COMMISSION DECISION

of 30 January 2002

on the State aid granted by Germany to Hirschfelder Leinen und Textil GmbH (Hiltex)

(notified under document number C(2002) 310)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/895/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 provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By letter dated 9 April 1999, registered on 12 April 1999, Germany informed the Commission of restructuring aid for Hirschfelder Leinen und Textil GmbH (Hiltex).

(2) By letter dated 11 May 2000, the Commission informed Germany that it had initiated the procedure laid down in Article 88(2) of the EC Treaty in respect of the ad hoc aid granted to Hiltex. At the same time Germany was asked to provide sufficient information and data to allow the Commission to assess whether aid of some DEM 60,472 million complied with the terms of the approved aid schemes under which it was claimed it had been granted.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ([1]). The Commission invited interested parties to submit their comments on the aid. The Commission received no comments from interested parties.

(4) On 6 June 2000, Germany informed the Commission that Hiltex had been declared bankrupt and that no contacts could be established with its owners, Linen Production Ltd and Uniwear Asia.

(5) By letter dated 6 September 2000, Germany responded to the information injunction contained in the initiation of the formal investigation procedure stating that the aid which it claimed to have awarded under approved aid schemes had been reduced to DEM 48,53 million and submitting some information on the aid measures.

(6) By letter dated 7 February 2001, the Commission informed Germany that it had decided to extend the formal investigation procedure to the aid, which, on the basis of the information submitted, did not seem to be covered by approved aid schemes.

([1]) OJ C 272, 23.9.2000..

(7) The Commission decision to extend the procedure was published in the *Official Journal of the European Communities* ([2]). The Commission invited interested parties to submit their comments on the aid. The Commission received no comments from interested parties.

(8) By letter received on 6 April 2001, Germany responded to the extension of the formal investigation procedure. In its letter Germany informed the Commission of the grant of a further DEM 1 million by way of restructuring aid for the bankrupt company. That amount is not covered by this Decision.

II. **DESCRIPTION**

A. **The relevant undertakings**

(9) Hiltex is a flax and textile spinning mill located in Hirschfelde, Saxony, an assisted area pursuant to Article 87(3)(a) of the EC Treaty. It produces middle to fine spun linen yarns, long linen yarn (100 % linen) and tow yarn (100 % linen). The yarns are used for technical, household and home textiles as well as outer garments.

(10) The enterprise, founded in 1848, operated in the former German Democratic Republic in form of a *Volkseigener Betrieb* (State-owned corporation), VEB Vereinigte Leinenindustrie Grosspostwitz. According to the information submitted, the Treuhandanstalt (THA) set about restructuring the company as from 1990/91. On 19 December 1994, Hiltex was incorporated into Schröder & Partner GmbH & Co. Management KG (S+P MKG) ([3]). The company was to be privatised once the most necessary investment had been carried out. During 1994 and 1995, investment totalling DEM 9,4 million was carried out. No indication was given of how the investment was financed.

(11) After the initiation and extension of the formal investigation procedure, Germany informed the Commission that in 1993 Hiltex had 134 employees, a turnover of DEM 4,4 million and assets of DEM 33,2 million. In 1994 Hiltex had the same workforce, a turnover of DEM 8,993 million and assets of DEM 38,321 million.

(12) Following a call for tender on 21 December 1995, Hiltex was privatised for DEM 25 500 to Uniwear Trading Ltd (51 %), which belonged to Uniwear SA, Belgium (the Uniwear group) and whose manager was Mr Jvan Bontognali. MCC-Credit Commercial à moyen terme Ltd (MCC) acquired 49 % of the shares for DEM 24 500. According to the information provided by Germany, two other potential investors had shown interest, but subsequently withdrew.

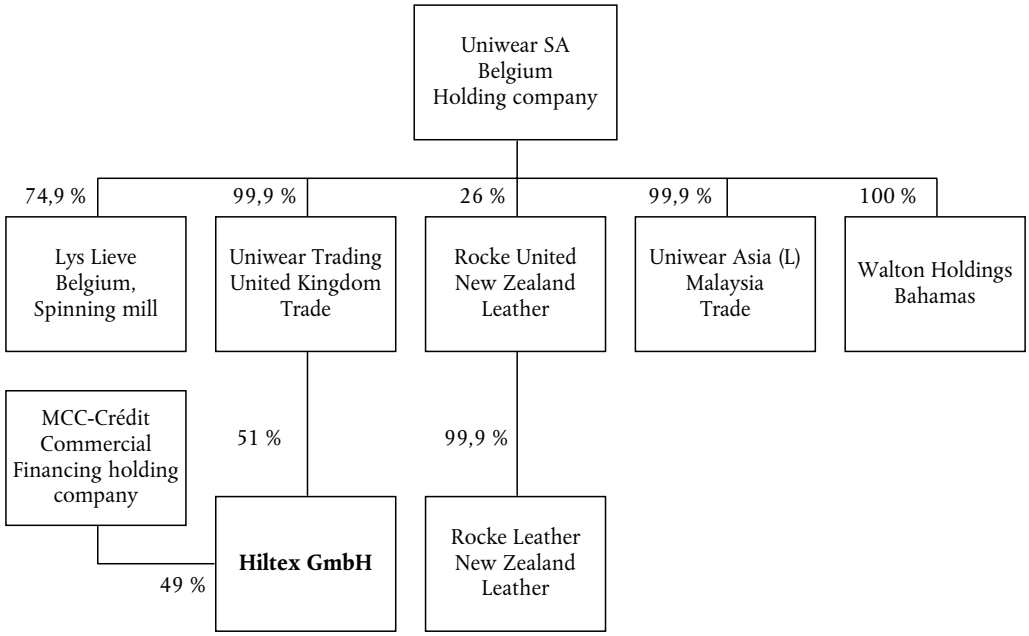
1. *Structure at the time of privatisation in December 1995*

(13) In 1995, Hiltex employed 113 people, had a turnover of DEM 4,186 million and a balance sheet total of DEM 11 million. MCC, based in Ireland, employed 140 people, had assets of EUR 565 301 and an annual turnover of EUR 4 167 065 in 1995. On 31 December 1995, the Uniwear group employed 438 people, had a turnover of EUR 8,754 million and a balance sheet total of EUR 31,811 million.

([2]) OJ C 87, 17.3.2001, p. 2.

([3]) The THA ended its tasks on 31 December 1994. Since 1995, some of the companies to be privatised were assembled under the 'Berlin Management Beteiligungsgesellschaft mbH' (BMGB) grouping another five holdings named 'Managementkommanditgesellschaften' (MKGs). These held companies from specific industry sectors (textiles, manufacturing, metal and steel production, etc.). The BMGB was in charge of the restructuring and subsequent privatisation of the companies. In 1998, those companies which remained in the BMGB were transferred to the THA's successor, the BvS.

(14) The figures for December 1995 indicate the following structure:



2. *Structure of the company in 1996*

(15) The structure of the Uniwear group changed during the course of 1996, with an increase in employees, turnover and assets ([4]). According to the 1996 management report, in January 1996 the Uniwear group acquired 37,9 % of the shares of PEX plc (United Kingdom) ([5]) a sock manufacturer, and 100 % of the shares of Australia Slinkskins, a company specialising in the treatment of skins.

(16) On 4 September 1996, with retroactive effect from 1 July 1996, MCC sold its shares in Hiltex to Uniwear Asia, which then belonged to the Uniwear group, and whose manager was also Mr Jvan Bontognali. Hiltex was then 100 % owned by the Uniwear group.

(17) According to its 1996 management report, on 2 November 1996, with retroactive effect from 1 January 1996, the Uniwear group sold off Uniwear Trading and Uniwear Asia on the grounds that 'Hiltex was not able to receive the subsidies it expected due to the size of Uniwear' ([6]).

3. *Structure since May 1999*

(18) On 6 June 1997, Uniwear Trading Ltd changed its name to Linen Production Ltd and, together with Uniwear Asia, was integrated in the Key Corporate Ventures Ltd group, Virgin Islands, whose main or sole shareholder seems to be Mr Jvan Bontognali. No further data on this group have been made available. The exact date when both companies joined this group is also unknown.

(19) Germany states that, since autumn 1998, there have been no management or personnel relationships with the Uniwear group. This would seem to imply that, up to that time, relationships with the Uniwear group still existed despite the fact that Hiltex's owners had been sold off in November 1996. In particular it is to be noted that until 22 July 1997, Mr De Poorter, one of the managers of the Uniwear group, acted as manager of Hiltex.

([4]) The balance sheets as at December 1996 show that the group employed 549 people (as against 438 in 1995), had a turnover of EUR 23,448 million and a balance sheet total of EUR 41,279 million.

([5]) In December 1996, PEX employed 152 people, had a turnover of EUR 8,376 million and assets of EUR 7,048 million.

([6]) Management report of Uniwear S.A. for 1996, page 3.

(20) In this connection, the Commission also notes the business relationship between Hiltex and the Uniwear group subsidiary Lys Lieve ([7]), a wetspun linen producer based in Belgium. Hiltex acted as sales agent for Lys Lieve's products in Germany. Lys Lieve has since 1997 stored machinery which Hiltex acquired in 1996 from the company Mackie International Ltd ([8]), one of the shareholders of the Uniwear group. For the payment of these machines Uniwear Asia and the Uniwear group intended to increase Hiltex's capital by DEM 6,6 million. The Commission also notes that, in 1998, Hiltex sold under its own brand name products manufactured by Lys Lieve. According to the information submitted, Lys Lieve will irreversibly close its plant facilities and Hiltex will take over its market shares.

(21) According to the information provided, with effect from 30 June 1999, the nominal capital of Hiltex was to be increased by DEM 6,6 million, to which Uniwear Asia would contribute DEM 6 million and the Uniwear group DEM 0,6 million. A further capital increase of DEM 3,3 million was planned for the end of 1999. After these capital increases, Uniwear Asia would have a share of 65 % (DEM 6,409 million), the Uniwear group a share of 15 % (DEM 1,5 million) and Linen Production Ltd a share of 20 % (DEM 1,941 million) in Hiltex.

(22) In its response to the initiation of the formal investigation procedure, Germany stated that none of the capital increases took place and that therefore the Uniwear group never held 15 % of Hiltex. According to Germany, the Uniwear group filed for bankruptcy in June 2000. Hiltex filed for bankruptcy on 6 July 2000. The manager of Hiltex, Linen Production Ltd, Uniwear Asia and Key Corporate Ventures Ltd, Mr Jvan Bontognali, seems to have disappeared.

B. **The restructuring**

(23) Despite the information injunction, it is still unclear when the restructuring started. The information submitted states that the THA initiated the restructuring of the company in 1990/1991, i.e. prior to its privatisation. However, it is also stated that the restructuring started in 1995, when a sharp fall in demand and prices led to a drop in turnover of more than 50 %. A further amendment to the restructuring plan took place in 1999, when the obligations under the 1995 privatisation contract were revised.

(24) The only restructuring plan submitted to the Commission covered the period from 21 December 1995 to 30 June 2000. According to it, Hiltex would closely co-operate with the Uniwear group in order to become one of the main suppliers of fine linen yarn in Europe. For this purpose, Hiltex bought machinery from Mackie International Ltd in 1996 and intended to enlarge the range of nature fibres produced (wool, silk, cotton and linen). Hiltex was to concentrate on the production on very fine yarns whilst coarse yarns would be imported from China and marketed by Hiltex. For this purpose, the Uniwear group acquired a spinning mill in China and intended to acquire a further spinning mill in Brazil.

(25) The core element of the restructuring plan was the moving of the current production site from a 150-year-old building to a modern industrial park. This was intended to reduce internal transport costs and optimise the operational activities. The machinery acquired was supposed to improve efficiency and help reduce material costs as well as personnel and energy expenditure. Facilities to treat waste water were to reduce energy and water expenditure by 10-15 %.

(26) Hiltex expected to increase sales from some 400 tonnes/year up to 1 343 tonnes/year as from 2000 which, according to Germany, would be realised without increasing capacities. The Commission notes that Hiltex was supposed to take over the market shares of Lys Lieve, which in 1999 produced 600 tonnes/year.

([7]) In 1998, Lys Lieve had a turnover of EUR 4,806 million, a balance sheet total of EUR 7,743 million and employed 86 persons.

([8]) Now Bridge Mackie Textile International.

(27) Table 1 shows the investment measures included in the plan and the position regarding their realisation:

Table 1

(in DEM million)

Investment	Total project	Realised	To be realised in 1999/2000
Land and buildings	15,275	0,025	15,250
Machinery and spinning facilities	12,392	4,898	7,494
Water treatment	0,380	0	0,380
Humidification	0,410	0	0,410
Looms machinery	0,361	0,111	0,250
Informatics (including software)	0,161	0,096	0,065
Total	28,980	5,130	23,850

(28) In its decision to initiate the formal investigation procedure, the Commission noted that the planned restructuring measures had not been implemented in 1999 as intended. According to Germany, this was due to financial problems on the part of the acquirers, as a result of which the construction of the new production site could not be started. Germany conceded that this meant a one-year delay in Hiltex's sales forecasts, but the break-even point was still deemed to be 1999/2000.

(29) According to Germany, Hiltex reduced its capacities for both long flax yarn and tow yarn between 1995 and 1999 from 606 tonnes/year to 595 tonnes/year. A further reduction to 577 tonnes/year was planned in 2000. During the implementation of the plan for the period 1996-2000, the capacities were to be increased with regard to long flax, but reduced with regard to tow yarn. According to Germany, total production capacity was reduced.

(30) The information submitted by Germany indicated that as from 1992 Hiltex acquired 47 machines, at least some of which were purchased from the Uniwear group, and scrapped 76 machines. The information indicated the existence of some 21 machines for different production purposes. A further 12 machines were to be acquired in 1999-2000.

(31) Germany drew particular attention to the cost reduction to be achieved by the restructuring. The expansion to international markets as well as the specialisation in fine-spun yarns were expected to lead in the medium term to improved operating results, with the break-even point being reached in 1999/2000. According to Germany, Hiltex would then be able to compete in the market on its own merits.

(32) The Commission notes that on 6 July 2000 Hiltex filed for bankruptcy. The Commission has never been informed on the state of implementation of the above measures. The break-even point was never achieved.

C. **The costs of the restructuring**

(33) The overall costs of the restructuring for the period 1996–2000 and the financial measures planned for the covering of these costs are detailed in the following table presented by Germany:

Table 2

(in DEM million)

Restructuring measures	Amount	Public measures	Amount	Private measures	Amount
Investments 1996-2000	28,980	Direct investment grants (Land)	10,820	Cash/kind	6,000
		Investment allowance (Land)	3,430	Investment loan	3,100
		Loan (BvS)	3,000	Waiver of loan repayment	0,499
Interest on Uniwear group loan	0,101			Waiver of interests	0,101
Interest on BvS loan	0,136	Underwriting (BvS)	0,136		
Environmental liabilities (Altlasten)	0,250	Underwriting (BvS)	0,250		
				Loan	1,140
Negative cash-flow 1996-1999	5,903	Loan (BvS)	3,000	Cash	3,300
				Remaining	0,549
Total	35,370	Total	20,636	Total	14,734

D. **The financial commitment from the public authorities**

(34) According to the information submitted by Germany, Hiltex benefited from four sets of financial measures. The following tables provided by Germany show the financial measures taken to assist Hiltex (the amounts have been rounded).

(35) Financial measures granted from 1991 to 1995:

Table 3

(in DEM million)

	Granting entity	Description	1991	1992	1993	1994	1995
1	Zittau tax office	Investment allowance			0,003	0,228	
2	Sächsische Aufbaubank	Direct investment grants				1,260	
3	THA/BvS	Waiver of loans					23,938
4	THA/BvS	Grants for social plan	1,504	0,136	0,317	0,079	0,185
5	THA/BvS	Grant for loss cover				1,751	0,658
6	Federal Ministry of Food and Agriculture	Grants		0,249			
7	Federal Ministry of Research and Technology	Grants				0,022	0,025
8	Saxon Ministry of Food and Agriculture	Promotion of projects		0,820	0,230		
9	SMWA, Dresden	Promotion of employment			0,149	0,132	
	Total		1,504	1,205	0,699	3,472	24,806
	Total						31,686

(36) Financial measures granted upon privatisation:

Table 4

(in DEM million)

	Granting entity	Description	1995	1996	1997	1998	1999
10	THA/BvS	Grants for covering of liabilities			0,070		
11	THA/BvS	Grants for personnel reduction		0,241	0,001		
12	THA/BvS	Waiver of liabilities, cash-pool	1,867				
13	THA/BvS	Loss compensation		1,125	1,184	0,607	0,083
14	THA/BvS	Waiver of loans	0,820				
15	S+P MKG	Guarantee for Deutsche Bank credit	3,000				
16	S+P MKG	Guarantee for Deutsche Bank credit	3,000				
	Total		8,687	1,366	1,255	0,607	0,083
	Total						11,998

(37) Financial measures granted from 1996 to 1999:

Table 5

(in DEM million)

	Granting entity	Description	1996	1997	1998	1999
17	Zittau tax office	Investment allowance	0,687	0,172		
18	Sächsische Aufbaubank	Direct investment grants	0,966	0,631		
19	Land of Saxony	Promotion of employment		0,065	0,009	
20	SMWA	Promotion of technology			0,001	
21	Federal Ministry of Economic Affairs	Grant for certification fees	0,007			
22	Sächsische Landesanstalt f. Landwirtschaft	Promotion of projects	0,020			
23	Regierungspräsidium Chemnitz	Grant		0,009		
24	BAW, Eschborn	Grant for participation in fairs	0,002	0,003	0,004	
25	Federal Labour Office	Promotion of employment		0,021	0,027	
26	Bautzen labour office	Promotion of employment		0,003	0,013	0,002
	Total		1,682	0,904	0,054	0,002
	Total					2,642

(38) In its decision to initiate the formal investigation procedure, the Commission also noted that, in 1996, Hiltex received financial assistance for the promotion of projects from the Federal Ministry of Food, Agriculture and Forestry amounting to DEM 479 (measure 27). Due to its small amount this measure is not included in Table 5.

(39) Financial measures granted in 1999, within the context of the amendment of the financial obligations deriving from the 1995 purchase contract:

Table 6

(in DEM million)

	Granting entity	Description	1999
27(a)	Tax office	Investment allowance	0,710
28	Sächsische Aufbaubank	Direct investment grants	—
29	BvS	Waiver of repayment of 'Altlasten' grant	—
30	BvS	Redemption of guaranteed bank dues (Deutsche Bank)	—
31	BvS	Redemption of loan interest (Deutsche Bank)	0,136
	Total		2,444

(40) In its response to the information injunction, Germany explained that, since Hiltex had been declared bankrupt, measure 27(a) (originally amounting to DEM 3,430 million) and measure 28 (originally amounting to DEM 10,820 million) had been only partially paid out. In its response to the extension of the formal investigation procedure, Germany explained that measures 28, 29 and 30 had not been implemented and that their amount is therefore not included in the total. Table 6 has been modified to reflect the actual payments.

E. **The private commitment**

(41) The Commission first notes that, in view of the changing corporate relationships and the insufficient information provided, it is impossible to determine who should be considered to be Hiltex's investor. The information submitted on this point is contradictory sometimes describing the Uniwear group as the investor, but at other times including Uniwear Asia and Linen Production Ltd as investors. The information on the form, amount and origin of the investor's contribution is both contradictory and misleading. From the terms of the information submitted, the investor's contribution to the restructuring of Hiltex seems to consist of the following items:

(42) A capital increase of DEM 6 million, originally described as cash and contribution in kind (machinery) from the Uniwear group, but subsequently as cash from Uniwear Asia, was to be directly transmitted by Hiltex to Idra Consult as payment for eight machines acquired in 1996 from Mackie International Ltd. According to the information submitted after the initiation of the formal investigation procedure, this amount was paid into a bank account in the Bahamas, with instructions that it be transferred to Idra Consult. According to the information submitted by Germany, the capital increase never took place. The Commission has not been informed on the current location of this money.

(43) A capital increase by the Uniwear group of DEM 0,6 million, including interest of DEM 0,101 million. This is described by Germany as a waiver of a corporate loan originally amounting to some DEM 1 million granted to Hiltex by the group in 1997. The information submitted states that the loan was directly transmitted to Mackie International Ltd. In return, three machines stated to be the property of the Uniwear group were leased to Hiltex.

(44) A further capital increase in the form of a grant of DEM 3,3 million, from which DEM 0,385 million was to be provided by Uniwear Asia, DEM 1 million by the Uniwear group and DEM 1,915 million by Linen Production Ltd. According to Germany, from the total amount, DEM 1,592 million has effectively been paid in.

(45) An investment credit of DEM 3,1 million. According to Germany, although the contract for the award of this credit was signed, it was never paid.

(46) A loan for the covering of liabilities amounting to DEM 1,14 million, which, according to Germany, was actually granted.

(47) The information submitted further mentions a loss cover originally amounting to DEM 0,927 million, later to DEM 0,594 million. There is no indication as to its origin or effectiveness.

(48) In view of the above, it seems that DEM 3,332 million has been effectively paid in favour of Hiltex.

F. **Market analysis**

(49) The market for linen yarn comprises weaving plants for dress fabrics, weaving mills for home textiles and manufacturers of technical articles. The first segment influences the second one insofar as dress fashion trends raise the price of linen yarns, and home textile manufacturers then switch to other yarns. According to the information provided by Germany, Hiltex sells 20 % of its production in Germany and the remaining 80 % in the other Member States.

(50) Germany supported its assumptions on the restoration of long-term viability with a short market analysis, according to which the European market for linen yarn is currently undergoing a restructuring process. The rate of capacity utilisation currently fluctuates between 60 % and 70 % as against almost 100 % in previous years of high demand. The trend shows a preference for high-quality fine-spun yarns, the market segment in which Hiltex is operating.

(51) The development of capacities in Europe is described by Germany as follows:

Table 7

Year	Middle fineness Nm	Capacities (t/a)
1990	10,2	1 098
1995	13,9	606
2000	22,6	536

(52) Hitherto, upturns and downturns alternated in seven-year cycles. The last boom in demand took place in 1993/1994, and the suppliers thus expect a similar development in 2000/2001. With regard to technical articles, the information provided by Germany indicates that the market has been declining for years.

III. **COMMENTS FROM GERMANY**

(53) In its response to the initiation of the formal investigation procedure, Germany stated that all relevant information concerning Hiltex's SME status had already been submitted. Germany gave details on some aid measures and informed the Commission that some of these had not been actually implemented. Germany stated that all the measures made available to Hiltex either did not constitute aid or were covered by aid schemes approved by the Commission.

(54) In its response to the extension of the formal investigation procedure, Germany submitted some data on the company for the years 1993 and 1994 and provided further information on the aid allegedly granted under approved aid schemes.

IV. **ASSESSMENT**

(55) As part of the initiation of the formal investigation procedure, Germany was requested by means of an information injunction to provide the Commission within one month with enough information to allow it to assess the measures under investigation. The decision on the extension of the formal investigation procedure noted that most of the questions contained in the information injunction remained unanswered. In spite of these measures, the information submitted in response to the information injunction remains insufficient to dispel the doubts expressed by the Commission in the opening of the formal investigation procedure and its extension. The Commission therefore bases the assessment on the information available ([9]).

A. **Aid beneficiary**

(56) According to the latest information submitted, Hiltex qualified as an SME in 1993 and 1994. However, despite the information injunction, in view of Hiltex's relationship with the Uniwear group and subsequently with the Key Corporate Ventures group, the Commission cannot conclude that the immediate aid beneficiary, Hiltex, qualified as an SME after its privatisation.

(57) At the time of its privatisation in December 1995, Hiltex considered on its own might have qualified as an SME within the meaning of the Commission recommendation of 3 April 1996 concerning the definition of SMEs ([10]). However, since the Uniwear group holding 49 % of its shares at that time was a large undertaking, the independence criterion was not fulfilled and Hiltex did not qualify as an SME.

(58) In its decision to initiate the formal investigation procedure, the Commission pointed out that the retroactive sale of Hiltex in November 1996, in order to enable the company to benefit from regional aid up to the ceilings allowed for SMEs, was likely to constitute a circumvention of the SME criteria.

(59) According to the Commission recommendation of 3 April 1996 concerning the definition of SMEs, in order to verify the fulfilment of the thresholds laid down for qualifying as an SME, the reference year to be considered is that of the last approved accounting period. Since in 1996 Hiltex benefited from aid granted up to the ceilings allowed for SMEs (measures 17 and 18), the reference year for clarifying its status would then be 1995. As explained above, as at 31 December 1995 Hiltex, having been integrated in the Uniwear group, did not qualify as an SME.

(60) As regards its current status, since 1997 Linen Production Ltd and Uniwear Asia have been integrated into the Key Corporate Ventures Ltd group. In the absence of data on this group, it cannot be determined whether Hiltex qualifies as an SME since its two owners Linen Production Ltd and Uniwear Asia were sold off in November 1996.

B. **State aid within the meaning of Article 87(1) of the EC Treaty**

(61) In its decision to initiate the formal investigation procedure, the Commission took the view that all the above financial measures constituted State aid. The measures derived directly or indirectly from State resources, threatened to distort competition and affect trade between Member States and had conferred on the company advantages which it would not have obtained from a private investor in the light of its difficulties.

([9]) Article 13(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1.

([10]) OJ L 104, 30.4.1996, p. 4.

(62) Germany contested this with regard to measures 4 and 6 to 9. However, in its decision to extend the formal investigation procedure, the Commission pointed out that through the State interventions under measures 4, 6, 7 and 8 the company was liberated from charges which it would otherwise have borne from its own resources. Hiltex thus obtained an advantage with respect to its competitors which in view of its difficulties it would not have received from a private investor. Such advantages threaten to distort competition and affect trade within the common market and are therefore to be regarded as aid within the meaning of Article 87(1) of the EC Treaty.

(63) As regards measure 9, the Commission noted in its decision to extend the formal investigation procedure that it had not been provided with sufficient information to allow it to determine whether the State had any discretionary power in selecting the companies benefiting from such grants. Since Germany has not provided any further information in this respect, the Commission cannot conclude that this was a general measure. Consequently, measure 9 will be regarded as State aid within the meaning of Article 87(1).

C. **Aid which Germany claims was granted under approved aid schemes**

(64) Germany claims that measures 1-28 were granted under aid schemes approved by the Commission. Since the Commission seriously doubted that these measures complied with the terms of the approved aid schemes under which, according to Germany, they had been granted, it issued an information injunction on the basis of Article 10(3) of Council Regulation (EC) No 659/1999 calling on Germany to submit all data, documentation and information necessary to enable the Commission to decide whether the aid which Germany claimed was granted under approved aid schemes effectively complied with the terms of those schemes.

(65) In its decision to extend the formal investigation procedure, the Commission concluded that measures 12, 14, 15 and 16 granted during the privatisation were covered by the THA-Regime N 768/94 ([11]). This scheme states that when the liquidation of a company is the less costly option from an economic point of view, but the THA/BvS decides to sell the company (negative price), the sale must be notified to and assessed by the Commission only if the company employs more than 250 employees. Hiltex employed 113 people at the time of its privatisation and the price of DEM 0,5 million paid for it must be deemed negative in view of the financial engagement of some DEM 10 million by the public authorities. Thus, the sale itself did not need to be notified and the aid measures granted during the privatisation must be deemed to be covered by this scheme.

(66) The Commission also found that measure 19 complied with the terms of an approved aid scheme for the promotion of employment within the context of R&D projects and thus constituted existing aid which did not need to be re-assessed ([12]).

(67) The remaining measures which Germany claimed had been awarded under approved aid schemes were found to constitute new aid, since the Commission could not conclude that the terms of the schemes under which they allegedly had been awarded had been complied with. This was the case with measures 1 to 11, 13, 17, 18 and 20 to 23. After the extension of the formal investigation procedure, Germany submitted information which prompted the Commission to revise its view in part.

(68) Measures 1 and 2, direct investment grants and investment allowances awarded under regional investment aid schemes up to the ceilings for SMEs: According to the latest information submitted, Hiltex qualified as an SME before its privatisation. However, Germany has conceded that Hiltex received excessive regional aid up to its privatisation. Germany has also stated that the excess was

([11]) THA-Regime N 768/94 (SG (95) D/1062).
([12]) N 493/97, SG (98) D/1836, 3.3.1998.

partially repaid through the grants under measure 10. However, the Commission has not been informed on the amount of aid that exceeded the provisions of the approved aid schemes. No evidence has been provided that the excess amount of regional aid was fully reimbursed. It has not been indicated whether interest was paid for the period until the excess was allegedly repaid. Consequently, the Commission cannot conclude that the total amount of aid complied with approved aid schemes.

(69) Measure 3, a waiver of the repayment of loans: Germany has stated that this waiver related to loans of DEM 23,938 million granted by S+P MKG before privatisation. The loans did not need to be notified to the Commission under the provisions of THA-Regime N 768/94 ([13]). Germany states that in order to prepare for privatisation their repayment was waived in April 1995 until such time as profits were achieved (Besserungsschein). Upon privatisation, since no profits had been yet achieved, repayment was completely waived. The Commission acknowledges that these loans had been granted to a company in difficulty. In view of the high risk of default in such cases combined with the specific circumstances of the new Länder, the potential aid element in these loans was 100 % ([14]). Consequently, the waiver of their repayment does not constitute new aid ([15]).

(70) Measure 5: grants to cover losses were allegedly awarded in 1994 and 1995 under the relevant THA-Regimes. However, as already established in the initiation of the formal investigation procedure and its extension, the THA-Regimes do not cover grants before the privatisation of companies ([16]). Consequently, these grants cannot be considered to be covered by the relevant THA-Regime.

(71) Measure 10: Germany states that according to the privatisation contract, if excessive regional aid had been awarded in the run-up to privatisation and part had to be paid back, the THA should pay 50 % of the amount to be returned, with a maximum of DEM 70 000. Germany admits that Hiltex received excessive regional aid in the run-up to privatisation, so that measure 10 is to be regarded as the THA's payment of the excessive aid received by Hiltex. The Commission considers that, if such an agreement took place, it would imply awarding aid to return part of aid falling outside approved aid schemes. Such an agreement would circumvent the Commission's regional aid policy and cannot be the subject of Commission approval.

(72) Measure 11: according to Germany, investors agreed, upon privatisation, to employ 70 people. Germany states that since the workforce had to be given notice before dismissal, over 70 employees had to be provisionally taken over. The THA agreed to compensate for any personnel reduction exceeding 70 people. The Commission concludes that this compensation derived from engagements undertaken upon privatisation and was covered by the relevant THA-Regime.

(73) Measure 13: Germany states that the privatisation contract stipulated that the State would take over the losses for the period 1996 to 1998. Measure 13 is claimed to constitute partial payments covering the losses during those years. However, the privatisation contract established limits for the coverage of those losses which were exceeded by DEM 0,184 million in 1997 and by DEM 0,107

([13]) This scheme, cited in footnote 13, allows for loans granted before privatisation to companies employing less than 250 employees when the amount of the loans does not exceed DEM 50 million.

([14]) Commission communication to the Member States (OJ C 307, 13.11.1993) in relation with the Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29.7.1980). Point 33 of the Commission communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aids in the aviation sector (OJ C 350, 10.12.1994). See also cases Chemieanlagenbau Staßfurt (OJ L 130, 26.5.1999), C 30/98 Wildauer Kubelwelle, NN 4/99 Esda Feinstrumpffabrik, Lautex Weberei und Veredlung (OJ C 387, 12.12.1998).

([15]) See also point 3.4 of the abovementioned THA-Regime 'when the THA or its succeeding institutions renounce to its rights within the context of the *Vertragsmanagement*, a notification is needed in case the company employs more than 250 employees and the obligations surpass DEM 50 million'.

([16]) See footnote 12.

million in 1998. Moreover, the loss cover for the year 1999 was not provided for in the privatisation contract. Consequently, the Commission concludes that the amounts exceeding the provisions of the privatisation contract are not covered by the relevant THA-Regime.

D. **New aid**

(74) After an assessment of the information submitted in response to the initiation of the formal investigation procedure, the Commission extended the formal investigation procedure to those measures which, on the basis of the information available, still did not seem to be covered by approved aid schemes.

(75) The Commission has reviewed its assessment with respect to part of measures 1-3 and measures 11 and 13, which according to the latest information, are covered by approved aid schemes. Their amount must nevertheless be taken into account in assessing the proportionality of the aid. The remaining measures continue to be regarded as new aid.

(76) Part of the new aid was claimed to fall under the *de minimis* rule. The *de minimis* rule provides that the ceiling for such aid is EUR 100 000 over a three-year period. This ceiling applies to the total of public assistance considered to be de minimis aid and does not affect the possibility of the recipient obtaining aid under schemes approved by the Commission.

(77) Germany states that measures 7 (amount paid in 1995), measures 21, 22, 23, 24 (amounts paid in 1996 and 1997), 25 (amount paid in 1997) and 26 (amount paid in 1997) totalling DEM 90 000, i.e. EUR 46 016, do not exceed the limit allowed under the *de minimis* rule.

(78) Germany further states that measures 20, 24 (amount paid in 1998), 25 (amount paid in 1998) and 26 (amounts paid in 1998 and 1999) totalling DEM 47 000, i.e. EUR 24 030, do not exceed the limit allowed under the *de minimis* rule.

(79) Germany has stated that the conditions for application of the *de minimis* rule have been complied with. The Commission therefore regards these amounts as *de minimis* aid.

E. **Derogation under Article 87 of the EC Treaty**

(80) In view of the above, aid of at least DEM 9,978 million falls to be assessed as new aid by the Commission. The aid is in principle incompatible with the common market, but might fall within the scope of the derogations of Article 87 of the EC Treaty. The exemptions in Article 87(2) of the EC Treaty do not apply in the present case because the aid measures neither 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 is the aid granted to the economy of certain areas of the Federal Republic of Germany affected by its division.

(81) Further exemptions are set out in Article 87(3)(a) and (c) of the EC Treaty. In this case, Article 87(3)(c) of the EC Treaty is relevant, because the main objective of the aid is not regional development, but the restoration of the long-term viability of an undertaking in difficulty. Article 87(3)(c) gives the Commission discretion to permit State aid granted to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. In the Community guidelines on State aid for rescuing and restructuring firms in difficulty ([17]), the Commission spelled out the conditions governing the exercise of its discretionary powers. The Commission considers that none of the other Community guidelines, such as those for research and development, the environment, small and medium-sized enterprises, or for employment and training, is applicable.

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

1. *Restoration of viability*

(82) The award of restructuring aid requires a feasible, coherent and far-reaching restructuring plan capable of restoring the long-term viability and health of the firm within a reasonable time span. It is therefore necessary to consider the exact time span of the restructuring plan.

(83) Despite an information injunction, the Commission still cannot determine when the restructuring of Hiltex started. Thus, it is impossible to ascertain whether the long-term viability would be restored within a reasonable period. Furthermore, in view of the numerous grants of State aid to Hiltex since 1991 and the negative operating results achieved by the undertaking, the Commission has grounds to believe that Hiltex was kept artificially alive.

(84) Restructuring usually involves the reorganisation and rationalisation of the firm's activities on to a more efficient basis typically involving the withdrawal from activities that are no longer viable or are already loss-making. In addition, those existing activities that can be made competitive again should be restructured and, possibly, new viable activities should be developed or diversified into. Financial restructuring usually has to accompany the physical restructuring.

(85) The Commission first notes that the core element of the restructuring plan, the construction of the new production site in a nearby park, was postponed until 2000, thus impeding the installation of the new machinery bought in 1996, which was intended to contribute to the planned concentration of production on very fine yarns. In these circumstances, it was unrealistic to expect that Hiltex would restore its viability or reach break-even point in 2000.

(86) The following table shows the development of the actual and expected economic results of Hiltex:

Table 8

(in DEM million)

	1995 (*)	1996 (*)	1997 (*)	1998 (*)	1999 (*)	2000 (*)	2001 (*)
Turnover	4,186	3,433	7,212	5,942	9,968	20,647	21,814
Operating result	−3,023	−2,024	−3,566	−3,130	−2,799	−0,365	0,709

(*) final figures

(87) Hiltex expected a turnover increase of 370 % by the year 2001 in relation to the operating result achieved in 1998. However, the Commission notes that the market analysis provided by Germany showed a declining market. In addition, most of the necessary investments could not be realised during the first three years of the restructuring and it did not seem realistic that they would be realised within the following two years. In its initiation of the formal investigation procedure, the Commission concluded that such an increase in turnover did not correspond to economic reality and did not seem to be based on realistic assumptions.

(88) The Commission's doubts are confirmed by the fact that the company filed for bankruptcy in July 2000. It is thus clear that long-term viability will not be achieved.

2. *No undue distortions of competition*

(89) The restructuring must contain measures taken to offset as far as possible adverse effects on competitors, otherwise the aid involved is contrary to the common interest and not eligible for exemption pursuant to Article 87(3)(c) of the EC Treaty.

(90) If the undertaking is situated in a relevant market in the EU where an objective assessment of demand and supply shows that there is a structural excess of production capacity, the restructuring plan must make a significant contribution, proportionate to the amount of aid received, to the restructuring of the industry serving the relevant market by irreversibly reducing or closing capacity.

(91) The market on which Hiltex operates is currently undergoing a significant restructuring phase. According to the information available, Hiltex intended to expand its capacities in the 'long linen yarns' segment and to increase its market shares. A company in receipt of restructuring aid is not allowed to increase its production capacity unless its survival depends on it. Such an exception must be explicitly invoked and justified. In the present case, no explanation on the necessity of the intended increase in capacities and market shares was provided.

(92) In addition, Hiltex acquired new and more modern machinery, intended to improve efficiency and increase production capacity. Although it was claimed that several machines had been scrapped, the Commission believed that they may have been reallocated within the Uniwear group. The total capacities within the group, which *de facto* seems to have controlled Hiltex, would then remain unaltered.

(93) Germany has submitted no information to dispel the Commission's doubts. The Commission cannot therefore conclude that the intended restructuring, which was never carried out, contained sufficient measures to counterbalance possible negative effects on competitors.

3. *Proportionality to restructuring costs and benefits*

(94) The amount and intensity of the aid must be limited to the strict minimum needed to enable the restructuring to be carried out and must be related to the benefits anticipated from the Community's viewpoint. Therefore, the investors must make a contribution to the restructuring plan from their own resources. Moreover, the way in which the aid is granted must be such as to avoid providing the company with surplus cash which would be used for aggressive, market-distorting activities not linked to the restructuring process.

(95) In its initiation of the formal investigation procedure, the Commission noted that in the absence of a precise starting date for the restructuring, it was impossible to determine the overall amount of the restructuring costs. Without an account of the overall restructuring costs throughout the whole restructuring period, it could not be determined whether the aid granted to cover those costs was the strict minimum required for the restructuring or whether the alleged investor contribution could be considered substantial within the meaning of the guidelines. Moreover, the lack of information prevented the Commission from determining who should be considered to be the investor in Hiltex. In addition, no explanation was provided as to why the different shareholders could not finance the restructuring from their own resources. In the absence of full information on the investor groups, the Commission could not assess whether the aid was really necessary. Furthermore, the Commission doubted that the purported capital increases in the form of loans directly transmitted to one of the shareholders in the Uniwear group could be considered to be an investor contribution within the meaning of the guidelines.

(96) These doubts were not dispelled after the initiation and extension of the investigation procedure. Moreover, the information submitted indicates that a substantial part of the purported investor contribution was never paid in. Since Uniwear Asia filed for bankruptcy and Mr Bontognali seems to have disappeared, it is highly doubtful that any outstanding contributions will be paid. In view of the foregoing, the Commission cannot conclude that the investor contribution criterion is met.

4. *Full implementation of the restructuring plan*

(97) Finally, a company in receipt of restructuring aid must fully implement the plan submitted and approved by the Commission. In the present case, the different changes in the ownership of Hiltex,

entailing subsequent amendments to the restructuring plan, raised doubts that any plan would be fully implemented. These doubts were confirmed by the fact that the company filed for bankruptcy and the restructuring plan was not fully implemented.

V. **CONCLUSION**

(98) The Commission finds that Germany has unlawfully implemented the aid in question in breach of Article 88(3) of the EC Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which Germany has granted to Hirschfelder Leinen und Textil GmbH (Hiltex), amounting to at least DEM 9,978 million, is incompatible with the common market.

The aid consists of the following measures:

— the amount of measures 1 and 2 (direct investment grants and investment allowances) exceeding the provisions of the schemes under which they were granted and which may have not yet been reimbursed, as well as the interest generated from the time they were granted until their full reimbursement,

— measure 4, grants for the social plan of DEM 2,221 million,

— measure 5, grants to cover losses of DEM 2,409 million,

— measure 6, grants of DEM 0,249 million,

— measure 7, amount paid in 1994, grants of DEM 0,022 million,

— measure 8, grants for the promotion of projects of DEM 1,050 million,

— measure 9, grants for the promotion of employment of DEM 0,281 million,

— measure 10, grants to cover liabilities of DEM 0,070 million,

— the amount of measure 13 exceeding the provisions of the privatisation contract, i.e. DEM 0,374 million,

— measure 17, investment allowance of DEM 0,859 million,

— measure 18, direct investment grants of DEM 1,597 million,

— measure 27, grants of DEM 479,

— measure 27(a), investment allowance stated to have only been paid in an amount of DEM 0,710 million,

— measure 31, redemption of interest of DEM 0,136 million.

Article 2

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

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 the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiary 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.

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, 30 January 2002.

For the Commission
Mario MONTI
Member of the Commission