JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
17 October 2002

(State aid - Definition - Advantage - Normal commercial transaction - Rational operator in a market economy)

In Case T-98/00,

Linde AG, established in Wiesbaden (Germany), represented by H.-J. Rabe and G. Berrisch, lawyers, applicant,
supported by
Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, assisted by J. Sedemund and T. Lübbig, lawyers, intervener,

v.

Commission of the European Communities, represented by D. Triantafyllou and K.-D. Borchardt, acting as Agents, with an address for service in Luxembourg, defendant,

APPLICATION for partial annulment of Commission Decision 2000/524/EC of 18 January 2000 on the State aid granted by Germany to Linde AG (OJ 2000 L 211, p. 7),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),
composed of: J.D. Cooke, President, R. García-Valdecasas, P. Lindh, N.J. Forwood and H. Legal, Judges,
Registrar: D. Christensen, Administrator,
having regard to the written procedure and further to the hearing on 31 January 2002,
gives the following

Judgment

Facts and procedure

1. The applicant is a German undertaking which produces and distributes industrial gases. It owns, *inter alia*, a production plant in Leuna (Sachsen-Anhalt).

2. By a contract concluded on 22 April 1993 ("the privatisation contract of 22 April 1993"), the Treuhandanstalt (the public-law body responsible for the administration, restructuring and privatisation of undertakings of the former German Democratic Republic, "the THA") sold the business activities of Leuna Werke AG (the legal predecessor to Leuna-Werke GmbH, "LWG"), an

undertaking located in Leuna, producing amine and dimethylformamide, to UCB Chemie GmbH ("UCB"), a German subsidiary of the Union Chimique Belge group.

3. That contract was supplemented by a number of ancillary contracts which included an agreement of 22 April 1993 in which the THA and LWG undertook to supply specific quantities of carbon monoxide, a gas used in the production of amine and dimethylformamide, to UCB at market price, for a period of 10 years, renewable for an indefinite period ("the supply agreement of 22 April 1993"). Article 6(4) of that agreement provided that LWG was entitled to terminate the agreement in two circumstances, namely, if UCB concluded another supply agreement with a third party on "terms not less favourable" than those contained in that agreement, or if UCB built its own carbon monoxide production facility. In the latter case, the THA would pay UCB an "investment subsidy" of up to DEM 5 million.

4. Performance of the supply agreement of 22 April 1993 caused LWG and the THA to incur substantial losses, of approximately DEM 3.5 million per year. The carbon monoxide production facility which they operated for that purpose was particularly old and its production costs were very high. As UCB had decided not to build its own facility and there was no other producer of carbon monoxide operating in Leuna, LWG was not entitled to terminate the agreement under Article 6(4) of that agreement. LWG and the **Bundesanstalt für vereinigungsbedingte Sonderaufgaben ("the BvS"), the successor to the THA,** therefore looked for an undertaking which was prepared to build and operate a carbon monoxide production facility and to ensure, in their place, the long-term supply of carbon monoxide to UCB.

5. Thus, in June 1997 the BvS, LWG, UCB and the applicant concluded an agreement in which the applicant undertook to build, within 18 months, a carbon monoxide production facility which it would incorporate into its hydrogen production plant in Leuna, to operate that facility, and to supply specific quantities of carbon monoxide to UCB ("the agreement of June 1997"). That agreement also provided that the BvS and LWG were to grant the applicant an "investment subsidy" of DEM 9 million ("the subsidy at issue"), the remaining investment costs, DEM 3.586 million, being borne by the applicant. The agreement further stipulated that the supply agreement of 22 April 1993 would terminate when the applicant started to supply carbon monoxide to UCB, or, at the latest, 18 months after the conclusion by those two undertakings of a contract for the supply of carbon monoxide (see paragraph 6 below) or of the agreement of June 1997, as the case may be.

6. Contemporaneously with the agreement of June 1997, the applicant concluded a contract with UCB to supply it with carbon monoxide for a period of 15 years, renewable for 5-year periods ("the 1997 supply contract"). Article 2(2) of the agreement of June 1997 states that the supply contract "is to be regarded as a similar contract for the purposes of Article 6(4)(i) of the [supply agreement of 22 April 1993]". In October 1998 the applicant started to supply carbon monoxide to UCB under the 1997 supply contract.

7.

Following a meeting with the German authorities on 15 May 1998, the Commission questioned them about the subsidy at issue. The German authorities answered the Commission's questions in a letter of 7 August 1998. By letter of 18 September 1998, the Commission requested additional information, which was provided by letter of 3 December 1998.

8. By letter of 30 March 1999, the Commission informed the German Government of its decision to initiate the procedure under Article 88(2) EC, and requested it to submit its observations and reply to a number of questions. By way of publication of the letter in the *Official Journal of the European Communities* of 10 July 1999 (OJ 1999 C 194, p. 14), interested parties were informed of the initiation of that procedure and invited to submit any comments they might have. By letter of 25 May 1999, the German Government submitted its observations and replied to the questions put by the Commission. No other interested party responded to the publication of the Commission's letter.

9. On 18 January 2000, the Commission adopted Commission Decision 2000/524/EC on the State aid granted by Germany to Linde AG (OJ 2000 L 211, p. 7, "the contested decision").

10. ***The operative part of the contested decision provides as follows:***

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) [EC] 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.

..."

Procedure and forms of order sought by the parties

11.

By application lodged at the Registry of the Court of First Instance on 21 April 2000, the applicant brought this action for partial annulment of the contested decision.

12. By document lodged at the Court Registry on 20 September 2000, the Federal Republic of Germany sought leave to intervene in the case in support of the applicant's claims. The President of the Fifth Chamber (Extended Composition) granted leave to intervene by order of 6 October 2000.

13. The Federal Republic of Germany lodged its statement in intervention on 8 December 2000 and the Commission submitted observations on it. The applicant waived its right to lodge observations in respect of that statement.

14. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure. By way of measures of organisation of procedure, the Court requested the Commission to reply to certain written questions and to produce certain documents. The Commission complied with that request.

15. The parties presented oral argument and replied to the Court's questions at the hearing on 31 January 2002.

16. The applicant claims that the Court should:
- annul Articles 2 and 3 of the contested decision;
- order the Commission to pay the costs.

17. The Commission contends that the Court should:
- dismiss the action as unfounded;
- order the applicant to pay the costs.

18. The Federal Republic of Germany supports the applicant's claims.

Law

19. In support of its action, the applicant raises a single plea, alleging infringement of Article 87(1) EC. That plea has two parts, a principal claim and an alternative claim. The applicant's principal claim is that the subsidy at issue is not State aid. In the alternative, it claims that the subsidy does not distort competition and does not affect trade between Member States. The Federal Republic of Germany raises a second plea, alleging a failure to state reasons.

20. It is appropriate to begin by examining the first part of the first plea.

Arguments of the parties

21. The applicant and the Federal Republic of Germany contend that the subsidy at issue does not constitute State aid within the meaning of Article 87(1) EC.

22. The applicant submits that the agreement of June 1997 falls within the scope of the "Treuhand arrangements" (which concern grants made by the THA and its successor bodies), is "the result of renegotiation of the privatisation contract [of 22 April 1993]" and is a "contract-management **measure" within the meaning of the letter of 16 June** 1997 from the Director-General of the Commission Directorate-General for Competition to the Federal Ministry of the Economy and the guidelines appended thereto ("the letter of 16 June 1997").

23. The applicant, after stressing the **binding nature of the letter of 16 June** 1997, explains that it sets out the principle that "contract-management measures" with a commercial purpose which are taken by the BvS in respect **of privatisation contracts do not constitute State aid**. It notes that

those measures include the "modification of privatisation contracts to accommodate gaps in the contract or changes in external circumstances". It adds that the guidelines appended to the letter of 16 June 1997 dispense with the obligation to notify the Commission of, *inter alia*, contract-management measures "**which concern the implementation or the (supplementary) interpretation of a privatisation contract**" or which "appear necessary, in (exclusively) commercial terms, to safeguard the financial interests of the BvS". The **guidelines also state that "it is only in cases where, seen in commercial terms, concessions granted in the context of contract-management are economically advantageous to the BvS**, that those concessions need not be notified" and that "that implies the need to carry out an economic analysis of the results of any renegotiations and to ensure that there is a balance between performance and counterperformance".

24. In the present case, the **applicant submits that the "modification" of the privatisation contract of 22 April 1993 was motivated entirely by commercial considerations** and therefore complied with **the requirement of a "balance between performance and counterperformance**". It explains that termination of the supply agreement of 22 April 1993 was necessitated by the heavy losses ensuing from the operation of the LWG carbon monoxide production facility. **Faced with UCB's refusal** to install such a production facility and the lack of any other carbon monoxide producer on the Leuna site, the BvS and LWG had no other choice but to turn to a third party who was prepared to build a carbon monoxide production facility and supply UCB. Those were the circumstances in which the applicant was "brought into the renegotiation of the privatisation contract [of 22 April 1993] with UCB".

25. **As regards the subsidy at issue, the applicant explains that its purpose was to allow the applicant to supply carbon monoxide to UCB on "terms not less favourable" than those of the supply agreement of 22 April 1993, as provided** for in Article 6(4) thereof, and, more specifically, to charge "reasonable prices".

26.

For the rest, the applicant considers **that the "private investor" test** (see below, **paragraph 36**) **does not apply in the context of arrangements for the management of privatisation contracts.**

27. The Federal Republic of Germany stresses the fact that the subsidy at issue is not such as to confer a "unilateral advantage" on the applicant**. The subsidy represents reasonable consideration for the applicant's undertak**ing to supply carbon monoxide to UCB, in place of the BvS and LWG, on "terms not less favourable" than those of the supply agreement of 22 April 1993. At the hearing, the applicant essentially adopted the same line of reasoning.

28. The Federal Republic of Germany also submits **that the decision to grant the subsidy at issue was based on commercial considerations.** It argues that **any private undertaking which found itself in the same situation as the BvS and LWG would have paid DEM 9 million to the applicant in order to release** itself from the obligation to provide carbon monoxide to UCB and to cease the uneconomic operation of an obsolete plant.

29. **The Commission contends that the applicant cannot rely on the letter of 16 June 1997**.

30. First, that letter **is not an official statement** of the Commission's position but a "non-binding aid to interpretation, provided in the spirit of constructive cooperation between the Commission and the national authorities".

31. Second, **the subsidy at issue does not meet any of the criteria set out in that letter or the guidelines appended** to it, and therefore does not constitute a "a contract-management measure in respect of the privatisation contract" of 22 April 1993.

32. Third, **the subsidy at issue does not form part of the privatisation contract**. The Commission points out that the obligation to supply carbon monoxide which was the object of the supply agreement of 22 April 1993 was of relevance only to the relationship between the THA, LWG and UCB and the privatisation contract did not envisage the possibility of a third-party undertaking building a production facility and receiving, for that purpose, a grant twice as high as the one provided for in that contract. Referring to point 32 of the contested decision, the Commission claims that the subsidy at issue in fact comes within the scope of the agreement of June 1997, which is a new agreement between different parties and which must be interpreted without regard to the privatisation contract of 22 April 1993. It considers that that subsidy therefore cannot be regarded as a mere "modification" of the privatisation contract, nor is it justified by "changes in external circumstances".

33. Next**, the Commission, relying on Case T-613/97** ***Ufex and Others*** **v** ***Commission*** **[2000]** ECR II-4055, **submits that regard must be had to the effects of the aid on the favoured undertaking and its competitors and not**

the status of the institutions distributing or administering the aid. The concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings.

34. In the present case, the **subsidy at issue clearly confers an advantage on the applicant by allowing it to add a new carbon monoxide production facility to its existing production facilities without having to bear the cost of that new facility**, and to extend its range of products. The fact that the grant of that subsidy enabled the BvS and LWG to make significant savings is of no relevance.

35. Moreover, the Commission **disputes the relevance of the argument that the subsidy at issue constitutes the consideration for the applicant's contractual undertaking.** It submits that aid which is declared compatible with the common market under Article 87 EC is always granted in return for consideration, since State aid intended solely to fund the operation of the recipient undertaking is strictly prohibited. It adds that it is not the existence of some form of consideration which precludes classification as State aid but the presence of an "ordinary reciprocal obligation", such as the obligation to pay "the current market price in the case of a sale". "An obligation to supply a privatised undertaking at cost price, in place of the original public obligor, which is made possible by receipt of investment subsidies, is not an ordinary reciprocal obligation in the context of the grant of investment aid". More specifically, the Commission argues that the applicant's obligation to supply carbon monoxide at a reasonable price reflects "standard commercial practice" and does not represent a real burden on it. Finally, the fact that the advantage conferred on the applicant is, in any event, not "unreasonable" is of no relevance to classification of a measure as State aid. That factor can be taken into account only when the compatibility of the measure in question with the common market is assessed under Article 87(2) and (3) EC.

36. **BISTVO**

Finally, the Commission submits **that the conduct of the BvS and LWG in the present case was not that of "private investor[s] operating under normal market conditions**", since "in this case, **the State acted ... in pursuit of its privatisation policy"**. It submits that when applying the test the State's obligations as a public authority must not be taken into account. In particular, as the **THA and LWG were aware of the high costs involved in the production of carbon monoxide** in the existing facilities, the supply **obligation assumed by them under the supply agreement of 22 April 1993 did not constitute a "normal obligation" which would have been accepted by a "hypothetical obligor operating under market conditions"**. The arrangement reached under the agreement of June 1997, in so far as it was intended to release the BvS and LWG from an obligation "characterised ... by the public-policy objective of privatisation", cannot therefore be regarded as "in accordance with market conditions".

Findings of the Court

37. Article 87(1) EC provides that "[s]ave as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market".

38. **"Aid",** within the meaning of that provision, necessarily **refers to advantages granted directly or indirectly through State resources** or **constituting an additional charge** for the State or for bodies designated or established by the State for that purpose (see, in particular, Joined Cases C-52/97 to C-54/97 *Viscido and Others* [1998] ECR I-2629, paragraph 13, and Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 16).

39. The Court has held, in particular, that in order to determine whether a State measure constitutes aid it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60, and Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 41).

40. Finally, it must be noted that **aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors.** For that reason, the Community courts must in principle, having regard both to the **specific features of the case** before them and to the technical or complex nature of the Commission's assessments, **carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1)** EC (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25, and Case T-296/97 *Alitalia* v *Commission* [2000] ECR II-3871, paragraph 95).

41. The **arguments of the parties must be examined in the light of those principles and of the circumstances** in which the subsidy at issue was granted.

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 a 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**;
- 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 Art**icle 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 oper**ating 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 paragraph 22 of the contested decision).

43. In the light of those factors, the **Court holds that, from a commercial point of view, it was logical for the BvS and LWG to try to find a solution enabling them to put an end to their obligation to supply carbon monoxide to UCB while continuing to honour their commitments to it**.

44. More specifically, the BvS and LWG were entitled to enter into an agreement with a third undertaking which was prepared to build and operate a new carbon monoxide production facility in Leuna in order to supply UCB, in their place, on "terms not less favourable" than those of the supply agreement of 22 April 1993.

45. The decision by the BvS and LWG **to choose the applicant for that purpose was economically rational.** The **applicant already had a hydrogen production plant on the Leuna** site into which a carbon monoxide production facility could be incorporated, thereby enabling a significant reduction in investment costs and, thus, in production costs. **It has not been disputed by the Commission that the construction of a new carbon monoxide production facility under different conditions would have required a significantly higher investment, of around DEM 15**

to 20 million. Given the **relatively small amount of carbon monoxide required by UCB** and the lack of any other potential purchaser on the Leuna site, the operation of a new facility would not have been profitable in those circumstances.

46. In addition, it is apparent from a document appended to the reply, the substance of which has not been challenged by the Commission, that even though the decision to engage the applicant meant that investment costs could be reduced to DEM 12.586 million, **provision by the applicant of carbon monoxide to UCB on "terms not less favourable" than those of the supply agreement of 22 April 1993 would have led the applicant to incur substantial losses**, had it had to bear all those costs itself. The decision by the BvS and LWG to contribute to the investment costs by granting the applicant a subsidy which was substantially lower than the aggregate losses which they would have suffered if they had continued to perform that agreement until the date of its expiry was therefore objectively justified (see paragraph 42 above). **No economic operator would have made such an investment and, at the same time**, assumed such a supply obligation toward UCB without a substantial third-party contribution toward the costs involved. In that respect, it is of no relevance in economic terms whether the contribution was intended as advance compensation for the future losses which would inevitably have resulted from the provision of carbon monoxide to UCB in the loss-making conditions mentioned above, or as the assumption of a portion of the initial investment costs.

47. **Those are therefore the circumstances in which the agreement of June 1997 and the 1997 supply contract were negotiated and concluded**. In short, those agreements instituted a comprehensive arrangement between the BvS, LWG, UCB and the applicant under which the applicant undertook to guarantee, in place of the BvS and LWG, to supply carbon monoxide to UCB **on "terms no less favourable" than those of the supply agreement of 22 April 1993.** For that purpose, the applicant was to build a carbon monoxide production facility, which it would incorporate into its existing hydrogen production unit in Leuna, for which it would receive an "investment subsidy" of DEM 9 million from the BvS and LWG.

48. In the light of the foregoing considerations, the Court finds, first, that as the Commission correctly pointed out in the contested decision (in point 32) and its written submissions, **that comprehensive arrangement constitutes a new agreement, legally separate from the privatisation contract** and the supply agreement of 22 April 1993. That is particularly clear from the fact that it involves a new contract party, namely the applicant, that it modifies the rights and obligations of the various parties and that it provides for the payment of an "investment subsidy" substantially higher than that originally agreed. The Commission's assertion that, in the present case, **the German authorities were acting in pursuit of a**

public policy of privatisation and not under normal market conditions must therefore be rejected.

49. Second, **the comprehensive arrangement** described above represents a normal commercial transaction in the course of which the **BvS and LWG behaved as rational operators in a market economy**. It is evident that they were motivated primarily by commercial considerations and did not have regard to any economic or social policy objectives.

50. Third, the **contested subsidy is, in principle, an essential part of the comprehensive arrangement** and is, like that arrangement, justified on commercial grounds.

51. Fourth, in the contested decision, the **Commission did not examine whether the comprehensive arrangement and the investment subsidy at issue, which was integral to that arrangement, constituted, in whole or in part, a normal commercial transaction.** It merely asserted that that subsidy was to be regarded as State aid "since it has enabled [the applicant] to add a carbon monoxide production unit to its existing hydrogen plant without having to bear the costs thereof" (point 28 of the contested decision) before - correctly (see paragraph 48 above) - rejecting one of the arguments raised by the German authorities in the course of the administrative procedure, which was based on a purported connection between the privatisation contract of 1993 and the comprehensive arrangement (paragraphs 29 to 32 of the contested decision).

52. The **Commission failed to examine whether the value of the investment subsidy reflected in general terms the price which** would have been agreed between economic operators in the same situation. In any event, only the portion of the subsidy in excess of that price could be regarded as State aid.

53. Nor did Commission establish whether the sum paid to the applicant as consideration for its contractual obligations exceeded the cost of those obligations and, if so, the amount by which it did so.

54. It has therefore failed to prove to the requisite legal standard that the subsidy at issue constitutes, in whole or in part, "aid" within the meaning of Article 87(1) EC.

55. In the light of the foregoing, the first part of the first plea must be upheld.

56. It therefore follows that Articles 2 and 3 of the contested decision must be annulled and that there is no need to examine the other arguments raised by the Federal Republic of Germany.

Costs

57. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful

party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay not only its own costs but also the costs incurred by the applicant, in accordance with the forms of order sought by the applicant.

58. Under Article 87(4) of those Rules, the Federal Republic of Germany, which has intervened in the proceedings, is to bear its own costs.

On those grounds,
THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition),

hereby:

1. Annuls Articles 2 and 3 of Commission Decision 2000/524/EC of 18 January 2000 on the State aid granted by Germany to Linde AG;

2. Orders the Commission to bear its own costs and pay those of the applicant;

3. Orders the Federal Republic of Germany to bear its own costs.