

COMMISSION DECISION

of 7 December 2005

on the State Aid implemented by Belgium for ABX Logistics (No C 53/2003 (ex NN 62/2003))

(notified under document number C(2005) 4447)

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

(2006/947/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⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 28 November 2002, registered in the Commission on 29 November 2002 (No DG Tren/A 71122), the Belgian authorities notified a scheme of rescue aid for ABX Logistics (F, D and NL subsidiaries, and group). The aid (case N 769/2002) was approved by Commission Decision on 21 January 2003.
- (2) By letter dated 17 February 2003, Belgium notified a restructuring plan for ABX Logistics, which was registered by the Commission on 17 February 2003 (No Tren A/13396). Through the notification and other pieces of information at its disposal, the Commission was informed that Belgium had implemented certain amounts from public funds for ABX Logistics in addition to the notified restructuring plan. By letters dated 7 May 2003, Belgium provided the Commission with further information.
- (3) By letter dated 24 July 2003 (SG(2003) D/231003), the Commission informed Belgium of its decision to initiate the procedure (case No C 53/03) laid down in Article 88(2) of the Treaty in respect of these measures.
- (4) After it had been agreed that confidential data should be removed, the Commission Decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the measures in question.
- (5) By letter dated 29 August 2003 (Loyola de Palacio incoming mail No 2805), the Belgian authorities submitted their comments on the initiation of the procedure.

- (6) The Commission received comments on this subject from interested third parties. It transmitted them to Belgium by letter dated 18 February 2004 (No D (2004) 2823), giving it the opportunity to comment, and received its comments by letter dated 18 March 2004 (No A/15992).
- (7) In the meantime the Belgian authorities provided further information by letters dated 12 December 2003 (No A/37839), 19 December 2003 (No A/38582) and 12 November 2004 (No A/35928) and updated the ABX restructuring plan by letters dated 14 January 2005 (No A/2010), 24 February 2005 (No A/4889) and 14 March 2005 (No A/6690). Further information was received by letters dated 18 August 2005, 31 August 2005, 2 September 2005 and 26 September 2005.
- (8) By letter dated 4 May 2005 the Commission informed Belgium of its decision to extend proceeding No C 53/03 to cover the new information notified. After the Belgian authorities had agreed that confidential data should be removed, the Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited interested third parties to submit their comments on the measures in question.
- (9) The Commission received comments on this subject from the Belgian authorities and interested third parties. It transmitted the third parties' comments to Belgium by letter dated 18 July 2005, giving it the opportunity to comment, and received its comments by letter dated 18 August 2005. This correspondence was followed by notification letters dated 2 September 2005 and 29 September 2005.
- (10) By letter dated 3 August 2005, after the time limit allowed for submitting comments on the extension of the above procedure, the Italian authorities sent the Commission a letter of complaint concerning the sale of ABX Logistics Worldwide. By letter dated 19 August 2005 the Commission asked the Belgian authorities to send it their opinion on the facts given in the letter from the Italian authorities. The Belgian authorities replied by letter dated 15 September 2005.

⁽¹⁾ OJ C 9, 14.1.2004, p. 12.

⁽²⁾ See footnote 1.

⁽³⁾ OJ C 142, 11. 6.2005, p. 2.

- (11) Lastly, the Belgian authorities provided various other information during November 2005, in particular by letter dated 1 December 2005 (No A/30862).

2. GENERAL CONTEXT OF THE RESTRUCTURING OF ABX

2.1. The principal stages of the procedure

- (12) Further to the more detailed information provided when the procedure was initiated, the Commission notes briefly that between 1998 and 2001 the Belgian railways ('SNCB') acquired a collection of individual companies. At the time, the collection had not yet been legally gathered together under a holding company, but nevertheless it formed the ABX Logistics network, comprising some 107 consolidated subsidiaries worldwide, 89 % of whose sales were made in Europe, 6 % in Asia and 5 % in America.
- (13) This case concerns the restructuring of the network notified by the Belgian authorities on 17 February 2003.
- (14) The main information notified and the doubts expressed by the Commission when the procedure was initiated/extended are recapitulated below.

2.1.1. Notification of 17 February 2003

- (15) The original restructuring plan provided, firstly, that SNCB's 107 ABX subsidiaries, which were owned by different ABX holding companies, were to be consolidated under a general holding company. Secondly, since the subsidiaries ABX Logistics (Deutschland) GmbH ('ABX-D'), ABX Logistics Holding (Nederland) BV ('ABX-NL') and ABX Logistics (France) ('ABX-F') were in difficulty, they were to be restructured in order to become viable again.
- (16) The operational restructuring measures consisted essentially in (i) reorganising the legal structures by integrating all the legal entities of the group under one lead company ⁽⁴⁾, (ii) disposing of and closing assets ⁽⁵⁾, and (iii) other operational measures in Germany, the Netherlands and

⁽⁴⁾ In order to (i) create a cohesive, autonomous group; (ii) facilitate synergies between the entities in the group; and (iii) make it possible to open up the capital to an external industrial or financial investor.

⁽⁵⁾ This involved the sale of three subsidiaries (Rheinkraft, Safety First and Worldpack) with a combined turnover of EUR 98,5 million, the closure of sites (7 agencies and 3 warehouses in Germany, 4 agencies in France and 2 agencies in the Netherlands) and the sale and rent-back of buildings and other fixed assets.

France with a view to further improving operating profit ⁽⁶⁾.

- (17) To this end, the Belgian authorities had notified the Commission that SNCB would provide most of the finance needed for the restructuring. The amounts initially notified were EUR 91,6 million in conversion by SNCB of debt into capital (long-term financing) for ABX-D, -NL and -F, and EUR 140 million in refundable credit (short-term financing) granted by SNCB to the same undertakings.

2.1.2. The Commission's doubts as at 23 July 2003

- (18) When it initiated the investigation procedure, the Commission provisionally expressed its doubts about a number of aspects.
- (19) *Existence of aid:* First of all, it expressed doubts about the statement by the Belgian authorities that the disbursement of funds (in the form either of refundable loans or of conversion of debt into equity) by SNCB as part of the restructuring of ABX was an ordinary intra-group transaction and did not constitute state aid within the meaning of Article 87 of the Treaty.
- (20) *Restructuring — eligibility:* The Commission also expressed its doubts about the eligibility of ABX-D, -NL and -F for restructuring aid, since it was not clear how far the rest of the ABX group might support the restructuring firms financially.
- (21) *Restructuring — viability, distortion and limiting the aid:* The Commission also expressed its doubts concerning the financial part of the 'restructuring' plan, which proposed to meet the long-term financial requirements (need of equity) of the ABX entities concerned with essentially short-term financing (refundable credit of EUR 140 million). Accordingly, the Commission also doubted that such financing could allow the entities concerned to return to sustainable viability, that the proposed compensatory measures (especially capacity reductions) were enough to avoid distortion of the market contrary to the common interest and that such alleged aid would not enable ABX to have potentially surplus cash.

- (22) The Commission also expressed its doubts about the alleged absence of state aid and the compatibility of the (re) investments by SNCB in ABX and the means used to finance them (possible guarantees, cross-subsidies, direct

⁽⁶⁾ These measures were to be effected mainly by (i) improving productivity (cutting staff by some 690 FTE in the three restructuring countries, including the impact of closing agencies); (ii) reducing costs; and (iii) renegotiating lease contracts.

financing, compliance with the directives in force). This was particularly the case with the following measures:

- (a) *Acquisition of ABX by SNCB.* This concerns investments by SNCB between 1998 and 2001 amounting to EUR 672,4 million (since revised to EUR 433,8 million⁽⁷⁾) for the 'acquisition' of the ABX network, and certain information concerning the allocation of guarantees granted either by SNCB or by the government for financing (re)investments in ABX, whose substance had to be checked.
- (b) *Other amounts.* The Commission also had doubts about the legality/compatibility of the payment in 2001 of other subsidies totalling EUR 150 million (since revised to EUR 114,6 million⁽⁸⁾) granted by SNCB to ABX-D, -NL and -F, which were paid without being notified to the Commission in advance. The Commission's doubts in this respect concerned the presumed absence of aid and the compatibility of such potential aid.
- (c) *Parallel amounts.* The Commission also expressed its doubts about the statement by the Belgian authorities that the conversion into capital in 2004 of loans granted by SNCB to ABX totalling EUR 21 million (since revised to EUR 12,1 million⁽⁹⁾), hereinafter 'parallel amounts', for ABX Logistics (Ireland) Ltd (EUR 3,2 million), ABX Logistics (Portugal) Lda. (EUR 2 million), ABX Logistics (Singapore) Pte Ltd. (EUR 3,8 million) and ABX Logistics International (Belgium) NV/SA (EUR 12 million) ('ABX-Irl', 'ABX-P', 'ABX-Sing' and 'ABX-B' respectively), constituted a normal transaction within the SNCB group. The Belgian authorities considered that this amount would be paid 'outside the notified restructuring' and did not therefore constitute state aid within the meaning of Article 87 of the Treaty. The Commission's doubts in this respect also concerned, therefore, the compatibility of this potential aid.

2.1.3. Supplementary notifications

- (23) By letters dated 14 January and 24 February 2005, the Belgian authorities supplemented the original notification with information substantially altering the ABX restructuring plan. The changes concerned in particular an increase by SNCB and the ABX group in the financing for the restructuring, the sale of ABX-France in the form of a management buyout ('MBO') at less than the market price, further capacity reductions, substantial internal restructuring measures and the proposed sale at the market price of the entire ABX group.

⁽⁷⁾ See the section entitled 'Financial implications in figures'.

⁽⁸⁾ See the section entitled 'Financial implications in figures'.

⁽⁹⁾ See the section entitled 'Financial implications in figures'.

2.1.4. Extension of the procedure on 3 May 2005

- (24) The Commission extended the investigation procedure — supplementing rather than replacing the original procedure — with regard to two main aspects of this extra information: the change in the budget for the ABX restructuring and the terms of the sale of ABX-France in particular but also of ABX-WW (ABX Worldwide), the new ABX holding company set up during the restructuring.
- (25) In the new situation, therefore, the following amounts were to be contributed:
 - (a) EUR 157,4 million instead of the EUR 50 million in equity for the restructuring of ABX in Germany, to bring ABX-D to an equity level of EUR 14,4 million (at 31 December 2004), compared with a balance sheet total of EUR 234 million (at 31 December 2003);
 - (b) EUR 10,6 million instead of the EUR 12,6 million in equity for the restructuring of ABX in the Netherlands, to bring ABX-NL to an equity level of EUR 9,3 million (at 31 December 2004), compared with a balance sheet total of EUR 35,7 million (at 31 December 2003).

For ABX-D and -NL, these amounts take the form of a capital increase either through the conversion of existing debt or through the contribution of new equity;

 - (c) EUR 223 million to enable an MBO of part of ABX in France. This amount is permanent expenditure for SNCB and consists in particular of debt write-offs and covering future losses.

- (26) As to the sale at a loss of ABX-F (MBO), the Commission raised doubts about the presence of state aid in the funds contributed by SNCB to the purchaser. Concerning the proposed sale of ABX-WW, the Commission stressed the need to provide all the necessary information, so that it could check that the company was effectively being sold at the market price.

2.1.5. Further information

- (27) In particular by letter dated 9 June 2005, Belgium provided the Commission with a whole set of information concerning the extension of the procedure, while emphasising and supplementing other details concerning the case as a whole.
- (28) By letter dated 1 December 2005, Belgium submitted certain supplementary information basically clarifying earlier points and expressing a new commitment as regards the presence of ABX in Germany.

2.2. Activities of ABX

- (29) Apart from the ABX activities summarised above and described in the initiation of the procedure, the Belgian authorities state that the strategic and commercial positioning of ABX Logistics Worldwide is clearly that of a 'transport managing company' or 'freight forwarder'.
- (30) As such, ABX carries out transport logistics operations. According to the expert study commissioned by the Commission ('Jacobs') ⁽¹⁰⁾, logistics consists generally speaking in 'managing how and when to transport resources to the place where they are needed'. According to this study, in the case of ABX it is a question more specifically of optimising the continuous flow of equipment over an interconnected transport network and through nodal warehousing points.
- (31) The Belgian authorities add that freight forwarders do not usually own transport assets (lorries, boats, planes, etc.) but use haulage companies; this is confirmed by Jacobs.
- (32) In this particular case, apart from a few exceptions mainly in the Netherlands, the ABX group's transport capacity is almost entirely subcontracted. The number of lorries owned in the Netherlands has been declining steadily since 2001, and the objective is to reduce it to zero. In 2001, ABX Logistics in the Netherlands owned 240 lorries, which figure was reduced to 166 in 2002, 138 in 2003 and 110 in 2004.
- (33) For domestic and international road transport operations, ABX Logistics subcontracts the transport activity proper to independent road hauliers. For air and maritime transport, ABX Logistics acts as a broker, buying the necessary transport capacity on behalf of its customers from shipping lines or airlines.
- (34) The table below clearly confirms this strategic positioning: only 3 % of the lorries used by ABX Logistics are owned or leased by group companies ⁽¹¹⁾.
- (35) Transport capacity of ABX Logistics

	Owned (or leased)	Subcontracted
Transport capacity (lorries)	3 %	97 %
Transport capacity (planes)	0	100 %
Transport capacity (ships)	0	100 %

(36) *ABX's place in the different market segments:* According to the Belgian authorities, in 2003 49 % of ABX's operations were in the road transport market, 42 % in the air and sea markets and 8 % in the contract logistics market, which comes under the warehousing of goods.

(37) Given its level of activity in Germany, the Netherlands and France, ABX is not among the five leading firms in the individual markets at national level (road, air, sea and contract logistics), and this is confirmed by Jacobs.

(38) *Growth potential of the markets concerned — general:* According to both the Belgian authorities and Jacobs, despite recent difficulties due in particular to the events of 11 September 2001, demand for logistical services continues to grow. According to Jacobs, this is due to the growth of Europe's population, consumers' increasing preference for a variety of products to choose from, growth in consumers' purchasing power and increasing outsourcing of logistical services by producers to logistics specialists.

(39) *Growth potential in Germany:* Jacobs considers that there is considerable potential for growth in the German logistics market. The trend of subcontracting logistical services in the German market over the last eight years indicates that both supply and demand could grow by 15 % to 20 % annually in the years ahead.

(40) *Growth potential in the air market:* Both Airbus and Boeing forecast that the number of cargo aircraft will double in the next 15 to 20 years on account of the increase in air freight, which will exceed that in air passenger transport. Airbus forecasts a tripling of freight transport, with average annual growth of 5,7 % (6,4 % according to Boeing) between now and 2021. These high growth margins should also give a growth margin for carriers and logistics operators.

(41) *Growth potential in the road market:* The expert states that, in Europe as a whole, road transport is an industry with low barriers to entry which therefore suffers from long-term structural overcapacity ⁽¹²⁾, which has been confirmed during the last five to seven years when prices have fallen. However, the overcapacity concerns the firms carrying out the transport operations in question; this is not the case with ABX, which 'organises' the transportation but does not carry it out. According to Jacobs, there is a strong growth trend in the road freight transport market. Consequently, such a market trend should also ensure a margin of growth for carriers and logistics operators.

⁽¹²⁾ Even though the recent enlargement seems to be calming the current situation temporarily. Nevertheless, the fact that many transport companies seem to subcontract the carriage of goods by road to cheaper transport operators from the new Member States should increase competitive pressure on prices in the road haulage market.

⁽¹⁰⁾ Jacobs Consultancy: Capacity of ABX Logistics and Sernam markets, final report, May 2004.

⁽¹¹⁾ Letter from the Belgian authorities, 24.2.2005, p. 13.

(42) *Growth potential in the maritime market:* According to Jacobs, growth in the maritime freight forwarding sector was 7 % on average between 1998 and 2002. Future growth in maritime freight transport will depend on more general, global developments.

2.3. Creation of the ABX network

2.3.1. Acquisition of companies in the ABX network by SNCB

(43) Although the transactions for the acquisition of the ABX network by SNCB, which by their very nature cannot contain advantages for ABX, are not the subject of this Decision, the Commission highlights their main stages below (as presented by the Belgian authorities) by way of general background.

(44) The Belgian authorities explained that SNCB decided to acquire the different companies in the ABX Logistics group on the basis of business plans which, at the time of the investment, suggested a rapid return to profitability. For Thyssen Haniel Logistik ('THL')/Bahntrans, Dubois and Saima Avandero (which became ABX in Germany, France and Italy), the acquisition conditions are briefly summarised below.

(45) *Acquisition of THL/Bahntrans (subsequently ABX in Germany):* According to the information provided by the Belgian authorities in October 2000, the purchase price for the THL group as a whole was DEM [...] (*) million (Thyssen group) plus DEM [...] million (Deutsche Bahn AG). The group's business had been valued at DEM [higher value than the above purchase price (**)] million by Coopers & Lybrand (of which DEM [...] million for the groupage business) and at DEM [...] million, taking account of the holding company's costs. When it made this acquisition, SNCB assumed the commitments of the former shareholders with regard in particular to an existing guarantee on a building in Munich. The lower-than-market price of EUR [...] million (DEM [...] million) was paid by the former shareholders of Bahntrans, Thyssen Handelsunion and Deutsche Bahn, on 1 October 1998.

(46) ABX-D made losses from the time of acquisition onwards. These considerably weakened the financial structure of the undertaking, whose equity turned negative in 1999. This situation, which lasted until 2005, led SNCB as the parent company to issue a comfort letter concerning the risk associated with the negative equity position.

(47) *Acquisition of Dubois (subsequently an important part of ABX in France).* The Belgian authorities state that, for the period 1998-2002, the calculation available to SNCB resulted in an internal rate of return (IRR) of 12,7 % for a weighted average cost of capital (WACC) of 9,5 % and a net present value (NPV) of EUR 9,7 million, making it possible to expect a reasonable return on investment.

(48) *Acquisition of Gruppo Saima Avandero (subsequently ABX in Italy).* The Belgian authorities state that, for the period 1998-2002, the calculation available to SNCB resulted in an internal rate of return (IRR) of 13,0 % for a weighted average cost of capital (WACC) of 9,0 % and a net present value (NPV) of EUR 51,8 million, making it possible to expect a reasonable return on investment.

(49) In response to the Commission's question about possible cross-subsidies used by SNCB to finance its investments in ABX, the Belgian authorities provided the following clarifications:

(a) They state that 'for the period from 1998 to 2002 as whole, state support is not enough to cover the public service mission expenses [of SNCB]' ⁽¹³⁾. They stress that in 2001 the Belgian Court of Auditors had already stated that 'as regards the investment and operating functions, for the period as a whole, except for 1997, appropriations cumulatively exceed resources for both functions, so that there is nothing to indicate a disposal, by balance, between the two public service missions and the other activities [of SNCB]' ⁽¹⁴⁾.

(b) They also state that 'since the operating and investment costs of SNCB in regard to its public service tasks are not even covered by the state support, SNCB has resorted to borrowing for the balance of its needs' ⁽¹⁵⁾. This is also valid, therefore, for the SNCB resources used for investments in ABX, which were 'not financed by specific borrowings, ... but from its general cash resources' ⁽¹⁶⁾.

(50) Lastly, the Belgian authorities explain that, following these acquisitions, SNCB addressed a number of comfort letters to the creditors of several ABX subsidiaries, in particular to creditors of ABX-D and ABX Spain. The Belgian authorities consider that these comfort letters are part of the usual relations between a parent company and its subsidiaries in a market economy.

⁽¹³⁾ Letters from the Belgian authorities dated 23.12.2003, registered on 29.12.2003 under No A/38604, and that registered on 20.6.2003 under No A/23465.

⁽¹⁴⁾ Report of the Belgian Court of Auditors, 18.5.2001, p. 221.

⁽¹⁵⁾ Letter from the Belgian authorities, registered 20.6.2003 under No A/23465.

⁽¹⁶⁾ Letter from the Belgian authorities dated 29.8.2003, registered on 29.8.2003 (Loyola de Palacio cabinet incoming mail No 2805), p. 12.

(*) Confidential data

(**) The exact figure has been deleted and replaced by this formula.

2.3.2. Reinvestments made by SNCB in 2001

(51) *Capital increase in Germany.* At the end of 2000 and in 2001, SNCB increased the capital of its German subsidiary (ex-Bahntrans) with a cash contribution of EUR 17,5 million and by converting short-term loans from SNCB amounting to EUR 55 million into capital. The decision was based on recommendations and analyses made by the Boston Consulting Group (BCG).

(52) The BCG documents put forward the following arguments and recommendations:

- (a) the ABX Group presented an opportunity to create significant value and a strategic interest for SNCB;
- (b) financial investment and strengthened management were needed to capture this potential;

(53) The Belgian authorities state that the IRR of the total investment of EUR 72,5 million which could be expected at the time of the investment was 8 % to 10 %, depending on the profit forecasts selected. This internal rate of return is comparable to the cost of capital for SNCB at the time.

- (c) the self-financing by SNCB of this financial investment was considered at the time to be the best option;
- (d) in the implementation of this strategy of creating value through ABX Logistics, a priority matter for SNCB was to turn around Bahntrans;
- (e) in conclusion, BCG's experts concluded that the recovery plan should be implemented for two reasons:
 - if successful, the turnaround would make it possible to continue the ABX Logistics strategy, 'which has a value creation potential of more than EUR 300 million';
 - even if only partly successful, the turnaround would make it possible to put a higher price on the resale value of Bahntrans.

Calculation of the IRR for SNCB's reinvestments in ABX Germany in 2001 of EUR [...]million

Yearly growth rate of EBIT	[...]						
Discount rate	[...]						Terminal value
Year	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Discount factor	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	2001	2002	2003	2004	2005	2006	Terminal value
Turnover	[...]	[...]	[...]	[...]	[...]	[...]	
Pre-tax operating profit	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Use of the surplus EUR [...]million at the acquisition price	[...]						
Investment of EUR [...] million in 2001	[...]						
Free Cash Flows	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Weighted average cost of capital	9 %						
Total discounted cash flow	[...]	[...]	[...]	[...]	[...]	[...]	[...]
IRR	10,04 %						

(54) *Capital increase of EUR 12,2 million in the Netherlands.* the strategic plan for the 'Dutch stage' (ex-Kerstin Hunik group, acquired in February 1999 and also comprising the holdings in Ireland) consisted in:

- (a) strengthening domestic activities through the acquisition of a company operating in national distribution in the Netherlands; the company's volume of business was 2 000 consignments a day, and SNCB's management considered that a volume of 6 000 consignments would be necessary to work profitably in national distribution;

- (b) continuing the restructuring of Kersten Hunik Holding (renamed ABX Logistics Holding BV), acquired in 1999;
- (c) selling the maritime transport activities ('rederijen') Kersten Hunik Scheepvaartmaatschappij BV and Link Line Europa BV, thereby generating EUR 1 million in cash;
- (d) in practice, the financing needs were supplied as follows:
- EUR 9,2 million in short-term credit from SNCB was converted into capital in March 2001;
 - in September 2001 SNCB increased the capital of ABX Logistics Holding by EUR 10 million. This sum was intended to finance the acquisition of Wegtransport BV by ABX Logistics Holding. The price paid for the shares was EUR [...] million, the balance of EUR [...] million remaining available to cover any price adjustments resulting from due diligence;

- altogether, the Belgian authorities consider that the amount of financing granted by SNCB to the Dutch subsidiary (excluding the acquisition price of EUR [...] million for Wegtransport) was therefore EUR 9,2 million in March 2001 plus EUR 3 million in September 2001, i.e. a total of EUR 12,2 million;
- in their view, this recapitalisation was justified by the prospect of a return to profitability in 2002 for the Dutch activities, as reflected in the positive profit trend forecast at the end of 2000:

	2000A	Budget 2001 (drawn up at end 2000)	Budget 2002 (drawn up at end 2001) (*)
Turnover	54,1	60,9	86,4
Operating profit (EBIT)	- 2,59	- 2,73	0,68

(*) includes the turnover from the acquisition of Wegtransport.

- (55) The Belgian authorities consider that, on the basis of the profit forecasts available at the time, the internal rate of return for this investment of EUR 12,2 million is about 11 %.

Calculation of the internal rate of return (IRR) for SNCB's reinvestments of EUR 12,2 million in ABX Netherlands in 2001 (EUR million)

Yearly growth rate of EBIT	[...]						
Discount rate	[...]						
Year	[...]	[...]	[...]	[...]	[...]	[...]	Terminal value
Discount factor	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	2000A	Budget 2001 drawn up at end 2000	Budget 2002 drawn up at end 2001 (*)	Plan 2003 (**)	Plan 2004 (**)	Plan 2005 (**)	Terminal value
Turnover	[...]	[...]	[...]	[...]	[...]	[...]	
Pre-tax operating profit	[...]	[...]	[...]	[...]	[...]	[...]	
Recapitalisation of EUR 12,2 million in 2001	[...]						
Free Cash Flows	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Weighted average cost of capital	9 %						
Total discounted cash flow	[...]	[...]	[...]	[...]	[...]	[...]	[...]
IRR	11,3 %						

(*) includes the turnover from the acquisition of Wegtransport

(**) Historical data not available. Ex post revaluation carried out on the basis of (1) an expected gross operating margin of [...] % in 2003 and (2) an annual growth rate of [...] % of turnover and profit from 2004.

(56) *Capital increase of EUR 30 million in France.* In December 2001 SNCB increased the capital of the French company acquired in 1999-2000 in order to start a debt securitisation programme that would make it possible to obtain a line of bank credit of EUR 70 million. The capital increase had been imposed by Société Générale, the provider of credit for ABX Logistics (France) SA, as an essential precondition for the securitisation of that company's commercial debt portfolio.

(57) According to the Belgian authorities, the ABX Logistics (France) financial forecasts available at that time revealed the prospect of a return to profitability within the framework of a recovery plan. As a result of measures to improve operations (IT, audit of distribution processes, closures and disposals, harmonisation of working conditions, integration of activities), the plan forecast an improvement in operating profit (EBIT) from — EUR 19,6 million in 2001 to EUR 4,6 million in 2003.

(59) The Belgian authorities consider that the profit forecasts available at the time indicate an IRR of 14 % for this investment of EUR 30 million.

Forecast profit trend for ABX Logistics France (at September 2001)

	2000 actual	2001 bud- get	2002 fore- cast	2003 fore- cast
Turnover	516,0	631,0	626,0	664,0
Operating profit (EBT)	- 6,1	- 19,6	- 8,2	4,6
Net profit	- 2,1	- 28,4	- 11,6	4,0

Source: Recovery plan, page 43; conversion rate: EUR 1 = FRF 6,55957

(58) SNCB thought that this securitisation transaction would make it possible to substitute external financing for short-term financing by SNCB. In the short term, it was possible to inject a large proportion of the excess cash released by the securitisation into the ABX cash pool, thus enabling the companies which were members of it to partly reimburse their own exposures to SNCB.

Calculation of the internal rate of return (IRR) for SNCB's reinvestments of EUR 30 million in ABX France in 2001 (EUR million)

Yearly growth rate of EBIT	[...]						
Discount rate	[...]						
Year	[...]	[...]	[...]	[...]	[...]	[...]	Terminal value
Discount factor	[...]	[...]	[...]	[...]	[...]	[...]	[...]
	2000 actual	2001 budget	2002 forecast	2003 forecast	Plan 2004 (*)	Plan 2005 (*)	Terminal value
Turnover	[...]	[...]	[...]	[...]	[...]	[...]	
Net profit	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Recapitalisation of EUR 30 million in 2001	[...]						
Free Cash Flows	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Weighted average cost of capital	9 %						
Total discounted cash flow	[...]	[...]	[...]	[...]	[...]	[...]	[...]
IRR	14,0 %						

(*) Historical data not available. Ex post revaluation carried out on the basis of (1) an expected gross operating margin of [...] % in 2004 and [...] % in 2005 and (2) an annual growth rate of [...] % for turnover and profit from 2004

(**) [...] % on the basis of pre-tax operating profit (EBT)

2.3.3. 'Parallel contributions' from SNCB to ABX

- (60) The Belgian authorities specified that, when it acquired the companies in Ireland and Portugal and the Air&Sea activities in Belgium, SNCB took over all or part these companies' debts of and then converted them into capital. According to the authorities, these capital conversions, which they describe as 'parallel contributions', were aimed:
- (a) either at making it possible for certain companies to merge and achieving the objective of simplifying the group in legal terms (Ireland, Portugal),
 - (b) or at maintaining transport licences (Ireland),
 - (c) or at enabling the companies to continue their Air&Sea activities with a minimum level of equity so as to obtain external means of financing (Air&Sea Belgium).
- (61) According to Belgium, the rebuilding of the equity and the rapid return to profitability were ensured by virtue of: (1) the ratio of their losses to their turnover, (2) the total amount of the conversions, and (3) by the financial projections (2003 budget) made by management at the end of 2002, which forecast a return to equilibrium towards the end of 2003. The subsidiaries were not to be regarded as

firms 'in difficulty', and their situation is not comparable therefore to the three undertakings in difficulty identified in the original restructuring plan. According to the Belgian authorities, the specific, one-off assistance given by SNCB to these subsidiaries is a normal financing transaction between certain subsidiaries and a parent company in the course of business and is therefore entirely compatible with the market-economy private investor principle.

- (62) The 2003 budget for the three companies concerned, drawn up at the end of 2002, indicated there was a prospect of a return to equilibrium, or quasi-equilibrium (losses of less than EUR 1 million), within 12 months from the introduction of the plan.

	Net profit 2002	Net profit budgeted for 2003 (*)
ABX Logistics (Ireland) Ltd.	- 0,3	0,0
ABX Logistics (Portugal) Lda	- 3,5	- 0,3
ABX Logistics Int. (Belgium) SA/NV	- 2,0	- 0,8

(*) Budget drawn up by the management in September 2002.

Key financial data for 2002 of the companies in Ireland and Portugal and Air&Sea Belgium (EUR million)

	Turnover 2002 (actual)	Operating profit (EBIT) 2002 (actual)	Net profit 2002 (actual)	Net losses 2002 as % of turnover	(1) (2) Total amount of conversions	
					Acc. to original plan (*)	Actually carried out
ABX Logistics (Ireland) Ltd.	31,4	0,2	- 0,3	-1 %	3,2	4,3
ABX Logistics (Portugal) Lda.	13,7	- 1,3	- 3,5	-25 %	2,0	2,0
ABX Logistics Int. (Belgium) SA/NV	39,0	- 0,5	- 2,0	-5 %	12,0	2,0
					17,2	8,3

(*) Conversions into capital: EUR 91,6 million + provision of extra funds: EUR 140 million, including a safety margin of EUR 21 million allocated to the subsidiary.

- (63) The Belgian authorities provided calculations of the internal rate of return (IRR) for each transaction. The calculations, which are not presented here in detail, are comparable in method to those for the reinvestments in 2001 (which are presented). In each case they give an IRR of between 9,6 % and 12,7 %.
- (64) SNCB also made an investment of EUR 3,8 million in ABX Singapore. According to the Belgian authorities, the assistance concerning ABX Singapore definitely does not fall within the scope of Article 87 of the Treaty.

Nevertheless, at the Commission's request, the Belgian authorities provided an estimate of the internal rate of return for this investment, which was 10,9 %.

- (65) SNCB also issued, in 2000, a guarantee of EUR 3 million for the construction of a building in Singapore. The Belgian authorities consider that this transaction is also outside the scope of the Treaty. They subsequently stated that the debt guaranteed is covered primarily by the building, which is regarded as a property situated in a dynamic, booming market. The building was sold in 2005.

2.4. Role of the state in SNCB's decisions concerning ABX

- (66) Further to the information provided on this subject in the initiation of the procedure, the Commission here summarises certain aspects concerning SNCB and the potential influence of the state on its decisions.

2.4.1. SNCB's board of directors and activities

- (67) SNCB is an autonomous public undertaking. As such it is not subject to bankruptcy law under the Law of 21 March 1991 reforming certain economic public undertakings⁽¹⁷⁾. Its object is to carry passengers and goods, but it can carry on any commercial activity directly or indirectly associated with that object. Its organs are the board of directors (BoD), the management board (MB) and the managing director (MD). The BoD has ten members, including the MD. The directors⁽¹⁸⁾ are appointed by the King and chosen according to the complementarity of their qualifications⁽¹⁹⁾.
- (68) Although SNCB is free to carry on any activities compatible with its object, the Belgian legislator has introduced certain limited mechanisms for checking whether an autonomous public undertaking is infringing the law, its statutes or the management contract. The main mechanism is the presence in the management bodies, particularly the board of directors and the management board, of a government commissioner, who ensures that the law, the statutes of SNCB and the management contract are observed.

2.4.2. Conclusions of the Court of Auditors

- (69) In May 2001 the Belgian Court of Auditors issued a report⁽²⁰⁾ on SNCB which provides several important clues about clarifying the influence of the state on the decisions taken by SNCB with regard to its commercial activities. The report states, firstly, that 'the object of SNCB is defined as follows: "The object of the company is the carriage of passengers and goods by rail. The Company may, on its own or through a stake in Belgian, foreign or international

bodies, whether existing or prospective, undertake any commercial, industrial or financial operations directly or indirectly relating, in whole or in part, to its object or which would be likely to facilitate or promote the attainment or development thereof"

The original text of the Law of 23 July 1926 setting up SNCB did not specify the object of the company. The Law of 1 August 1960 (amending the above Law) included the object in its provisions, on the basis of the following considerations: "The draft Law submitted to you therefore determines the object of SNCB, stipulating that the latter may lawfully undertake any activity associated with the operation of the network, in particular the running of buffets, snack bars, etc. ..., the building of rolling-stock for its use, the organisation of all road transport with a view to facilitating the carriage of goods"

The object of SNCB, therefore, is deliberately defined very widely. Furthermore, the definition contains no geographic restriction ... The object may be determined in such a way as to justify any commercial or even financial activity.'

- (70) Secondly, with regard to SNCB's expenditure on ABX, the Court of Auditors describes the approach to drafting certain parts of the report: 'Given the autonomy of SNCB, the level of risk to be prevented and the challenges, special attention has been paid to acquisition decisions in the context of the development of the ABX network. This analysis is concerned basically with clarifying the conditions in which those decisions were taken and are followed up, in order in particular to illustrate the difficulties of implementing the legal provisions which enable the state to avoid any threat to the undertaking's ability to fulfil its public service obligations' (21).

- (71) Accordingly, the Court of Auditors reaches the following conclusions:

- (a) 'the change in the strategy of expanding the ABX network was manifestly initiated by the management [of SNCB]' (22).

⁽¹⁷⁾ In particular Articles 2, 3, 8, 12 and 41.

⁽¹⁸⁾ According to the information provided by Belgium, the function of director (all members of the BoD) is incompatible with the task or functions of a Member of the European Parliament, a member of the legislative chambers, a Minister or Secretary of State, a member of the Council or Government of a Community or a Region, a governor of a province, a member of a Provincial Executive or a member of SNCB's staff.

⁽¹⁹⁾ According to the Court of Auditors (p. 46), the removal of directors currently requires the assent of a two-thirds majority of the board of directors.

⁽²⁰⁾ Court of Auditors: The sound use of public funds by SNCB. Audit carried out pursuant to the resolution of the House of Representatives of 11 May 2000, Brussels, May 2001

⁽²¹⁾ Report of the Court of Auditors, 18.5.2001, p. 142.

⁽²²⁾ Report of the Court of Auditors, 18.5.2001, p. 151.

(b) 'a wide-ranging autonomy has been granted to the public undertaking [SNCB] as regards its non-rail investments and its acquisition of holdings in commercial activities' ⁽²³⁾.

(c) 'the decisions taken by SNCB in regard to these [commercial] activities are limited only by compliance with its object and the provisions of the Law of 21 March 1991 which are designed to prevent the risk of a threat to the performance of its public service tasks' ⁽²⁴⁾.

(d) 'investments in non-rail commercial activities are not ... approved in advance, so that state control relies entirely on the intervention of the Government Commissioner' ⁽²⁵⁾.

(e) 'The current legal provisions, which grant the Government Commissioner a right to bring proceedings and the Minister a right of cancellation in respect of decisions jeopardising the performance of the public service tasks [of SNCB], do not provide a sufficient guarantee that the objective of the permanence of those tasks is satisfied' ⁽²⁶⁾.

(72) It is in this context of awareness of the risk threatening SNCB's public service activities and the inadequacy of the means of supervision available to the state for limiting such risks that the action of the Government Commissioner and the Minister responsible reported by the Court of Auditors should be seen. Thus, on 2 March 2000, the Government Commissioner was concerned to check whether the investment in the Italian arm of ABX '... does not prejudice the performance of the public service tasks [of SNCB] ...' ⁽²⁷⁾. On 28 April 2000, the Minister for Mobility and Transport expressed the wish that 'the strategic operations of the undertaking should be long-term ones and should make it possible to ensure its viability and sustainability' ⁽²⁸⁾. On 31 May 2000, the Minister for Mobility and Transport spelt out '... the conditions for the exercise of supervision by the state in the event of an acquisition or equity participation ...' ⁽²⁹⁾, remarks which followed those of the Government Commissioner on 26 May 2000 when he emphasised '... the need for commercial activities to be compatible with the object of SNCB and the task conferred on it by statute ...' ⁽³⁰⁾.

⁽²³⁾ Report of the Court of Auditors, 18.5.2001, p. 142.

⁽²⁴⁾ Report of the Court of Auditors, 18.5.2001, p. 141.

⁽²⁵⁾ Report of the Court of Auditors, 18.5.2001, p. 154.

⁽²⁶⁾ Report of the Court of Auditors, 18.5.2001, p. 154.

⁽²⁷⁾ Report of the Court of Auditors, 18.5.2001, p. 152.

⁽²⁸⁾ Report of the Court of Auditors, 18.5.2001, p. 150.

⁽²⁹⁾ Report of the Court of Auditors, 18.5.2001, p. 153.

⁽³⁰⁾ Report of the Court of Auditors, 18.5.2001, p. 153.

2.4.3. Council of Ministers involvement in the restructuring of ABX

(73) When it initiated the investigation procedure, the Commission referred to the record of the Council of Ministers meeting of 22 February 2002 and the related press release ⁽³¹⁾, which clearly show the involvement of the Government, at that date, in the decision on the restructuring of ABX: 'On a proposal from the Prime Minister, the Council of Ministers approved a set of measures concerning the activities of ABX. The following decisions were taken on the basis of the information and strategic considerations transmitted by SNCB: the setting-up by SNCB of a holding company bringing together all the activities of ABX, ...'.

2.4.4. SNCB's financing capacity from 1998 to 2001

(74) The Commission found that between 1998 and 2001 SNCB was by itself in a sufficiently good financial position to obtain loans on the market. This is borne out in particular by:

(a) the fact that in 1998 SNCB had a healthy balance sheet structure, with a debt to equity ratio of 51 % in 1998, 54 % in 1999, 62 % in 2000 and 90 % in 2002, and made a consolidated profit ⁽³²⁾;

(b) the study by the independent expert, Nera, which indicates that SNCB's average indebtedness during this period was sustainable when compared with that of similar undertakings in the same sector. According to Nera, such a sustainable level corresponds to a debt/equity ratio of between 0,8/1 and 1,25/1 ⁽³³⁾. In the same study, Nera concludes that SNCB's ratio did not exceed these values between 1997 and 2001 ⁽³⁴⁾.

(75) Nevertheless, from 2002 SNCB's financial position deteriorates. Its financial debts, as expressed in the consolidated accounts, went up from EUR 3,9 billion in 2001 to EUR 5 billion in 2002 and EUR 6,2 billion in 2003, compared with total consolidated debts of EUR 8,6 billion in 2001, EUR 9,6 billion in 2002 and EUR 10,7 billion in 2003, whereas its equity fell from EUR 4,9 billion in 2001 to EUR 4,4 billion in 2002 and EUR 4,2 billion in 2003. Taking account only of financial debts with less than one year and more than one year to run ⁽³⁵⁾, the ratio increases from 80 % in 2001 to 114 % in 2002 and 150 % in 2003, years when SNCB posted a consolidated loss.

⁽³¹⁾ Available on the web at: <http://www.belgium.be/>

⁽³²⁾ Letter from the Belgian authorities dated 29.8.2003, registered on 29.8.2003 (Loyola de Palacio cabinet incoming mail No 2805), p. 4.

⁽³³⁾ Nera report, p. 58.

⁽³⁴⁾ According to Nera (appendix D.1. p. 7), the debt/equity ratio changed from 0,6 in 1997, 1998 and 1999 to 0,8 in 2000 and 1,0 in 2001.

⁽³⁵⁾ For the period 1998 to 2001, SNCB established the abovementioned ratio by including long-term financial debts due within the year, which explains the difference between 90 % and 80 % for 2001 and a difference for the following years.

3. DETAILED DESCRIPTION OF THE ABX RESTRUCTURING AND PRIVATISATION MEASURES

- (76) The activities of the ABX group were brought together in a holding company called ABX Logistics Worldwide NV/SA ('ABX-WW') ⁽³⁶⁾. In addition, the Air&Sea activities, which hitherto came under the different ABX national entities, are already largely gathered under ABX Logistics Air&Sea Worldwide SA/NV, a subgroup of the newly founded ABX-WW, hereinafter referred to as ABX Air&Sea ⁽³⁷⁾.

This consolidation is part of a thorough restructuring of all the group's activities, begun in 2002. The restructuring also includes both operational measures (integration of different entities, setting-up of a central service, organisation into profit centres, capacity reductions and productivity efforts, etc.) and financial measures intended to restore the group's financial structure and viability. Taking account of these restructuring measures, SNCB signed a sale agreement for ABX-Worldwide group with an investor, subject to the Commission's approval of the restructuring.

The main features of the restructuring are described below.

- (77) The Belgian authorities state that, as a result of this restructuring, ABX-WW returned to operating profitability in 2004 (EBIT of EUR 11,6 million) and should return to net profitability in 2006 (net profit of EUR 10,7 million) ⁽³⁸⁾.

3.1. Integration and reorganisation of the ABX group

- (78) Various measures integrating the companies of the ABX group have been put into effect: integration of the group's management structure (Phoenix programme), the IT systems, financial management and human resources management.
- (79) *Phoenix*. The Belgian authorities state that the programme is intended to integrate the international management of the group's various activities, harness operational synergies, concentrate purchasing volumes at a smaller number of suppliers, strengthen the Corporate Centre by providing it with the IT processes, skills and tools necessary for the performance of its tasks, coordinate commercial and

operational activities between countries and the quality of customer service through 'product' teams, and strengthen local management's desire, and awareness of the need, to work together with the other entities in the group.

- (80) *IT*. The Belgian authorities state that the integration of IT systems is intended to integrate existing systems, rationalise applications and introduce general solutions for the group.

- (81) *Financial centralisation*. The team for the financial management of the group's headquarters was strengthened so as to centralise this function within the group. Thus the financial control and cash management teams were strengthened, and new teams were installed for the consolidation of profits and the management of accounts receivable. The quality of the financial information was improved by the above-mentioned IT integration projects and the standardisation of the financial information transmitted from the countries to group headquarters.

- (82) As part of the financial centralisation, ABX introduced a mechanism for pooling the cash of all the companies in the group. This cash pooling led the ABX group in January 2001 to open, with a guarantee from SNCB, a single cash credit line for a maximum amount of EUR [...] million at a financial establishment.

The Belgian authorities informed the Commission that the lending bank receives a commercial consideration for this line of EUR [...] million, and that there is a consideration of [...] basis points for the guarantee provided in January 2001 by SNCB for the credit line.

⁽³⁶⁾ This consolidation took place on 29 December 2003, except for the international activities of ABX Logistics (France), which were disposed of at the end of December 2004. According to the Belgian authorities, these activities are profitable or close to being so. The entities concerned are ABX Logistics Air&Sea (France) SAS, Road International, Mitjaville S.A.S. and Lacombe Transports Internationaux Sarl.

⁽³⁷⁾ The Air&Sea activities in Belgium, Asia and America have already been consolidated under ABX-Air&Sea. The Air&Sea activities in the Netherlands were so consolidated in early January 2005. The transfer of the Air&Sea activities in Germany was deferred for two reasons: (i) it was apparent that the transfer would generate an accounting profit of EUR [...] million in the books of ABX Logistics (Deutschland) GmbH in the year of the transfer but would subsequently entail a recurrent cash drain of EUR [...] million a year; and (ii) the transaction would make ABX Logistics (Deutschland) lose the financial resources generated by the securitisation of the debts associated with these activities, i.e. EUR [...] million. These resources should be obtained from other sources of financing, which is impossible to achieve while the company's balance sheet structure has not been strengthened.

⁽³⁸⁾ Letter from the Belgian authorities, 9.6.2005. These are updated figures, which may therefore differ from the forecasts of January 2005.

- (83) *Human resources*. A director of human resources for the group was hired in November 2003, with the task of introducing the structures and processes for coordinating the management of the subsidiaries' human resources and common procedures for the recruitment, assessment and remuneration of the group's senior executives and 'high potentials'. A European Works Council will be set up in 2005.

- (84) The Belgian authorities state that the centralisation of the coordination functions makes the central services more efficient. The cost of the central service, which consists of the costs of international customer and/or multiproduct global accounts, central IT costs and the costs of the structure (financial, legal, human resources and commu-

nication), is reinvoiced to the ABX-WW subsidiaries through licence and service fees. The reinvoicing amounts to about [...] % of the turnover of the ABX-WW subsidiaries and covers the costs associated with the protection and use of the brand and all the services which headquarters performs for the subsidiaries.

(85) In addition, citing a recent study ⁽³⁹⁾, the Belgian authorities point out that the costs of the ABX-WW structure are lower than average for groups of similar size, taking all sectors together. As regards the size of the headquarters relative to the size of the group, the figures show that the geometric mean of all the groups studied is 186 staff at headquarters out of a total staff of 10 000. The mean is higher than the figure for ABX, which has 60 staff in the central service out of a total of 10 000.

(86) ABX's operations are divided into a number of profit centres, each being an activity that is meant to be viable in its own right by 2006 (including the Road Domestic activities in Germany, where the difficulties were greatest).

3.2. Measures specific to ABX Germany

(87) *Operational measures.* Apart from the operational restructuring measures described in the initiation of the procedure, additional measures involving the disposal of subsidiaries and activities, closures of agencies and activities, and productivity gains will result in an overall reduction of 64 sites (- 69 %), EUR 184 million in turnover (- 30 %), 1 589 full-time jobs (- 43 %) and 405 062 m² in surface area (- 56 %) ⁽⁴⁰⁾ by the completion of the restructuring plan in principle at the end of 2005, with a return to viability for the group in 2006-2007.

(88) By letter dated 1 December 2005, the Belgian authorities also stated that 'given the unfavourable trend of the market in Germany, and taking the requirements in the Commission's guidelines into account, ABX is working on a plan allowing it to reduce [...] the scope of its domestic road transport activities in Germany. (...)

The plan has not yet been finalised. ABX Logistics can, however, give the Commission a commitment that by [...] it will reduce its domestic road courier service in Germany through closures, disposals or partnerships, with the goal of reducing the current number of agencies (30) controlled by ABX to [...]. ABX could, moreover, remain a [...] shareholder in about [...] of the [...] sites.'

(89) *Productivity gains.* According to the information communicated by the Belgian authorities, the operational

restructuring measures in Germany will generate an improvement (theoretical, at constant turnover) in ABX Germany's operating margin of some EUR 14,6 million.

(90) *Financial restructuring.* SNCB plans to convert a debt of EUR 50 million into capital, to make EUR 100 million of additional equity available and to convert EUR 7,4 million of interest into capital. The measures will be carried out as soon as they have been approved by the Commission. This capital contribution should enable ABX-D to bring its equity level at 31 December 2004 up from — EUR 143 million (since updated to — EUR 141,2 million) to EUR 14,4 million. According to the Belgian authorities, such a total is needed for ABX-D in order to bring about the proposed privatisation of ABX-WW ⁽⁴¹⁾.

(91) *Expected results.* The application of all these measures should, according to the business plan, restore ABX-D to operational viability from 2006 (EBIT of EUR [...] million) and to net viability from 2007 (net profit of EUR [...] million).

3.3. Measures specific to ABX Netherlands

(92) *Operational measures.* Apart from the operational restructuring measures described in the initiation of the procedure, the disposals of subsidiaries and activities, closures of agencies and subsidiaries, and productivity gains will result in an overall reduction of 4 sites (- 44 %), EUR 14 million in turnover (- 21 %), 93 FTE staff (- 22 %) and 18 400 m² in surface area (- 28 %).

(93) *Productivity gains.* According to the information communicated by the Belgian authorities, the operational restructuring measures in the Netherlands will generate an improvement (theoretical, at constant turnover) in ABX Netherlands' operating margin of some EUR 5,7 million at the latest by the return of the group to viability, expected for 2006-2007.

(94) *Financial restructuring.* SNCB plans to convert a debt of EUR 10 million and interest of EUR 0,6 million into capital, as soon as these measures have been approved by the Commission. This capital contribution should enable ABX-NL to bring its equity level at 31 December 2004 up from — EUR 1,3 million (since updated to — EUR 1,5 million) to EUR 9,3 million. According to the Belgian authorities, such a total is needed for ABX-NL in order to bring about the proposed privatisation of ABX-WW ⁽⁴²⁾.

⁽³⁹⁾ Source: Collis D., Young D. and Goold M., 'The Size, Structure and Performance of Corporate Headquarters', Harvard Business School Strategy Working Papers Series, 2003; ABX Logistics.

⁽⁴⁰⁾ Letter from the Belgian authorities, 14.1.2005, p. 23.

⁽⁴¹⁾ Letter from the Belgian authorities, 24.2.2005, p. 12.

⁽⁴²⁾ Letter from the Belgian authorities, 24.2.2005, p. 12.

- (95) *Expected results.* The application of all these measures should, according to the business plan, restore ABX-NL to operational viability from 2005 (EBIT of EUR [...] million) and to net viability from 2006 (net profit of EUR [...] million).

3.4. Divestiture of domestic road activity in France

- (96) The Belgian authorities stated that, faced with the difficulties of ABX-F, regarded as critical for the viability of the whole ABX group, SNCB was divesting the domestic road activities of ABX France through an MBO. Since the MBO was described in detail when the procedure was extended, it is only pointed out here briefly that the domestic activities of ABX-F were sold in an MBO at a negative market price of EUR [...] million. The sale became effective on 31 March 2005 at midnight. The other activities of ABX-F were transferred to ABX-WW.
- (97) Two auditing firms, Deloitte and Ernst & Young Transaction Advisory Services, reached the conclusion that the negative sale price of EUR [...] million for the domestic division of ABX-F is appropriate and represents a market value.
- (98) According to the Belgian authorities, 'SNCB decided not to continue with its investment in ABX France: the recapitalisation measures notified in February 2003 will not be implemented. The measures concerning France — including the MBO — were part of a rationale of controlled, socially responsible disengagement, allowing more than 2 300 jobs to be saved. SNCB is withdrawing from France: once the MBO has been completed, the only activity of ABX

France is three profitable logistics contracts, which will be maintained until the end of [...] and which generate a turnover of only EUR 29 million. ABX France will then no longer have any operational activity and will probably be put into liquidation' ⁽⁴³⁾. 'Therefore, while the divestiture in France may be considered to be part — in the broad sense — of the restructuring of the ABX Logistics group, the activities of ABX Logistics in France are not being restructured in the same sense as the measures notified for Germany and the Netherlands' ⁽⁴⁴⁾.

3.4.1. Selection of an MBO

- (99) It should be noted that with regard to the domestic part of ABX's activities the Belgian authorities compared the MBO scenario (management buyout) with a voluntary liquidation scenario and concluded that the MBO was the less costly solution. When it extended the procedure, the Commission questioned this reasoning, saying that it would also be pertinent to compare the MBO with a compulsory liquidation scenario, on the grounds that a private investor placed in a comparable position would seek the least costly solution, without excluding a court-ordered liquidation if this should prove more attractive economically.
- (100) The Belgian authorities maintain that a court-ordered liquidation would in any event be more expensive than the MBO and also that, despite the Commission's doubts, the comparison with a voluntary liquidation is not only socially more responsible, but is still the pertinent comparison, for the reasons summarised below.

3.4.2. Cost of the different scenarios

- (101) The Belgian authorities compared the costs of the three options — MBO, voluntary liquidation and court-ordered liquidation — as detailed in the table below ⁽⁴⁵⁾:

	MBO	Voluntary or amicable liquidation	Court-ordered or compulsory liquidation
Negative equity at 30/9/2004	[...]	[...]	[...]
Losses expected in last quarter 2004	[...]	[...]	[...]
Negative equity estimated at 31/12/2004	[...]	[...]	[...]
Of which, debt to SNCB	[...]	[...]	[...]
Reductions in value of intangible assets	[...]	[...]	[...]
Capital gain on sale of Contract Logistics to MGF, not yet recorded	[...]	[...]	[...]
Capital gain on transfer of Eurocargo, Air&Sea, Mitjavile and Lacombe	[...]	[...]	[...]
Finalisation of current redundancy programme (PSE4) — 2004 expenditure	[...]	[...]	[...]
Coverage of losses 2005 for activities not included in the MBO	[...]	[...]	[...]

⁽⁴³⁾ Letter from the Belgian authorities, 9.6.2005, p. 18.

⁽⁴⁴⁾ Letter from the Belgian authorities, registered on 16.6.2005 under No 15050, p. 18.

⁽⁴⁵⁾ Letter from the Belgian authorities, 2.9.2005.

	MBO	Voluntary or amicable liquidation	Court-ordered or compulsory liquidation
Cash impact for SNCB before choice of divestiture scenario	[...]	[...]	[...]
(Negative) transfer price — maximum	[...]		
Coverage of losses during redundancy programme negotiation period — 2005		[...]	
Coverage of losses for 4 extra months — 2006 (risk)		-15	
New redundancy programme for remaining staff		[...]	
Termination of lease contracts		-8	
Termination of other contracts		-6	
Risk [...] for SNCB [...]			
Commercial debts to suppliers at 31.12.2004			
Company's debts to staff			
Redundancy programme for staff of ABX France			[...]
Compensation of creditors — Leases			-8
Compensation of creditors — Other contracts			-6
Risk of the SNCB guarantee being used for debts to Soc. Gen/Natexis			
Loss of value of the ABX LOGISTICS group			-112
Cost of additional redundancies following drop in volume			[...]
Impact on the need for operating capital			-45
Impact on cost of financing SNCB's bank debt			-14
Impact on cost of financing bank debt of ABX LOGISTICS			-7
Total cost SNCB	- 137,5	-183	-346

(102) As for the difference in cost between the MBO and the voluntary liquidation (basically the cost of a redundancy programme for the remaining staff and the coverage of losses while the programme was being negotiated), the Belgian authorities state that this was verified and confirmed by Ernst & Young. The accounting firm concluded as follows: '... we conclude that on an overall level the price differential between the scenario of the Management Buy-Out and the scenario of the Liquidation of Domestic Road Transport Activities amounting to EUR 45,5 million to be fair and reasonable'.

(103) According to the Belgian authorities, the cost of the court-ordered liquidation is much higher than the net assets of ABX France at the time when the transaction was effected (i.e. — EUR [...] million) on account of:

- (a) the risk for SNCB [...];
- (b) the loss of customers that would result from the deterioration of ABX's image, and the impact of that loss on the value of the ABX Logistics Worldwide group;
- (c) the costs of making staff redundant who had become surplus following the loss of customers;

(d) the impact on the group's need for working capital, and

(e) the impact on the cost of financing the ABX Logistics group and SNCB itself following a default by one of their subsidiaries.

(104) Risk of [...] (EUR [...] million). According to the Belgian authorities ⁽⁴⁶⁾, 'the scenario of a court-ordered liquidation would expose SNCB to a [...] risk that would call its responsibility into question. [...] ⁽⁴⁷⁾, [...] ⁽⁴⁸⁾, [...] ⁽⁴⁹⁾' ⁽⁵⁰⁾.

(105) The Belgian authorities also cite as an example a recent decision [...] ⁽⁵¹⁾.

(106) The Belgian authorities consider that 'the Commission should confine itself to ascertaining the existence of the risk and its plausibility, and to establishing that, faced with that risk, a private operator would have probably sought, in the same situation, to avoid a court-ordered liquidation and opted for a voluntary liquidation. [...] ⁽⁵²⁾.

⁽⁴⁶⁾ Letter from the Belgian authorities dated 9.6.2005, registered on 16.6.2005 under No 15050, p. 22.

⁽⁴⁷⁾ [...].

⁽⁴⁸⁾ [...].

⁽⁴⁹⁾ [...].

⁽⁵⁰⁾ Letter from the Belgian authorities dated 9.6.2005, registered on 16.6.2005 under No 15050, p. 22.

⁽⁵¹⁾ Letter from the Belgian authorities, 9.6.2005, Annex C 4.

⁽⁵²⁾ Letter from the Belgian authorities dated 9.6.2005, registered on 16.6.2005 under No 15050, p. 22.

(107) The French law firm Grand, Auzas et Associés drew SNCB's attention to this risk at the end of 2004 and confirmed its analysis of it in writing.

(108) Similarly, the law firm Linklaters informed the Belgian authorities that if '[...]' ⁽⁵³⁾ '[...]' ⁽⁵⁴⁾.

(109) If SNCB [...], the Belgian authorities consider that it should have at least financed a redundancy programme for the remaining 1 300 employees, i.e. at a cost of EUR [...] million, and compensated the creditors of ABX France (EUR 8 million for the property creditors and EUR 6 million for the others).

(110) *Loss of value for the ABX group following the loss of customers (EUR 112 million).* The Belgian authorities consider that a court-ordered liquidation of the domestic road activity in France would have caused a serious and permanent deterioration in the group's image and reputation and entailed a loss of customers detrimental to the group as a whole. Their estimate of the loss of value for the ABX group is given in the table below.

The Belgian authorities consider that the loss of turnover would have been partly compensated by the immediate disappearance of the direct transport costs. But the indirect costs (structural costs) could have been reduced only gradually (by staff redundancies in proportion to the volume of activities lost) over a three-year period in order to return to the situation prior to the application for a court-ordered liquidation. The impact of the loss of customers on operating profit (EBIT) would have been greatest, therefore, in the first year and would have declined in the following two years until the return to the situation prior to the application for a court-ordered liquidation.

Reduction in the value of the group due to the decline in volume following the court-ordered liquidation of ABX LOGISTICS France S.A.

EUR million, based on the forecasts available at end 2004		2005	2006	2007	Total
In France					
Road International France					
Budgeted gross margin	[...]	[...]	[...]		
Loss of customers in %	30 %	15 %	7,5 %		
Estimated impact on EBIT	[...]	[...]	[...]		8,8
Air&Sea France					
Budgeted gross margin	[...]	[...]	[...]		
Loss of customers in %	10 %	6 %	2 %		
Estimated impact on EBIT	[...]	[...]	[...]		3,1
Outside France					
Road Germany					
Budgeted gross margin	[...]	[...]	[...]		
Loss of customers in %	30 %	15 %	7,5 %		
Estimated impact on EBIT	[...]	[...]	[...]		46,7
Air&Sea Germany					
Budgeted gross margin	[...]	[...]	[...]		
Loss of customers in %	5 %	3 %	1 %		
Estimated impact on EBIT	[...]	[...]	[...]		3,1
Road Domestic Netherlands					
Budgeted gross margin	[...]	[...]	[...]		
Loss of customers in %	30 %	15 %	7,5 %		
Estimated impact on EBIT	[...]	[...]	[...]		3,3

⁽⁵³⁾ [...]

⁽⁵⁴⁾ Letter from the Belgian authorities, 9.6.2005, Annex C.2.

EUR million, based on the forecasts available at end 2004		2005	2006	2007	Total
Road Domestic Belgium					
	Budgeted gross margin	[...]	[...]	[...]	
	Loss of customers in %	30 %	15 %	7,5 %	
	Estimated impact on EBIT	[...]	[...]	[...]	16,5
Other countries and product lines					
	Budgeted gross margin	[...]	[...]	[...]	
	Loss of customers in %	5 %	3 %	1 %	
	Estimated impact on EBIT	[...]	[...]	[...]	25,2
Total					
	Budgeted gross margin	455,6	489,7	519,7	
	Loss of customers in %	14 %	7 %	3 %	
	Estimated impact on EBIT	61,6	34,4	16,4	112,4

(111) In this respect the Belgian authorities also stated that, according to the Court of Justice of the European Communities, 'It must ... be accepted that a parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. Such decisions may be motivated not solely by the likelihood of an indirect material profit but also by other considerations, such as a desire to protect the group's image or to redirect its activities' ⁽⁵⁵⁾.

(112) *Costs of shedding staff who had become redundant following the fall in volume (EUR [...] million).* As indicated above, the Belgian authorities assumed that the indirect costs could have been gradually reduced by layoffs over a three-year period in order to return to equilibrium. The estimates adopted by the Belgian authorities are approximately 1 000 layoffs (i.e. some 550 persons in Germany, 200 in France, 100 in Belgium and 200 in the rest of the world).

(113) *Impact on the ABX group's need for working capital (EUR 45 million).* The Belgian authorities consider that a court-ordered liquidation of the group would have led to significant pressure from the suppliers of the rest of the group to renegotiate the time limit for payment of their invoices (e.g. immediate payment required instead of payment within 30 days of the end of the month). They calculate that a reduction of 7 days in the average time for paying suppliers would have led to an immediate need for cash of about EUR 45 million.

(114) *Impact on the average cost of financing for SNCB and ABX Logistics Worldwide (EUR 14 million + EUR 7 million).* According to the Belgian authorities, the average cost of financing for SNCB and ABX Logistics at their respective banks could have been increased if one of their subsidiaries

had suspended payments. The potential extra cost of financing is estimated at 100 basis points (1 %) for the bank debt of ABX Logistics (about EUR 240 million) and at 50 basis points for the bank debt of SNCB (about EUR 900 million) not assumed by the Belgian state. On the premise that the extra cost would be neutralised over three years, the Belgian authorities consider that the extra cost of financing SNCB's debt would therefore be about EUR 14 million and that of financing the debt associated with ABX Logistics would be about EUR 7 million.

3.4.3. Other considerations put forward by the Belgian authorities

(115) As well as the comparisons of the estimated costs of the different scenarios, the Belgian authorities consider that other factors are taken into account by investors when the question of the disposal or closure of an activity arises.

(116) Thus they consider that an adjudication of bankruptcy could have caused industrial trouble leading to an interruption of ABX Logistics' activities at the sites not affected by the liquidation (international activities), which would have had an impact on traffic to other countries or even on SNCB's traffic. A private company in the same situation would, according to them, also have taken account of the very considerable, similar risks and opted for voluntary liquidation.

(117) More generally, according to the Belgian authorities, 'it is not correct that a private investor, especially a European one of the size of SNCB, would definitely choose compulsory liquidation if it were less expensive than voluntary liquidation. Other private companies, in the same circumstances, have opted for a voluntary liquidation

⁽⁵⁵⁾ Case C 303/88 *Italian Republic v Commission (Eni-Lanerossi)* [1991] ECR I-1433, paragraph 21.

scenario with the financing of a redundancy programme for the workers affected by the closure of activities' ⁽⁵⁶⁾. According to the assessment requested by the Belgian authorities from a law firm specialising in labour law (Claeys & Engels), there are several recent examples of private companies which have adopted such conduct.

(118) The Belgian authorities also state that the private company TNT acted in the same way as SNCB by deciding to divest itself of its loss-making national transport activities and part of its contract logistics activities in France rather than have them wound up voluntarily or by a court ⁽⁵⁷⁾.

(119) Lastly, with regard to corporate restructuring, the Belgian authorities quote the Commission communication of March 2005, which states in particular that 'the preservation of social cohesion, which is a distinctive characteristic of the European social model, requires the introduction of accompanying policies designed to reduce the social costs to a minimum and to promote the search for alternative sources of jobs and income. (...) The restructuring of enterprises is often seen to be an essentially negative phenomenon, and its immediate effects on employment or working conditions are highlighted in most cases. (...). It is therefore necessary to accompany these changes in such a way as to ensure that their effects on employment and working conditions are as short-lived and limited as possible' ⁽⁵⁸⁾.

(120) In conclusion, the Belgian authorities state that SNCB chose the MBO scenario for the following reasons:

- (a) cost and risk significantly less than in the court-ordered or voluntary liquidation scenarios;
- (b) limited impact on the value and image of the ABX Logistics Worldwide group;
- (c) more acceptable social consequences (preservation of 1 300 jobs in France in the new private company Cool Jet);
- (d) social responsibility of SNCB towards its suppliers and creditors to act in a responsible way, like any other European undertaking of its size.

3.5. Reduction of the ABX network

(121) The restructuring of the ABX group involved considerable reductions in its freight forwarding capacity. In this activity, capacity is measured in an appropriate way by indicators such as invoiced turnover, number of sites, warehousing area or number of wage-earners.

(122) According to the Belgian authorities, the total operational restructuring measures applied to the ABX-WW group go significantly beyond the measures originally planned.

The original plan provided for the sale of 3 subsidiaries with a turnover of EUR 98,5 million, the closure of 7 agencies and 3 warehouses in Germany, 4 agencies in France, 2 agencies in the Netherlands, and a reduction of 690 FTE (including the impact of the agency closures).

The capacity reduction measures notified during 2005 will have the effect by the end of the restructuring exercise of reducing the number of sites by 176 (- 31 %), turnover by EUR 624 million (- 21 %), staff by 5 827 FTE (- 40 %) and surface area by 917 377 m² (- 54 %) ⁽⁵⁹⁾.

The additional commitments regarding Germany, which Belgium made in November 2005, will increase this reduction.

(123) The Belgian authorities state that the area reductions and disposals carried out since 2002 and those provided for recently are as large as possible, and that further reductions would lead to the dismantling of the ABX Logistics network. In their view, the existence of an international network is essential for the strategic and commercial positioning of ABX and its competitors; dismantling the network would have a serious adverse effect, which would jeopardise the group's competitive structural position in the market, the possibility of carrying out the restructuring plan and the group's attraction for potential partners in the context of a privatisation.

They consider in this respect that the divestiture of the domestic parcel delivery services in France cannot be replicated in Germany; the integration of the domestic and international activities of the group's companies in Germany and the Netherlands is more advanced than in France because of the integration of IT operations and systems and the high proportion of common customers; this greater integration is the result not only of the structure of the German market but also of the history of ABX Logistics — the international and domestic departments in France having been integrated in 2003 only and in a partial manner, whereas in Germany domestic parcel delivery services and international freight forwarding by road had coexisted in a single entity since the merger in 1996 of THL and Bahntrans (which became ABX in Germany).

⁽⁵⁶⁾ Letter from the Belgian authorities dated 9.6.2005, registered on 16.6.2005 under No 15050, p. 21.

⁽⁵⁷⁾ Letter from the Belgian authorities, 2.9.2005, p. 6.

⁽⁵⁸⁾ Commission communication — Restructuring and employment — anticipating and accompanying restructuring in order to develop employment: role of the European Union, COM(2005) 120 final, pp. 2-3.

⁽⁵⁹⁾ According to the data at the Commission's disposal, this consists basically of warehousing area.

They add that, both in Germany and the Netherlands, a further decline in the density of the Road network would lead to exit from the German market, given the comparison of the number of sites owned by ABX Logistics and its competitors in each of these countries.

Comparison of the number of Road sites of ABX Logistics and its main competitors in the German and Dutch markets (before allowing for further reduction commitments in Germany) ⁽⁶⁰⁾

Germany		Netherlands	
Schenker/Stinnes	57	DHL/Danzas (Van Gend&-Loos)	17
IDS (Elix)	37	Frans Maas	13
Dachser	34	Vos Logistics	10
DHL/Danzas	32	Wim Bosman	8
ABX Logistics	30	ABX Logistics	4

Source: Websites; estimates by ABX Logistics

They emphasise that the divestitures occur at a time when ABX's main competitors are acquiring parcels delivery and groupage companies, particularly in Germany, with a view to expanding their own domestic courier network in that country.

3.6. Loans granted by SNCB to ABX in 2002

(124) SNCB granted loans to various ABX subsidiaries.

In April-May 2002, SNCB granted its Belgian subsidiary ABX Logistics group NV three loans (EUR 50 million, EUR 10 million and EUR 29 million), which were remunerated at variable rates. According to the Belgian authorities, the average rate for these loans was [...] %, [...] % and [...] % respectively.

On 30 June 2004 the loans were called in by SNCB and allocated direct to ABX Germany, ABX Netherlands and ABX France at the respective interest rates of [...] %, [...] % and [...] %.

3.7. Privatisation of ABX-WW

(125) According to the Belgian authorities, 'SNCB confirmed its willingness to privatise ABX Logistics Worldwide within six months of the Commission decision approving the restructuring plan. (...) A binding agreement in principle ("Term sheet") was concluded by SNCB Holding with a potential buyer and signed on 22 March 2005. The agreement was subject, however, to a condition precedent that the Commission would adopt a positive decision authorising the restructuring plan.' ⁽⁶¹⁾

(126) The Belgian authorities stated that, following its decision to restructure and dispose of ABX, SNCB started negotiations with various potential buyers. Accordingly, it mandated ABX-WW and Petercam to represent it for the purposes of the sale.

(127) In June 2003 ABX-WW began preliminary discussions with an initial partner, an industrial group. In March and June 2004 a draft memorandum of understanding was drawn up. Between June and August 2004 the negotiations were suspended for reasons peculiar to this initial potential partner.

(128) In June 2004 ABX-WW contacted a second industrial partner. However, in September 2004, this second potential partner indicated that it wanted to put an end to the negotiations with ABX-WW.

(129) At the end of August 2004 contact was established with a third potential partner, another industrial group. However, these negotiations ended when successful talks were held with a fourth partner, which in November 2004 transmitted to SNCB the above-mentioned binding offer for the takeover of ABX-WW. It was with this candidate, hereinafter referred to as 'Yvan', that SNCB signed the sale agreement and the above-mentioned Term Sheet (letter of intent) in March 2005.

(130) According to the Term Sheet, Yvan undertook, subject to a positive decision from the Commission, to invest an amount of between EUR [60 and 150 ("")] million, of which EUR [...] million for the payment of ABX Logistics Worldwide shares to SNCB Holding. The remainder of the investment by Yvan would be used as follows:

- (a) EUR [...] million to provide back-to-back cover (borrowing and on-lending operations) for an SNCB guarantee for a building in [...];
- (b) EUR [...] million in the form of a subordinated loan granted to ABX Logistics Worldwide in order to finance:

- the transaction costs, including the costs of Yvan and in particular its strategic, legal and financial advisers. These costs are estimated to be between EUR [...] and [...] million;

- the financing needs associated with possible withdrawal or possible requests for guarantees on the part of certain financial institutions following the change of shareholder. The balance of the amount of EUR [...] million after transaction costs, i.e. EUR [...] to [...] million, is intended to meet the need for financing resulting from such withdrawals.

⁽⁶⁰⁾ Table submitted by the Belgian authorities.

⁽⁶¹⁾ Letter from the Belgian authorities, 9.6.2005, p. 26.

- (131) The Term Sheet provides that, subject to the usual conditions and due diligence in disposal cases, Yvan and SNCB will be obliged to sell the ABX group as soon as the condition precedent concerning the Commission's decision is removed.

If this condition is not removed, Yvan and SNCB could in certain circumstances no longer be bound by the sale agreement.

- (132) Lastly, the Belgian authorities stated that 'after the privatisation of ABX-WW, SNCB will be free from all off-balance sheet commitments, guarantees and comfort letters. [...] There will no longer be any need for the comfort letters, which will cease to apply once the financial measures for the recapitalisation of the German subsidiary are authorised by the Commission and implemented' ⁽⁶²⁾.

4. OBSERVATIONS FROM INTERESTED PARTIES

4.1. Initiation of the procedure

- (133) In light of the circumstances of the case, and in particular the conclusions outlined by the Commission in the initiation of the procedure, the following interested parties have separately and independently submitted the following observations.
- (134) Firstly the arguments of an initial group of third parties were presented, namely 1. Association for the promotion of competition and fair play in the haulage, logistics and transport industry, Cologne, 2. H.A.L.T.E., 3. Ziegler, 4. Freshfields, Bruckhaus, Deringer (representing Deutsche Post AG), 5. The Professional body of Flemish freight transporters and logisticians (SAV). Their arguments are summarised below ⁽⁶³⁾.
- (135) *Regarding the restructuring plan.* The interested parties stress the intrinsic weaknesses of the original restructuring plan proposed by ABX. It is disputed whether the entities concerned are eligible for restructuring aid since they are part, at least financially, of a group of companies which should be able to co-finance the proposed measures. It is stressed that restructuring aid can be authorised only in conjunction with a viable restructuring plan ensuring the long-term restoration of profitability. However, the interested parties take the same line as in the initiation of the procedure, which found that, given the lack of funding and that the operational restructuring measures are inadequate, this plan would not restore viability. It follows that approving aid which does not lead to viability would distort competition in a way contrary to the Community's interests.
- (136) In general terms, the probability of restoring a normal level of capital profitability was not made explicit, any more so than the conditions for this development in terms of overall market growth, increases in market share, improving productivity and quality of service and changing client behaviour.
- (137) The planned restructuring and rationalisation measures are adaptations to changes in the parcel service and logistics business which ABX should have carried out several years ago and which other companies in the sector have already completed at considerable cost. Approval of the plan by the Commission would only prolong a long-standing distortion of the market and shift the financial difficulties onto the companies which have already restructured, in particular medium-sized, privately funded businesses, even confronting some of them with insurmountable difficulties.
- (138) *Regarding state interference.* The delays in restructuring ABX are to a large extent the result of continued interference by SNCB in the daily running of ABX and the fact that members of ABX's board of directors are appointed for political reasons. Some interested parties point out the lack of transparency in the selection of directors both in the ABX Logistics group and, therefore, in ABX Logistics Worldwide. These directors are appointed in a discretionary way by the management of SNCB based on political criteria, which prevents the company being managed autonomously. It was noted in particular that management decisions are taken for ABX either by the Council of Ministers or the management of SNCB, and that it cannot be claimed that ABX has been managed by its own executive committee.
- (139) *Regarding the restructuring of the subsidiary in France.* The sum needed to refinance this subsidiary has been underestimated. The original plan underestimates the level of aid required simply to balance the losses incurred since the network of ABX subsidiaries was set up. Overall, the business recovery forecasts are unrealistic and cannot be achieved without subsequent additional aid, and without capturing the market to the detriment of competitors through a policy of market disruption.
- (140) *Regarding the privatisation of ABX.* Some interested parties called for ABX to be privatised. One criticism voiced is that this privatisation is merely a plan, without any signs to indicate that such a sale is actually going to be made.
- (141) *Regarding the purchase and expansion of the ABX network.* The third parties mentioned above feel that ABX has operated in the parcel delivery and logistics services sector since 1998 through illegal state aids which have seriously distorted competition on the market. It was only possible to create the ABX network because of massive sums of state aid granted by SNCB.
- (142) The following is a list of arguments put forward by a second group of interested third parties, namely 6. FGTE CFDT Route (Federal Road-Users' Union), 7. National Federation of Transport Unions CGT, 8. the Royal Belgian

⁽⁶²⁾ Letter from the Belgian authorities, 9.6.2005.

⁽⁶³⁾ Although not all the arguments set out below have been made individually by the above parties, they still summarise the main points made in this group of comments.

Road Hauliers' Federation, 9. ABX Logistics — representatives of the German group ABX Logistics. Their arguments are summarised below ⁽⁶⁴⁾.

- (143) The interested parties made several comments on the situation of ABX's employees. They point out that several hundred employees have already been affected by earlier social plans in France and that jobs in logistics are under threat. The representatives of the German subsidiary note also that around 4 000 jobs have been lost since 1998, and that 2 000 related sub-contracting jobs have also been cut. In addition they point out that ABX is on the verge of being privatised and that the work done to this end should not be undone.
- (144) The National Federation of Transport Unions CGT calls more specifically for the creation of a mandatory social pricing policy in order to fight 'economic dumping' which appears to be practised by ABX's competitors in France.
- (145) However, the Royal Belgian Road Hauliers' Federation (FRBT) points out that ABX cooperated by voluntarily showing it its books. The FRBT can therefore confirm that current rules on licences and vehicle insurance are complied with.
- (146) It is also noted that the management of ABX (Belgium) S.A. sent the Commission, after the deadline for comments to be submitted, a petition from drivers working in ABX Belgium's various regional distribution centres explicitly calling for a positive decision in the ABX restructuring case.

4.2. Extension of the procedure

- (147) The following interested parties have separately and independently submitted the following observations with the aim of extending the procedure.
- (148) Firstly the arguments of an initial group of third parties are presented, namely 1. 'HALTE'; 2. Freshfields Bruckhaus Dehringer; 3. BCA — Belgian Courier Association; 4. Mr Robert Ziegler ⁽⁶⁵⁾; 5. Febeta (Royal Belgian Federation of Carriers and Logistics Service Providers); 6. SAV — the Royal Professional Association of Freight Transporters in the Flemish Region and Brussels Capital Region. Their arguments are summarised below ⁽⁶⁶⁾.
- (149) These parties essentially express their doubts regarding the compatibility of aid received by ABX and call for fair competition conditions to be restored, in particular in the

light of the increase in aid notified and taking account of the considerable share of this highly competitive market held by ABX, particularly in Germany. Any aid approved should, however, be accompanied by sufficient concessions from ABX. Regarding the sale of part of ABX France, the parties call for checks to ensure the sale was made without giving rise to new aid payments. Selling ABX is considered a positive step provided that it is done in line with market conditions. However, the sale should only lead the Commission to take a less severe decision regarding the aid received by ABX if it is not sold.

- (150) Furthermore, Mr Ziegler indicated that one repayment of a EUR 140 million loan granted to ABX was not made, that there is a risk that ABX will be given an advantage when the ABX group is privatised given the conditions of this privatisation, that SNCB did not go through with the sale of ABX-France, that it is unrealistic to restructure ABX under current management and business strategy conditions and that the impact of ABX going bankrupt would be significant.
- (151) The following is a list of arguments put forward by a second group of interested third parties, namely 1. ABARENT N.V., 2. DOL & SERVICES, 3. Pierre Lepoint, 4. Geert Lagae BVBA, 5. WEVETRA — Werner Vranckx Transport, 6. Claude Bogaerts, 7. Johan Vergote, 8. Cooljet, 9. UPTR — the Professional Road Transport Union, 10. Van Hauwermeiren Transport 'BA.AN' BVBA, 11. SD Transport BVBA, 12. Gincotrans, 13. Vervoer Marc Cobbaert, 14. François Timmermans, 15. Tractrans, 16. GPF, 17. Transport Fabrice, 18. SOS Transport, 19. Eddy Ommeslag. Their arguments are summarised below ⁽⁶⁷⁾.
- (152) Most of these third parties indicated that they did not wish the Commission to jeopardise the jobs of thousands of subcontractors working for ABX by adopting a negative decision.
- (153) Cool Jet stated that the activities acquired in the MBO could be viable following recovery, and that this should be carried out in line with a detailed strategic plan of action within 3 years of work resuming; the sale price takes account of reasonably expected and budgeted losses; the activities taken over do not account for a significant market share (1,5 % of the parcel and express delivery market in France) and lastly that Cool Jet employs 1300 people, jobs which would have been lost if Cool Jet had not been able to purchase the activities in question.

⁽⁶⁴⁾ Although not all the arguments set out below have been made individually by the above parties, they still summarise the main points made in this group of comments.

⁽⁶⁵⁾ According to the letter sent by the Chairman of the Board of Directors of the Ziegler Group dated 18.8.2005, Mr Robert Ziegler is not authorised to address the Commission alone on behalf of the Ziegler Group or Ziegler SA.

⁽⁶⁶⁾ Although not all the arguments set out below have been made individually by the above parties, they still summarise the main points made in this group of comments.

⁽⁶⁷⁾ Although not all the arguments set out below have been made individually by the above parties, they still summarise the main points made in this group of comments.

(154) However, UPTR states that it was able to access ABX's books in all transparency and notes the group's improved results. The group became profitable at operational level for the first time in 2004. UPTR encourages the Commission to take a decision quickly in order to enable ABX to be privatised, thereby ensuring the stability of a loyal operator whose presence benefits the Belgian road transport sector.

(155) The Commission also received, after the procedural deadlines, a complaint regarding the sale of ABX-WW claiming that SNCB Holding did not comply with the conditions of a transparent, open and non-discriminatory procedure when privatising ABX Logistics and thereby deterred the investors lodging the complaint.

5. COMMENTS FROM BELGIUM

5.1. Initiating and extending the procedure

(156) The basic points made in Belgium's comments regarding the initiation and extension of the procedure are mainly set out in the descriptive section. The other points are summarised below.

(157) *Regarding the imputability of some actions to the Belgian State.* The Belgian authorities have pointed out throughout this case that the Belgian State was in no way involved within the meaning of the Court of Justice's *Stardust* decision in SNCB's decision-making regarding ABX Logistics. They also reiterated that the onus is on the Commission to prove any such imputability.

(158) Regarding investments in ABX, the Belgian authorities have repeated throughout the proceeding that the State did not intervene in decisions taken by SNCB.

(159) Regarding the press release from the Council of Ministers of 22 February 2002, the Belgian authorities pointed out ⁽⁶⁸⁾ that:

(a) 'the public authorities cannot legally impose decisions or guidelines on the managing bodies of autonomous public companies (such as the SNCB) in matters which do not concern their public service task (such as the management of ABX Logistics)'.

(b) 'in the press release of 22 February 2002 the Council of Ministers merely expressed its support for some guidelines on the restructuring of ABX Logistics (guidelines which in any case were not finally accepted by SNCB's board of directors, except for one which it had already adopted itself before 22 February 2002)'.

(c) 'the fact that at their inter-cabinet meetings or on other occasions the public authorities were made aware of reports or studies pertaining to SNCB and ABX Logistics is simply the normal behaviour of a

shareholder who ensures that he keeps abreast of the major developments in his investments'.

5.2. Reply from the Belgian authorities on the observations made by third parties

(160) In response to the observations made by the interested parties regarding the selection of directors on the basis of their political affiliation, the Belgian authorities state that the operations of ABX Logistics do not concern SNCB's public service tasks. These activities, and management of them, therefore come completely under the autonomous management of the SNCB. Consequently, the procedure for appointing directors for ABX Logistics is simply that laid down in Belgian law for every public limited company to which that law applies. The appointment of directors to ABX Logistics or its subsidiaries thus complies with transparent procedures laid down in law, and is therefore not done arbitrarily on the basis of political affiliation.

(161) *Regarding the funding of the ABX Logistics network.* The Belgian authorities confirm that SNCB's balance sheet structure was healthy until 2001 and that the consolidated result was in the black between 1998 and 1999.

(162) *Belgium's arguments regarding the (re)investments.* In addition to the indications from the Belgian authorities regarding the (re)investments as summarised in the statement of facts, the Belgian authorities also point out that SNCB's timely intervention regarding the subsidiaries in question (Germany, France, the Netherlands, Ireland, Portugal, Belgium) is in line with the principle of the private investor in a market economy. What is more, it should be noted that the interventions concerning ABX Logistics Singapore are not covered by Article 87 of the Treaty.

(163) Regarding the comments made by third parties on the extension of the procedure, the Belgian authorities point out that in their previous reactions they have already responded to comments which only echo the Commission's misgivings.

(164) Regarding the statement by Mr Robert Ziegler, the Belgian authorities state that the Commission has been notified of the temporary loan of EUR 140 million and the new measure aimed at capitalising this loan. Neither SNCB nor ABX can make any commitment pending approval. The same applies to the contribution of EUR 157,4 million of own funds for restructuring ABX-Germany as well as for the other notified measures. Regarding the potential advantage which ABX could gain through being privatised, the Belgian authorities refer to the 'fairness opinion' prepared by KPMG and sent to the Commission which indicates that 'the terms of the proposed sale to [Yvan] are

⁽⁶⁸⁾ Letter from the Belgian authorities, 29.8.2003, p. 16.

fair and reasonable and represent fair market value'. Regarding the alleged failure to sell ABX France, the Belgian authorities note that they indicated which parts were sold. Regarding the conditions of this sale, they refer in particular to the report by Ernst & Young which states that 'the price valuation for Road Domestic Transport Activities amounting to (...) is fair'. Finally, regarding the question on the consequences of the possible bankruptcy of the ABX group, the Belgian authorities can only stress the serious consequences both for ABX Logistics Worldwide and for SNCB Holding were the Commission to adopt even a partially negative decision.

(165) *Sale of ABX-WW*. According to the Belgian authorities, SNCB Holding was under no obligation to privatise ABX Logistics Worldwide by issuing an invitation to tender.

(166) The Belgian authorities point out that close examination of the Commission's state aid practices relating to privatisations shows that, in the absence of an invitation to tender, the Commission only checks that assets are sold at market price on the basis of an assessment by an independent expert. Therefore, in line with this, the Belgian authorities submitted to the Commission an independent assessment, carried out by the consultants KPMG Corporate Finance, of the conditions of the sale of ABX Logistics Worldwide.

6. COMMISSION'S ASSESSMENT

6.1. Presence of state aid

(167) Under Article 87(1) of the 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 shall, insofar as it affects trade between Member States, be incompatible with the common market'.

(168) Firstly the Commission notes that the above measures concerned a number of companies which had formed part of the ABX network since it was established and which had then been integrated into the ABX group when the holding company ABX-WW was founded. It considers that even before this holding company was legally established these companies formed, within the SNCB group, a distinct financial unit ('the ABX group') which should be seen as the relevant entity in the following assessment.

(169) The Commission notes straight away that three of the four criteria set out in Article 87(1) of the Treaty are met ('favouring certain undertakings' 'threatening to distort competition' and 'affecting trade between Member States').

The funds which the SNCB made available to the ABX group favour that company over other companies operating on its markets.

By exclusively favouring the ABX group or its subsidiaries, these measures distort or threaten to distort competition in those activities which are subject to free competition.

Lastly, these measures affect trade between Member States as the investigated competitive activity is also carried out in several other Member States. This conclusion also applies to measures favouring the group's companies operating outside the Community. Firstly, in accordance with the 'Tubemeuse' decision⁽⁶⁹⁾ and taking account of the interdependence between the markets on which Community undertakings operate, it is possible that aid might distort competition within the Community, even if the undertaking receiving it exports almost all its production outside the Community. Secondly, as this is a case of an international transport group operating globally in competition with other Community operators, the aid granted to one of the group's companies operating in third countries strengthens the group as a whole and therefore affects trade between Member States and distorts, or threatens to distort, intra-Community competition.

(170) In addition, as the measures in question mobilise SNCB's resources, they must be regarded as implementing State resources (public funds).

(171) Due to the fact that SNCB is state-owned and its specific status as a public undertaking, the SNCB's resources remain constantly under public control. This conclusion is backed up by the observation that SNCB is subject to the Law of 21 March 1991 under which it is granted specific protection against the risk of bankruptcy, comparable to a guarantee from the State.

(172) The Court states in *Stardust Marine*⁽⁷⁰⁾ that: 'it should be recalled that it has already been established in the case-law of the Court that Article 87(1) EC covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources'.

⁽⁶⁹⁾ Case C-142/87 *Belgium v Commission*, (Tubemeuse) [1990] (ECR I-959, paragraph 35).

⁽⁷⁰⁾ Case C-482/99 *France v Commission*, (Stardust Marine) [2002] (ECR I-4397, paragraph 37).

(173) In addition, also in *Stardust Marine*, at paragraph 52, the Court states that: '...the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, such as the financial support measures in question here, to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures'.

(174) Another condition needed for measures taken by a public undertaking to constitute State aid is that the measures are not the same as those which would be taken by a private investor in a similar situation.

(175) As a result, the Commission will assess each of the measures taken by the SNCB in favour of the ABX group to check whether each one is both imputable to the State and not the likely behaviour of a private investor in this situation. If both these conditions are fulfilled, the measures are deemed to constitute State aid and the Commission will analyse the subject and amount of this.

6.1.1. Investments made in 2001 and parallel contributions

(176) The Belgian authorities pointed out that the reinvestments made in 2001 by SNCB in the ABX group's German, Dutch and French operations were based on positive financial forecasts and the advice of business development experts.

(177) The profitability calculations set out above appear to be based on acceptable business development forecasts, as far as SNCB was able to predict in 2001.

(178) The investments in Germany are based on an expert opinion which calculated that by successfully turning around ABX-D the ABX strategy could be continued, potentially creating EUR 300 million compared with the injection of EUR 50 million, and based on an adequate intrinsic return.

(179) Regarding the investment of EUR 30 million in France, the profitability calculations indicate that the SNCB could achieve an internal rate of return of between 8 and 14 %. Moreover, this investment has made it possible to start a programme to securitise receivables so the company can get a bank credit line of EUR 70 million.

(180) The Commission considers that there is insufficient justification, in the case of the investment made in 2001 in ABX-NL, for basing the calculation of the IRR on the capital gain after deducting the costs of acquiring Wegtransport, as is proposed by the Belgian authorities. However, considering that the SNCB's total investment includes this acquisition cost and as a result is EUR 19,2 million rather than EUR 12,2 million, the IRR of the investment is between 8,9 % and 10,2 %, and therefore remains acceptable, in particular in the light of the fact that when the investment was made, the entire ABX-NL was expected

to become profitable again within the very short period of two years.

(181) Likewise, the estimation of rates of profitability of the 'parallel contributions' to the capital of the companies in the ABX group in Ireland, Belgium, Portugal and Singapore (which were not in financial difficulty) gave an expected IRR of between 9,6 % and 12,7 %, and appears acceptable.

(182) The Commission also points out that until the end of 2001 SNCB's financial structure allowed it to finance its commercial development without placing an excessive burden on its financial structure (debt/equity ratio rising from 0,6 to 0,9 between 1997 and 2001), which was not the case from 2002.

(183) Lastly, it should be noted that all these investment decisions are part of a group strategy. In these circumstances SNCB was justified in taking account not only of the expected intrinsic return on each of these operations, but also the positive effects expected at group level.

(184) The Commission therefore concludes that, in the light of the prospects at the time, SNCB acted as a private investor would have done by making reinvestments in 2001 and making 'parallel contributions', and that these measures do not constitute state aid.

(185) However, the Commission notes that SNCB gave a guarantee to ABX Singapore without requiring payment, which is not what a private investor would have done. Given that this guarantee was granted in June 2000 when ABX started arousing public interest and the public authorities intervened with regard to SNCB, and taking account in its analysis of all potential forms of aid, the Commission feels that granting this guarantee without payment may involve state aid. As this guarantee was awarded to a company in the ABX group at a time when the decision to reorganise and restructure the network had already been taken and this was underway, the Commission will investigate this aid together with the other restructuring measures taken by the ABX group, which has incorporated ABX Singapore.

6.1.2. Recapitalisation measures

(186) The meeting of the Belgian Council of Ministers in February 2002 constitutes irrefutable proof of the Belgian Government's involvement, from that day on, in SNCB's management of the ABX case. The measures taken to recapitalise ABX Germany (for a sum of EUR 157,4 million) and ABX Netherlands (for a sum of EUR 10,6 million) were notified by Belgium after this date, and have not yet been implemented. Belgium has presented these measures not as wise investments, but as restructuring aid. There is therefore no doubt that these measures must be classed as state aid and investigated as restructuring aid.

(187) The letter of intent which SNCB had to issue for its German subsidiary because the latter's equity was negative from the month in which it was bought, was re-issued annually until 2005 by SNCB, including during a period when there is no doubt that SNCB's decisions regarding ABX can be imputed to the State. As this letter contains commitments comparable to a guarantee and SNCB received no payment for this, the Commission considers that there are elements of state aid. However, since the recapitalisation of ABX Germany by SNCB, which is the subject of this Decision, effectively and definitively gives the company's creditors the security which they sought through the letter of intent, which then becomes inapplicable, there will be no need to conduct a separate, redundant investigation relating to the recapitalisation measures themselves.

6.1.3. Loans in 2002

(188) SNCB granted loans to ABX Logistics NV and to ABX-D, -NL and -F from April and May 2002, i.e. during a period in which there is no doubt that SNCB's decisions regarding ABX can be imputed to the State.

(189) As indicated in the descriptive section, these loans resulted in remuneration of between [...] and [...] %. The Commission considers that this level of remuneration is inadequate in view of the situation of the companies concerned. It uses the Commission's reference rate, set at 5,06 %, as an indicator of an appropriate level, which was also used for setting the rate of the rescue aid granted in January 2003 to ABX Germany.

(190) The Commission concludes that these loans contain an element of state aid. On the basis of the above reference rate increased by 400 basis points for a firm in difficulty, but also undergoing restructuring, the Commission estimates the sum of the aid element corresponding to this loan at around EUR 8 million.

(191) As the loans were given to several companies in the ABX group at a time when the decision to reorganise and restructure the network had already been taken and was being implemented, the Commission will investigate this aid together with the other measures to restructure the ABX group, which has incorporated the retained activities of the companies which benefited from these loans.

6.1.4. Guarantee granted for setting up a cash pool

(192) As stated in the description of the restructuring measures, the Belgian authorities pointed out that the overdraft facility of EUR [...] million opened by the ABX group with a financial establishment results in commercial remuneration, and that the guarantee set up in January 2001 by SNCB for this credit line is subject to a remuneration of [...] basis points.

(193) This rate is permitted in view of the usual bank rates given in similar situations⁽⁷¹⁾. The Commission concludes that this guarantee has not given the ABX group an advantage constituting state aid. Besides, even if it were considered that the rate demanded by a private investor would have been a few basis points higher or even double, it would have resulted in a negligible advantage in view of the other aid measures (EUR 0,07 million per year) and would not have changed the following assessment of the compatibility of all the restructuring aid measures.

6.1.5. Other SNCB off-balance sheet commitments

(194) The Belgian authorities maintained that in addition to the guarantees taken out at the time of the original acquisition of some companies in the network, the only new guarantees issued by SNCB in favour of the ABX group are the two above guarantees in favour of ABX Singapore, taken out at the end of 2005, and the approval of the overdraft facility for the cash pool. However, SNCB did issue a number of letters of intent.

(195) The Belgian authorities are of the view that these letters of intent, which do not involve any remuneration, are standard practice in a market economy in dealings between a parent company and its subsidiaries. In the case in point, with the exception of the letter for ABX Germany which has already been assessed and a letter of intent in favour of ABX Spain for EUR 12,3 million, the Commission noted that none of the new letters of intent of which it is aware and which have been issued since 2000 (when ABX started arousing public interest) contains terms which are legally binding on SNCB. The Commission deems that the letter of intent in favour of ABX Spain is equivalent to a bank guarantee, given that SNCB undertakes to grant ABX Spain the funds needed to repay its debts to the bank. The Commission recalls that the aid element in question is made up of the cost of the guarantee which the company would have had to pay to obtain the loan and which is in addition to the cost of the loan itself; in any case this amount remains limited and corresponds to a few basis points. Therefore, even though the margin of [...] basis points paid by the ABX group to SNCB is adequate, the resulting aid element remains marginal (EUR 0,02 million per year). Even if the cost of a guarantee should be considerably higher, for example double this amount, or [...] basis points, which seems high, the aid element itself would still be marginal (EUR 0,04 million per year) and would not alter the conclusions on the restructuring aid.

⁽⁷¹⁾ For example, the rate of [...] basis points paid by a subsidiary of ABX to its banks for their bank guarantee.

6.1.6. Disposal of the Road domestic France business

- (196) As the choice and the conditions of ABX France disposing of its Road domestic France business were clearly imputable to the Belgian State, the Commission must check the arguments put forward by the Belgian authorities to justify the choice of an MBO as being in line with what a private investor would have done under the same circumstances.
- (197) *Cost of the scenario chosen by SNCB.* the total cost of the divestiture scenario chosen by SNCB is EUR 137,5 million, or EUR [...] million corresponding to the business' negative net assets at the time of disinvestment, and a negative selling price of EUR [...] million.
- (198) The Commission notes that two independent experts have confirmed that this sum of EUR [...] million corresponds to the negative value of the Road domestic France business sold to the employees.

Deloitte Corporate Finance reviewed the business plan of the company in question and evaluated it using the discounted cash flows method. The business plan covers the years 2005 to 2008. The assessment concludes that the value of ABX-F domestics corresponds to the above negative price. This was confirmed by Ernst & Young Transaction Advisory Services who reviewed the estimates made by Deloitte.

Given that these two independent experts used the standard and appropriate assessment methods, the Commission accepts that this price corresponds to the market price and that the buyer of the Road domestic France activity did not receive state aid when making this purchase.

- (199) *Cost of voluntary liquidation:* according to the Belgian authorities, the cost of voluntary liquidation would be EUR 183 million, or EUR [...] million for the negative net assets when the disposal decision was taken, and EUR [...] million in other additional costs.
- (200) In the case of a voluntary liquidation plan, SNCB would have to pay off all the creditors of the liquidated company which were not covered by the liquidated assets. It is therefore legitimate to include the amount of EUR [...] million.
- (201) The other additional costs taken into account by the Belgian authorities comprise in particular EUR [...] million for the redundancy programme which should have been carried out by SNCB during the liquidation, and EUR [...] million incurred through losses which would have been made by the ABX group throughout the negotiations for this programme.
- (202) Both these estimates seem reasonable. In terms of the redundancy programme, the amount breaks down into an acceptable redundancy cost of EUR [...] per employee; the expected amount of losses incurred while this programme was carried out is comparable to the level of losses for 2005 in the company's business plan at the time of

disposal (between EUR [...] million and EUR [...] million). Further, the Belgian authorities take account in their assessment of an additional amount of EUR 15 million for losses incurred in the first four months of 2006.

- (203) As a result, as ABX France would also have had to pay various penalties for breach of contracts (at a cost estimated by the Belgian authorities of EUR 14 million) and cope with the consequences for the group's other businesses of loss of access to the French market, it is reasonable to consider that amicable liquidation would have led SNCB to bear a higher cost than that of the employees purchasing Road domestic France.
- (204) *Cost of court-ordered liquidation.* According to the Belgian authorities, the cost of court-ordered liquidation would be EUR 346 million, or EUR [...] million for the sold company's negative net assets when the disposal decision was taken, and EUR [...] million in other additional costs.
- (205) In the Commission's view, given the difference between the options of disposal and voluntary liquidation, it is unjustified to consider that, in the case of obligatory liquidation, SNCB would have had to bear all the EUR [...] million amounting to the net negative assets at the time the disposal decision was taken, as by definition it would not have sought to pay off the creditors of its subsidiary.
- (206) Among the other additional costs, the Belgian authorities consider that, in this case, SNCB should have been able to bear a risk [...] of EUR 58 million.
- (207) The Belgian authorities provided the Commission with several points to back up this theory, in particular an opinion from the experts Linklaters and Grand Auzas et Associés stating that the option of court-ordered liquidation would expose SNCB to a real and non-negligible risk [...] calling its liability into question.
- (208) The Commission does not deny that, in certain exceptional cases, some national legislation provides for the possibility of third parties to bring proceedings against the shareholders of a liquidated company, in particular if these shareholders may be considered [...] and/or as being guilty of mismanagement.
- (209) However, in the case in point, although French law does provide for this possibility and the Belgian authorities have provided some indications of such a risk, they have not sufficiently erased the doubts expressed regarding this case when the procedure was extended in April 2005. The Commission concludes that it is not legitimate in this case to include among the costs of this scenario the EUR 58 million which, according to the Belgian authorities, are linked to the risk of [...].
- (210) Similarly, the Commission considers that, in view of the special status of SNCB, it is unlikely that SNCB's financing cost would have been significantly affected by the court-

ordered liquidation of Road domestic France, contrary to the view taken by the Belgian authorities. However, it is possible to accept that this liquidation could have entailed an additional cost to paying the ABX group's bank debts, estimated by the Belgian authorities at no more than EUR 7 million.

(211) The Belgian authorities' simulation also takes account of an impact on the group's need for working capital, as the creditors of the entire group could, once Road domestic France was put into liquidation, demand a drastic reduction in their repayment schedules. The estimated impact of this at EUR 45 million, based on the average deadline for repayment given by suppliers being reduced by one week, or around 15 %, seems acceptable. Even if the impact could have been reduced for the clients of the group's subsidiaries which were in good financial health, it could have been considerably more than one week in the case of the clients of the other subsidiaries in financial difficulties when the business went into liquidation in France.

(212) Lastly, the Belgian authorities consider that liquidating Road domestic France would also have resulted in the group's other activities losing between 5 and 30 % of clients in the year of liquidation. As the group offers integrated services in Europe, and its different operations are highly interdependent, it is reasonable to expect that a court-ordered liquidation could have tarnished the image of the other activities in the group and caused business to drop off, especially since the activity and/or the country in question are close to the activity and country of the company which would have been liquidated, as is reflected in the assessments made by the Belgian authorities. This reasoning cannot be applied to the chosen MBO option. On one hand this solution actually protects the group's image; on the other, the disposal contract for Road domestic France contains a cooperation agreement between the company consolidating the activities sold by MBO and the international operations of ABX-F remaining within the ABX group, meaning that the ABX group's clients will still have access to a service in France. The Commission notes that it is difficult to confirm client losses of up to 30 %. Thus, bearing in mind the fact that the group's various subsidiaries share several joint major clients, and given the importance of France in the group's international activities in France, Germany and the Netherlands (which is between 14 and 36 %), rather than the additional cost of EUR 112 million expected by the Belgian authorities, the Commission considers that, when assessing the impact this will have, it is wise to work with estimated costs of a maximum loss of 20 % of clients in the first year in the worst affected activities, totalling around EUR 75 million.

(213) It is also reasonable to accept the possibility that this drop in business would have led the group to make staff cutbacks, as the company could have been forced to lay off more staff in order to avoid losing too great a gross margin.

The Belgian authorities estimated this additional cost at EUR 35 million. As the scale and therefore the cost of these redundancies should correspond to the amount of business lost, the same cautious hypothesis as above results in an estimated value of two thirds of additional costs, or EUR 24 million.

(214) Overall, the Commission considers that, rather than the sum of EUR 346 million cited by the Belgian authorities, the court-ordered liquidation of Road domestic France could have resulted in SNCB bearing a cost of at least $7 + 45 + 75 + 24$, or EUR 151 million (excluding the possible risk of [...]) which is higher than the cost of the scenario put forward by SNCB.

(215) *Conclusion.* Upon completing this assessment the Commission feels that the choice made by SNCB to sell its Road domestic France business to the employees, and the arrangements it adopted for this, can be considered in line with the choice which a private investor, guided solely by financial considerations, would have made and therefore that this operation contains no elements of state aid.

(216) The Commission based the above analysis only on the assumptions which it considered reasonable and sufficiently motivated. These estimates lead one to consider that the discrepancy between the scenario chosen by SNCB and the alternatives to liquidation would be at least EUR 13 million, which should more than cover any margin of error in the estimates selected following the assessment.

6.1.7. Sale of ABX-WW

(217) The Commission notes that the SNCB went to great lengths to find a buyer for ABX-WW, in particular by using a specialised company.

(218) Regarding the sale price and conditions of ABX-Worldwide, the Commission takes account of the report by KPMG who were asked to check, from a financial ('fairness') point of view, the offer for sale of all ABX-WW's remaining assets, as described above.

(219) KPMG's report ⁽⁷²⁾ is based essentially on a comparison between two methods of evaluation: the discounted cash flow method (DCF) which involves calculating the current net value of expected future revenue; and the capitalised earnings method (CEA) which consists of comparing several levels of a company's expected revenue (turnover, EBITDA, EBIT, etc.) in relation to others in the same sector by applying the multiplier coefficients of the market in question.

(220) Given that the expert carried out a detailed assessment of the disposal and used recognised calculation methods for this type of fairness option, the Commission considers that

⁽⁷²⁾ KPMG: Yvan Project — Valuation summary, Presentation to NMBS/SNCB Holding NV/SA, 26 May 2005 v2.2.

KPMG's final conclusion that 'the term of the proposed sale to Yvan is fair and reasonable and represents fair market value' is acceptable. It concludes that the disposal of ABX-WW does not involve any element of state aid in favour of the purchaser, provided that this is done at the agreed price and is subject to only the usual and financially justifiable adjustments applicable in the event of disposal.

- (221) The conditions of disposal will ensure that Yvan gives Belgium a sale price and a commitment to make substantial contributions which will reduce public money earmarked for this by Belgium. These conditions also ensure that SNCB effectively disposes all the ABX group's operations.

6.2. Compatibility of restructuring aid

- (222) The Commission will now look at the compatibility of the state aids which it has just identified with its Guidelines on State aid for rescuing and restructuring firms in difficulty. The Belgian authorities' original notification was made in 2003 and resulted in proceedings being opened in 2003 on the basis of the 1999 Community Guidelines for State aid for rescuing and restructuring firms in difficulty⁽⁷³⁾ ('the 1999 guidelines'). However, on one hand, updating the restructuring plan after the new guidelines came into force allows for a considerable increase in the amount of aid originally planned; on the other, the above assessment shows that SNCB granted illegal aid to the ABX group. In the light of these factors and points 103 and 104 of the 2004 Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁷⁴⁾ ('the 2004 guidelines') the Commission will examine all these aids in the light of the latter text, while taking account of the fact that the plan was originally notified under the 1999 guidelines. In any case, the following assessment shows that the aid in question may be declared compatible under both the 1999 guidelines and the 2004 guidelines.

6.2.1. Eligibility

- (223) The Commission notes, on the basis of several relevant indications, that the ABX group as a whole must be considered a firm in difficulty within the meaning of point 11 of the 2004 guidelines. Firstly, the group's operating losses ballooned during 2001 and 2002 up to EUR 50 million in 2002; losses also increased, the net result rising from -EUR 73 million in 2000 to -EUR 186 million in 2002; financial charges rose throughout the same period from EUR 15 million to EUR 41 million, while debt increased from EUR 442 million to EUR 512 million.

Secondly, and more importantly, ABX's operations in Germany, France and the Netherlands faced serious financial difficulties, which are described in the decision approving rescue aid to ABX, and thereby indisputably constitute firms in difficulty, as noted by the Commission in that Decision⁽⁷⁵⁾. However, at the time, these played a key role in the ABX group's strategy and in its ability to provide integrated logistics and transport services in Europe. They also made a decisive contribution (about 60 % in 2002) to the group's turnover, such that the serious difficulties they faced threatened the survival of the group as structured at the time.

- (224) Furthermore, the Commission considers that the rest of the ABX group was unable to make a greater contribution to funding its restructuring.

- (225) The Belgian authorities stated that, through disposals, external funding and productivity gains (particularly in Italy, the Netherlands and Spain), ABX-WW generated EUR 24,3 million which enabled it to partially fund the restructuring of the group.

- (226) The sale of assets, combined with the internal rationalisation measures, substantially reduces the scale of the ABX group: the number of sites will be reduced by 31 %, turnover by 21 %, staff (FTE) by 40 % and (warehousing) area by 54 %. These figures are significantly higher in Germany, with reductions up to 69 %, before taking account of the commitments made by Belgium in November 2005. It is considered that further disposals of assets could ensure the group becomes viable as an integrated network of multimodal logistic services in Europe.

- (227) The healthy parts of the group have supported the other parts which are in difficulty, thereby helping them recover. For example, ABX Logistics (Belgium) NV/SA wrote off a sum of EUR 10,6 million owed by ABX Netherlands.

- (228) Lastly, it should be noted that the entire group, whose cash has been pooled since 2001, is [...] in a negative liquid position as the cash released by the profit-making parts of the business has been absorbed by the loss-making ones.

- (229) The overdraft of the cash pool is still negative and often close to the authorised overdraft limit of EUR [...] million (for example EUR -[...] million in June 2005), and the group owes [...] in short-term liquid assets:

⁽⁷⁵⁾ Decision No C(2003) 245 final of 21.1.2003: State aid No 769/2002 Rescue aid for ABX Logistics (F, D, NL subsidiaries and the group). Published on the Commission website at: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/transport-2002/n769-02-fr.pdf (available in French only).

⁽⁷³⁾ OJ C 288, 9.10.1999, p. 2.

⁽⁷⁴⁾ OJ C 244, 1.10.2004, p. 2.

**Consolidated liquid position of ABX Logistics
Worldwide S.A.**

	EUR million		
	31.12.2003	31.12.2004	30.06.2005
Bank current accounts	[...]	[...]	[...]
Financial debts of over one year maturing during the year	[...]	[...]	[...]
Short-term bank over- draft	[...]	[...]	[...]
Net liquid position	- 36,8	- 62,2	- 114,4

(230) Lastly, the Commission notes that, although the holding company ABX-WW was only created in 2003, as a financial entity the group is not a new firm within the meaning of the 2004 guidelines as it was formed by merging several pre-existing entities in the same sector, and that the group's new structure was set up precisely to aid restructuring.

6.2.2. Restoring viability

(231) The provisional results expected for ABX-WW, ABX-D and ABX-NL, as indicated in the descriptive section above and based on realistic assumptions, predict a return to viability between 2006 and 2007.

(232) Moreover, the financial results have improved significantly since 2002, the year in which the restructuring plan was drawn up. The operational results (EBIT) of ABX-Logistics Worldwide S.A. have improved from -EUR 28,7 million (2002) to +EUR 11, million (2004). The operational result of ABX Logistics (Deutschland) GmbH (excluding Air&Sea) went from -EUR 32, million to -EUR [...] million over the same period, and that of ABX Logistics Holding (Nederland) BV is almost balanced by going from -EUR 6, million to -EUR [...] million.

(233) In addition to this undeniable financial recovery witnessed in recent years, the descriptive section shows that the ABX group is evidently undergoing a real organic restructuring which will restore its viability in a sustainable manner.

(234) Lastly, the Commission considers that signing a preliminary contract of sale for the entire ABX Logistics WW group which makes disposal obligatory, subject to approval and the normal conditions in the event of disposal, and accompanied by substantial investment commitments from the private buyer, is a further indicator which determines

the quality of the ABX group's restructuring plan and its return to sustainable viability.

6.2.3. Avoidance of undue distortions of competition

(235) According to the 2004 guidelines, compensatory measures must be taken to attenuate as far as possible any adverse effects the aid may have on competitors. Otherwise, the aid will be regarded as contrary to the common interest.

(236) The ABX group has already embarked on greatly reducing its capacity. As previously mentioned, between now and the end of the restructuring operation it will make dramatic cut backs in the number of its sites, its operating area, turnover and staff numbers in order to make reductions in ABX-WW of up to 54 %, in ABX-D of up to 69 %, in ABX-NL of up to 44 % and in ABX-F of up to 76 % (mainly in the form of disposal and by closing offices). These cuts will be boosted further still, on the German market, by the additional commitments taken by the Belgian authorities in [...] 2005. These cuts, which go considerably further than those set out in the original plan, will free up parts of the market to competitors.

(237) The Commission feels that these closures and disposal measures can be considered proportionate given their quantitative scale, the weakness of ABX's residual market share in freight forwarding (less than 2 % in Germany, 1 % in the Netherlands in 2002), the necessity of having a minimum network in several European countries in order to maintain a viable intermodal logistics service in Europe, and lastly the fact that the transport logistics market is not saturated and is a growth sector, as analysed in Section 2.2. It should not be forgotten that the ABX group owns almost no means of transport and is therefore practically non-operational as a road haulier.

(238) In addition, on the basis of information submitted by the Belgian authorities, the Commission has verified that a very large part of the cuts in capacity are in short-term ancillary activities. These additional cuts affect around 19 % of a total of 31 % of sites cut, 12 % of a total 21 % reduction in turnover, 15 % of a total 40 % in staff cuts and 40 % of a total 54 % reduction in warehousing area.

6.2.4. Aid limited to the minimum

(239) The 2004 guidelines require the amount and intensity of the aid to be limited to the minimum.

- (240) In the light of this the Commission notes, firstly, that the recapitalisation will cause the group to have a debt/equity ratio of 80 % once the notified measures have been implemented. This rate would be 155 % after eliminating the goodwill of EUR 146 million currently in the group's accounts.

ABX LOGISTICS Worldwide S.A., consolidated balance sheet

	31.12.03	31.12.04	30.6.05	31.12.05 before con- version	31.12.05 after con- version	31.12.05 after con- version and elim- ination of goodwill	31.12.06	31.12.07
Consolidated equity	185,8	173,9	158	131,9	300	154	[...]	[...]
Financial debts	369	414,3	407	407	239	239	[...]	[...]
Debt ratio	199 %	238 %	258 %	309 %	80 %	155 %	[...]	[...]

- (241) The Commission feels that this second figure of 155 % can also justifiably be taken into consideration given that much of this goodwill comes from the original acquisition of ABX-D (EUR [...] million) and NL (EUR [...] million), the capacities of which will be greatly reduced by the restructuring (exacerbated by the [...] commitments to reduce presence in Germany communicated by the Belgian authorities in December 2005). The Belgian authorities also feel that instigating restructuring measures would lead to all the goodwill for the German and Dutch subsidiaries disappearing from SNCB's accounts [...].

restructuring plan, either from his own resources or through external funding obtained at market conditions.

- (247) To do this, the Commission starts by determining the total cost of the restructuring, net of productivity gains and the reduced need for working capital.

Net cost of restructuring

Redundancies, closures	- 49,0
Cash drain during restructuring (net productivity gains)	- 121,0
Debt to SNCB (prior to 2002)	- 60,0
Interest on SNCB debts (debt prior to 2002 + rescue aid)	- 8,0
Repayments of credits and loans following bank withdrawals	[...]
Repayments by Yvan of other guarantees and debts to ABX's creditors	[...]
Reduction in working capital needed	29,1
Total	- 296,6

- (242) However, these two ratios of 80 and 155 % are still significantly higher than the equivalent ratios noted in the cases of competitors comparable to the ABX group. For example, the average (weighted by turnover) of the ratios of competitors is around 43 % (and would fall to 16 % were account taken of DPWN, which did not, however, seem sufficiently comparable to be included).
- (243) This shows that the ABX group will be recapitalised at a lower level than the sector average and will not have any surplus resources due to its financial structure.

- (248) The Commission feels that it is justified in deducting the costs set out in the above table, in particular for the following reasons:

- (244) Secondly, the Commission reiterates that ABX-WW's net liquid position has been negative since 2003, so the ABX group has no surplus cash available.
- (245) Thirdly, account should be taken of the fact that the price which the SNCB should receive in payment of the sale of ABX-WW shares helps reduce the effective amount of aid. It would have been the same for the group and its competitors, as well as for SNCB and Yvan, if the aid contributed by SNCB were reduced by as much, the sale were made for a token price, and the corresponding funding contributed directly by the buyer.

- (a) the amount of EUR 49 million corresponds to costs incurred directly by the restructuring, such as redundancy fees and the cost of closing subsidiaries;

- (246) Furthermore, the Commission must also ensure that the aid recipient makes a substantial contribution to the

- (b) the amount of EUR 121 million corresponds to the cash drain of the entities restructured between 2003 and 2005. It corresponds essentially to the corrected EBITDA of investment needed for restructuring, financial charges and some exceptional items. The

Commission is assured, on the basis of information sent by the Belgian authorities, that the investments taken into account are mainly IT-related investments, and in any case remain below the amount of repayments. IT-related investments make up one of the important elements of the reorganisation and increase in productivity of the group. The Belgian authorities have confirmed that these investments do not involve any increase in capacity. The Commission has also assured itself that the exceptional elements mainly cover costs linked to restructuring the company; this concerns the reorganisation and productivity measures (redundancies in the central operations, legal simplification measures, other productivity measures, etc.) needed to ensure viability is restored.

It should be noted that the cost of the cash drain during the restructuring period itself, totalling EUR 150,9 million, is here reduced by the positive effects expected as a result of the restructuring and which generates a positive cash flow in this period of EUR 29,9 million, making a net cost presented here of EUR 121 million.

- (c) Other funding needs at the end of 2005 must be covered before ABX-WW is transferred in order to restore the group's financial structure. These concern either the debts owed to SNCB which will be converted into capital (EUR 60 million) and the resulting interest (EUR 8 million), or withdrawals from bank accounts made between 2003 and 2005 (EUR [...] million), or lastly the planned take-over by Yvan of existing guarantees and debts (EUR [...] million);

- (d) The reduction in working capital needed results from improved management of the group's commercial relations with its clients and suppliers, and is deducted from the restructuring costs.

- (249) The ABX group has mobilised a number of its own resources or external resources obtained at market conditions in order to finance these measures. These were mainly generated by the sale of assets to third parties (EUR 24,2 million), the previously described repurchase of the operations being restructured by the healthy parts of ABX or by the holding company ABX-WW (EUR 22,6 million) and by the healthy parts of the group writing off debts and providing funding (EUR 10,6 million + 6 million). These concerted efforts made by the healthy parts of the group make a real contribution to the recipient, which is the group as a whole. In addition to this is the funding provided by Yvan (EUR [...] million). The total amount of these own contributions is EUR [...] million.

- (250) The above assessment shows that the percentage of the recipient's own contributions is at least 43,4 % of funds

needed for restructuring. In this case, the Commission feels it can accept an own contribution of less than 50 % in the light, particularly, of the specific difficulties of the restructuring operation (on which 13 000 jobs depend directly in Europe), the scale of the cuts in capacity (cuts up to 50 % mainly in short-term ancillary activities), the risk that a further reduction could pose to the viability of the ABX-WW's international transport logistics network, the fact that the original notification was made under the 1999 guidelines which did not provide for a minimum rate, and the privatisation of ABX-WW, which is also a factor which determines the group's viability and the absence of future aid to the group.

- (251) Other elements show that the markets believe the viability of the company can be restored, in accordance with the 2004 guidelines. For example, the Commission again points out that the ABX group was able to obtain an overdraft of (EUR [...] million) from a financial establishment, guaranteed by SNCB, which for reasons of caution has not been taken into account in the above calculation of the recipient's contributions, given that the Commission was not able, in the light of the premiums paid to the bank and to SNCB, to completely exclude the possibility of any state aid. Furthermore, private banks continue to grant sizeable amounts of short-term credit to the ABX group without comfort letter or public guarantee.

- (252) The Commission therefore feels that this meets the condition that aid must be limited to the minimum and that the firm has to make a sizeable contribution to its restructuring costs from its own resources.

6.2.5. *One time, last time*

- (253) The Commission again notes that the ABX network was established from 1998 and that at no time has the Commission approved restructuring aid for this network prior to this Decision.

- (254) The Commission also considers that the planned privatisation of the ABX group should not only guarantee its return to sustainable viability, but also uphold the 'one time, last time' principle by making it considerably less likely that public funds will be injected into the firm once it has been privatised.

6.2.6. *Conclusion*

- (255) In the light of the above, the Commission concludes that the aid granted by SNCB as part of the restructuring of the ABX group are in line with the criteria set out in both the 1999 and the 2004 guidelines, and are therefore compatible with Article 87(3) of the Treaty. It notes in particular that the healthy parts of the ABX group have

made substantial contributions to funding those parts in difficulty and, in addition to this contribution, that the group has substantially reduced its capacity in exchange for the aid. In addition, the privatisation of the ABX group means not only that the group will be viable in future, but also precludes the possibility of it being granted any other State aid in future.

(256) Lastly, the Commission once again notes that the political guidelines in the field of state aid to the railways sector, which it set out in its Decision of 2 March 2005 in Case No N 386/2004, provide a horizontal examination of the issues raised by the unlimited guarantee which rail companies have in several Member States.

HAS ADOPTED THIS DECISION:

Article 1

1. The aid investigated in this Decision, granted by the Belgian railways (*Société nationale des chemins de fer belges*, SNCB) as part of the restructuring of the ABX Logistics group, is compatible with the common market under the conditions provided for in Article 2.

2. The funds used by SNCB to finance the divestiture of part of ABX Logistics (France), and the other financing operations investigated in this Decision, in particular the investments of capital in 2001 and the 'parallel contributions', do not constitute state aid.

Article 2

The Commission authorises the restructuring aids set out in Article 1(1) on the condition that the ABX Logistics group is sold within [...] of the date of notification of this Decision, at market price, to a buyer who has no legal links to SNCB, and in line with the commitments regarding conditions of purchase and financing proposed by the potential buyer as described in this Decision.

Article 3

Belgium shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply with it.

Article 4

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 7 December 2005.

For the Commission

Jacques BARROT

Vice-President