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Ms. Margrethe Vestager
Executive Vice-President and Commissioner for Competition
European Commission

Ms. Adina-Ioana Vălean
Commissioner for Transport
European Commission

Berlin, 18. August 2020

Intended Subsidy to the Deutsche Bahn AG

Dear Ms. Vestager,
Dear Ms. Vălean,

The German Government and the German Bundestag are planning to raise the equity capital of the 100 percent state-owned Deutsche Bahn AG by 5 (five) Billion Euro this year. This federal subsidy is a State Aid under European Union law.

The planned increase in equity would result in a serious distortion of competition for the rail freight companies represented by our association that do not belong to the DB Group. As things stand, this would:

1) unilaterally and exclusively support the market-dominant state-owned company in response to the COVID-19 pandemic in the rail freight transport market

2) inevitably, equalise deficits of the DB rail freight division, which result from unresolved, structural problems of the DB companies regardless of the COVID-19 pandemic. This would also enable the DB rail freight division to offer prices below market costs, which would impair fair competition and risks market exits, which are significantly more likely in the current climate.

The companies represented by our association are in intermodal competition with a large number of transport companies, especially in the market for rail freight transport services hey are also in intramodal competition with the DB subsidiaries that continue to dominate the market. in particular, DB Cargo AG and their numerous other DB Cargo companies and Company subsidiaries (currently seven domestic and 19 foreign companies).

The so-called "Wettbewerbsbahnen" () have increased their performance significantly over the past 20 years and were able to expand their intramodal market share. Most recently, the market share of these railway undertakings beyond the DB in Germany was together above (53 percent) the market share of the DB companies. Overall, however, rail freight transport was only able to increase its share of total transport performance on the German freight transport market slightly - it was recently just over 19 percent. Since the year 2000 - with the exception of a few years before the financial crisis - the growth in performance has been carried solely by the competitive railways. Competitive railways companies want to be in a position to continually grow. Before the start of the pandemic, most of the companies surveyed in Germany were able to achieve a slightly positive margin according to the results of the Federal Network Agency's market observation. During the pandemic, they - like all transport companies - were hit hard in economic terms despite their undeniable systemic relevance for the supply of industry and trade. This is primarily due to declining sales from falling transport volumes, due to aggressive pricing strategies, especially for road freight transport, as well as additional expenses caused by the pandemic.

The ever more extensive financing of the rail freight division of Deutsche Bahn AG, which has been in financial loss for five financial years, within the so-called "group network" of the DB AG, had already affected competition before the pandemic and reached a new high in the 2019 financial year with a deficit of 488 million euros.

The existing domination and profit transfer agreements within the DB Group oblige it to compensate for the respective deficits of DB Cargo AG (or other companies belonging to the group). As a result, an equity increase by the owner, the federal government, of Deutsche Bahn AG immediately and directly covers deficits at the freight railroad subsidiary. Regardless of whether they are due to sales losses (with or without countermeasures/savings) or so-called "structural Deficits" that have arisen or will also arise in the future.

Our association has spoken out to the government and parliament in favour of helping the rail freight transport companies affected by the pandemic as a whole. We are in favour of taking company-independent measures such as the temporary lowering of train-path prices, which has also been proposed by the EU Commission, or easing energy charges. We also support an improvement in measures planned for the entire economy (e.g. expansion of tax loss offsetting).

Our association pointed out at an early stage that the general support measures that the federal government initiated for the entire economy at the end of March as "immediate measures" and at the beginning of June as part of the so-called "economic stimulus package", would only be of limited support to the competitive railways. This assessment was confirmed by surveys among the member companies (for details of the results, see Annexes 1 and 2).

After the "immediate measures" announced in March 2020, Deutsche Bahn AG, according to press reports from April 2020, first approached its owner - the federal government - for financial support of billions of euros. Despite several requests from our association, the latter conducted the discussion entirely with DB alone excluding the competitive railways (regardless of whether this was on the owner's side The Federal Ministries of Transport and Digital Infrastructure and Finance or the parliamentary committees). Our association has advocated that the same standards must be applied for both the federally owned DB AG (or DB Cargo AG) and other railway companies for company-related assistance. The Federal Government and Parliament have not taken up this demand and have not commented on it and thus disregarded the premise of a competition-compliant design of measures.

According to the assessment of the rail freight companies represented by our association, the EU Commission's state aid approval for the planned equity increase must either be refused under the applicable state aid law or at least be provided with effective conditions to avoid distortion of competition. In principle, the lower the equity share of the member state and the higher the remuneration for a corresponding equity injection, the less necessary provisions are. Our association would like to justify the assessment in more detail below and submit suggestions for any conditions.

In addition, our association asks that the position of the EU Commission cited by the Federal Ministry of Transport and Digital Infrastructure in the decision of May 20, 2020 be revised, according to which the contents of the discussions on the equity increase between the federal government (and possibly representatives) should be disclosed to the relevant parties.

II

According to the Federal Government, the aforementioned increase in equity is intended to compensate for lost sales and additional expenses as a result of the COVID-19 pandemic at Deutsche Bahn. As far as we know, in a timely manner and in addition to the increase in equity already budgeted in the regular federal budget for the purpose of modernizing the rail infrastructure, additional grants (amounting to one billion euros) will be allocated to the company. With the resolution of the 2nd supplementary budget 2020 on the 2nd July 2020, the German Bundestag created the budgetary basis for this.

As far as our association is aware, the basis for the consultation was a paper that the Parliamentary State Secretary in the Federal Ministry of Finance submitted on behalf of the Federal Government to the Parliamentary Committees for Transport, Digital Infrastructure and Budget on May 22, 2020 (Annex 3) and in which pandemic-related sales shortfalls or additional spending at DB Group of up to 13.5 billion euros in the years 2020 to 2024 were discussed. Neither precise information about the calculation and creation of the underlying data nor its distribution to the individual group companies is known to the public. After the Federal Ministry of Transport and Digital Infrastructure did not respond to numerous informal, written and, finally, inquiries under the "Freedom of Information Act", corresponding information was still withheld from parliamentarians on the grounds that it is a matter of trade and business secrets (see question from the FDP parliamentary group with the printed matter 19/20523 - here, however, specifically on passenger traffic).

Regardless of this, according to reports, the parliamentary committees of the German Bundestag have agreed not only to increase the equity capital but also to further increase the debt burden of the federally owned company by up to 30 billion euros. Through parliamentary resolutions, the political requirement for the owner representatives was previously an upper limit of debt of 20 billion euros by 2019, which was exceeded last year due to changes in accounting regulations - albeit apparently only partially - even without underlying new debt. The approval by the parliamentary bodies to an even higher indebtedness of the still best-rated company also represents a competition-relevant circumstance, which should not be considered in detail apart from the consideration of the equity increase. The willingness of the owner to keep increasing the debt of DB AG, however, underscores the demand for conditions to protect fair competition, since the competitors usually do not avail of similar conditions on the capital market or the owners/parent companies do not have the financial resources of the German state to provide similar support measures.

III.

The admissibility and design of the framework conditions for the capital increase must be measured against the provisions of Article 107 TFEU and the EU State Aid regulations - which have been adapted several times in connection with the COVID-19 pandemic. The changes made on 19th March, 2020 are not relevant from our association's point of view, as they do not deal with the increase in the equity of a state company. This also applies to the expansions decided on 3rd April, 2020. While the fourth and so far last amendment of June 29, 2020 is not relevant for the present case, the amendment of 8th May introduces a temporary extension of the framework for state aid to companies on the basis of Article 107 (3) b) TFEU according to which the Member States can support companies in need (healthy before the pandemic), for example, through recapitalization aid, in order to reduce the risk for the EU economy as a whole, **while maintaining a level playing field**. The amended framework applies until the end of December 2020, and in the case of recapitalization measures according to Section 3.11, until the end of June 2021.

IV.

In addition, a generally permissible aid under Article 107 (2) b) TFEU would also come into question. Even clearer than in the above-stated case the aim however would be to eliminate "damage" undisputed by all market players. In this case, "lost sales" would actually have to be understood as damage within the meaning of the regulation. Rather, according to the context and wording, it is aimed at individual "events" which are also explicitly designated as such (the provision initially only refers explicitly to "natural disasters") that cause additional (restoration) costs and against which there is no possibility of countermeasures. The competitive railway companies - as well as the various infrastructure operators - are, however, basically affected in the same way by the effects of the pandemic, so that financial support exclusively for Deutsche Bahn AG would not be suitable for the "damage" from a possibly classified "other extraordinary event" and would therefore be inadmissible for this reason alone. For this reason, the discussion of the option of aid for DB AG in accordance with Article 107 (2) b) TFEU is not discussed further here.

V.

It should be noted at this point that key representatives of the Federal Government have repeatedly and expressly spoken out against compensating for lost sales or comparable economic damage to rail freight companies that **do not** belong to the DB Group or helping such companies in economic emergency situations. Our association has questioned this approach with various letters, in particular:

1) from March 31st (to the Parliamentary State Secretary in the BMVI and Logistics Commissioner of the Federal Government, Mr. Steffen Bilger, Member of the Bundestag), (Annex 4)

2) of April 28th (to the Federal Minister for Transport and Digital Infrastructure), (Annex 5)

3) from April 30th (to State Secretaries Dr. Güntner and Ferlemann with an estimate of the revenue shortfalls in the area of competitive railways of rail freight transport of 422 million euros for 2020 and 2021), (Annexes 6 and 7)

4) of May 26th (to the responsible members of the budget committee of the German Bundestag), (Annex 8)

5) of June 18th (to the Federal Commissioner for Rail Transport, Parliamentary State Secretary Enak Ferlemann) (Annex 9) and last

6) on July 1st to the parliamentary group chairmen of the governing coalition (Messrs. Brinkhaus and Mützenich) and the transport policy spokespersons of the political groups (Annex 10).

We tried hard to draw the attention of the government and parliament to the competitive railways affected by the economic development as well as the DB companies and asked for support. The Federal Ministries for Finance, Economics and Energy and the Federal Chancellery received some of the letters for information. Our association has appealed to the decision-makers several times - unsuccessfully - to support the freight railways as a whole and not only the DB AG company in the crisis caused by the pandemic.

The focus was initially on the proposal to increase the support for train path prices in rail freight transport for a limited period of time up to 100 percent without discrimination, although our association referred to this shortly after similar signals from the EU Commission.

Furthermore, our association submitted proposals at an early stage on how a change (partial restoration) of the regulatory framework and targeted investments can assist the industry through the crisis, support it through cost reductions and modernize it without discrimination (e.g. explicitly through an accelerated expansion of ETCS, take-over the owner shares in the construction and expansion of infrastructures as well as intermodal systems and rail connection funding, the funding of new loading points for freight traffic, vehicles/machines for emergency management of the DB network infrastructures, additional maintenance resources, energy-saving measures, the modernization of the IT network, NiKraSa-Equipment in DUSS terminals or an additional training grant).

It was only after the Federal Minister of Transport and Digital Infrastructure as a key representative of the DB-owner personally rejected the proposal to the press for more support for train path prices (and did not react to the other proposals) and had given the signal to only use public funds to compensate for the losses in sales at DB AG with the "Alliance for our Railways" (see below) that of our association has primarily advocated treating the entire industry equally ("1: 1 rule" DB Cargo / competitive railways) and to prevent market distortions through the unilateral promotion of DB AG which would result in the more than likely exit of freight railways. The European legal requirements for a fair market structure were pointed out several times.

Representatives of the government or the governing coalition have not taken a dedicated position on this demand, but the public statements of the CEO of DB AG, Richard Lutz, and some members of the Bundestag can be understood to mean that the federal government is only responsible for the federally owned companies and they see a “duty” of ownership to compensate for their deficits.

However, there is neither a railway law nor a private law basis for accepting such an obligation. The Research Services of the German Bundestag concluded that “duties” of the federal government as the owner of DB AG could only have an obligation to increase equity in the context of public services. This is because the federal government is only able to carry out tasks in these federally owned businesses. However, there is no obligation to operate or recapitalize transport companies as a whole on the part of the federal government.

The federal government's decision to increase equity is apparently primarily a purely political judgment, in which various motives could play a role: for example, securing the intrinsic value and dividend capability of the federally-owned company, and avoiding possibly unpopular restructuring measures in precisely this company and possibly also securing or even (re)gaining market shares of the company in competition with other transport companies in the crisis. In this context, it should be pointed out that the federal government will make annual dividend payments in the high three-digit million range from DB AG for the financing of the state's task of replacing investments in the existing rail network (in the so-called "Service and Financing Agreement III" oder LuFV III). The federal government has firmly stated, as mentioned in the paper above, it is still assumed that DB AG will continue to pay the expected dividend to the federal government in 2020.

A "deal" with the "Eisenbahner- und Verkehrsgewerkschaft" (EVG) and the employee representatives of DB AG also plays a role, details of which are not known. According to the deal, the promises to increase equity in return for savings potential have been coupled with not yet concrete personnel reductions. See the statements at the press conference scheduled at short notice to present the "Alliance for our Railways" on May 26, 2020: https://www.bmvi.de/SharedDocs/DE/Artikel/E/buendnis- for-our-train.html

Overall, however, it became clear that the effects of an equity increase for only the DB AG were never considered. The effects on competition for rail freight transport services were never examined or seriously discussed with the companies concerned or their associations. The concerns and information presented in the letter from our European umbrella organization "European Rail Freight Association (ERFA)" to the EU Commission on June 12, 2020 - for example, on the report of the Federal Court of Auditors - were not commented on by the federal government or recognizably picked up.

VI.

It is undisputed that the crisis caused considerable economic damage to a large number of rail freight companies.

These are primarily due to drastically falling sales and not to rail freight transport-specific state interventions. The freight railways - both inside and outside the DB Group - were damaged by border closings at the beginning of the pandemic. The companies had to cope with additional expenses for preventive measures, personnel and (re)planning. However, after various interventions by the sector and supportive activities by the government and the EU Commission, the operational handicaps themselves could be contained again relatively quickly. The rail freight transport industry was able to perform its systemically important function during the crisis. There are no findings available to support the assessment that has been made on various occasions that the so-called single wagon or wagonload traffic of DB Cargo AG in particular has been an "element of general interest" in the crisis. Regardless of this, at the request, operation or instruction of the Federal Government, even with the waiver of sales and the acceptance of the corresponding negative economic effect, the transport was continued (as is assumed, for example, in long-distance passenger rail transport).

Secondly, the fall in prices as a result of the oversupply of capacities in the entire freight transport market after the start of the crisis led to a loss of income for all railway companies. This development was also caused by the early suspension of existing regulations in the road haulage industry (lifting of the Sunday and public holiday ban and other regulations) by the federal government and the state governments.

Due to the pandemic-related developments in the shipping industry and as a result of the pricing strategies of rail freight's main competitor, road freight transport, some companies in our association had to cope with a drop in sales of up to 60 percent. This hit was felt in particular during the month of April even though, in some cases, the companies initially felt no significant changes in the transport volume.

On the 30th April, 2020, our association gave the Federal Ministry of Transport and Digital Infrastructure an assessment of the effects of the pandemic. According to which (exclusively) for the competitive railways in the two years 2020 (with minus 25 percent or 294 million euros in comparison compared to the previous year) and in 2021 (with still minus 10 percent compared to 2019 or 128 million euros) a revenue shortfall due to the pandemic totalling 422 million Euros is expected. This was also based on the assessment that in the course of 2021 the pre-crisis level can be reached again, at least for the competitive railways. Contributions to growth that were originally expected and that were also lost due to the pandemic were not counted as damage in the calculation.

The assessment has not yet been updated because there are no detailed figures on sales development. The inquiries about the performance development of the companies represented by our association (see below) show that the recovery effect expected in the assessment started a little earlier than expected. The effects of the persistently low prices from the road freight transport sector and the strong intramodal competition as well as the indirect economic damage from the weakening of the national economies are, however, three factors that have an opposing effect and were not taken into account in the estimate.

On the development of the rail freight transport market (excluding DB companies), the association carried out a total of three surveys among a larger number of its members on the development compared to the situation before the pandemic (February 2020). The results of which are documented in Annexes 1 and 2 and roughly correspond with the assumptions made at the end of April.

Reliable assessments of the extent of the pandemic damage to DB Cargo AG are not available. Deutsche Bahn AG has made various statements about the decline in its pandemic-related services and sales, which are not necessarily consistent. General statements from company representatives at the end of March and from a government paper from the 22nd May, which are identical, show that the performance in April was 40 percent below the previous year's value. It remains to be seen whether and to what extent there was actually an increase in performance, as it has been stated by the Federal Office for Goods Transport in the entire sector. In contradiction to the above statement, made by DB company representatives from the “Investor Relations” division, there was a decline of only 18 percent in April of that year. According to current statements by the federal government, the performance of DB freight railways in the first half of the year was 87 percent of the previous year's figure.

The paper dated 22nd May, 2020, submitted by the State Secretary in the Federal Ministry of Finance to the Bundestag Committee for Transport and Digital Infrastructure and the Budget Committee, did not contain any differentiated information about the actual amount of revenue losses at DB or its rail freight companies and how much expected losses for 2020 can be attributed to the pandemic. In the information in the said paper, the government representative refers to information from the group (minus 40 percent in April 2020 compared to the previous year, see above).

It is unclear whether the statement relates to the size of the transport performance or actual sales. It is still unclear…

a) what effects are assumed in the following months,
b) how the said effects are separated from the already known structural deficits of the company,
c) whether plan values were used to specify the amount of sales losses,
d) what proportion of the loss of sales is attributable to transports invoiced in Germany and which is attributable to the foreign companies of DB Cargo AG.

The fact that there is a considerable need for clarification in this regard is also shown by the vague statement made by DB AG's CEO Richard Lutz in a letter to employees in June (quoted from dpa): "We have been suffering great losses since the end of March in Germany, losing hundreds of millions every month". Depending on the method for the group-internal billing and taking into account the so-called "rescue package" for local rail passenger transport, an amount in the low three-digit million range would under certain circumstances be significantly below the estimates from the paper cited above.

It should also be taken into account that the paper presented by the State Secretary to the Federal Ministry of Finance also adopted the logic of an internal DB assessment, according to which the economic consequences are felt for the alleged duration of the pandemic and concluding that the consequences of the crisis (specifically: lost sales) would continue into 2024. In line with the current debate, this would have to result in further federal resolutions for additional payments in subsequent years, so that the distortion of competition could be significantly greater than assumed here for 2020.

At this point, it should be pointed out once again that the half-year balance sheet submitted by Deutsche Bahn AG on 30th July 2020 did not provide any detailed information on the reasons for the deficits. It merely informed that the deficit in the freight rail division of the DB Group would be EUR 350 million in the first six months of the year (a good third of which was not related to the pandemic).

The particular competitive relevance arises from the fact that DB Cargo AG has not been able to present a positive result for the fifth year in a row. It can therefore be assumed that at least some of the business activities are continuously being billed at a lower cost in the market. Generating an artificially low-price level that affects the market opportunities of the competing companies and reduces their revenues. Since the beginning of the pandemic, this has posed an existential threat to other freight railways. Other freight railways are also struggling with lost sales. As far as the association is aware, not only are other freight railway companies not subsidized by the federal government, but also, in no case, have received similar financial support as DB received or have been promised to receive.

At the end of July 2020, Deutsche Bahn AG published the annual financial statements of DB Cargo AG for 2019 in the Federal Gazette, which were adopted on March 20 and confirmed by the Supervisory Board on 14th of April. The annual financial statements show a deficit of 488 million euros, which is well above the estimates made by the DB management board in the autumn of last year (300 million euros - letter from the DB management board chairman of November 8, 2019, page 7) to the Federal Minister for Transport and digital infrastructure, forwarded to the Bundestag Committee for Transport and Digital Infrastructure (Annex 11), and its creation is only explained in general terms. However, the period under review of the annual financial statements is unquestionably before the start of the pandemic. Considering the structural deficits that arise in the business activities of DB Cargo AG for the same reasons as in the previous year raises the question of how high the pandemic-related revenue shortfalls in 2020 will actually be.

In addition, the published documents only provide very little information about which of the DB AG companies operating in the rail freight transport sector have made which contributions to the published results overall. Including which foreign subsidiaries contribute to the deficits and, if so, in what capacity. It is also unclear whether they may be able to request foreign government aids now or in the future.

DB Cargo AG itself has produced considerable deficits in the past five years, which have been compensated for within the DB-Group. This is in contrast to non-state companies, where this compensation cannot be expected. In the year and a half between 1st January 2019 and the end of June 2020, the deficit per employee at DB Cargo will be based on the above Numbers at around 46,000 euros. In the meantime, a significant proportion of investments made by DB Cargo AG receives public (project funding) funds.

For 2020 as a whole, a further deterioration in the economic situation of DB Cargo AG is to be expected. At least due to the pandemic compared to 2019, but possibly also due to a further decline in productivity, so that the deficit financing resulting from an equity increase on the part of the federal government would reach an even greater dimension. With a total (external) turnover of around 2.3 billion euros, DB Cargo AG is by far the largest market participant and provider of rail freight transport services. Exact figures for the sales achieved only in the German market are not publicly available. However, a size comparison based on the recorded traffic performance shows that DB Cargo AG (2018) is still around seven times larger than the next largest competitor in Germany and thus still dominates the market.

It should be noted that the decision of the Bundestag on an equity increase of the DB AG in 2020 was made without exact knowledge of the entire situation in the industry, in the individual sub-markets or national companies. In all likelihood the decision was made without distinguishing between pandemic-related and structural deficits, especially in the area of rail freight traffic within the DB AG.

The high risk that competition will be distorted, not only in the German market but also in other European submarkets, where companies of the DB Group are active in the rail freight transport, is therefore evident and must be examined in the course of the examination of the planned aid, be clarified and published by the EU Commission.

VII.

As things stand, the plans of the Federal Government and the German Bundestag (as budget legislators) contradicts the applicable state aid law in the form amended on the 8th May 2020:

1) It is undisputed that aid can help companies that are heavily burdened by lost sales, but are essentially healthy, in particular to survive a temporary crisis. The recapitalization at DB AG or DB Cargo AG would, however, go beyond the minimum necessary to guarantee the profitability of the recipients and, with regard to the competition with the companies of DB AG, could lead to unnecessary market exits by companies that were profitable before the COVID-19 outbreak. (item 6)

   This risk from recapitalization would arise especially for companies in competition with DB Cargo AG. Their exit from the market can also lead to lasting disruptions in supply chains and thus damage to EU economic life beyond the pandemic.

   It must be disputed whether DB Cargo AG could be considered a "healthy company" as of December 31, 2019. The deficits accumulated over five years and, most recently, the significantly more negative than expected 2019 annual result (before the pandemic) indicate that there is a considerable need for restructuring and that a direct increase in DB Cargo AG's equity would not be expected if a "private investor test" is carried out.

2) It cannot be taken as proof that the conditions formulated in items 7 and 64 are fulfilled. According to these, state-aid “should only be considered if no other appropriate solution can be found“.

3) It is, for example, incomprehensible why the company DB AG, which still has an excellent rating, does not cover any capital requirements with “subordinate debt” (item 12). Occasionally, it is pointed out that a further increase in the debt level would worsen the financing conditions of DB AG on the capital market. If this argument is upheld, which is plausible, it would have to be ensured that the federal government would not save the company owned by the government by injecting equity capital. Furthermore it would have to ensure it does not create better financing conditions for companies belonging to the DB Group compared to other competing companies, subsequently ensuring that that healthy competition can take place without market distortion.

4) The regulations that are particularly relevant for the federal project can be found in the newly inserted section 3.11 of the state aid guidelines on recapitalization measures. These ensure that the disruption of the economy does not result in the unnecessary exit from the market of undertakings that were viable before the COVID-19 outbreak", whereby an orientation towards the goals of the EU (climate protection and digitization are explicitly mentioned) is a prerequisite and they should be limited to June 30, 2021. Furthermore, such measures may only be considered if no other suitable solution can be found and strict requirements are met. Since such instruments can strongly distort competition between companies, clear conditions for the participation of the state in the companies concerned (entry, remuneration, exit), governance provisions and suitable measures to limit the distortion of competition should be provided. Distortion of competition must be as low as possible (item 53) if it is permissible at all.

5) In the discussion process outlined, the federal government did not, at any time, discernibly consider whether and, if so, which "stringent conditions" should be imposed. In what form the aid should be repaid to the aid donor or how the distortion of competition should be prevented was not considered. There are also no indications as to how the orientation towards the two mentioned EU goals would be guaranteed in a special or at least better way by supporting the DB, without equal support for all freight railway companies (affected by lost sales).

6) It must be stated that maintaining and strengthening rail freight transport undoubtedly not only serves the EU's climate protection goals but is a prerequisite for them. However, it is not understood why this should (can) only happen through a recapitalization of DB Cargo AG, because all non-federally owned freight railways also make or can make at least equal contributions to this. The realization of the mentioned EU goals would even be jeopardized in the medium term, because DB Cargo AG, strengthened by the equity injection, could gain unilateral and competition-distorting advantages through various behaviour in the market:

   - Deficit coverage of a permanent supply of prices below costs (as in the past five years),
   - Targeted repression of competing companies through aggressive pricing or additional services or acceptance of high "start-up losses",
   - Expansion policy through the acquisition of weakened companies,
   - Selective cooperation with individual market participants.

   This would contradict the requirement that beneficiaries should not engage in aggressive state aid-funded business expansion or taking excessive risks.

7) The eligibility criteria and prerequisites for government entry documented in Section 3.11.2, all of which must be met, are to a large extent not met.

   It is not to be expected, that the beneficiaries goes „out of business or would face serious difficulties to maintain its operations" (point a). As the company concerned would be able to obtain further financial resources on the credit market (point c) and through the sale of parts of the company at affordable conditions.

   There is also no "common interest" in state intervention (point b). Social emergencies or significant job losses would not have to be feared. Even in the unlikely event of insolvency or complete cessation of business of the DB Cargo AG. The company would continue to operate or other companies can offer the previous services. The DB Cargo AG is not a systemically innovative company. After all, DB Cargo is a company that on December 31, 2019 - contrary to the requirement in point d - was already "in difficulty".

8) Item 54 of the State aid guidelines specify that the scope of the recapitalization measures may not do more than restore the capital structure that existed on December 31, 2019. As things stand, however, there would be excessive funding or state funding of structural deficit phenomena at DB Cargo AG. The independent estimate of the value of the unlisted company benefiting from the aid, which is required in accordance with item 60 of the State Aid Directives, for the purpose of checking proportionality is not currently available and may not have been carried out either. The companies represented by our association expect the relevant documents to be submitted to the sector for comment.

9) A further condition for an equity increase (according to items 55 and 56) specifies that the state must receive appropriate compensation for the investment. The more the compensation corresponds to market conditions, the lower the potential distortion of competition caused by state intervention. According to the current assessment of the economic situation of DB Cargo AG, adequate compensation from ongoing business operations is not to be expected in the long term. As a result, the prerequisite that the necessary state remuneration can be raised by the supported DB Cargo AG cannot be regarded as feasible

   An alternative consideration of DB AG for its planned dividend payment would be that the income and surpluses generated mainly from the income from infrastructure fees is used for remuneration. Thus, remuneration would be collected largely from competing companies to the rail transport companies of Deutsche Bahn AG and would constitute a "remuneration" for the support of DB Cargo AG. This would cause even more severe distortion of competition to the detriment of the competitive railways than described above.

10) Item 56 describes the option that the recipient of the aid undertakes the repurchase and sale of the recapitalization instrument within a reasonable time in order to ensure a return flow of the funds to the aid provider. This can and should be done step by step and stimulated by the structure of the remuneration (see above). In the present case, it can probably not be assumed that DB Cargo AG would be able to buy back, because of the structure of the group, which would be the formal recipient of the aid. Thus, the possibility of the state to sell their shares, outlined in item 64, gained by the equity increase to third parties needs to be part of conditions for the sale of shares that benefit the DB Cargo AG.

11) The condition from item 72 is not met. According to item 72, the Member States have to pay the recipient of a COVID-19 recapitalization measure that amounts to more than EUR 250 million or is a company that is active in at least one of the relevant markets, on which it is active, has significant market power, additional measures (“structural or behavioural obligations” under Council Regulation (EC) No 139/2004 and Commission Regulation (EC) No 802/2004) in order to safeguard effective competition in these markets.

VIII.

As a result, in the event of approval of aid to DB AG, the following conditions in accordance with item 53 would be expedient from the point of view of our association and should be granted by the EU Commission to the beneficiary in the course of aid to DB AG that has been checked Company and the aid donor are ordered to:

1) The federal government guarantees that, in order to avoid unnecessary market exits, any applications for COVID-19-related aid from other railway companies in the rail freight transport sector will also be submitted by a key date (e.g. 31st October) measured by the same standards (e.g. only support on 31st December 2019 economically healthy companies, assessment of the amount of aid for loss of sales, the stipulation of conditions, etc.), as this should also happen at DB Cargo AG/DB AG. If the revenue losses offset in this way at DB Cargo AG exceed the sum of the revenue losses at the competitive railways, the difference must be made available to the competitive railway's industry for future investments (1:1 rule).

2) A price observatory will be set up that collects data in a suitable manner, from which anti-competitive (dumping) behaviour by all freight transport companies can be identified when setting prices. This body should also monitor compliance with the mandatory ban on advertising with the aid under item 73.

3) The existing profit transfer and control agreements between the DB infrastructure companies and the DB railway companies and the DB Group will be terminated on 31st December 2020.

4) The obligation to provide relevant evidence to the EU Commission and a publication obligation in order to ensure that DB Cargo and its subsidiaries and any other beneficiaries of aid do not make multiple uses of aid in the different Member States, especially for foreign and cross-border transports.

5) The DB Group is instructed to sell part or all of its shares in DB Cargo or other companies involved in rail freight transport to third parties. Unless it is possible to reimburse the federal government for the aid within a reasonably short period of time. It must be specified that the sale does not create any new companies that are market-dominant beyond the current scope.

6) The single wagon system operated by DB Cargo will be opened for further partners according to a step sequence to be specified in detail. The opening begins with an invitation to tender, which is already common in local rail transport. These tenders will include regional service and continue with long-distance traction between the large train formation facilities, through shunting activities, and right up to access to required rolling stock.

7) DB Netz AG will be exempted from paying dividends to the group or the federal government for the 2020 and 2021 financial years. Possibly as part of a condition for the DB Group. If the COVID-19-related loss of income of the infrastructure operator exceeds the planned annual result, the deficit should be covered by federal aid in order to be able to maintain the efficiency of the infrastructure even in the crisis. The planned financing components for planned modernization investments in accordance with LuFV III, which are no longer due to the elimination of dividends from all DB infrastructure companies, are to be replaced by the federal government budget funds. Should the above-mentioned debt not achieve the planned dividend, the state-aid may be correspondingly lower.

8) The railway infrastructure managers of the DB Group include in their "Infrastructure terms of use (SNB)" clear regulations on liability for consequential damage incurred by the train operating companies as a result of the

poor state of the infrastructure or as a result of the significantly increased construction sites. The federal government compensates the resulting additional needs of railway infrastructure managers in a suitable manner.

9) In the case of an amendment to the statutes concerning the DB, as envisaged in the coalition agreement of March 2018, the statutes of DB Netz AG include profit-free business operations as well as customer satisfaction, quality - and price-weighted increase in traffic performance the acquisition of further customers anchored as assessment criteria. The supervisory board of the DB Group, which was previously only occupied by the owner side (DB Group) is to provide three places for external customers in the future.

10) In order to avoid a continuing regulatory gap, the functions of the network operator and the energy supplier in today's DB Energie GmbH are separated from each other under company law (unbundled) and/or the assigned infrastructure components of DB Netz AG or a joint new company (or an organization in another legal form).

11) The federal government is instructed to provide for a permanent adjustment of the calculation of train path prices to the marginal cost principle, which is predominantly valid in Europe, and to avoid any loss of income due to the management of the company with the goal of handling more traffic in the network.

12) Despite the item 74 and 75, DB Cargo AG or DB AG must be prohibited from acquiring competitors or other companies in the same business area, including upstream and downstream business activities, as long as the aid has not been repaid.

13) With reference to item 76, in the case of aid, it must be guaranteed that DB Cargo

    a) will publish its economic data together with the group in a timely manner,
    b) the necessary transparency about the position of all parts of the company in Germany and all other national state-aid relevant markets
    c) possibly also list justification for the aid for other business activities (e.g. single wagon transport).

14) The ban on dividends set out in item 77 and the ban on bonuses set out in item 78 must become part of the requirements.

Kind regards,

Ludolf Kerkeling
Chairman

Peter Westenberger
Managing Director