II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 10 May 2007

on the State aid C 1/06 (ex NN 103/05) implemented by Spain for Chupa Chups

(notified under document number C(2007) 1710)

(Only the Spanish version is authentic)

(Text with EEA relevance)

(2007/613/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Whereas:

I. PROCEDURE

(1) By letter registered on 22 April 2005, the Commission received a complaint from a competitor about an alleged aid measure in favour of Chupa Chups SA. The Commission requested information by letters dated 10 June 2005 and 7 September 2005, to which Spain replied by letters registered on 11 August 2005, 26 October 2005, 18 November 2005 and 12 December 2005.

(2) The Commission decided on 25 January 2006 to initiate proceedings pursuant to Article 88(2) of the Treaty as it had doubts about the compatibility with the common market of various measures granted by public bodies to Chupa Chups.

(3) Spain submitted comments by letter of 2 March 2006. The Commission requested information from the Spanish authorities on 25 April 2006, 6 July 2006 and 24 November 2006. These authorities replied by letters registered on 22 May 2006, 5 September 2006, 7 September 2006, 20 October 2006, 1 February 2007, 6 February 2007 and 12 March 2007.

(4) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Communities* [2], with an invitation to interested parties to submit their comments on the aid. The Commission received comments from Chupa Chups, registered on 30 May 2006, and from Inmobiliaria Casa Batlló, registered on 8 August 2006. These comments were forwarded to the Spanish authorities on 28 September 2006. Spain did not react to them.

(5) No other observation from third parties was received. The complainant did not intervene.

[1] OJ C 97, 25.4.2006, p. 2.

[2] See footnote 1.

II. DESCRIPTION OF THE BENEFICIARY AND AID MEASURES

(6) Chupa Chups is the holding company of an industrial group established in Spain in 1940. Its main activity consists in the production and commercialisation of candies, notably lollypops. Currently the group operates four production centres, located in Russia, Mexico, Sant Esteve de Sesrovires (Barcelona) and Villamayor (Asturias). In June 2006 Chupa Chups, until then a group of family-owned companies, was sold to the Italian–Dutch candies corporation Perfetti Van Melle ([3]).

(7) Since 2002 the Chupa Chups group has undergone considerable financial difficulties, with consolidated losses of EUR 22 500 000 in 2002, EUR 4 720 000 in 2003 and EUR 5 950 000 in 2004, and a decreasing turnover ([4]). Under those circumstances, the management launched a restructuring plan in 2002. To restore the financial situation of the company:

— in July 2002, a syndicated loan of a maximum of EUR 75 million was granted to Chupa Chups by a group of private banks. The contract stipulated a number of obligations for the company, including compliance with certain financial ratios. The loan was guaranteed by several companies belonging to the group ([5]). In 2005 the banks offered to Chupa Chups to renew the financing, but the offer was eventually declined,

— in March 2003, Chupa Chups' owners injected in the capital of the company extra funds amounting to EUR 8 million,

— a reshuffling of the corporate structure enabled the raising of additional funds to the amount of EUR 6 790 000 ([6]).

(8) In the context of that financial restructuring, on 5 September 2003 the Instituto Catalán de Finanzas (ICF, financial agency of the Catalonian regional government) granted to Inmobiliaria Casa Batlló, SL (ICB), a subsidiary of Chupa Chups, a credit of EUR 35 million. The credit was secured by means of a mortgage on a real estate property owned by ICB ([7]), whose value had been estimated by an independent expert at EUR 71 million. This credit (Measure 1), which was immediately 'passed on' from ICB to Chupa Chups by means of a subordinated loan ([8]), is at the origin of the complaint that triggered the Commission investigation. Chupa Chups used these funds to cancel part of the 2002 syndicated loan (EUR 20 million) and to cover other treasury needs.

(9) The Commission's preliminary investigation subsequently revealed a number of additional measures in favour of Chupa Chups, namely:

— subsidy of EUR 1 580 000 from the Spanish 'Ministerio de Agricultura y Pesca' in support of investments in the Barcelona plant (1989-1994) (Measure 2),

— subsidy of EUR 4 330 000 from 'other public bodies' supporting the building of the Asturias plant (1994-1997) (Measure 3),

— subsidy of EUR 6 710 000 from 'different public bodies' for the enlargement of the same Asturias plant (1999-2003) (Measure 4),

— interest-free credit of EUR 2 800 000 granted by the Spanish 'Ministerio de Ciencia y Tecnología' in 2004 (Measure 5),

— additional non-specified subsidies for EUR 1 540 000 (2004) (Measure 6),

([3]) Perfetti Van Melle results from the merger in 2001 between the Italian Perfetti and the Dutch Van Melle. The group is present in 130 countries, had a turnover in 2006 of approximately EUR 1,5 billion and employs 12 000 people.

([4]) EUR 344 million in 2002; EUR 294 million in 2003; EUR 261 million in 2004.

([5]) This loan was granted under market conditions and is not under examination in the present procedure.

([6]) Several operations between June and December 2004, including splitting of real state activities, and incorporation of the property of the brands through a capital increase.

([7]) 'Casa Batlló' is an emblematic Gaudí building in downtown Barcelona, declared 'Monumento Histórico-Artístico de Interés Nacional' by Spain. The mortgage on Casa Batlló for the ICF credit is a first rank one.

([8]) The loan of ICF to ICB was granted at six months Euribor + 1 %. The subordinated loan from ICB to Chupa Chups added an additional 0,125 % margin to this interest rate.

— out of the EUR 11 150 000 aggregate value of Measures 3 and 4, about EUR 5 million still remained to be received by Chupa Chups at the end of 2004. In 2005 a private bank granted a loan of EUR 4 480 000 to Chupa Chups. The loan benefited from an endorsement by the Asturias regional government, to whom Chupa Chups offered by way of security the EUR 4 480 000 in subsidies it was to receive, and a bank deposit of EUR 300 000 (Measure 7),

— in February 2004, the Spanish tax agency authorised Chupa Chups to split the payment of its debts for VAT and corporate income tax into quarterly instalments expiring on 20 February 2008. As guarantee for this deferral, a new mortgage was established on Casa Batlló (Measure 8).

III. REASONS FOR INITIATING THE PROCEDURE

(10) In its decision of 25 January 2005 to initiate the formal investigation procedure (the opening decision), the Commission expressed its concerns that Chupa Chups had been advantaged by the financing from ICF (Measure 1 above), since:

— the credit to ICB did not include any of the restrictive conditions attached to the syndicated loan agreed between Chupa Chups and the private banks one year earlier,

— the conditions agreed with ICF were probably better for the group than those of the 2002 syndicated loan, since the ICF loan was immediately allocated to the partial cancellation of the syndicated loan,

— the interest rate attached to the ICF credit seemed to correspond to the market rate applicable to healthy companies, whereas at the time Chupa Chups was already a 'firm in difficulty' within the meaning of the Rescue and Restructuring guidelines ([9]),

— the Spanish authorities did not explain why no private bank showed willingness to provide financing with conditions comparable to those of the ICF, nor what were the conditions attached to the syndicated loan of 30 July 2002.

(11) As regards Measures 2 to 8 above, the opening decision referred to the fact that the Spanish authorities had not provided any response to the Commission's request for information on the nature and justification of those measures.

IV. OBSERVATIONS FROM SPAIN

Measure 1

(12) Spain contested the initial assessment of the Commission that the ICF credit provides an advantage to the Chupa Chups group, and therefore constitutes State aid. In particular, the Spanish authorities advanced the following arguments:

— the 2002 syndicated loan was contracted between Chupa Chups and a group of private banks, whereas the ICF credit was granted to a Chupa Chups subsidiary, ICB, which was soon to become fully independent from the group ([10]). Therefore, creditors and borrowers were different in the two operations,

— securities were also substantially different. The 2002 syndicated loan to Chupa Chups did not offer any real estate as security. In particular, the company was not in a position to offer the first ranking mortgage in question, since the real estate was owned by ICB ([11]). Instead, Chupa Chups secured its loan by committing itself to a number of behavioural obligations and to compliance with certain financial ratios,

— the interest rate of the syndicated loan to Chupa Chups was also made dependent on the respect of those commitments. Because of the company's performance since 2004, this has eventually resulted in rates that are the same, or even lower, than those applied by ICF to ICB,

([9]) In particular, the 2004 annual accounts show accumulated losses from previous years of EUR 38 420 000, corresponding to 360 % of the subscribed capital at the end of that year (EUR 10 660 000). The negative results for 2004 amount to an additional 55,8 % of that capital.

([10]) The Spanish tax authorities had received a request for approval of the corporate restructuring seven months before the granting of the ICF credit. They green-lighted the operation in March 2004, i.e. 14 months after the request and seven months after the concession of the ICF credit.

([11]) Before the corporate restructuring, Chupa Chups held 94 % of ICB's shares. The remaining 6 % was held by a holding company fully owned by the common shareholders of Chupa Chups and ICB.

— ICB is not a firm in difficulties but a healthy real estate company with enough income to honour its refunding obligations. Furthermore, it provided securities that were more than sufficient to guarantee the ICF credit. Consequently, that credit took place under normal mortgage-market conditions (where interest rates are usually below rates applied to other types of loans ([12]) and did not require any risk premium, nor the restrictive behavioural clauses contained in the syndicated loan of Chupa Chups. The same credit could have been contracted with any private bank under equivalent conditions,

— in conclusion, the market economy investor principle applies to the main credit between ICF and ICB, whereas the subordinated loan between ICB and Chupa Chups is, in substance, a financial operation between two private parties (and therefore irrelevant in terms of State aid control).

Measure 2

(13) According to the information submitted by the Spanish authorities, Measure 2 was granted between 1989 and 1994, i.e. more than 10 years before the earliest action from the Commission in the present case, which was a request for information dated May 2005.

Measure 3

(14) According to the information submitted by the Spanish authorities, Measure 3 can be split into:

— EUR 3 600 000 in aid granted before 1995,

— EUR 730 000 in aid, corresponding to an aid intensity of 13 %, granted on 14 March 1997 by the Asturias regional government under Decree 7/96 of 15 February establishing various support programmes for SMEs ([13]) (Decree 7/96). The Spanish authorities believe that this aid has to be regarded as an extension of scheme N 448/94 in support to SMEs in Asturias (exceptionally applicable to large companies contributing to regional development) ([14]). The measure constituted a complement to regional aid granted in 1994 by Spain under Law 50/85 of 27 December on regional incentives to remedy inter-regional economic imbalances (LIR), approved by the Commission ([15]).

Measure 4

(15) According to the information submitted by the Spanish authorities, Measure 4 can be split into the following items:

Year	Public body granting the aid	National legal basis	Subsidy (EUR millions)	Aid intensity
2000	Ministry of Economy and Finance	LIR	2,55	13 %
1999	Ministry of Industry, Tourism and Trade	Order of 6 March 1998 (Minería 1) ([1])	1,98	14 %
2003	Ministry of Industry, Tourism and Trade	Order of 17 December 2001 (Minería 2) ([2])	0,8	12 %
2000	Asturias regional government	Decree 41/2000 ([3])	0,69	13 %
2002	Asturias regional government	Decree 41/2000	0,69	9 %

([1]) *Orden de 6 de Marzo 1998, modificada por la Orden de 6 de abril 1999, por la que se establecen las bases reguladoras para la concesión de ayudas dirigidas a proyectos empresariales generadores de empleo, que promuevan el desarrollo alternativo de las zonas mineras.*
([2]) *Orden de 17 de diciembre de 2001 por la que se establecen las bases reguladoras para la concesión de ayudas dirigidas a proyectos empresariales generadores de empleo, que promuevan el desarrollo alternativo de las zonas mineras.* The 'Minería 2' programme was approved by the Commission on 27 November 2001 (letter C(2011) 3628).
([3]) *Decreto 41/2000 de 11 de mayo por el que se establecen diversos programas de ayuda a las empresas*. Scheme approved by Commission Decision of 30 May 2000 (OJ C 293, 14.10.2000, p. 7).

([12]) The interest rate of the ICF credit was relatively high for the mortgage market, with rates not rarely in the area of Euribor + 0,5 %.

([13]) BOPA, 19.7.1996, p. 7714.
([14]) Commission Decision of 9 February 1995 (SG/01388/1994).
([15]) This Law was developed by *Real Decreto 1535/87, de 11 de diciembre, por el que aprueba el reglamento de desarrollo de la Ley 50/85 de incentivos regionales para la corrección de desequilibrios económicos interterritoriales*. The LIR scheme was approved by the Commission by letter of 1 September 1987 (SG(87) D/10875).

Measure 5

(16) According to the information submitted by the Spanish authorities, Measure 5 was granted under the existing aid scheme 'Actividades del Centro para el Desarrollo Industrial — CDTI — Desarrollo Tecnológico' ([16]).

Measure 6

(17) According to the Spanish authorities, Measure 6 concerns a subsidy of EUR 1 590 000 from the European Agricultural Guidance and Guarantee Fund (EAGGF) concerning refunds on export to third countries.

Measure 7

(18) The Spanish authorities maintained that the credit operation endorsed by the Asturias regional government consisted in advancing to Chupa Chups the amounts corresponding to pending subsidies to which it was already entitled. Those subsidies had been granted for the enlargement of the Asturias plant, a condition that the company had already complied with when the credit was agreed. As security in return for the public endorsement, Chupa Chups pledged to the Asturias government its rights over the subsidies, for an amount of EUR 4 480 000.

(19) The endorsement by the Asturias regional government was therefore covered by the pledge of claims that Chupa Chups held vis-à-vis several public authorities.

Measure 8

(20) The Spanish authorities argued that the rescheduling of Chupa Chups debts for VAT and corporate income tax stemmed from the mere application of Spanish taxation law ([17]), which defines the criteria for eligibility – in particular as to the financial situation of the undertaking and the type of securities to provide – and the interest rates for arrears (interest rates that were indeed applied to the company). They therefore consider that the tax authorities did not enjoy any discretionary power.

([16]) Letter from Regional Policy DG (dated 8 May 1995, registered under DG/95104085) informing the Spanish authorities that the CDTI aid scheme was to be considered an existing aid scheme. Letter from Competition DG to Regional Policy DG dated 24 February 1995, registered under D/12874.

([17]) *Ley General Tributaria 58/2003* and *Reglamento General de Recaudación*.

V. OBSERVATIONS FROM THIRD PARTIES

(21) The submission from Chupa Chups repeated the arguments advanced by the Spanish authorities as regards the lack of State aid in the ICF credit. It also provided detailed data, along the same lines already submitted by Spain, on the other measures included in the opening decision. Chupa Chups also claimed that in addition to the EAGGF refunds, Measure 6 included a subsidy of EUR 100 000 from the Instituto de Comercio Exterior (ICEX), granted in 2003 in the framework of a programme under Commission Regulation (EC) No 1159/2000 ([18]) of 30 May 2000 on information and publicity measures to be carried out by the Member States concerning assistance from the Structural Funds.

(22) Inmobiliaria Casa Batlló submitted its annual accounts for business years 2001 to 2004 and the annual accounts for the same period of the real estate company 'Casa Batlló, SL', which is linked to it.

VI. ASSESSMENT OF THE AID

1. Existence of State aid

(23) Article 87(1) of the EC Treaty declares aid granted in any form whatsoever by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States to be incompatible with the common market.

1.1. Measure 1: ICF credit (2003)

(24) As regards the ICF credit, it must be determined whether it confers on Chupa Chups a support that the company would not have been able to obtain on market conditions. In other words, the Commission has to assess whether this public body acted as a hypothetical market economy investor would have done under similar circumstances.

(25) As set out under Section IV above, further to the opening decision Spain submitted information showing that the 2002 syndicated loan and the ICF credit cannot be compared because the borrowers were different in the two operations, securities were different, ICB was not a firm in difficulties, and ICB provided a security that was more than sufficient to guarantee the ICF credit.

([18]) OJ L 130, 31.5.2000, p. 30.

(26) On the basis of the information and arguments provided by Spain, the Commission considers that it has been sufficiently proved that the market economy investor principle was complied with in the main credit operation between ICF and ICB, and that the subordinated loan between ICB and Chupa Chups is a financial operation between two private parties.

(27) Therefore, the Commission concludes that Measure 1 does not involve State aid.

1.2. Measures 2 to 5

(28) Measures 2 to 5 were public subsidies directly granted to Chupa Chups. They involved the allocation of State resources conferring an advantage on one individual company. As regards in particular Measure 5, Spain used State resources by granting an interest-free loan to the company. The measures have provided Chupa Chups with advantages vis-à-vis competitors which distort competition, inasmuch as the company has reinforced its financial position and has increased its investment capacity. Since Chupa Chups is active in the candies market, a sector in which trade exists between Member States, and it is an internationally active company, the criterion of affecting trade within the Community is also fulfilled.

(29) The Commission therefore concludes that Measures 2 to 5 constitute State aid within the meaning of Article 87(1) EC Treaty. The Spanish authorities do not dispute this analysis.

1.3. Measure 6: additional non-specified subsidies for EUR 1 540 000

(30) Further to the information received from Spain and Chupa Chups, it must be concluded that Measure 6 encompasses the following elements:

— a subsidy of EUR 1 590 000 from the EAGGF concerning refunds on exports to third countries ([19]). The Commission notes that, according to the case law of the Court of Justice (see paragraph 22 of the judgment of 13 October 1982 in Joined Cases 213-215/81 *Norddeutsches Vieh- und Fleischkontor*), export funds granted by the EAGGF under Common Agricultural Policy (CAP) rules do not constitute State aid ([20]). This measure therefore does not contain State aid elements;

— according to the comments from Chupa Chups received on 30 May 2006, Measure 6 also includes a subsidy of EUR 100 000 from ICEX granted in 2003 in the framework of the programme '*Plan de Marcas Españolas*' for activities related to the promotion of the brand 'Chupa Chups' in South Korea. This programme was introduced by ICEX in 2003 and, according to Chupa Chups, the Spanish authorities considered at the time it was granted that the subsidy to the company complied with Regulation 1159/2000. Spain has not rejected the assertion by Chupa Chups that this subsidy was part of the EUR 1 540 000 'additional non-specified subsidies' identified in point 5(5) of the decision initiating the procedure. Nor has Spain made any comment on the nature of the subsidy. Specifically, despite the low amount involved and the Commission's enquiries in this regard, Spain has not claimed that its granting was subject to the conditions on *de minimis* aid applicable at the time ([21]).

(31) Consequently, the Commission concludes that Measure 6 constitutes State aid within the meaning of Article 87(1) EC Treaty to the amount of EUR 100 000.

1.4. Measure 7: endorsement from the Asturias regional government (2005)

(32) In view of the information provided by Spain, as described under section IV above, the Commission considers that the endorsement by the Asturias regional government was guaranteed by the firm credit rights that Chupa Chups had vis-à-vis several public authorities. The Commission considers, in particular, that Chupa Chups was formally entitled to receive the subsidies in question at the time the credit was agreed, and that, according to the analysis below (cf. assessment of Measure 4), those subsidies were all compatible aid with the exception of EUR 800 000.

(33) In the light of the above, the Commission concludes that the intervention of the Asturias government did not involve any significant risk and therefore did not constitute State aid.

([19]) According to Chupa Chups' submission of 30 May 2006, EAGGF refunds amounted to EUR 1 440 000. However, in a document dated 7 September 2006, Spain showed that EAGGF refunds to the company totalled EUR 1 590 000 in 2004.

([20]) [1982] ECR 3583.

([21]) Commission Regulation No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

1.5. Measure 8: debt deferral by the tax agency

(34) The information provided by the Spanish authorities in reaction to the opening decision shows that:

— the Spanish public administration is bound to follow the procedures laid down by General Taxation Law 58/2003 and its implementing law. Those procedures are administrative in nature, and only in some specific cases, as established in the laws, is the administration required to undertake court procedures,

— the legal figures for the deferment of payments or payment by instalments are described in Article 65 of Law 58/2003,

— the possibility of requesting a deferment of payments is open to any taxpayer,

— the granting of a deferment is subject to the provision of securities that cover the amount deferred, payment of the deferral interest, and a 25 % surcharge on the total. In the present case, Chupa Chups provided a mortgage covering EUR 15 240 000, which is the amount that resulted from those calculations,

— Chupa Chups did not benefit from any actual 'tax suspension' (*Moratoria fiscal*), but rather from the possibility of paying by instalments. Thus, deferred payments generated interest according to the legal rates established by the Spanish budgetary laws for each period. Those rates were similar to market rates applied to other types of credits,

— Chupa Chups requested deferral of its tax debts before the period for voluntary payment had expired. This prevented, according to Article 65 of Law 58/2003, the initiation of an execution procedure,

— the deferment agreement established that any credit position of Chupa Chups vis-à-vis the tax administration would be assigned to the cancellation of debts deferred. Given that Chupa Chups is a frequent generator of VAT credits on account of its exporting activities, the schedule of amortisation initially foreseen has been substantially accelerated.

(35) On the basis of the above arguments the Commission considers that Spain has provided sufficient evidence that the rescheduling of Chupa Chups debts for VAT and corporate income tax stemmed from the mere application of Spanish taxation law, and that the tax authorities did not enjoy any discretionary power as regards eligibility of the company, securities necessary or interest rates applied.

(36) In consideration of this, the Commission concludes that Measure 8 is of a general nature and does not constitute State aid.

2. **Compatibility of Measures 2 to 6**

2.1. Measure 2: subsidy of EUR 1 580 000 from the Spanish 'Ministerio de Agricultura y Pesca' in support of investments in the Barcelona plant (1989-1994)

(37) According to the information submitted by Spain, Measure 2 was granted between 1989 and 1994, i.e. more than 10 years before the earliest action from the Commission in the present case, which was a request for information dated May 2005.

(38) The Commission therefore concludes that for Measure 2 the limitation period provided for by Article 15 of Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [22] has expired and the measure constitutes existing aid.

2.2. Measure 3: subsidy of EUR 4 330 000 from 'other public bodies' supporting the building of the Asturias plant (1994-1997)

(39) The Commission notes that according to the information provided by Spain, subsidies of EUR 3 600 000 within Measure 3 were granted before 1995, i.e. more than 10 years before the earliest action from the Commission in the present case, and therefore the limitation period provided for by Article 15 of Council Regulation (EC) No 659/1999 has expired. The subsidies thus constitute existing aid.

[22] OJ L 83, 27.3.1999, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1). Article 15 of the Regulation states: 1. The powers of the Commission to recover aid shall be subject to a limitation period of 10 years. 2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh (…). 3. Any aid with regard to which the limitation period has expired shall be deemed to be existing aid.

(40) As regards the EUR 730 000 in aid granted on 14 March 1997 by the Asturias regional government under Decree 7/96, the Spanish authorities claim that this aid should be regarded as an extension of scheme N 448/94 in support to SMEs in Asturias (exceptionally applicable to large companies contributing to regional development), and that it would constitute a complement to regional aid granted in 1994 by Spain under Law 50/85 (LIR). The Commission notes that scheme N 448/94 expired at the end of 1996 and was not subsequently extended. Nevertheless, the Commission considers that the complementary subsidy from the Asturias regional government can be examined on an ad hoc basis in the light of Decree 7/96 and the regional aid ceilings for Spain as laid out in Commission Decision No 463/94 ([23]). On this basis, the aid can be declared compatible since: (i) it constitutes regional aid, in so far as it was applied to investments in fixed assets that were eligible under the LIR; (ii) the accumulated aid intensity remained below the 50 % ceiling for the Asturias region applicable at the time.

2.3. Measure 4: subsidy of EUR 6 710 000 from 'different public bodies' for the enlargement of the same Asturias plant (1999-2003)

(41) The Commission approved the LIR scheme by decision of 1 September 1987. Therefore, the EUR 2 550 000 subsidy granted to Chupa Chups under this regional aid scheme constitutes compatible aid.

(42) As regards the EUR 1 980 000 subsidy received by Chupa Chups in 1999 under 'Minería 1', the Commission notes that this programme is not an approved aid scheme. However, after an individual assessment of the measure, the Commission concludes that the subsidy at hand constitutes compatible regional aid according to the 1998 Commission's Guidelines on national regional aid (1998 RAG) ([24]). In particular, Spain has provided evidence that the aid was limited to the initial investment, that eligible costs were among those considered in the 1998 RAG, that the intensity of the aid respected the regional ceilings applicable in Asturias at the time, that accumulation rules were respected, that at least 25 % of the investment was financed with the beneficiary's own resources, and that the investment was kept more than five years after the date the aid was granted.

(43) Concerning the EUR 800 000 in regional aid granted in 2003 under 'Minería 2', the Commission notes that 'Minería 2' is an approved aid scheme ([25]). However, the Commission letter approving the scheme makes clear that it must not apply to companies in difficulties. The Commission notes that further to the heavy losses incurred in 2002 ([26]) and its performance during 2003 ([27]), Chupa Chups had to be regarded as a company in difficulties ([28]) at the time the aid was granted. Therefore, Chupa Chups was not eligible for this aid. The Spanish authorities have stated that this aid has not yet been paid out.

(44) Regarding the two subsidies granted under Decree 41/2000, the Commission notes that the latter decree was approved by decision of 30 May 2000, that in 2000 and 2002 (when the subsidies were granted) Chupa Chups was still eligible for regional aid, and that the regional aid ceilings for Asturias were respected. Therefore, the two subsidies in question constitute compatible regional aid.

(45) In conclusion, the Commission considers that of the subsidies encompassed by Measure 4, EUR 5 910 000 constitute compatible regional aid and EUR 800 000 constitute incompatible aid. The latter has not yet been paid out by the Spanish authorities.

2.4. Measure 5: interest-free credit of EUR 2 800 000 granted by the Spanish 'Ministerio de Ciencia y Tecnología' in 2004

(46) The Spanish authorities have provided evidence that Measure 5 was granted under the existing aid scheme 'Actividades del Centro para el Desarrollo Industrial – CDTI – Desarrollo Tecnológico'. Therefore, it constitutes compatible State aid.

2.5. Measure 6: subsidy of EUR 100 000 from ICEX further to Commission Regulation (EC) No 1159/2000

(47) The Commission notes that Regulation 1159/2000 concerns information on publicity measures to be carried out by the Member States concerning assistance from the Structural Funds and does not provide any legal basis for the granting of the aid. Despite the Commission's request in that regard, Spain has not justified in any other manner the compatibility of this subsidy. In particular, Spain has not submitted any evidence that State aid in the context of the ICEX programme '*Plan de Marcas Españolas*' constitutes an existing aid scheme.

([23]) OJ C 25, 31.1.1996, p. 3.
([24]) OJ C 74, 10.3.1998, p. 9.
([25]) Cf. footnote 17.
([26]) EUR 22,078 million, corresponding to 86,5 % of the capital subscribed at the end of the financial year.
([27]) Leading to additional losses of EUR 4,72 million.
([28]) Within the meaning of point 5(a) of the 1999 Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2).

(48) In the absence of information proving the opposite, the Commission finds that none of the exceptions laid down in Article 87(2) and (3) of the Treaty is applicable to the subsidy, and therefore concludes that the aid has to be considered incompatible.

VII. **CONCLUSION**

(49) The Commission finds that:

(a) Measures 1, 7, 8, and the financing of EUR 1 590 000 within Measure 6 do not constitute State aid;

(b) Measures 2, 3, 5, and EUR 5 910 000 within Measure 4 can be declared compatible with the common market;

(c) the financing of EUR 800 000 in Measure 4 and EUR 100 000 in Measure 6 constitute State aid that cannot be declared compatible with the common market under any derogation in the EC Treaty. According to the Spanish authorities, the EUR 800 000 in Measure 4 have not been paid out, and therefore there is only need for recovery of the EUR 100 000 in Measure 6,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid amounting to EUR 100 000, unlawfully granted by Spain in breach of Article 88(3) of the Treaty, in favour of Chupa Chups is incompatible with the common market.

2. The State aid which Spain is planning to implement for Chupa Chups, amounting to EUR 800 000, is incompatible with the common market. This part of the aid may accordingly not be implemented.

3. The remaining State aid which Spain has implemented in favour of Chupa Chups, comprising a subsidy of EUR 1 580 000 in support of investments in the Barcelona plant, a subsidy of EUR 4 330 000 supporting the building of the Asturias plant, a subsidy of EUR 5 910 000 for the enlargement of the same Asturias plant, plus an interest-free credit of EUR 2 800 000, is compatible with the common market.

Out of these amounts, EUR 6 640 000 (corresponding to EUR 730 000 supporting the building of the Asturias plant plus EUR 5 910 000 for the enlargement of that plant), and the interest-free credit of EUR 2 800 000 are compatible with the common market pursuant to Article 87(3)(c) of the Treaty, whereas EUR 5 180 000 (corresponding to a EUR 1 580 000 subsidy in support of investments in the Barcelona plant plus EUR 3 600 000 supporting the building of the Asturias plant) are considered as existing aid since the limitation period has expired.

4. The remaining measures described in the present decision in favour of Chupa Chups, namely a EUR 35 000 000 credit from ICF, EUR 1 590 000 export refunds from EAGGF, the endorsement by the Asturias regional government of a commercial loan of EUR 4 480 000 and the deferments of taxes granted by the Spanish tax agency do not constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 2

1. Spain shall recover the aid referred to in Article 1(1) from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([29]).

4. Spain shall cancel all outstanding payments of the aid referred to in Article 1(1) with effect from the date of adoption of this Decision.

Article 3

1. Recovery of the aid referred to in Article 1(1) shall be immediate and effective.

2. Spain shall implement this Decision within four months following the date of its notification.

([29]) OJ L 140, 30.4.2004, p. 1.

Article 4

1. Within two months following notification of this Decision, Spain shall submit the following information to the Commission:

(a) the total amount (principal and recovery interest) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1(1) has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to Spain.

Done at Brussels, 10 May 2007.

For the Commission

Neelie KROES

Member of the Commission