II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 18 January 2000
on the State aid granted by Germany to Linde AG

(notified under document number C(2000) 64)

(Only the German text is authentic)

(Text with EEA relevance)

(2000/524/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 called on interested parties to submit their comments pursuant to the provision cited above [1],

Whereas:

I. PROCEDURE

(1) In May 1998, in the course of its contacts with the German authorities, the Commission became aware of the existence of several transactions involving the Treuhandanstalt (THA), its successor, the Bundesanstalt fur vereinigungsbedingte Sonderaufgaben (BvS) and the companies UCB Chemie GmbH (JCB) and Linde AG (Linde). These transactions basically concerned the conditions under which carbon monoxide was to be supplied to an amine production site acquired by UCB from Leuna Werke GmbH (LWG) after a privatisation procedure.

(2) Subsequently, by letter dated 7 August 1998 (A/36142), the German authorities informed the Commission of the background to these transactions and the aid measures involved. By letter dated 18 September 1998 (D/16578), the Commission requested further information, which was provided by letter dated 3 December 1998 (A/38804). The case was registered as NN 16/99 on 10 February 1999.

(3) By letter dated 30 March 1999 (SG(99)D/2353, OJ C 194, 10 July 1999, p. 15), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of:

— a DEM 9 million grant to Linde for the construction of a new carbon monoxide production plant;

— the conditions under which carbon monoxide is currently being supplied to UCB.

(4) By letter dated 25 May 1999 (A/33985), the German authorities submitted their comments.

(5) The Commission received no comments from other interested parties.

II. DESCRIPTION OF THE MEASURES

II.1. Recipient

(6) Linde is an affiliate company of the Linde Group, a worldwide conglomerate with over 120 subsidiaries and employing more than 32 000 workers. In 1998 the Linde Group had a turnover of DEM 10 738 000 000 and a balance sheet total of DEM 9 371 000 000. It operates in four business sectors: engineering and contracting, materials handling, refrigeration engineering and industrial gases.

(7) Linde's headquarters are located in Höllriegelskreuth, Munich. In 1998 the company achieved a turnover of DEM 4 554 000 000 and employed 12 499 workers. Linde is currently the second-largest supplier of industrial gases in Europe. Industrial gases are those gases

[1] OJ C 194, 10.7.1999, p. 15.

which are delivered to the end-user in relatively large quantities, often by pipeline direct from the gas producer. They are used as intermediate products in the production of a wide range of chemicals, in medicine and for R & D purposes.

II.2. **The privatisation of chemical production in Leuna (Saxony-Anhalt)**

(8) In 1993 the THA decided to sell LWG's Leuna-based amine production operation to UCB, a subsidiary of Union Chimique Belge, a Belgian pharmaceutical and chemicals group that operates throughout the world. Union Chimique Belge employs more than 8 000 workers of whom around half work in the pharmaceuticals sector and the rest in the chemicals and film sector. Nearly one third of those employees work in Belgium. UCB itself achieved a turnover of DEM 6 619 million in 1998, and employed 79 workers.

(9) Amine production constitutes only a small part of the Leuna chemical conglomerate. According to the information provided by the German authorities, the sale was effected after an open, basically unconditional and transparent tender procedure. UCB, which was the only bidder, paid a purchase price of DEM 6,6 million. The THA assumed the costs arising out of the inherited debt burden and site clearance ([2]).

(10) Carbon monoxide is required for amine production, as it is for many other chemicals. UCB therefore made the purchase conditional upon THA's undertaking to guarantee the supply of carbon monoxide.

(11) The THA ([3]) undertook to provide carbon monoxide at a 'market price' agreed for a 10-year period provided that UCB:

— did not conclude a contract for the supply of carbon monoxide with another producer; or,

— did not decide to build a carbon monoxide production facility for its own use. However, the THA would make a grant of DEM 5 million available for this eventuality under the privatisation contract.

(12) No information was provided on how this 'market price' was to be determined. However, it should be noted that at the time the THA was concluding such long-term supply contracts with new investors because the supply situation for the chemicals sector was clearly rather uncertain. According to the German authorities, without such supply guarantees most producers would not have been prepared to establish themselves at the location concerned and consequently the THA would not have been able to fulfil its privatisation task.

([2]) In its Decisions (see Decisions in Cases NN 108/91, E 15/92 and NN 768/94 — Germany — Treuhand) the Commission has recognised the unique and unprecedented background to THA activity in connection with the transition from a centrally planned to a market economy. It therefore also accepts that the elimination of ecological damage caused before 1 July 1990 does not constitute State aid.

([3]) This Decision is without prejudice to any aid granted in connection with the privatisation agreement of 22 April 1993.

(13) When it concluded the contract with UCB on the amine production plant, the THA was hoping to find an investor to take over the carbon monoxide production plant. This hope was disappointed. Since the carbon monoxide production plant had been neither restructured or modernised, production costs were far above the market level. The public authorities were therefore running the plant at an annual loss of some DEM 3,5 million. In 1996, the BvS decided to cancel the loss-making contract for the supply of carbon monoxide and proposed that UCB should itself produce the carbon monoxide it required for its amine production. In accordance with the privatisation contract, UCB would receive a grant of DEM 5 million for this.

(14) However, UCB rejected the proposal. As a result, the BvS was forced to look for another investor. The only investor interested in taking over production was Linde, which had been established in the area since 1994. In June 1997 an agreement was concluded between the BvS, LWG, UCB and Linde for the supply of carbon monoxide.

II.3. **The agreement between the BvS, LWG, UCB and Linde**

(15) According to this agreement, Linde would build a new carbon monoxide production plant within 18 months. The new plant would be incorporated into Linde's existing facilities in Leuna. The building cost would be DEM 12 million, to which Linde would contribute DEM 3 million from its own funds. During the construction period, Linde would use the existing facilities and would supply UCB with carbon monoxide on the same terms as those agreed between the THA and UCB under the 1993 privatisation contract.

(16) Under this agreement, the BvS contributed DEM 9 million to the costs of building the new facility. According to the German authorities, this amount consisted of the DEM 5 million grant agreed between the THA and UCB under the privatisation contract, plus an additional amount of DEM 4 million.

(17) Since the Commission had serious misgivings that elements of state aid might be included in: (i) the DEM 9 million grant awarded to Linde AG for carbon monoxide production, and (ii) the 'market price' agreed between UCB and Linde, it decided to initiate the procedure laid down in Article 88(2) in respect of these measures.

III. **GERMANY'S RESPONSE TO THE INITIATION OF THE ARTICLE 88(2) PROCEDURE**

(18) By letter dated 25 May 1999, the German authorities responded as follows to the initiation of the procedure:

— given the specific nature of carbon monoxide, this gas must be produced in the place where it is consumed. Therefore, such a product cannot affect trade,

— since there is no carbon monoxide market in the customary sense, the purchase price can only be based on current costs at the existing facilities. An entirely separate carbon monoxide plant would be much more costly,

— Linde is not enjoying favourable treatment for the following reasons:

(i) the old carbon monoxide plant was not sold. It still belongs to LWG. So there was no obligation to call for tenders. Since Linde was building its own carbon monoxide plant, there was no obligation to call for tenders for this either;

(ii) Linde's prices are based on investment costs plus an adequate return;

(iii) since Linde was not obliged to build a new carbon monoxide plant and there were no other interested parties, there can be no question of Linde receiving preferential treatment,

— nor can UCB have received preferential treatment, since UCB is paying Linde a higher price for carbon monoxide than that paid to the BvS. This price is, in any event, higher than that paid in other countries (United States) [4],

— the supply guarantee was a precondition for UCB taking over amine production. On the basis of this guarantee, the carbon monoxide price was to remain unchanged at [...] (*) for a period of 10 years. This price was no longer economically sustainable for BvS,

— LWG examined the possibility of producing carbon monoxide itself, but the investment costs were too high. Carbon monoxide is produced on the basis of a synthesis gas that has to be purified in a steam reformer. The only alternative to LWG's own production was to utilise a steam reformer available in the vicinity. Since Linde had previously acquired a steam reformer from LWG, Linde proposed to the BvS and to UCB7 that it should become UCB's carbon monoxide supplier. Carbon monoxide would then be supplied to UCB at the price of [...] (*) This price was to apply from the date on which the agreement between BvS, UCB and Linde was signed (June 1997) until Linde actually started to operate the new carbon monoxide facility, and for [...] (*) after that date. It would be reviewed in line with normal practice. According to the German authorities (letter A/33985 dated 25 May 1999, received on 28 May 1999), UCB decided to accept Linde's offer, since Linde was able to supply more carbon monoxide than LWG because of the new production plant. The possibility of increasing production in the future was an important consideration for UCB. Linde therefore offered UCB a contract for [...] (*).

— The price of [...] (*) was agreed for a period of [...] (*) There is no provision for a control mechanism because no typical market price exists.

— Linde has invested DEM 12,586 million, of which DEM 9 million was provided by the public authorities (DEM 0,45 million as an investment allowance (Investitionszulage) and the rest as an ad hoc grant from the BvS). The investment costs related primarily to the building of a new carbon monoxide production facility.

IV. ASSESSMENT OF THE MEASURES

IV.1. The relevant market

(19) The relevant product market is one on which industrial gases, particularly hydrogen, oxygen and nitrogen, are supplied by pipeline right up to, or to the vicinity of, the plant itself. Direct supply is a separate market since tankers or cylinders generally cannot provide enough gas for large-scale customers.

(20) Gas supply plants can be built anywhere. In this field of activity, large-scale producers are active worldwide. The relevant geographic market is at least the Community market.

(21) Linde is engaged in the direct supply of industrial gases. These products are traded within the Community [5] The following figures show that other competitors are active on this market:

Company	Market share
Linde	18 %
Messer Griesheim	6 %
Air Liquide	50 %
BOC	8 %
Air Products	15 %

(22) Carbon monoxide is a highly toxic gas used in the chemical industry. The amount of carbon monoxide needed by UCB can only be supplied by pipeline or by direct suppliers. It is expensive to transport and therefore production must be located near the purchaser.

[4] According to a recent report, the price of CO in the United States is currently DEM 250/1 000 Nm^3 (See European Chemical News, 29 March 1999, pp 28 to 29).

(*) The exact figures are confidential.

[5] In 1997 the value of intra-Community trade in industrial gases (NACE 24.11) was EUR 244 749 400 (Eurostat).

(23) In 1994 Linde inaugurated the world's largest industrial gases centre in Leuna, and in 1998 it took over the entire supply of industrial gases to the Mitteldeutsche Erdoelraffinerie (MIDER) in Leuna. MIDER, which belongs to the French mineral oil group Elf Aquitaine, receives hydrogen, oxygen, and nitrogen from Linde. The supply contract amounts to over DEM 1 billion.

(24) Compared with the exceptional costs of building new, separate facilities, Linde was in the advantageous position of being able to incorporate carbon monoxide production into its existing hydrogen production facilities which are linked with MIDER.

(25) Although UCB is currently Linde's only customer for carbon monoxide, it cannot be ruled out that in the future Linde will also supply carbon monoxide to other companies based in the same industrial triangle. Here it is worth noting that Buna, Leuna and Bitterfeld are trying to attract chemical investment. The companies already established, in addition to UCB, Linde and Elf Aquitaine, include, for example, Elf Atochem SA, Rhone-Poulenc SA and Domo SA.

(26) Linde can supply gas at a reasonable price and these companies may prefer this source of supply to other sources on the grounds of reliability and economy.

(27) For these reasons, any aid granted to Linde for the building of a new carbon monoxide production facility is capable of distorting competition.

IV.2. **Measures which constitute State aid: the DEM 9 million grant to Linde**

IV.2.1. *State aid character of the measure*

(28) The DEM 9 million grant awarded by the BvS to Linde constitutes aid within the meaning of Article 87(1) of the EC Treaty, since it has enabled the company to add a carbon monoxide production unit to its existing hydrogen plant without having to bear the costs thereof. The fact that for certain reasons it is preferable to produce carbon monoxide in the place of consumption does not alter this assessment. First, Linde has an advantage over its competitors, because of better investment conditions for building a new carbon monoxide production facility. Second, for the aforementioned reasons, any support granted to the sole carbon monoxide supplier in the Leuna area will have direct effects on other producers' end products for which carbon monoxide is required (such as UCB's amine production). These end products are traded within the Community.

(29) The German authorities claim that the guarantee to supply carbon monoxide to UCB was the only way of selling the amine production facilities.

(30) As regards this argument, it should be noted that this was normal practice in the early 1990s, since it was the only way to sell parts of integrated conglomerates, which could not be privatised as a whole. The supply situation at the chemical plant sites would otherwise have been too uncertain. Without such guarantees most producers would therefore not have agreed to buy part of the site and consequently the THA would have been unable to fulfil its privatisation task.

(31) However, the guarantee to supply UCB entered into in 1993 does not justify the grant of State aid to Linde in 1997 in connection with the construction of a new carbon monoxide production facility.

(32) First, it is difficult to regard the award of the DEM 5 million grant (in accordance with the 1993 privatisation contract) as part of the supply guarantee. For as far as UCB was concerned, such a grant was not a requirement under the supply guarantee assumed by the THA. Under the contract, UCB was entitled to an adequate supply of carbon monoxide, even without such a grant. Even less can such a supply guarantee be invoked to justify the award of a DEM 9 million grant to Linde. Secondly, the original 1993 arrangement did not envisage the possibility of a third party being commissioned to build new facilities and receiving a DEM 9 million grant for this purpose. In fact, the agreement only gave UCB the right to explore supply conditions which might be more advantageous, including the building of its own facilities. However, there was never any question of a third possibility, which the German authorities, in their comments on the initiation of the Article 88(2) procedure rightly call an alternative solution, namely of a third company receiving support to build a new carbon monoxide facility. The agreement concluded between the BvS, LWG, UCB and Linde in June 1997 must therefore be regarded as a new agreement, different from the 1993 privatisation contract.

(33) Finally, it should be noted that the German authorities have not produced concrete or sufficient evidence to show that no companies other than Linde would have agreed to supply UCB. They merely assert that Linde was the only interested investor.

IV.2.2. *Assesment of the compatibility of the State aid measure*

(34) Having established that the DEM 9 million grant awarded to Linde constitutes State aid within the meaning of Article 87(1) of the EC Treaty, the Commission must examine whether this measure can be exempted on the basis of the EC Treaty.

(35) As regards the nature of the aid granted to Linde, with the exception of the investment allowance of DEM 0.45 million, the aid was not granted under a Commission-approved scheme but pursuant to national measures which the Commission had not approved and of which it should have been notified in advance in accordance with Article 88(3) of the Treaty. This aid is consequently unlawful.

(36) Article 87(1) of the EC Treaty provides that aid meeting the criteria laid down therein shall be incompatible with the common market.

(37) In the present case, the derogations under Article 87(2) of the EC Treaty are not applicable since the aid does not pursue any of the objectives listed in that paragraph. Nor have the German authorities attempted to invoke those derogations.

(38) Article 87(3) of the EC Treaty lists the types of aid that may be considered to be compatible with the common market. Compatibility must be determined in the context of the Community as a whole and not of a single Member State, or a region thereof.

(39) To ensure that the common market functions normally and to abide by the principle established in Article 3(g) of the EC Treaty, the derogations listed in Article 87(3) of the EC Treaty should be construed narrowly when an aid scheme or any individual aid award is scrutinised. In particular, the derogations may be applied only if the Commission establishes that, without the aid, market forces would not in themselves be sufficient to induce the recipients to act in such a way as to achieve any of the desired objectives.

(40) As regards the derogations under Article 87(3)(b) and (d) of the EC Treaty, the aid is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the German economy, and does not have the characteristics of such projects. Nor is it intended to promote culture or heritage conservation.

(41) As far as the derogation under Article 87(3)(c) of the EC Treaty is concerned, the German *Land* of Saxony-Anhalt is not located in an area which qualifies for regional aid under this provision.

(42) In certain circumstances, Article 87(3)(c) of the EC Treaty also allows the Commission to authorise the granting of rescue or restructuring aid to firms in difficulties, in accordance with the Community guidelines on State aid for rescuing and restructuring firms in difficulty [6], which were in force when the aid was granted. Linde is not a firm in difficulty within the meaning of those guidelines, and the DEM 9 million grant does not constitute rescue or restructuring aid.

(43) The regional aid map of a Member State indicates the assisted areas of the Member State concerned and the maximum aid intensities permitted in each assisted area for initial investment or job creation. According to Germany's regional aid map, Saxony-Anhalt is an area eligible under Article 87(3)(a) of the EC Treaty.

(44) Article 87(3)(a) provides that aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment may be considered to be compatible with the common market.

(45) To guarantee effective control of regional aid while helping to achieve the objectives set out in Article 3 of the Treaty, in particular under points (g) and (k), the Commission sets a maximum population ceiling in assisted areas for each Member State. The ceiling for Saxony-Anhalt is 35 % of the eligible costs.

(46) Aid for initial investment is calculated as a percentage of the investment's value. This value is established on the basis of a uniform set of items of expenditure (standard base) corresponding to the following elements of the investment: land, buildings and plant/machinery. In Linde's case, the standard base is the following:

(DEM million)

Buildings	1,809
Plant/machinery	10,777
Total	12,586

(47) The Commission has to check whether the aid granted within that limit can be regarded as compatible with the common market within the meaning of the derogation laid down in Article 87(3)(a) of the EC Treaty.

(48) Since the German authorities are providing DEM 9 million of the eligible investment costs of DEM 12.586 million, the permitted aid ceiling has been substantially overshot. According to the information provided by the German Government, DEM 0,45 million was granted under the Investment Allowance Law (Investitionszulagegesetz) [7] and therefore does not need to be re-examined by the Commission. The German authorities have also indicated that direct investment subsidies have been granted under the joint Federal/*Länder* programme for improving regional economic structures (Gemeinschaftsaufgabe zur Verbesserung der regionalen Wirtschaftsstruktur). Finally, the German Government states that the investment subsidies granted by the BvS amount to no more than DEM 855 million (DEM 9 million minus DEM 450 000).

[6] OJ C 368, 23.12.1994, p. 12.
[7] Investment Allowance Law (Investitionszulagegesetz). Measures under this law qualify as regional investment aid under Article 87(1) of the EC Treaty and have been approved by the Commission (aid scheme N 494/A/95).

(49) With the exception of the investment allowance of DEM 0,45 million, the aid in question has not been awarded under Commission-approved regional aid schemes, but on the basis of ad hoc decisions taken by the competent authorities. In such cases, the impact of the aid has to be examined in the context of the Community as a whole. The Court of Justice confirmed this interpretation in Hytasa (Judgement of 14 September 1994 in Joined Cases C-278/92, C-279/92 and C-280/92 Spain v. Commission ([8]) and Pyrsa Judgement of 14 January 1997 in Case C-169/95 Spain v. Commission ([9]).

(50) An individual aid measure may be classed as regional aid compatible with the common market where it effectively contributes to the long-term development of the area concerned and does not have effects that are detrimental to the common interest and competitive conditions in the Community. Such aid may therefore be considered to be compatible with the common market where it does not affect trading conditions to an extent that is contrary to the common interest.

(51) Since the grant to Linde is directly linked to a specific investment project, i.e. the construction of a new carbon monoxide production facility in Leuna, and since it represents a percentage of the eligible investment costs, it can be regarded as investment aid.

(52) The investment costs are eligible under the guidelines on national regional aid ([10]) ('guidelines'), since they relate to an initial investment and such aid is calculated as a percentage of the investment's value expressed in terms of the standard base ([11]), Linde's contribution to the financing of the project is over 25 % of the total project costs. Consequently, the investment fulfils the criteria laid down in the guidelines.

(53) Moreover, the Commission considers that the new carbon monoxide production facility makes a positive contribution to the development of the Saxony-Anhalt region and in particular to the renewal and improvement of the Leuna area which, together with Buna and Bitterfeld, forms the main industrial area in this region. The investment will also increase the efficiency of the region's chemical production. Finally, the Commission has found no overcapacity of carbon monoxide at Community level. Linde's carbon monoxide production will be easily absorbed by the market.

(54) It must consequently be concluded that the part of the aid under examination which, in conformity with the cumulation rules ([12]) does not exceed the maximum intensity of 35 % of the eligible investment costs, does not affect trading conditions to an extent that is contrary to the common interest and can therefore be deemed compatible with Article 87(3)(a) of the Treaty.

(55) This being so, and in view of the fact that the investment costs total DEM 12,586 million, the amount of investment aid (including the investment allowance of DEM 0,45 million) may not exceed 35 % of that amount, i.e. DEM 4 404 750. The Commission accordingly concludes that this part of the aid is compatible with the common market.

(56) The remainder of the aid (DEM 439 520) which, according to the cumulation rules ([13]) exceeds the maximum intensity of 35 % of the eligible investment costs, constitutes State aid which is incompatible with the common market, since it satisfies none of the preconditions necessary for one of the derogations provided for in Article 87(2) and (3) to be applied.

IV.3. **Measures in relation to which the Commission has found no element of State aid: the 'market price' paid by UCB to Linde**

(57) The Commission finds that, according to the information provided by the German Government, the price currently paid by UCB to Linde for supplies of carbon monoxide […] (**) is based on actual costs. This price is higher than the price UCB had agreed to pay LWG in the 1993 privatisation contract.

(58) The German Government also indicated that because of the special characteristics of carbon monoxide there is no way of checking whether this price corresponds to a normal market price.

(59) The German authorities also referred to current prices in the United States ([14]), This price is substantially lower than the one agreed between UCB and LWG.

(60) Here it should be noted that in the end these two operators had to agree on the price. The German authorities have confirmed that the price is based on the production cost plus a 'normal profit margin'. The Commission tried to obtain information on the market price of CO, but it proved extremely difficult to find any reliable data. In its notice on the initiation of proceedings, the Commission expressly asked third parties for information on this matter. However, no comments were received from other interested parties.

([8]) ECR [1994] I-4103.
([9]) ECR [1997] I-135.
([10]) OJ C 74, 10.3.1998, p. 9.
([11]) See footnote 9 point 4.5 of the guidelines.
([12]) Point 4.18 of the guidelines on national regional aid states that the aid intensity ceiling shall apply to the total aid: (i) where assistance is granted concurrently under several regional schemes; (ii) whether the aid comes from local, regional, national or Community sources.
([13]) See footnote 11.
(**) The exact figures are confidential.
([14]) Industrial gas prices in the Member States differ from those prevailing in the United States. But prices in Germany are relatively high even by Community standards.

(61) Although the Commission was unable to identify an element of State aid in this transaction, it should be noted that the agreed price was a part of an overall agreement. This states, in essence, that Linde would supply UCB at a given price level, and that it would receive a DEM 9 million grant for the construction of a new carbon monoxide production facility ([15]).

V. **CONCLUSION**

(62) It must consequently be concluded that the part of the aid under examination which, in accordance with the cumulation rules, does not exceed the regional aid ceiling of 35 % of the eligible investment costs, does not affect trading conditions to an extent that is contrary to the common interest and can therefore be deemed compatible with Article 87(3)(a) of the EC Treaty.

(63) The remainder of the aid under examination (DEM 4 395 250) which, in accordance with the cumulation rules, exceeds the regional aid ceiling of 35 % of the eligible costs, constitutes State aid which is incompatible with the common market, since it does not satisfy any of the necessary preconditions for one of the derogations provided for in Article 87(2) and (3) of the EC Treaty to be applied.

(64) As regards the prices for the supply of carbon monoxide to UCB, the Commission has not identified any element of State aid therein.

(65) When aid is deemed incompatible with the common market, the Commission requires the Member States to recover it from the recipient ([16]). For this reason, the aid amount of DEM 4 395 250 which, according to the cumulation rules, exceeds the regional aid ceiling of 35 % of the eligible investment costs, and which is the subject of this Decision, must be recovered.

(66) The aid must be recovered in accordance with the procedures and provisions laid down in German law, and must include interest from the date on which it was unlawfully granted until its actual recovery, calculated on the basis of the reference rate used for calculating the net grant equivalent of regional aid in Germany ([17]).

(67) In accordance with the case law of the Court of Justice of the European Communities, the aforementioned provisions must be applied in such a way that the aid can actually be recovered. Any difficulties of a procedural or other nature which may arise in applying the measure will not affect its legal validity ([18]),

HAS ADOPTED THIS DECISION:

Article 1

The aid granted to Linde AG by Germany in the form of a grant for the construction of a carbon monoxide production facility in Leuna (Saxony-Anhalt) is compatible with the common market as regards the portion which, in accordance with the cumulation rules, does not exceed the 35 % ceiling laid down for national regional aid in Saxony-Anhalt.

Article 2

The aid granted to Linde AG by Germany in the form of a grant for the construction of a carbon monoxide production facility in Leuna (Saxony-Anhalt) is incompatible with the common market under Article 87(1) of the EC Treaty as regards the portion which, in accordance with the cumulation rules, exceeds the 35 % ceiling laid down for national regional aid in Saxony-Anhalt.

Article 3

1. Germany shall take all necessary measures to recover from the recipient the aid referred to in Article 2 and unlawfully made available to the recipient.

2. Recovery shall be effected in accordance with the procedures and provisions of national law. The aid to be recovered shall include interest from the date on which it was made available to the recipient until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

([15]) In accordance with general legal principles, agreements remain valid so long as there is no change in the basic conditions and expectations which existed when they were concluded (*rebus sic stantibus*). Had the agreed price been influenced by the grant amount, it would be reasonable to expect Linde to try to renegotiate the price, in order to take account of the change in the economic and financial assumptions (in particular the 'normal profit margin' mentioned by the German authorities) which results from the obligation to repay the amount of aid found to be incompatible.

([16]) Commission communication of 24 November 1983 (OJ C 318). See also the Judgement of the Court of Justice in Case 70/72 Commission v. Germany [1973] ECR 813 and Case 310/85 Deufil GmbH and Co. KG v Commission ECR [1987] 901.

([17]) Letter from the Commission to the Member States SG (91) D/4577, 4 March 1991. See also the Judgment of the Court of Justice in Case 142/87 Belgium v. Commission ECR [1990] I-959.

([18]) Judgment of the Court of Justice in Case 142/87 Belgium v. Commission ECR [1990] I-959, points 58 to 63.

Article 4

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

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 18 January 2000.

For the Commission

Mario MONTI

Member of the Commission