II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 7 May 2002

relating to alleged State aid by the Federal Republic of Germany for the company BahnTrans GmbH

(notified under document number C(2002) 1599)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/643/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

I. PROCEDURE

(1) By letter dated 10 January 1996, the Association for the Promotion of Competition and Honest Behaviour in the Freight Forwarding Business (Verein zur Förderung des Wettbewerbs und lauteren Verhaltens im Speditionsgewerbe eV, hereafter Wettbewerbsverein or the complainant) requested the Commission to inquire with the German Federal Government about the payment of allegedly illegal State aid for the company BahnTrans GmbH (hereafter BahnTrans) [2].

(2) Based on the information it received from the complainant, the Commission inquired with the German Federal Government. An exchange of Letters ensued [3].

(3) By letter dated 27 November 2000, the Commission informed the Federal Republic of Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measure.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [4]. The Commission invited interested parties to submit their comments on the measure. Within the time frame indicated in the notice, the Commission did not receive any comments from interested parties. However, the Commission received, with letter of 15 June 2001, comments from ABX Logistics (Deutschland) GmbH, the legal successor of BahnTrans GmbH.

II. FACTS

Creation of BahnTrans — contribution of the mother companies

(5) On 2 September 1994, the Deutsche Bahn AG (DB AG) and Thyssen Haniel Logistik GmbH (THL) founded BahnTrans, as a joint venture to develop the transport of small consolidated cargo loads in a largely rail-based network. DB AG is fully owned by the German State, whereas THL is a company of the Thyssen Handelsunion (THU) conglomerate.

[1] OJ C 52, 17.2.2001, p. 2.

[2] The complainant sent further letters to the Commission, dated 31 July 1996, 7 November 1996, 8 January 1997, 24 March 1997, 4 August 1997, 28 October 1997, 4 November 1997, 22 January 1998, 25 March 1998, 13 May 1998, 25 June 1998, 11 December 1998, 15 December 1998, 16 April 1999, 14 September 1999, 27 October 1999 and 17 May 2000. The Commission in turn replied to the complainant by letters dated 27 September 1996, 4 August 1997, 13 October 1997, 2 December 1997, 12 October 1998, 20 December 1999 and 23 May 2000.

[3] Commission letters dated 20 June 1996, 28 May 1997, 1 September 1997 and 28 May 1998. Germany replied with letters dated 1 July 1997, 12 September 1997, 30 September 1997 and 17 July 1998.

[4] See footnote 1.

(6) According to Subsection 5 of the Statutes of BahnTrans, in their certified version of 30 November 1995, THL gave the following original capital contribution (Stammeinlage): DEM 45 million in cash deposit (Bareinlage), DEM 19 975 million as contribution in kind (Sacheinlage). DB AG gave the following capital contribution: DEM 64 975 million in cash deposit.

(7) The contributions in kind by THL, largely trucks and other transport means, were sold by agreement of 15 March 1995 between BahnTrans and THL Rheinkraft GmbH to the latter company, and BahnTrans could thus rely on the cash generated by the sale of the equipment. The value of the capital contribution of THL had been assessed and approved as fair and reasonable by the independent accountants with report of 1 October 1994 ([5]).

Strategy of BahnTrans

(8) The former Deutsche Bundesbahn had recognised that its concepts for the stabilisation of its market share in the 'small cargo' segment — general cargo, part-load transport, express and courier services — had not worked well. After the railway reform of 1993, DB AG began to look for a partner to develop this segment. DB AG as such would close down totally its own 'small cargo' activities. It would perform rail and, to a lesser degree, road transport and production activities as subcontractor of a freight forwarder and freight consolidator. The strategic goals of this venture were transport of more volume, more revenues and stabilisation of the position of the DB AG in this sector. At the time of the creation of BahnTrans, the parties envisaged a market growth of about 7 % per year. Price increases of about 5 % per year were thought to be realistic.

(9) With this vision, BahnTrans was formed in cooperation with THL. BahnTrans sole function was that of a freight forwarder and freight consolidator for general cargo consignments in the segment of up to 2 000 kg. The parties believed that, in order to be able to consolidate and ship such cargo throughout Germany, about 40 freight centres were needed. In such freight centres, cargo for regional distribution or from regional sources is consolidated into full loads and then dispatched, via regular liner services on long distance transport, to another freight centre for distribution. It was the function of BahnTrans to organise these liner services between the freight centres. In this context, it is important to note that the customers in the general cargo business expect, as a rule, door-to-door shipment times of 24 hours nationally, and 48 hours for international transports to neighbouring countries.

([5]) KPMG, Prüfungsbericht, Wertgrundlagen des Teilbetriebs Stückgut der Thyssen Haniel Logistic GmbH Engelhardt, Düsseldorf, für die Sacheinlage in die BahnTrans GmbH, Duisburg, zum 1. Oktober 1994.

(10) In the BahnTrans concept, DB AG would provide, to as large a degree as possible, the long distance regular liner services by rail. It would also be responsible, via subcontractors, for the final delivery or pick-up via trucks from the freight centres to the final destination. By connecting the freight centres of BahnTrans, and by relying on existing or future combined transport terminals near the freight centres, DB AG could thus focus on its core rail business and at the same time close its own freight dispatch centres, which were heavily loss-making.

(11) This concept could thus be successful under two conditions: (1) a sufficient number of freight centres with combined transport terminals, and (2) a reliable liner service by DB AG. The main business relationships between BahnTrans and DB AG were thus twofold. First, DB AG acted as transport operator for BahnTrans. Second, DB AG leased several freight centres to BahnTrans.

(12) However, the 1994 forecast for the development of the small cargo segment did not prove to be correct. Due to the increasing liberalisation of the market, competition became very keen in the forwarding market, and market prices decreased. The abovementioned business goals of BahnTrans were not reached. According to the information of the Commission, BahnTrans reported the following figures for the time period July 1994 to June 1998:

Year	Turnover	Results
1994/1995	[...] (*) DEM	[...] DEM
1995/1996	[...] DEM	[...] DEM
1996/1997	[...] DEM	[...] DEM
1997/1998	[...] DEM	[...] DEM

(*) Business secret.

(13) On 23 June 1998, DB AG sold its participation in Bahntrans to SNCB for consideration of 10 % of the shares of THL. THU sold 100 % of the shares of THL to SNCB.

The freight facilities

(14) Due to the difficult market conditions, the ambitious plan to connect 40 freight centres via rail transport had to be scaled down. DB AG built only four freight centres for the use of BahnTrans: Regensburg, Cologne, Karlsruhe and Bremen. The freight centres Hamburg, Hagen and Nürnberg were financed by the private investor THL and leased to BahnTrans. As DB AG wanted to close down its own freight collection and despatch activities as quickly as possible, and not later than 1998, it leased

out further 16 of its own freight collection centres to BahnTrans. These 'freight collection centres' consist of older cargo despatch halls, in which cargo is transferred from trucks to conventional rail wagons. These freight collection centres were not as efficient as the foreseen new freight centres with combined transport terminals. As of 1997, it became clear that the concept of 40 freight centres with combined transport terminal would not be realised at all. In order to still be present in large part of the markets, BahnTrans rented these older freight collection centres as of 1997 as a second best option.

(15) The commercial relationship between DB AG concerning the four freight centres and the 16 freight collection centres is as follows:

(16) DB AG sold the freight centre Cologne to the leasing firm Deutsche Anlagen Leasing. This company is owned by the Westdeutsche Landesbank, Landesbank Rheinland-Pfalz, Bayerische Landesbank and the Landesbank Hessen-Thüringen ([6]). It is fully independent from DB AG. DAL leased the freight centre to BahnTrans. The leasing agreement signed of 22 December 1997 features standard leasing clauses. It provides for a leasing duration of […] years.

(17) BahnTrans paid a rental fee of DEM […]/month for the use of the freight centre in Regensburg. Information from independent real estate agents in the region indicates a market rate of DEM […] for such a centre. BahnTrans thus paid more than the market rate. For the use of the freight centre in Bremen, the rental fee was DEM […]/month, while market rates are indicated to be DEM […] for such an object in the region. Finally, BahnTrans rented the freight centre in Karlsruhe for DEM […]/month, and the regional market rate was DEM […].

(18) BahnTrans used the freight centres Regensburg and Bremen for some time, before a formal rental agreement was concluded between DB AG and BahnTrans. For the time of actual use without rental agreement, BahnTrans paid DB AG a use fee based on the total price of construction of the facilities, which had the function of a reimbursement of capital interest for the financing of the construction by DB AG.

	Regensburg	Bremen
Use fee period	May 1996 to October 1997	January 1996 to June 1998
Rate agreed between DB and BahnTrans	[...] %	[...] %
Five years mortgage market rate	6,11 %	6,07 %

([6]) See Deutsche Anlagen-Leasing GmbH, Annual Reports 1990, 1999.

(19) The freight centre Karlsruhe was terminated in June 1998, and used by BahnTrans as of 22 June 1998 under a formal rental agreement.

(20) The 16 freight collection centres were used by BahnTrans since 1997 under formal rental agreements. DB AG had first tabled an offer amounting to DEM […]. In a letter of 13 March 1997, BahnTrans countered this offer by presenting a detailed market rental analysis, which, according to it, would only warrant a total rental fee of DEM […]. Finally, the parties agreed on the market rate + […] % as a rental fee, namely DEM […] per year for the 16 freight collection centres.

Use of railway for transports

(21) At the beginning of the joint venture, it was planned that about 70 % of the liner transports between the freight centres should be conducted by rail. This 70 % figure resulted from the relation between the turnovers of the partners in the general cargo business, which were DEM […] for rail-based DB and DEM […] for road-based THL ([7]). However, the rail-based transport on account of BahnTrans was in reality as follows:

1994/1995	1995/1996	1996/1997
[...] %	[...] %	[...] %

(22) The growing gap between the expected and the real rail share in transport was due to the fact that DB AG was not in a position to propose rail liner services between the freight centres, which were competitive with the ones of road. This was due to two circumstances: first, the envisaged combined transport terminals in the vicinity of the freight centres were not built. Even where there were combined transport terminals, the service quality could not meet the standards demanded in the industry in terms of reliability and speed. Therefore, in order to be able to still offer a competitive service vis-à-vis its competitors, the freight forwarder BahnTrans had to rely increasingly on road.

(23) BahnTrans maintained a similar flexibility as regards use of transport means vis-à-vis THL. From the creation of the joint venture until 1 June 1996, THL Rheinkraft was indeed the sole provider for long-distance trucking services for BahnTrans at prices agreed in advance. In the first phase of its existence, BahnTrans had to rely on competitive and always available trucking services to build up its market and its reputation. Later, it was thought, a large amount of liner services would be

([7]) Relationship: […]/[…].

performed by rail. It would have been riskier for BahnTrans to build up with numerous new partners a whole network of liner services than to rely on the expertise and network of THL Rheinkraft. Prices for these transports were based on average fix costs for trucks and personnel per day plus average variable costs per truck-kilometre. As of 1 June 1996, this arrangement was changed, and BahnTrans now only had the obligation of first request to THL Rheinkraft for transport of sealed swap-bodies. Under this arrangement, BahnTrans had to ask a quote from THL Rheinkraft for transport in this market segment. However, if BahnTrans could find a better offer, it was free to prefer this one to the one of THL Rheinkraft.

(24) The obligation of first request was not appropriate vis-à-vis DB AG, as there was, during the time period relevant to this case, no actual competition in rail freight services on the German network. BahnTrans was thus structurally not in a position to receive a better offer for rail transport than the one from DB.

Take-over of personnel

(25) THL brought in 2 680 employees into the joint venture, as contribution in kind. In the framework of the sale of trucks from BahnTrans to THL Rheinkraft of 1 May 1995, 200 employees were transferred to THL Rheinkraft, so that THL brought in a total of 2 480 employees into BahnTrans.

(26) At the creation of BahnTrans, DB AG transferred 318 of its work force to the joint venture. The parties had envisaged that about 3 200 employees of DB AG would be working in BahnTrans, once the planned 40 freight centres were operational. However, as only seven freight centres became operational, BahnTrans only took over a total of 1 446 DB employees.

(27) All personnel costs of the former DB and former THL employees were fully borne by BahnTrans. However, DB AG agreed to bridge the cost difference between the higher remuneration benefits paid to employees at DB AG as a public enterprise, and the lower salary and remuneration levels paid by BahnTrans operating in the private sector. The special benefits of employees of DB AG consist especially of the following:

— free use of rail commuter services,

— pension rights on average 75 % higher than in the private sector, plus additional aliments,

— higher contributions of DB AG as an employer to social security than in the private sector,

— continued salary payments in case of illness is not restricted in time for civil servants working in DB AG, and limited to 26 weeks for workers and employees in this company; the private sector grants six weeks of salary payments.

(28) This contribution of DB AG was limited to two years. Such a contribution was not requested for former THL employees, as they did not enjoy the special benefits that DB employees had.

Marketing strategy of BahnTrans

(29) The creation of BahnTrans in 1994 was set in a context of continuing liberalisation of the road freight and forwarding market and intense price competition. Concentration tendencies were noted. Thus, Schenker merged with Rhenus and bought the Weichelt company. Danzas bought ASG and Federal Express in Germany. Bilspedition took over Nellen & Quack, and Nedlloyd bought Union Transport. These and other concentrations, and the setting-up of new nationwide forwarding networks in Germany, again led to further price reductions. Since 1994, there was total price freedom on the German market for inland transportation. Keen competition on price was the consequence. The market for freight forwarding activities is polypolistic, in that there are a large number of freight forwarders. The service offered is by and large homogenous, so that competition is carried out to a large extent via the price level. One association report notes a 'tense competition situation' resulting from the opening of the EC boundaries as of 1 January 1993. According to the report, to keep market share, firms are engaging in sharp price competition ([8]).

(30) BahnTrans had to participate in this keen price competition, as evidenced by its aggressive pricing strategy reported in newspapers and in complaints from competitors. Its turnover was considerably reduced between 1996 and 1998, from DEM […] to DEM […].

Other commercial relationships between BahnTrans and DB AG

(31) Apart from the commercial relationships developed above, two further aspects need to be mentioned: 1. the revenue sharing between BahnTrans and DB AG, and 2. the cash injections made by DB AG and THL in 1997.

Revenue sharing

(32) Originally, DB AG received from BahnTrans payments for its services amounting to about […] % of the turnover generated by DB AG through its railway activities for BahnTrans. As of the business year 1996/1997, BahnTrans took over certain handling and administrative activities. The payment figure was therefore reduced to […] % of the invoiced turnover. This figure is in accordance with the average payments received by transporters from the freight forwarders. As a rule, a freight forwarder, which does not operate transport services, must calculate about 70 % of its total turnover as payment for transport services through third parties ([9]).

([8]) Fachvereinigung Spedition und Lagerei Nordrhein eV, Jahresbericht in Schlagzeilen, 1993/1994.

([9]) See Bundesverband Spedition und Logistik eV, Zahlen, Daten, Fakten (2000).

Cash injections

(33) In July 1997, DB AG and THL agreed to each inject DEM […] into BahnTrans for the business years 1996/1997 and 1997/1998. This was done in conjunction with a change in the management, and also with a change in strategy for BahnTrans. By 1997, it had become clear that the original 1994 concept of rail liner services between 40 freight centres could not be achieved. Instead, as mentioned above, BahnTrans would operate with seven freight centres and 16 freight collection centres. This would permit DB AG to close down its own freight consolidation activities of 'DB Stückgut', which was heavily loss-making.

(34) In return for the DB cash injections, BahnTrans was obliged to secure 1 574 posts for former DB employees. If this could not be secured, DB AG was entitled to a repayment of its cash injection. This repayment was limited to the possible difference between the injections of DB and THL into the company in the business years 1996/1997 and 1997/1998. Furthermore, THL accepted to fully take over or close the 'DB Stückgut' distribution system before the date contractually agreed before, i.e. 30 September 1998. The new date was now end of January 1998.

(35) THL committed itself firmly to inject DEM […] into BahnTrans for the business years 1996/1997 and 1997/1998 each. THL had to pay a further DEM […] per business year, if BahnTrans continued to make losses before taxes in the said business years. As this was the case, THL paid in full its cash injections amounting to DEM […] per business year.

III. **COMMENTS FROM ABX LOGISTICS (DEUTSCHLAND) GmbH**

(36) With letters of 15 June 2001 and 5 December 2001, ABX Logistics (Deutschland) GmbH (ABX Logistics) submitted comments on the opening of the procedure. ABX Logistics is the legal successor of BahnTrans GmbH. ABX Logistics submitted that all transactions subject to the opening of the procedure had been conducted under market investor principles. First, ABX Logistics argued, that DB AG had to pay its share capital in cash, as it did not have any substantial assets interesting for the business of BahnTrans. Second, due to constitutional requirements, DB AG was not allowed to divest itself of assets to the benefit of BahnTrans.

(37) Concerning the financing of the freight centres, ABX Logistics submitted that this financing was done according to normal market conditions, and submitted the relevant agreements.

(38) ABX Logistics conceded that the railway services of DB AG were not used as extensively by BahnTrans as originally expected. However, according to ABX Logistics, this was done for pure business reasons, and was in the end for the commercial benefit of the company. THL did not get any more stringent guarantees from BahnTrans than DB AG concerning the use of its assets.

(39) ABX Logistics explains that DB AG did not take commercially unjustifiable burdens concerning personnel and payment of personnel costs.

(40) Finally, while ABX Logistics concedes that price competition was tough during the time in question due to increased liberalisation of the market, it denies an aggressive marketing strategy made possible by funding from DB AG.

IV. **COMMENTS FROM THE FEDERAL REPUBLIC OF GERMANY**

(41) In its letters of 19 February 2001 and 17 July 2001, the Federal Republic of Germany reacted as follows to the opening of the procedure. The German Government reiterated that no State aid was given, and flows of money between the Government, via the DB AG, to BahnTrans had not existed. Opening the procedure in these circumstances would, according to the German Government, violate the principle of neutrality of ownership, enshrined in Article 295 of the Treaty. The German Government also informed that the German Court of Auditors, after explanations of the German Government, had suspended further investigations into the BahnTrans case.

V. **ASSESSMENT OF THE MEASURE**

(42) According to Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, insofar as it affects trade between Member States, incompatible with the common market.

V.1. **The applicable legal test**

Equality between public and private undertakings

(43) The Treaty sets up the principle of neutrality with regard to the system of property ownership in the Member States and the principle of equality between publicly-owned and private undertakings (Articles 295 and 86 of the EC Treaty). In accordance with those principles, the Commission must not prejudice or favour publicly owned undertakings, in particular when examining economic transactions in the light of Article 87(1) of the EC Treaty. The German State holds 100 % of the shares in DB AG and appoints the board of DB. The German State as sole shareholder has the right to give instructions to the board according to the German Aktiengesetz. Public authorities exercise directly a dominant influence by virtue of their ownership over DB AG. DB AG is thus a publicly-owned enterprise.

(44) The German Government, in its letter of 19 February 2001, stated that opening of the procedure in this case would violate Article 295 of the EC Treaty. The Commission refutes this argument. As the Court of First Instance has clearly pointed out in its judgment of 14 December 2000 ([10]):

> 'To require that the remuneration which a public undertaking in a monopoly position receives in return for the provision of commercial and logistical assistance to its subsidiary should correspond to the payment which would have been demanded under normal market conditions, does not prohibit such a public undertaking from entering an open market but subjects it to the rules of competition, as the fundamental principles of Community law require. Such a requirement does not adversely affect the system of public ownership and merely ensures that public and private ownership are treated equally.'

(45) Thus, the Commission is not challenging the legal and factual possibilities for publicly-owned enterprises to invest and expand commercially. However, the publicly-owned enterprises must be treated on equal terms with comparable private enterprises ([11]).

The market economy investor principle

(46) In assessing the behaviour of DB AG vis-à-vis is daughter company BahnTrans and the commercial relationships and transactions between the two companies under the State aid rules, the Commission applies the 'market economy investor principle'. This test assesses whether a transaction between a Member State and an undertaking, or, as in the case at issue, between a public holding company and its subsidiary, contains State aid. The Commission verifies, whether the transaction took place in circumstances that would be acceptable to a private investor operating under normal market economy conditions. According to the jurisprudence of the European Courts, the behaviour of the public investor need not be compared with the conduct of an ordinary investor. The latter provides capital with a view to realising a profit in the relatively short term. However, it must at least be the conduct of a private holding company or a group of undertakings pursuing a structural policy and guided by profitability prospects in the long term ([12]).

(47) Further, as the Commission has pointed out in its above-mentioned Communication on financial transfers to public companies,

> 'if any public funds are provided on terms more favourable than a private owner would provide them to a private undertaking in a comparable financial and competitive position, then the public undertaking is receiving an advantage not available to private undertakings from their proprietors' ([13]).

(48) The State aid rules of the Treaty do not only apply to purely financial transactions, but also to the provision of services or the supply of assets on preferential terms between a holding company and its subsidiaries. The European Court of Justice has held:

> 'the provision of commercial and logistical assistance by a public undertaking to its subsidiaries, which are governed by private law and carry out an activity open to free competition, without normal consideration in return, is capable of constituting State aid within the meaning of Article 92 (now Article 87) of the Treaty' ([14]).

(49) In the case *La Poste*, the Advocate-General Jacobs concluded that State aid is involved if the assistance is provided

> 'on financial terms that are more favourable than those which the undertaking could obtain from a comparable commercial investor (…). In deciding, whether there is a subsidy it seems to me that it is necessary to consider whether a commercial investor would be satisfied with the level of consideration received for the assistance, having regard to factors such as the cost of providing the assistance, the size of its investment in the undertaking and its return from it, the importance of the activity of the undertaking to the investment group as a whole, conditions on the market in question and the period for which the assistance is granted' ([15]).

V.2. **Assessment of the commercial relationships between DB AG and BahnTrans**

The provision of equity capital

(50) Under the test developed above, the Commission concludes that there was no State aid involved in the provision of DB's capital contribution as full cash deposit. DB AG acted like a commercial investor. DB AG gave its capital contribution as a full cash deposit, because it did not have any contribution in kind of value to the newly created joint venture. As explained above, BahnTrans acted solely as a freight consolidator and forwarder, not as a transporter. It was thus not appropriate to contribute rolling stock, equipment or trucks.

([10]) Judgment of the Court of First Instance, 14 December 2000, Case T-613/97, *Ufex et al.* v. *Commission*, ECR 2000 II, p. 4055, paragraph 77.
([11]) See also Opinion of Advocate-General Jacobs, 13 December 2001, Case C-482/99, *France* v. *Commission* (Stardust Marine), at point 47.
([12]) Case C-305/89, *Italy* v. *Commission* (Alfa Romeo), ECR 1991, p. I-1603, paragraph 8.
([13]) Commission communication, OJ C 307, 13.11.1993, p. 3, point 11.
([14]) Case C-34/94, *SFEI et al.* v. *La Poste et al.* (La Poste), ECR 1996 p. I-3547.
([15]) Advocate-General Jacobs' conclusions in 'La Poste', paragraph 61.

DB AG did not contribute its real property assets to BahnTrans, as it was more economical to keep ownership of these assets and rent the land and eventual facilities to BahnTrans. Furthermore, change of ownership in real property would have given rise to real property sales taxes. Finally, DB AG as company fully owned by the Federation, is subject to Article 87e(3) of the Grundgesetz. This article prohibits the DB AG from selling transport-related assets to companies, in which it does not hold a majority of shares. As BahnTrans was owned by 50 % by THL, DB AG was thus legally not allowed to transfer any assets to BahnTrans. There was thus a further objective reason for it not to transfer any assets in kind to BahnTrans.

(51) THL brought in a mixed capital contribution. As stated above. it gave DEM 45 million in cash deposit and DEM 19 975 million as contribution in kind, while DB AG gave the following capital contribution: DEM 64 975 million in cash deposit. The contributions in kind by THL, largely trucks and other transport means, were sold by agreement of 15 March 1995 between BahnTrans and THL Rheinkraft GmbH to the latter company, and BahnTrans could thus rely on the cash generated by the sale of the equipment. The value of the capital contribution of THL had been assessed and approved as fair and reasonable by the independent accountants with report of 1 October 1994 ([16]). The behaviour of the public and the private undertakings was therefore largely similar.

The freight facilities

(52) The Commission considers that there was no State aid involved in the commercial relationships between DB AG and BahnTrans concerning the agreements relating to the lease of the freight centres and freight collection centres. As more fully developed below, BahnTrans received use of the freight facilities at a price, which reflected average market conditions. DB AG acted under normal market considerations, when it fixed the remunerations and conditions for the services provided ([17]). In analysing the arrangements on the freight facilities, the Commission has based itself on a comparison of the prices and conditions requested by DB AG with the prices and conditions prevalent in the market and being quoted by and to private undertakings.

(53) Concerning the freight centre Cologne, this was sold by DB AG and then leased to BahnTrans by Deutsche Anlagen Leasing, an undertaking fully independent from DB AG, as it was not owned or in any way connected to the latter ([18]). The relationship between BahnTrans and DAL was a normal commercial one and there is no place for State aid considerations.

(54) The rental fees and the use fee, in the case of the Regensburg and Bremen freight centres, for actual use before a formal rental agreement was concluded, reflected market conditions. The calculated interest rate is less than one percent lower than the market rate for five-year mortgages, as calculated by the Deutsche Bundesbank. BahnTrans paid these use fees based on capital interest only for about two and a half years, before a rental agreement was concluded. In light of the short pay-back period, it is reasonable to agree a lower interest rate than for five-year mortgages.

(55) With regard to the freight centre Karlsruhe, the rental fee has also been shown to be fully oriented on market rates ([19]).

(56) Also concerning the rental of the 16 freight collection centres, DB AG acted like a commercial investor. It even started out with a proposal for a lease fee, which was above the normal market rate and was therefore particularly beneficiary for it. Only after negotiations with BahnTrans was the fee agreed, which reflected normal market conditions plus a 10 % top-up to the benefit of DB AG.

(57) In conclusion, the payments received in return by DB AG from BahnTrans were fully compatible to payments demanded by a private holding company not operating in a reserved sector, pursuing a structural policy and guided by long-term prospects ([20]). They do not constitute an aid to BahnTrans.

Use of railway for transports

(58) The Commission concludes that there was no non-commercial advantage to BahnTrans resulting from the attitude of DB towards the use of its main product, rail transport, by its daughter company BahnTrans. DB's acceptance of decreasing use of rail transport by BahnTrans was dictated by commercial considerations. As explained above, DB AG was not able to set up 40 combined transport terminals and connect them with regular train liner services. Insisting nevertheless that BahnTrans use 70 % railway transport for its transport requirements would have meant that BahnTrans would not have been able to provide its customers with as rapid and reliable services as its competitors relying on road transport. This would thus have endangered BahnTrans' going concern. It was therefore crucial that BahnTrans be free in its modal choice to offer a competitive service.

(59) The private partner THL did not insist on the use of its road based assets by BahnTrans, either. The exclusivity agreement lasting for one year was in the interest of BahnTrans, which could rely on a proven road transport network, and was thus not in danger of losing THL Rheinkraft as a subcontractor. Later, there was only an obligation of first request, which guaranteed BahnTrans that it could always rely on a road haulier for its liner services, but at the same time BahnTrans was free to take any better offer. Both DB AG and THL thus acted flexibly in the best interest of their daughter company concerning the transport organisation.

([16]) See above, under recital 7.
([17]) See above, under recitals 14 et seq.
([18]) See above, under recital 16.
([19]) See above, under recital 17.
([20]) Compare Ufex et al., cited at footnote 10, at point 75.

Take-over of personnel

(60) DB AG agreed to bridge, for two years, the cost difference between the higher pay and remuneration benefits of ex-DB employees now working in BahnTrans, and the normal pay conditions in the private sector. Given the marked difference in pay and remuneration conditions, as mentioned above, it seemed normal for DB AG to do this under two aspects: first to help its personnel adapt to the new business environment, and second, not to overload the new daughter company with charges, which it would not have had to incur in a private sector business environment. DB AG thus temporarily relieved BahnTrans from extraordinary charges it had to face due to the nature of DB AG as a State-owned company, which offered its employees special conditions not available in the private sector. The respective arrangements aimed at establishing viable business conditions for BahnTrans, which operated in a very competitive environment.

(61) Also in this respect, DB AG acted as a normal investor. Any private holding company not operating in a reserved sector, pursuing a structural policy and guided by long-term prospects, tries to ensure that its newly founded daughter company starts out its business not unduly burdened by specific conditions and arrangements prevalent in the mother company, if these arrangements are disadvantageous in the business environment, in which the daughter company will have to operate.

Marketing strategy of BahnTrans

(62) The marketing strategy of BahnTrans does not yield evidence of non-commercial behaviour. While the Commission notes several alleged cases of very keen and aggressive pricing of BahnTrans, this behaviour seems in line with the generally acknowledged behaviour during the 1990s in the German freight forwarding sector, brought about by deregulation and concentration movements. Elements hinting at non-commercial behaviour of DB AG cannot be detected in this marketing strategy, and there is no further room for State aid considerations.

Revenue sharing between BahnTrans and DB AG

(63) The revenue sharing between BahnTrans and DB AG was fully in line with normal commercial practices and did not provide any unreasonable advantage to BahnTrans. As a rule, a freight forwarder, which does not operate transport services, must calculate about […] % of its total turnover as payment for transport services through third parties. As stated above, this rule is generally accepted business practice in the market. For the first two business years of the existence of BahnTrans, DB AG received even more than industry standards, namely […] %. For the remaining time of its involvement in BahnTrans, the parties agreed on the industry standard, […] %. In this respect, DB AG acted fully like a normal commercial investor.

Cash injections by DB AG

(64) Both THL and DB AG provided, as mother companies, the same amount of cash injections for BahnTrans, after a change in strategy had occurred in 1997. Both mother companies subjected these cash injections to conditions, which gave them necessary security and fostered their own business goals. The new strategy, which required the cash injections, gave DB AG a way to close down its loss-making freight consolidation activities faster than originally anticipated, and thus was of monetary value. DB AG had further commercial benefits linked to the cash injection, as BahnTrans was obliged to take over a large number of personnel from DB AG, as shown above, largely at its own cost (see recital 27). The same amount of the cash injections of DB AG and THL and the measures that DB AG took to protect its own commercial interest in the venture, give a clear indication that DB AG acted as a commercial investor in this matter. It did not grant any non-commercial advantage to BahnTrans.

VI. **CONCLUSION**

(65) In conclusion, all the business relations analysed show that DB AG acted as a normal commercial investor vis-à-vis its daughter company BahnTrans. In the case of the rental of freight facilities, DB AG negotiated or tried to negotiate conditions for itself, which were even more advantageous than average market conditions. In the agreements concerning personnel, the behaviour of DB AG showed the market investor's concern to permit its daughter company to achieve sustainable viability. DB AG thus acted as a strategically oriented investor. This result is further corroborated by the fact that the privately-owned company THL as the other shareholder acted in a similar way concerning its capital contributions to BahnTrans, its strategy concerning the use of its assets (road transport) by BahnTrans, and its capital injections in 1997. State aid was not involved in the commercial relations between DB AG and BahnTrans described above for the period October 1994 to June 1998,

HAS ADOPTED THIS DECISION:

Article 1

The commercial relationships between DB AG and the company BahnTrans, do not, for the time between September 1994 and June 1998, entail aid within the meaning of Article 87(1) of the Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 7 May 2002.

For the Commission
Loyola DE PALACIO
Vice-President