COMMISSION

COMMISSION DECISION
of 19 March 2003
on State aid granted by Germany to Linde AG (Saxony-Anhalt)

(notified under document number C(2003) 647)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/687/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 those provisions,

Whereas:

I. PROCEDURE

(1) On 17 October 2002, the Court of First Instance (CFI) annulled Commission Decision 2000/524/EC [1] in which the Commission declared aid granted to Linde AG (Linde) incompatible with the common market. The Court thus agreed with the application brought by Linde insofar as the Commission had refused a substantial part of an investment subsidy (the subsidy) as aid to Linde.

(2) 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 für vereinigungsbedingte Sonderaufgaben (BvS), and the companies UCB Chemie GmbH (UCB) and 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.

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

(4) By letter dated 30 March 1999, 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 and the conditions under which carbon monoxide was currently being supplied to UCB (SG(99)D/2353) [2].

(5) By letter dated 25 May 1999, Germany submitted its comments. The Commission received no comments from other interested parties.

(6) On 18 January 2000, the Commission adopted its partially negative Decision 2000/524/EC.

(7) By application lodged at the Registry of the Court of First Instance on 21 April 2000, Linde (supported by Germany) brought an action for annulment of Articles 2 and 3 of Decision 2000/524/EC. The Commission contended that the Court should dismiss the action as unfounded. In its judgment of 17 October 2002 in Case T-98/00 [3], after an oral procedure, the Court upheld Linde's application.

(8) Pursuant to Article 233 of the EC Treaty, the Commission must take the necessary measures to comply with the judgment of the Court, i.e. it must adopt a new Decision that meets the requirements of the judgment.

[1] OJ L 211, 22.8.2000, p. 7.
[2] OJ C 194, 10.7.1999, p. 14.
[3] Not yet reported.

II. DESCRIPTION OF THE MEASURES

1. The recipient

(9) Linde is a subsidiary of the international technology-oriented Linde Group. In 2001, the Linde Group had a turnover of EUR 9,076 billion, with a workforce of 46 400 employees, of which 18 176 were employed in Germany and 28 387 abroad. Net profit amounted to EUR 289 million in 2001. Linde's three business segments, gas and engineering, material handling and refrigeration have established leading positions in their markets, according to Linde Group ([1]).

2. The privatisation of amine production and the taking-over of carbon monoxide production

(10) In 1993 the THA sold the Leuna-based amine production operation (the privatisation contract) to UCB, a subsidiary of Union Chimique Belge, which is a worldwide industrial group, active in three industrial sectors: pharmaceuticals, chemicals and film. The parent company, UCB SA, comprises about 130 subsidiaries and affiliates worldwide, mainly in Western Europe, but also in the Americas and Asia. In 2001, the group employed about 10 000 people, of whom around half are in the pharmaceutical sector and the rest in the chemical and film sectors. Nearly one third of those employed work in Belgium, where several of the most important production units are located, as well as the general management of each of the three sectors and the research and development centres in the pharmaceutical and chemical fields. The group turnover in 2001 totalled EUR 2,475 billion ([2]).

(11) According to the information provided by Germany, the amine production was sold after an open, unconditional and transparent tender procedure in which UCB was the only bidder.

(12) Since carbon monoxide is required for amine production, UCB made the purchase conditional upon the THA's undertaking to guarantee the supply of carbon monoxide for its amine production at the acquired site in Leuna. The THA undertook to provide carbon monoxide for a fixed 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.

(13) No information was provided on how this fixed price was determined. However, it should be noted that at the time the THA was concluding such long-term supply contracts on a regular basis with new investors because the supply situation for the chemical sector was 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.

(14) When it concluded the privatisation contract with UCB on the amine production plant, the THA was also 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 nor modernised, production costs were far above the expected level. The supply obligation caused the THA losses of approximately DEM 3,5 to 5 million per year, since the fixed price was calculated on the basis of erroneous assumptions and did not even cover the production costs at the outdated facility. Accordingly, if the privatisation contract had been performed until its date of expiry, namely 30 April 2003, the THA would have suffered aggregate losses of more than DEM 15 million in the period after October 1998 alone.

(15) 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.

(16) However, since UCB rejected the proposal, the BvS was forced to look for another investor.

(17) The only investor interested in and objectively capable of taking over the carbon monoxide delivery obligation was Linde, since it had been producing gas at the Leuna site since 1994. In June 1997, an agreement (the 1997 agreement) was concluded between the BvS, LWG, UCB and Linde for the supply of carbon monoxide. Accordingly, 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 12,5 million, to which Linde would contribute DEM 3,5 million from its own funds and the BvS the remaining DEM 9 million (the subsidy).

(18) 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 fixed price agreed between UCB and Linde, it decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of these measures.

(19) By letter dated 25 May 1999, Germany pointed out that, due to the specific chemical nature of carbon monoxide, it must be produced at the place where it is used. Therefore, such a product could not affect trade in the Community. Since there was no carbon monoxide market in the customary sense, the purchase price could only be based on current costs at the existing facilities.

([1]) http://www.linde.com/en/en.jsp, 3 December 2002.
([2]) http://www.ucb-group.com/corp/default.htm, 3 December 2002.

(20) An entirely new carbon monoxide plant would have been much more costly than the modifications by Linde to its existing gas production site — DEM 20 million instead of DEM 12,5 million. There was no obligation to call for tenders since the likely providers of carbon monoxide had been contacted and there was no other interested company. Only Linde responded positively. Linde's prices were based on investment costs plus an adequate return.

(21) 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 UCB that it should become UCB's carbon monoxide supplier. Carbon monoxide would then be supplied to UCB at a newly negotiated higher price.

(22) By letter dated 25 May 1999, Germany stated that UCB had decided to accept Linde's offer, even though the carbon monoxide price was higher, because Linde offered some favourable conditions over the existing THA obligation. Through the new production site, Linde was able to supply more carbon monoxide than LWG over an extended period of time. This possibility of increasing its amine production in the future was an important consideration for UCB in accepting the 1997 agreement.

3. **Decision 2000/524/EC**

(23) The Commission initiated formal investigation proceedings in July 1999 as it believed that the DEM 9 million subsidy awarded to Linde could constitute aid. No interested party except Germany responded to the publication of the Commission's initiation of proceedings. In January 2000 the Commission terminated proceedings with the partially negative Decision 2000/524/EC.

(24) In the Decision, the Commission found that the subsidy of DEM 9 million constituted aid. In accordance with the guidelines on national regional aid [1], the portion exceeding 35 % of the eligible investment costs of the facility, i.e. DEM 4,4 million, was incompatible with the Treaty and had to be reimbursed.

(25) The main argument for considering the measure aid was that the subsidy allowed Linde to add a new production installation without having to bear all the costs. According to the Commission, the fact that for certain reasons it was preferable to produce carbon monoxide in the place of consumption did not alter this assessment. Linde had a pre-existing advantage over its potential competitors because it was already on the site and had thus better investment conditions for setting up the new facility.

(26) The Commission assumed that the subsidy could have an effect on other producers end products for which carbon monoxide is an intermediary. These end products are traded in the Community.

(27) Moreover, although UCB was the only buyer of carbon monoxide at the site, it could not be excluded that in future Linde would also supply to other companies based in the same area.

(28) Finally, Germany did not submit sufficient evidence showing that no other company than Linde would have been prepared to take over supplying UCB. They merely claimed that Linde was the only interested investor without having conducted a tender procedure.

(29) In April 2000, Linde, supported by Germany, appealed against Decision 2000/524/EC to the Court of First Instance.

4. **The judgment of the Court of First Instance**

(30) The Court based its decision largely on the following facts:

'42. It is apparent from the documents before the Court that in 1996 the BvS, which is the successor to the THA and which owned the carbon monoxide production plant operated by LWG at Leuna, was faced with a financial problem owing to the combination of the following circumstances:

— in the supply agreement of 22 April 1993, the THA and LWG undertook to supply specific quantities of carbon monoxide to UCB, at a price equivalent to the market price, for a period of 10 years, renewable for an indefinite period;

— it later became apparent, however, that the supply price would not cover the cost of production of carbon monoxide by LWG;

— the particularly high costs were occasioned by the obsolescence of the plant and technology used by LWG;

[1] OJ C 74, 10.3.1998, p. 9.

— in addition, the supply price had been fixed in the ultimately unrealised expectation that a second purchaser of carbon monoxide would set up business at the Leuna site, which would have enabled the LWG production unit to be operated more profitably;

— as a result of performance of that supply agreement, the BvS and LWG incurred losses of approximately DEM 3,5 million per year which, from 1998, would have increased to DEM 5 million per year;

— accordingly, if that agreement had been performed until its date of expiry, namely 30 April 2003, rather than being terminated in October 1998, the BvS and LWG would have suffered aggregate losses of more than DEM 15 million in the period after October 1998;

— LWG was not entitled to terminate the supply agreement of 22 April 1993 under Article 6(4) (see paragraph 3 above) since neither of the two conditions set out in that provision were met in the present case;

— that was because, first, UCB had ruled out the possibility of building and operating its own carbon monoxide production facility;

— second, there was no other carbon monoxide producer on the Leuna site which UCB could have used as a supplier;

— UCB could not have used a supplier who was not based on the site, since carbon monoxide must be produced near the user (see recital 22 of the contested Decision).'

(31) Another important factor was the planned capacity restriction of the new Linde plant to the needs of UCB ([1]). Delivery of carbon monoxide to third parties was excluded because of the small production reserve. There are no other potential buyers of carbon monoxide at the Leuna site and transport to the nearest chemical production sites at Bitterfeld or Buna was impossible due to the technical characteristics of carbon monoxide.

III. ASSESSMENT OF THE MEASURE

1. The relevant market

(32) The relevant product market is the market for carbon monoxide, which is a toxic gas used in the chemical industry. Since its transport is expensive and dangerous, production must be located near the purchaser.

(33) The relevant geographic market is always a local market, since due to the transport costs and risks, production and consumption have to be in the same location.

([1]) Cited by Linde in its application to the Court of First Instance, dated 19 April 2000, paragraph 21. Not contested by the Commission.

2. Existence of aid

(34) The subsidy of DEM 9 million did not constitute aid within the meaning of Article 87(1) of the EC Treaty since it appears that the measure did not distort competition and had no effect on trade.

(35) Owing to the specifics of the relevant product market and the context of privatisation efforts in the new *Länder* in the early 1990s, the subsidy affected neither the competitive situation in the production of carbon monoxide nor the further use of it in the production of amine.

(36) The specific economic and legal facts of this case must be seen against the background of the industrial 'Kombinat' system of the former German Democratic Republic (GDR). The idea of bundling a whole industry at one or two sites culminated in the two major GDR chemical production sites of Leuna and Bitterfeld. After German reunification, these complexes proved unmanageable under market economy conditions. The procedures developed for the privatisation of these industrial sites took account of the specifics of the former system of economy.

(37) In the course of the privatisation of the chemical industry at the Leuna site in 1993, Germany entered into a commitment to supply carbon monoxide to UCB for a fixed price over a fairly long period of time. Without this supply commitment, UCB would not have taken over the amine production at Leuna ([2]).

(38) In the course of fulfilling its loss-making carbon monoxide delivery obligation, Germany tried to minimise its financial burden by finding a more economical solution, while honouring its contractual commitment to UCB. The decision by the THA/BvS to choose Linde for that purpose was, in that specific situation, objectively the most economical solution for the State, since Linde already had a chemical production plant at the Leuna site. In 1994, Linde had inaugurated the world's largest industrial gases centre in Leuna, and in 1998 it took over the entire supply of industrial gases for the Mitteldeutsche Erdoelraffinerie (MIDER) in Leuna. It was possible to incorporate the new carbon monoxide production facility into the existing structure instead of building a completely new complex, thereby reducing the investment costs significantly.

(39) Since no other company located at the Leuna site presented such an objective structural advantage or even showed any interest in building a production facility for taking over the supply of carbon monoxide, Linde had an important cost advantage in building the new facility.

([2]) The fact that the purchase price UCB paid to the THA/BvS for the carbon monoxide did not even cover the production costs may indicate that an aid element was involved. However, since it was most probably covered by the approved derogation scheme (Treuhandregime), the Commission did not investigate this point any further.

(40) Linde received the subsidy for the construction of the carbon monoxide production plant. Without the subsidy, Linde would not have made the investment. The amount of the subsidy was negotiated as being the minimum necessary for building the facility. Since Linde, as the only company in Leuna, already had an operating chemical gas plant, no other company could have built the facility with this amount. The DEM 9 million subsidy constituted the best, most economical, deal for the State because a completely new plant would have cost up to DEM 20 million, instead of DEM 12,5 million in the case of Linde. In order to compensate for the higher building costs, any other company would either have asked for a substantially higher subsidy or would have been forced to increase the prices charged to UCB considerably. This would have been refused by UCB, which could rely on its delivery right under the original privatisation contract and the whole deal would have fallen apart.

(41) This exceptional position of Linde as the best-suited potential supplier of carbon monoxide to UCB was further reinforced by the fact that there was no reaction from any competitor or third party other than Germany during the Commission's entire investigation procedure. Taken together, all this provides sufficient evidence that another selection procedure would not have led to a lower level of subsidy than the one laid down in the 1997 agreement.

(42) The subsidy did not have an effect on the carbon monoxide market since the technological characteristics of the plant and the production capacities were tailored specifically to the needs of UCB. Linde's new plant was meant to work exclusively for UCB. There has never been a second purchaser of carbon monoxide who could have benefited from any 'subsidised' carbon monoxide. In the circumstances, therefore, there is no possibility that 'subsidised' carbon monoxide left the Leuna site or found another purchaser at the site. Consequently, any spill-over effect of the subsidy to other products or markets can be ruled out.

(43) It follows from these considerations that support given by Germany to Linde's new plant was only a vehicle allowing it to fulfil its commitments vis-à-vis UCB in a financially less costly way. The subsidy granted to Linde corresponded to the minimum amount necessary to attain this objective. Taking into account the specific circumstances of the case, such a support did not entail distortions of competition on the markets where Linde or UCB are present.

(44) Furthermore, a distortion of competition seems to be excluded on the amine market too since Linde's price for the carbon monoxide was even higher than the original price UCB paid under the privatisation contract and therefore certainly did not improve its competitive situation. The price was negotiated between Linde and UCB on purely commercial grounds. UCB agreed to the higher price in exchange for the delivery guarantee being extended beyond the original deadline of 2003 set in the privatisation contract. Consequently, the subsidy did not have any influence on a downstream market.

IV. **CONCLUSION**

(45) Given the unique factual characteristics of this case and its historic background, a distortion of competition on the relevant market (or even the threat of such distortion) can be excluded. Linde was the only company objectively suited to provide the carbon monoxide to UCB and delivered all its production exclusively to UCB. For Germany, Linde was just the means of assuring the continuation of its delivery obligation for carbon monoxide to UCB. The subsidy was limited to the necessary minimum for this purpose,

HAS ADOPTED THIS DECISION:

Article 1

The subsidy of DEM 9 million which Germany granted to Linde AG for the construction of a carbon monoxide plant at Leuna does not constitute aid within the meaning of Article 87(1) of the EC Treaty.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 19 March 2003.

For the Commission

Mario MONTI

Member of the Commission