with the common market is reimbursed within two months of publication of this Decision through repayment of DM 33 832 450 by Daimler-Benz to the Land of Berlin. This amount shall be increased by the amount of interest which the undertaking might improperly enjoy if repayment takes place after expiry of the two-month deadline.

Article 3

The Federal Government shall inform the Commission within two months of publication of this Decision of the measures which it has taken in order to comply with this Decision.

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 14 April 1992.

For the Commission

Leon BRITTAN

Vice-President

[1] Commission v. Germany, [1973] ECR 813.
[2] Deufil v. Commission, [1987] ECR 901.