COMMISSION DECISION

of 12 March 2002

on State aid C 62/2001 (ex NN 8/2000) implemented by Germany for Neue Erba Lautex GmbH and Erba Lautex GmbH in bankruptcy

(notified under document number C(2002) 944)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/783/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above [1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 29 December 1999, received on 3 January 2000, Germany notified the Commission of aid granted to the newly created Neue Erba Lautex GmbH. Since the aid had already been paid out the case was registered as non-notified aid NN 8/2000.

(2) The Commission sent out questions on 24 January 2000. Replies were received on 24 February and 6 March 2000. Further questions were sent out on 17 April 2000. Replies were submitted on 5 June 2000. The case was discussed during a meeting with representatives of the German Government on 6 June 2000. Further information was provided on 6 July 2000, 9 October 2000 and 8 January 2001. The case was again discussed during a meeting with representatives of the German Government on 28 February 2001. New questions were sent out on 15 March 2001. Replies were received on 9 and 17 April 2001. Additional questions were sent out on 26 April 2001. Further information was received on 7 May and 6 June 2001.

(3) By letter dated 30 July 2001, the Commission informed Germany of its decision to initiate the procedure under Article 88(2) of the EC Treaty in respect of the aid. Germany submitted its reaction by letter dated 21 September 2001, registered on 24 September 2001.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* [2]. The Commission invited interested parties to submit comments. It received comments from two German competitors and from a Belgian association of textile manufacturers. These comments were forwarded to Germany by letters dated 11 and 21 December 2001 and 10 January 2002. Germany replied by letter dated 7 February 2002, registered on the following day.

II. DESCRIPTION OF THE AID

A. The relevant undertaking

(a) *Neue Erba Lautex GmbH*

(5) According to the information available, Neue Erba Lautex GmbH (hereinafter referred to as 'NEL') is a company with limited liability and paid in equity capital of EUR 25 000. It was created on 23 December 1999 by the provisional administrator in bankruptcy of Erba Lautex GmbH, which had filed for bankruptcy on 2 November 1999 [3]. NEL was created as a wholly owned subsidiary of the bankrupt Erba Lautex GmbH and has continued the latter's activities without disruption. The intention was to offer NEL for sale, transferring to it the assets of the bankrupt Erba Lautex GmbH.

(6) According to Germany, certain assets of the bankrupt Erba Lautex GmbH have been leased to NEL. According

[1] OJ C 310, 7.11.2001, p. 3.

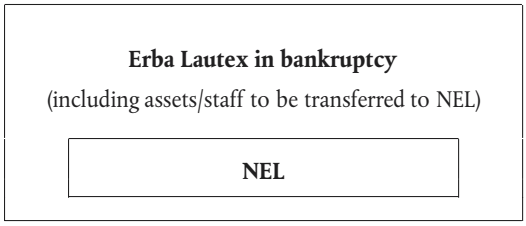
[2] See footnote 1.

[3] Bankruptcy proceedings were initiated on 31 December 1999.

to the documents submitted to the Commission, NEL was to pay a monthly rent of some EUR 215 626 (DEM 421 729) for the assets. The Commission has not been informed whether the rent is effectively being paid. Some pending orders from the bankrupt Erba Lautex GmbH were taken over.

(7) NEL's workforce consists of 249 employees of the bankrupt Erba Lautex GmbH, 16 trainees and one of its former managers, Mr Matt [4]. According to the information provided by Germany, following an agreement with representatives of the workforce, the contracts of the abovementioned 249 employees of the bankrupt Erba Lautex GmbH were terminated. These employees then signed direct contracts with NEL. No indemnifications were paid.

(8) Structure as described by Germany:



(9) Since it is continuing the activities of the bankrupt Erba Lautex GmbH, which was active in the textile industry, NEL is also active in this market. Activities were restarted on 31 December 1999. Like the bankrupt Erba Lautex GmbH, NEL is located in Neugersdorf, Saxony, an area eligible for regional aid under Article 87(3)(a) of the EC Treaty.

[4] Germany states that Mr Maron, former investor and manager of Erba Lautex GmbH, is no longer in this post.

The attempted sale of NEL

(10) Back in December 1999, Germany stated that the assets of Erba Lautex would be transferred to NEL, at which point NEL would be sold through an open and unconditional bidding procedure. The administrator in bankruptcy requested Price Waterhouse Coopers (hereinafter referred to as 'PWC') to organise the tender. According to Germany, on 25 February 2000 an offer for sale was published in the Financial Times and on the Internet, while a letter was sent to 70 European and international textile companies. The initial deadline to respond to this call for tender was 20 March 2000. It was extended to 12 May 2000 in order to provide more time for offers to be made.

(11) According to Germany, negotiations have taken place with several interested parties. The administrator in bankruptcy counted on being able to close the sale operation at the earliest by the end of February 2001. It did not do so. Germany insists that negotiations with potential investors are taking place, although it has not disclosed the number or identity of potential investors, stating that confidentiality has been requested.

The intended restructuring of NEL

(12) Germany submitted a study prepared by PWC indicating that the creation of a legal successor to continue the business of the bankrupt Erba Lautex GmbH would be possible only if the new company were restructured. The planned restructuring costs of the newly created NEL are detailed in the table below.

Restructuring measures	Cost (DEM million)	Cost (EUR million)
Acquisition of real estate and buildings (*)	8,0	4,090
Acquisition of non-fixed assets (**)	6,0	3,067
New investments	8,0	4,090
Liquidity	27,0	13,805
Repayment of two loans from the BvS and the *Land* of Saxony	8,7	4,448
TOTAL	**57,7**	**29,500**

(*) Real estate valued by an independent expert at EUR 0,911 (DEM 1,781 million), buildings at EUR 3,329 million (DEM 6,512 million).
(**) Valued by an independent expert at DEM 5,9 million.

(13) According to Germany the above are maximum costs. It has not been stated how these costs would be financed or whether State support would be made available in the event of NEL's finally being sold. Although Germany initially stated that the planned restructuring would not start until NEL were sold, the latest information available seems to indicate that several measures, such as the training of the workforce, the development of new products and an amendment to the business strategy, have already been undertaken.

(14) The study found that, after restructuring, NEL would return to viability by 2002. According to the latest information, NEL incurred losses of EUR 1,62 million (DEM 3,169 million) in the year 2000. It is not indicated how these losses were offset, or whether they were borne by NEL or Erba Lautex GmbH. According to the latest information, in the year 2001 NEL incurred losses of some EUR 0,5 million (DEM 1 million).

(b) *Erba Lautex GmbH in bankruptcy*

(15) The former Lautex Weberei und Veredlung GmbH was a textile company held by the Treuhandanstalt and subsequently by its legal successor, the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (BvS), until its privatisation in 1997. In 1998 the company had 360 employees. In 1997 it achieved a turnover of EUR 29,158 million (DEM 57,029 million) and held assets of EUR 45,976 million (DEM 89,921 million).

(16) In 1997, the company was privatised by sale to the Daun Group, a German-based conglomerate also active in textiles with 11 600 employees and a turnover of EUR 0,72 billion (DEM 1,4 billion). In April 1998, a further investor, the Maron Group, took over half the share capital and the undertaking became Erba Lautex GmbH. The Maron Group also operates in the textile sector. It includes the former Erba GmbH, a converter of fabrics for shirts and blouses, and weaving and dyeing plants in the Czech Republic. No data on the number of employees, turnover or assets of this group have been provided.

(17) In its Decision 2000/129/EC ([5]), the Commission prohibited aid of EUR 60,84 million (DEM 119 million) to Erba Lautex GmbH. The aid was found to be incompatible with the common market since it did not fulfil the criteria set out in the 1994 Community guidelines on State aid for rescuing and restructuring firms in difficulty ([6]). The Commission consequently ordered recovery of the aid together with interest from the date on which it was awarded. In November 1999 Erba Lautex GmbH filed for bankruptcy. According to Germany, the incompatible aid was registered as part of the estate of bankruptcy. No aid has been recovered to date.

B. **The new financial measures**

(a) *Purported rescue aid*

(18) On 23 December 2000 NEL received purported rescue aid of EUR 2,224 million (DEM 4,35 million) from the Sächsischen Aufbaubank (hereinafter referred to as the 'SAB'). On 1 February 2001 a further loan for the same amount was granted by the BvS for the same purpose. In addition, on 19 May 2001 the BvS granted a further amount of EUR 0,159 million (DEM 0,312 million). The same amount was granted on 8 June 2001 by the SAB. Germany states that these loans were granted at the reference rate.

(19) The purported rescue aid totals EUR 4,767 million (DEM 9,324 million) and was initially granted for six months. This period was extended to 12 months because, according to Germany, the beginning of the restructuring was delayed. Germany states that an agreement was reached for the repayment of these loans, whereby the SAB and the BvS would each be paid a monthly amount of 2 556 (DEM 5 000) from 1 July 2001. However, this entails a substantial extension of the 12-month duration of the loans.

(b) *The capital injection*

(20) On 27 February 2001 the Commission was informed that EUR 3,289 million (DEM 6,434 million) had been repaid by the BvS to Erba Lautex GmbH's former investors. This amount consisted of the reimbursement of the price paid for the company and of a capital injection of EUR 3,067 million (DEM 6 million) to which the investors agreed upon privatisation.

([5]) OJ L 42, 15.2.2000, p. 19.

([6]) OJ C 368, 23.12.1994, p. 12.

(21) Germany provided evidence that between April 1998 and August 1999, each of the investor groups had paid in a total of EUR 1,533 million (DEM 3 million) as equity capital. Under the privatisation contract, the privatisation was conditional upon a positive Commission decision on the aid granted to the company. However, since the Commission took a negative decision, the investors were entitled to repayment of these amounts. The privatisation contract further stipulated that the BvS should reimburse the investors for these amounts.

(22) On initiating the formal investigation procedure, the Commission noted that the company benefited from a capital injection of EUR 3,067 million (DEM 6 million) and that the BvS did not register that amount as a claim against Erba Lautex GmbH as part of the bankruptcy proceedings. In its response to the initiation of the formal investigation procedure, Germany informed the Commission that on 27 July 2001 this claim had been registered, with interest, as part of the estate of bankruptcy. No information has been provided on whether the claim has been accepted by the administrator in bankruptcy.

III. REASONS FOR THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE

(23) On the basis of the information available, the Commission took the view that the public financial measures for NEL and Erba Lautex constituted State aid within the meaning of Article 87(1) of the EC Treaty. In its provisional assessment, it regarded both entities as one economic unit, since NEL is a 100 % subsidiary of the bankrupt Erba Lautex whose activities it has continued by leasing its assets.

(24) The Commission considered that no exception seemed to justify granting new aid to the same economic entity and in particular took account of the fact that the aid declared incompatible in July 1999 had not been recovered. Following the established case-law of the Court of Justice of the European Communities, the Commission took the view that no new aid should have been paid out until the aid declared incompatible had been recovered. Moreover, the new aid seemed to have a negative cumulative effect in the market, as pointed out by the complainants. The Commission seriously doubted that the new aid could be considered compatible with the common market. Consequently the formal investigation procedure was initiated.

IV. COMMENTS FROM THIRD PARTIES

(25) The Commission received comments from two German competitors and from a Belgian federation of textile manufacturers. All competitors stated that the continued operation of the bankrupt Erba Lautex GmbH through NEL entailed considerable distortions of competition, particularly given the low prices with which NEL was said to be able to operate. The Belgian federation of textile manufacturers expressed its concern that, since the aid declared incompatible had not been recovered, the bankrupt Erba Lautex GmbH was still active through NEL and was able to offer prices which were, according to its information, below cost.

V. COMMENTS FROM GERMANY

(26) In its reaction to the initiation of the formal investigation procedure, Germany insisted that the newly created NEL is to be regarded as a rescue company (*Auffanggesellschaft*) within the meaning of the exception in footnote 10 of the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty [7]. This footnote states that the only exception to the principle of a newly created firm not being eligible for rescue or restructuring aid are 'any cases dealt with by the BvS in the context of its privatisation remit and other similar cases in the new *Länder* involving companies emerging from a liquidation or a takeover of assets occurring up to 31 December 1999'.

(27) According to Germany, an *Auffanggesellschaft* is a company created to continue the activities of a former company in liquidation. For this purpose, it takes over its assets, whereas the liabilities remain within the old company. According to Germany, both criteria are met in the present case. Rejecting the Commission's view that in the absence of liquidation or a takeover of assets, NEL cannot qualify as an *Auffanggesellschaft*, Germany states that the initiation of bankruptcy proceedings is a form of liquidation and considers the lease of the assets as comparable to their takeover.

[7] OJ C 288, 9.10.1999, p. 2.

(28) In response to the comments from third parties, Germany states that NEL has had to operate with higher prices than those formerly offered by the now bankrupt Erba Lautex GmbH. In response to the statements made by NEL's competitors, Germany claims that NEL has lost potential orders precisely for offering higher prices than its competitors. Moreover, Germany claims that NEL's current difficult situation does not leave it any possibility to engage in an aggressive price policy.

VI. ASSESSMENT

A. Aid within the meaning of Article 87(1) of the EC Treaty

(29) Financial assistance deriving from public resources was awarded to NEL and to the bankrupt Erba Lautex GmbH, giving these entities advantages over their competitors. As the textile market is a highly competitive European product market suffering from overcapacity, financial advantages favouring a company over its competitors threaten to distort competition and affect trade between Member States.

(30) NEL has been incurring losses and has stated that it needs to restructure to be able to operate on its own. Moreover, it is 100 % owned by a bankrupt company, Erba Lautex GmbH, which is obviously a firm in difficulty. In its decision initiating the formal investigation procedure, the Commission considered that a private investor would not have made such financial support available to these entities in view of their difficulties. Consequently, the financial measures from the public authorities for NEL and Erba Lautex GmbH were regarded as State aid within the meaning of Article 87(1) of the EC Treaty.

(31) The purported rescue aid granted by the BvS, a public agency, and the SAB, a public bank, together with the deferment of payment, constitute a first series of measures to be assessed by the Commission. Germany never contested the fact that both NEL and the bankrupt Erba Lautex GmbH should be regarded as entities in difficulties. Moreover, it accepts that the loans from the BvS and the SAB granted directly to NEL should be regarded as rescue aid. The Commission will accordingly maintain its stance. However, Germany contests the view that the capital injection to Erba Lautex GmbH should be regarded as aid. It considers that this measure does not threaten to distort competition in the common market or affect trade between Member States.

(32) Secondly, the Commission will look at whether the capital injection constitutes aid. In its decision initiating the formal investigation procedure, the Commission considered that the reimbursement of the capital injection to Erba Lautex GmbH's former investors, as agreed in the privatisation contract, did not confer any financial advantage on the investors. However, the capital injection itself did confer an advantage on the now bankrupt Erba Lautex GmbH since its capital was increased by EUR 3,07 million (DEM 6 million). When the BvS reimbursed the former investors of the now bankrupt Erba Lautex GmbH, this advantage, paid out of State resources after the event, remained in the company. However, the advantage is deemed to have been granted at the moment of the privatisation. Since the BvS agreed to reimburse the investors in the event of a negative Commission decision on the aid previously granted to the company, the BvS acted similarly to a guarantor for the capital injection. By analogy with the Commission notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([8]) the advantage is granted at the moment when the obligation to back the capital increase was agreed to, not when this obligation is invoked or when payments are made.

(33) Since the textile market is a highly competitive market and there is trade between Member States, such a financial advantage threatens to distort competition and affect trade between Member States. The Commission refers to its Decision 2000/129/EC, which describes the circumstances under which the privatisation of the now bankrupt Erba Lautex GmbH took place. The Commission considers that no market economy investor would have undertaken to provide backing to such a capital injection without the expectation of obtaining any proceeds.

(34) Consequently the Commission maintains its view that this measure should be regarded as State aid within the meaning of Article 87(1) of the EC Treaty. Germany's registering this claim as part of the estate of bankruptcy one year after reimbursing the investors does not alter the fact that the capital increase constitutes aid. On the contrary, the lack of diligence on the part of the German authorities could be regarded as an additional financial advantage for the bankrupt company and/or its creditors.

([8]) OJ C 71, 11.3.2000, p. 14.

B. **The recipients of the aid**

(35) The Commission already had doubts about Germany's claim that the newly created NEL should be regarded as the sole recipient of the purported rescue aid when it initiated the formal investigation procedure.

(36) In its decision initiating the procedure, the Commission took the view that NEL and the bankrupt Erba Lautex GmbH formed a single economic unit. NEL is a 100 % subsidiary of the bankrupt Erba Lautex GmbH, and has no assets of its own but leases the assets of the bankrupt Erba Lautex GmbH in order to continue the latter's activities. The bankrupt Erba Lautex GmbH holds all shares and assets and consequently controls the newly created entity. The Commission therefore considers the relevant aid recipient to be the group formed by the bankrupt Erba Lautex GmbH, as parent company, and its 100 % subsidiary, NEL. This view is supported by an analysis of which entity ultimately benefits from the aid.

(37) The purported rescue aid for NEL also benefited the bankrupt Erba Lautex GmbH. The aid was used, according to Germany, to cover running costs and to make replacement investments. Running costs are the expenditure incurred in order to carry out the operation of a fixed asset. In this case they consisted of salaries, energy, delivery of raw materials, etc. Aid for the coverage of personnel expenditure would directly benefit NEL, while, since NEL operates in Erba Lautex GmbH's installations and with its machinery, aid to cover costs derived from the use of these or any replacement investments ultimately results in an advantage for the bankrupt Erba Lautex GmbH as well. As regards the capital injection, it obviously benefited Erba Lautex GmbH.

(38) Taking into account the fact that NEL and the bankrupt Erba Lautex GmbH form a group and that both benefit from the aid, it can be assumed that both together should be considered the relevant aid recipient.

C. **Derogation under Article 87(3)(c) of the EC Treaty**

(39) The new aid granted to the group constituted by NEL and Erba Lautex GmbH totals EUR 7,834 million (DEM 15,324 million). It consists of EUR 4,767 million (DEM 9,324 million) of purported rescue aid and EUR 3,067 million (DEM 6 million) in the form of a capital injection.

(40) Since the aid was not granted under an approved scheme, it must be assessed as new aid by the Commission. Article 87(2) and (3) of the EC Treaty lay down exemptions to the general prohibition on aid stipulated in Article 87(1).

(41) The exemptions in Article 87(2) of the EC Treaty do not apply in this case because the aid measures do not have a social character and are not granted to individual consumers, nor do they make good the damage caused by natural disasters or exceptional occurrences, nor are they granted to the economy of certain areas of the Federal Republic of Germany affected by its division. The exemptions laid down in Article 87(3)(b) are not applicable either.

(42) Further exemptions are laid down in Article 87(3)(a) and (c) of the EC Treaty. As the aid was not granted for regional development purposes but to restore the long-term viability of an undertaking in difficulty, only the exemptions in Article 87(3)(c) of the EC Treaty may apply. Article 87(3)(c) provides for the authorisation of State aid granted to promote the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. Moreover, the only measures which Germany is prepared to regard as aid constitute rescue aid in its view. Germany has never argued that the aid was for a small business or provided evidence that the firm is a small business.

(43) The Commission has issued special guidelines for assessing rescue and restructuring aid. Following its preliminary examination, the Commission considers that none of the other Community guidelines, such as for research and development, environment, small and medium enterprises, or employment and training, could apply to this case. Since the aid was granted after 30 April 2000, the Community guidelines of 23 December 1999 ([9]) (hereinafter referred to as the 'Guidelines') are applicable ([10]).

([9]) See footnote 7.

([10]) Point 7.5 of these Guidelines states that 'the Commission will examine the compatibility with the common market of any rescuing and restructuring aid granted without its authorisation (...) on the basis of these guidelines if some of all of the aid is granted after their publication in the *Official Journal of the European Communities*'.

(a) *Eligibility of the firm*

(44) Germany claims that the sole aid recipient is NEL, which, as an *Auffanggesellschaft*, qualifies for the exception in footnote 10 of the Guidelines. As explained above, the footnote allows rescue or restructuring aid for companies in the new *Länder* emerging from a liquidation or a takeover of assets occurring up to 31 December 1999. However, in its decision initiating the formal investigation procedure the Commission noted that neither liquidation nor a transfer of assets had yet taken place. Germany claims that the initiation of bankruptcy proceedings is a form of liquidation and that the lease of the assets is comparable to their takeover.

(45) The Commission disagrees with the view that bankruptcy proceedings are a form of liquidation. It is in the nature of liquidation that assets are transformed into cash. Liquidation usually refers to the selling of assets and payment of liabilities in anticipation of going out of business. In the sense of winding-up, it relates to the distribution of a company's assets among its creditors and members prior to its dissolution. On the other hand, bankruptcy may result in reorganisation and continued operation of the firm where it does not require liquidation and distribution of the proceeds. Consequently bankruptcy and liquidation are different issues. The initiation of bankruptcy proceedings does not necessarily mean that the company will be liquidated, particularly under German law where there is the possibility of continuing activities. In this case, the decision was to continue activities until an unspecified point in time. Consequently, the effects of the decision to initiate bankruptcy proceedings are in no way comparable to those of a decision to liquidate the company.

(46) As for the argument that the lease of the assets can be considered comparable to their takeover, the Commission can only reject this view. The nature of a lease contract and that of a purchase contract are radically different. Under a lease contract, the lessee hires an asset from the lessor. The lessor retains the right of ownership but the lessee acquires the right to use the asset for a specific period of time in return for the payment of specific rentals or payments. In a purchase contract, the right of ownership is transferred from the seller to the purchaser for a price. Hence, the legal rights and obligations of purchaser and lessee are radically different and in no way comparable for the purpose of footnote 10 of the Guidelines.

(47) Moreover, in this case, all relevant transactions took place within the same group, since NEL is not an independent entity, but is wholly owned by its parent company, the bankrupt Erba Lautex GmbH. The assets were therefore not 'taken over' within the meaning of the Guidelines. The Commission accordingly takes the view that the criteria of footnote 10 of the Guidelines are not met. It must therefore examine whether the aid to the group can be considered rescue or restructuring aid on the basis of the Guidelines.

(b) *Compliance with the criteria set out in the Guidelines*

(48) The measures which Germany regards as aid are said to constitute rescue aid granted solely to NEL. However, as explained above, the Commission believes that the group constituted by the bankrupt Erba Lautex and its 100 % subsidiary NEL should be regarded as the relevant recipient. Moreover, it considers that the capital increase also constitutes aid which needs to be assessed under the same Guidelines.

(49) In order to be considered rescue aid within the meaning of the Guidelines, the aid must consist of liquidity support in the form of loans or loan guarantees granted at market rates and must be reimbursed over a period of not more than 12 months. It must be granted on the basis of serious social difficulties for a limited period, usually six months, until the firm's future can be assessed and a restructuring or liquidation plan devised.

(50) However, the capital increase is not liquidity support and was not granted on market conditions, according to the available information. Moreover, the usually accepted period of six months for which rescue aid can be approved is substantially exceeded in the present case without any justification being provided. The purported rescue aid, according to the information submitted, would be repaid by the company within some eight years, without counting repayment of any interest. As regards the capital increase, it is highly doubtful that it will be paid back at all.

(51) In addition, the Commission can conclude that rescue aid has been granted only if the future of the recipient is to be assessed. However, the future of NEL had already been assessed, since a restructuring plan had already been prepared at the date of its creation and before the award of the purported rescue aid. As for the bankrupt Erba Lautex GmbH, its future remains unclear since it has so far been decided only that it would continue its activities through NEL for an unspecified period of time.

(52) Germany states that the rescue aid was necessary until the restructuring of NEL could start. However, the Commission considers that the aim of rescue aid under the Guidelines is to allow the company to be kept in business until its future can be determined. Even applying a certain degree of flexibility, rescue aid cannot be approved for an unlimited period of time. However, this is precisely the case here, since the restructuring was supposed to start with the sale of NEL, for which no date was envisaged. Two years after launching the call for tender, the sale has not yet taken place. Moreover, some restructuring steps seem to have already been undertaken despite the fact that NEL has not been sold. However, this does not render the purported rescue aid compatible; rather, it means that it should have already been paid back in full, which is not the case.

(53) In view of the above, the Commission must conclude that the aid is not acceptable as rescue aid. Furthermore, the reasons listed below do not allow it to conclude that the aid could be considered compatible as restructuring aid either.

(54) First, Germany has never submitted a restructuring plan for the whole group. Germany recently claimed that the creation of a subsidiary to which the profitable assets will be transferred can be regarded as a form of restructuring. However, this would mean that it was the bankrupt Erba Lautex GmbH which was restructured. But there is no expectation of a plan to restructure or liquidate the bankrupt Erba Lautex GmbH. The sole plan submitted to the Commission concerns NEL, a part of the group.

(55) Second, there are no realistic expectations that the group or even part of it could restore its viability. Germany has never stated that the viability of the bankrupt Erba Lautex GmbH could be restored. In the report of the first assembly of creditors it is stated that the bankrupt company could not be revitalised. Although Germany claims that the viability of NEL can be restored, this would depend on its being sold. However, as stated repeatedly, no investor seems willing to acquire the new legal entity. There is therefore no significant contribution from the aid recipient, nor can one be expected.

(56) Lastly the Commission takes account of the comments submitted by third parties, to the effect that the continuation of the activities of the bankrupt Erba Lautex GmbH through NEL thanks to the unrecovered incompatible aid and to the new aid distorts competition in the common market.

(c) *Application of the Deggendorf doctrine*

(57) In its decision initiating the formal investigation procedure the Commission thought it appropriate to consider the recovery of the aid declared incompatible by its Decision 2000/129/EC. In accordance with the judgment of the Court of Justice of the European Communities of 15 May 1997 in Case C-355/95 P *Textilwerke Deggendorf* v *Commission and Germany* [11], when the Commission examines the compatibility of State aid with the common market, it must take all relevant factors into account. These include, where appropriate, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State. It is the Commission's responsibility, when examining new aid, to assess the cumulative effect in terms of distortion of the market of new aid and unrecovered incompatible aid.

(58) Commission Decision 2000/129/EC found that State aid amounting to EUR 60,844 million (DEM 119 million) granted to Erba Lautex GmbH was unlawful and incompatible with the common market. Article 2 of that Decision required Germany to recover the aid from the recipient. Germany did not contest the Decision within the prescribed period and it thus became legally enforceable.

(59) The Commission would point out that the purpose of recovering unlawful and incompatible aid is to put an end to undue distortions of competition in the common

[11] [1997] ECR I-2549.

market caused by that aid. In this respect it is noted that no aid has yet been recovered and that the bankrupt Erba Lautex GmbH continues to operate, through NEL, in the same market. Therefore distortions of competition have not yet been brought to an end. The new aid does not contribute to improving this situation. On the contrary, it allows Erba Lautex GmbH, through NEL, to continue its activities. Consequently the Commission considers that the new aid has a negative cumulative effect on competition.

VII. **CONCLUSION**

(60) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the EC Treaty. Moreover, the aid cannot be considered compatible with the common market and has a negative cumulative effect,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 7,834 million (DEM 15,324 million) granted by Germany to the group constituted by the bankrupt Erba Lautex GmbH and its wholly owned subsidiary, Neue Erba Lautex GmbH, is incompatible with the common market.

Article 2

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

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date of its being made available to the recipients to 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.

Article 3

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

Article 4

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 12 March 2002.

For the Commission

Mario MONTI

Member of the Commission