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⁽¹⁾ Text with EEA relevance

I

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

COMMISSION REGULATION (EC) No 1070/2007

of 18 September 2007

establishing the standard import values for determining the entry price of certain fruit and vegetables

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables ⁽¹⁾, and in particular Article 4(1) thereof,

Whereas:

- (1) Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the

standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto.

- (2) In compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 19 September 2007.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 18 September 2007.

For the Commission

Jean-Luc DEMARTY

*Director-General for Agriculture and
Rural Development*

⁽¹⁾ OJ L 337, 24.12.1994, p. 66. Regulation as last amended by Regulation (EC) No 756/2007 (OJ L 172, 30.6.2007, p. 41).

ANNEX

to Commission Regulation of 18 September 2007 establishing the standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)		
CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	MK	70,6
	XK	55,1
	XS	45,9
	ZZ	57,2
0707 00 05	JO	151,2
	MK	43,7
	TR	129,2
	ZZ	108,0
0709 90 70	TR	110,1
	ZZ	110,1
0805 50 10	AR	78,5
	UY	83,7
	ZA	64,1
	ZZ	75,4
0806 10 10	IL	51,3
	MK	28,3
	TR	116,2
	ZZ	65,3
0808 10 80	AU	215,7
	BR	117,4
	CL	85,0
	CN	79,8
	NZ	98,0
	US	97,8
	ZA	83,3
0808 20 50	ZZ	111,0
	CN	57,2
	TR	123,0
	ZA	103,8
0809 30 10, 0809 30 90	ZZ	94,7
	TR	152,3
	US	189,2
0809 40 05	ZZ	170,8
	BA	49,8
	IL	110,5
	MK	49,8
	TR	107,3
	ZZ	79,4

⁽¹⁾ Country nomenclature as fixed by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 1071/2007**of 18 September 2007****imposing a provisional anti-dumping duty on imports of coke of coal in pieces with a diameter of more than 80 mm (Coke 80+) originating in the People's Republic of China**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community⁽¹⁾, ('the basic Regulation') and in particular Article 7 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE**1. Initiation**

- (1) On 20 December 2006, pursuant to Article 5 of the basic Regulation, the Commission announced by a notice (notice of initiation) published in the *Official Journal of the European Union* ⁽²⁾, the initiation of an anti-dumping proceeding concerning imports into the Community of coke of coal in pieces with a diameter of more than 80 mm (Coke 80+) originating in the People's Republic of China (the PRC or the country concerned).
- (2) The proceeding was initiated following a complaint lodged on 20 November 2006 by three Community producers (the complainants) representing a major proportion, in this case more than 30 %, of the total Community production of Coke 80+. The complaint contained *prima facie* evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding.
- (3) The product concerned was already subject to anti-dumping measures from June 2000 until 2004. The measures were imposed provisionally by Commission Decision No 1238/2000/ECSC ⁽³⁾ and definitively by

Commission Decision No 2730/2000/ECSC ⁽⁴⁾ (the previous measures), but the measures were suspended in March 2004 by Commission Decision 2004/264/EC ⁽⁵⁾ due to a temporary change in market conditions. The suspension was extended by Council Regulation (EC) No 2117/2004 ⁽⁶⁾ until 15 December 2005, when the measures expired.

2. Parties concerned by the proceeding

- (4) The Commission officially advised the complaining producers and other known Community producers, the representatives of the PRC, exporting producers in the PRC, importers/traders and users known to be concerned, as well as associations known to be concerned of the initiation of the proceeding. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation. One exporter in the PRC, as well as producers, users and one importer in the Community made their views known in writing. All parties who so requested within the given time limit and showed that there were particular reasons why they should be heard were granted a hearing.
- (5) In view of the apparent large number of exporting producers and importers involved in the investigation, the application of sampling techniques was envisaged in the notice of initiation, in accordance with Article 17 of the basic Regulation.
- (6) In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, exporting producers and importers were requested to make themselves known and to provide information as specified in the notice of initiation. Only one exporting producer came forward to cooperate. It was consequently decided that sampling was not necessary.
- (7) Also as far as the importers of Coke 80+ are concerned, given that only one importer indicated its willingness to cooperate, it was decided that sampling was not necessary.

⁽¹⁾ OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 2117/2005 (OJ L 340, 23.12.2005, p. 17).

⁽²⁾ OJ C 313, 20.12.2006, p. 15.

⁽³⁾ OJ L 141, 15.6.2000, p. 9.

⁽⁴⁾ OJ L 316, 15.12.2000, p. 30. Decision as amended by Council Regulation 997/2004 (OJ L 183, 20.5.2004, p. 1).

⁽⁵⁾ OJ L 81, 19.3.2004, p. 89.

⁽⁶⁾ OJ L 367, 14.12.2004, p. 3.

(8) In order to allow the sole cooperating exporting producer in the PRC to submit a claim for market economy treatment (MET) pursuant to Article 2(7) of the basic Regulation or individual treatment (IT) pursuant to Article 9(5) of the basic Regulation, if it so wished, the Commission sent a MET/IT claim form to the sole Chinese cooperating company. This exporting producer requested neither MET nor IT.

(9) The Commission sent questionnaires to all parties known to be concerned and to all other companies that made themselves known within the deadlines set out in the notice of initiation. Replies were received from the sole Chinese cooperating exporting producer, from five Community producers, from one importer and from 36 users. In addition, several users submitted comments without replying to the questionnaire. Submissions were made also by the European Foundry Association (CAEF), acting also on behalf of its members, comprising national foundry associations from 17 EU Member States.

(10) The Commission sought and verified all information it deemed necessary for the purpose of a preliminary determination of dumping, resultant injury and Community interest. Verification visits were carried out at the following companies:

(a) *Community producers*

- Industrial Química del Nalón, SA, Oviedo, Asturias, Spain,
- Industrias Doy Manuel Mórte, SL, Oviedo, Asturias, Spain,
- Italiana Coke SpA, Savona, Italy,
- OKD, OKK, a.s., Ostrava-Přívov, Czech Republic,
- Productos de Fundición, S.A., Baracaldo, Vizcaya, Spain;

(b) *Unrelated importer in the Community*

- ThyssenKrupp MinEnergy GmbH, Essen, Germany;

(c) *Users in the Community*

- Rockwool International A/S and its subsidiary Rockwool A/S, Denmark; both in Hedehusene, Denmark;
- Fritz Winter Eisengiesserei GmbH & Co, Stadttalendorf, Germany.

(11) In the absence of any claims for MET or IT, and since a normal value for exporting producers in the PRC should be established on the basis of data from the selected analogue country, a verification visit took place at the premises of the following companies:

Producers of the analogue country USA

- Tonawanda Coke Co., New York;
- Erie Coke Co., Pennsylvania.

3. Investigation period

(12) The investigation of dumping and injury covered the period from 1 October 2005 to 30 September 2006 (investigation period or IP). The examination of trends relevant for the assessment of injury covered the period from 1 January 2003 to the end of the IP (period considered).

B. PRODUCT CONCERNED AND LIKE PRODUCT

1. Product concerned

- (13) The product concerned is coke of coal in pieces with a diameter of more than 80 mm (Coke 80+) originating in the People's Republic of China (the product concerned), normally declared within CN code ex 2704 00 19.
- (14) Coke of coal in pieces with a diameter of more than 80 mm (Coke 80+) is prepared from bituminous coal which is an organic sedimentary rock extracted from the ground. Steel industry uses primarily small and medium sized coke (Coke 80-; also called blast furnace coke), whereas cast iron and isolation industries use large size coke (Coke 80+; also called foundry coke) for their cupolas. Both types of coke fall under the same CN code.

- (15) The investigation showed that all types of the product concerned, despite differences in coal raw materials qualities, differences in the production methods and different lump sizes, have the same basic technical and chemical characteristics and are used as a combustion agent for use in cupola ovens.
- (16) It is therefore concluded that the product concerned is foundry coke originating in the PRC, that is to say coke of coal in pieces with a diameter of more than 80 mm of a kind used in cupola ovens. It is also concluded that all foundry coke is one single product since it always has the same basic technical and chemical characteristics and the same use.

2. Like product

- (17) The investigation showed that Coke 80+ produced and sold in the Community by the Community industry, that produced in the PRC and sold for export to the Community and that produced and sold in the analogue country (the USA) have the same basic physical, technical and chemical characteristics and uses. They are therefore considered to be alike within the meaning of Article 1(4) of the basic Regulation.

C. DUMPING

1. Cooperation

- (18) As mentioned in recital 6, only one Chinese exporting producer cooperated in the proceeding. The export sales made by this exporting producer represented less than 30 % of the total Coke 80+ imports originating in China sold to the Community during the IP. It is therefore concluded that the level of cooperation was very low. The representatives of the PRC were informed that such low level of cooperation may lead to the application of Article 18 of the basic Regulation.

2. Normal value

(a) Analogue country

- (19) In the notice of initiation, it was envisaged to use the USA as an appropriate analogue country for the purpose of establishing normal value for the PRC and interested parties were invited to comment on the appropriateness of this choice. No comments or objections were received from any parties in this respect.

- (20) The USA has a relatively large and open domestic market for Coke 80+, with five domestic producers (during the IP) and a sufficient level of imports. In addition, similar processes as in the PRC are used for the production of the product concerned.

- (21) The suitability of other countries which were considered as possibly having Coke 80+ production was also examined. For Australia, the only country where evidence of the production of the product concerned was found, information provided by the sole Australian producer indicated that the Australian domestic market is very limited.

- (22) On the basis of the above, it was concluded that the USA was a suitable choice as an analogue country. Accordingly, cooperation was sought from the American Association of coke producers.

(b) Determination of normal value

- (23) Pursuant to Article 2(7) of the basic Regulation, normal value was established on the basis of the verified information received from two cooperating companies in the USA.
- (24) As far as the determination of normal value is concerned, the Commission first established, in accordance with Article 2(2) of the basic Regulation, that the domestic sales to independent customers of the like product manufactured by the two cooperating producers in the USA were representative, i.e. that the total volume of such sales represented at least 5 % of the total export volume of the product concerned to the Community. In this respect, it should be noted that the product concerned consists of one single product type.
- (25) The Commission subsequently examined whether the above domestic sales could be regarded as being sold in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. It was found that more than 95 % of sales by volume on the domestic market were profitable.
- (26) As a result, normal value was established as the weighted average of the ex-works domestic sale prices to unrelated customers made by the two cooperating producers in the USA.

3. Export price

(27) In view of the limited cooperation from the PRC, the export price was mainly based on the best information available, in accordance with Article 18 of the basic Regulation. Since January 2006, there is no specific TARIC code for Coke 80+. As a consequence, Eurostat figures could not be used to calculate Chinese export prices of Coke 80+ or volume for the IP. However, detailed information on quantities and prices of Coke 80+ imported from China during the IP could be obtained from the customs authorities of importing Member States.

(28) As such information relating to imports of the product concerned during the IP was the best information available in accordance with Article 18 of the basic Regulation, it was used to assess the volume and price of Chinese exports during the IP. However, in consideration of the fact that the sole cooperating exporting producer had submitted information on export prices, this information was also considered and was found to be in line with the information obtained from the abovementioned customs authorities. The weighted average net ex-works export price established on the basis of this data was EUR 107,73 per tonne.

4. Comparison

(29) The normal value and export prices were compared on an ex-works basis. For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation. Appropriate adjustments concerning differences in physical characteristics, discounts, transport and insurance, packing, credit and after-sales costs were granted where they were found to be appropriate and supported by verified evidence.

(30) The sole Chinese cooperating exporting producer argued that the product concerned imported from the PRC during the IP was of a different quality than the like product manufactured in the analogue country and required additional screening operations before it could be actually sold.

(31) The chemical and dimensional quality requirements of the product concerned and of the like product manufactured in the analogue country were compared and

an adjustment was granted for the quality differences found. As for the screening in Europe, no adjustment is necessary since this operation takes place after the determination of the CIF value, which is the starting point from which the ex-works export price is determined.

5. Dumping margin

(32) The dumping margin was established on the basis of a comparison of a weighted average ex-works normal value with a weighted average ex-works export price, in accordance with Article 2(11) and (12) of the basic Regulation. The country wide dumping margin, expressed as a percentage of the CIF Community frontier price, duty unpaid, is 53,3 %.

D. INJURY

1. General

(33) As mentioned in recital 3, anti-dumping measures were imposed in 2000 on imports of Coke 80+ originating in the PRC. Those measures were suspended in March 2004 and expired in December 2005. Therefore, in the early part of the period considered there were measures in place on imports from the country concerned.

2. Community production and Community industry

(34) Within the Community, the like product is manufactured by seven producers. The output of these seven Community producers is therefore deemed to constitute the Community production within the meaning of Article 4(1) of the basic Regulation.

(35) Of these seven producers, a total of five declared their interest in cooperating in the proceeding within the time limit set out in the notice of initiation and properly cooperated with the investigation. These five producers were found to account for a major proportion of the total Community production of the like product, in this case around 75 %. The five cooperating producers therefore constitute the Community industry within the meaning of Article 4(1) and Article 5(4) of the basic Regulation and will be hereafter referred to as the 'Community industry'. The remaining two Community producers will be hereafter referred to as the 'other Community producers'. These two other Community producers did not oppose the complaint.

3. Community consumption

- (36) Community consumption was established on the basis of the sales volumes of the Community industry's own production destined for the Community market, the EC sales volume information obtained from the other Community producers and cross-checked against estimations made by the Community industry producers and information obtained from users, and on the basis of import volumes. As for the Chinese import volumes, there was no specific TARIC code for Coke 80+ in year 2006 and thus no Eurostat data available. Therefore, the import volumes for the IP have provisionally been established on the basis of the detailed information obtained from EC customs authorities, as mentioned in recital 27. For the years 2003 and 2005, the import volumes have provisionally been based on Eurostat data, which have been cross-checked against market data obtained during the investigation from users and importers. As for year 2004, the Eurostat data as far as import volumes are concerned are in a sharp contrast to market information obtained during the investigation from producers, importers and users. Indeed, while the market information shows that there were few Chinese imports in

2004, the Eurostat figures, on the contrary, show a significant peak of such imports in 2004. Therefore, it seems probable that after the suspension of the previous measures in March 2004, importers declared some Coke 80+ under the TARIC code of Coke 80+ and thus the Eurostat data do not give an accurate picture of import volumes in 2004. For that reason, and in view of the very limited cooperation from Chinese exporting producers and importers in the Community, at this stage of the investigation, the import volumes for 2004 have been established on the basis of information provided in the complaint, which is in line with information obtained during the investigation from importers and users. The Commission will continue its investigation on the import volumes before definitive determinations are made.

- (37) On the basis of the above, it was found that the Community consumption increased over the period considered and during the IP the Community market for the product concerned and the like product was approximately 25 % higher than in 2003.

	2003	2004	2005	IP
Total EC consumption (thousand tonnes) (range) ⁽¹⁾	1 100-1 500	1 300-1 700	1 350-1 750	1 400-1 800
<i>Index (2003 = 100)</i>	100	119	122	125

⁽¹⁾ For confidentiality reasons, given that there are only two companies in the category 'other Community producers', only ranges are given for the total EC consumption figures.

4. Imports from the country concerned

(a) Volume and market share of the imports concerned

- (38) Based on information available from customs authorities and from cooperating parties, the PRC has been, throughout the period considered, the only source of imports of the product concerned to the EC. Therefore, all import volumes in the EC during the period considered are deemed as originating in the PRC.
- (39) On the basis of the facts available at this stage as described in recital 36, it was found that Chinese import volumes of the product concerned into the Community increased by 45 % from 2003 (around 311 000 tonnes) to the IP (more than 452 000 tonnes).
- (40) The market share held by imports from the country concerned increased from 24 % in 2003 to 28 % during the IP, i.e. by 4 percentage points. During the IP, the market share of imports from the country concerned increased by 3 percentage points, as compared to year 2005.

	2003	2004	2005	IP
Volume of imports from the PRC (tonnes)	310 755	150 000	386 485	452 011
<i>Index (2003 = 100)</i>	100	48	124	145
Market share of imports from the PRC	24 %	10 %	25 %	28 %

(b) *Prices*

- (41) Since there is no Eurostat data available for the Chinese imports of the product concerned for 2006 (see recital 36), and in view of the very limited cooperation from Chinese exporting producers and importers in the Community, the average price of imports of the product concerned originating in the PRC has, for the IP, provisionally been established on the basis of the detailed information obtained from EC customs authorities mentioned in recital 27. For years 2003-2005, the average import price has provisionally been established on the basis of Eurostat data, which are in line with the findings of the investigation. It is noted that, as concerns the Eurostat data for year 2004, although they seem inaccurate as far as import volumes are concerned (see recital 36), for import prices the Eurostat data for year 2004 are in line with the findings of the investigation and comparisons made between price trends of Coke 80+ and Coke 80- during the whole period considered. Therefore, Eurostat data have provisionally been used for establishing the imports prices also for year 2004. The Commission, however, will still continue the investigation into import prices before definitive determinations are made.
- (42) Based on the abovementioned data, the average price of imports of the product concerned originating in the PRC more than doubled from 2003 (EUR 122/tonne) to 2004 (EUR 275/tonne), but declined significantly in 2005 (EUR 224/tonne), a trend which continued during the IP (EUR 156/tonne). In terms of percentages, the prices decreased by 35 % from 2004 to the IP; however, over the whole period considered (2003 — IP), the prices increased by 27 %.

	2003	2004	2005	IP
Average cif Community frontier price of imports from the PRC (EUR/tonne)	122	275	224	156
<i>Index (2003 = 100)</i>	100	225	184	127

(c) *Price undercutting*

- (43) For the determination of price undercutting, the price data referring to the IP were analysed. The relevant sales prices of the Community industry were net prices to independent customers after deduction of discounts and rebates. Where necessary, these prices were adjusted to an ex-works level, i.e. excluding freight cost in the Community. The prices of the imports concerned, based on data available as mentioned in recital 41, were adjusted, where necessary, to cif Community frontier with an appropriate adjustment for post-importation costs (screening and customs clearance costs), as incurred by importers in the Community.
- (44) The comparison showed that during the IP, the product concerned originating in the PRC was sold in the Community at prices which undercut the Community industry's sales prices, when expressed as a percentage of the latter, by 10,2 %.

5. Situation of the Community industry

- (45) Pursuant to Article 3(5) of the basic Regulation, the Commission examined all relevant economic factors and indices having a bearing on the state of the Community industry during the period considered.

(a) *Production*

- (46) From a level of around 824 000 tonnes in 2003, the Community industry's production increased to a peak during 2004 of around 1 017 000 tonnes, before decreasing in 2005 and increasing again slightly during the IP. The significant increase in the production of the Community industry in 2004 can be explained by the low supply on the market due to the low imports from the PRC, and by the closure of other plants producing Coke 80+ in the Community. Overall, production increased over the period considered by 18 % to around 971 000 tonnes during the IP.

	2003	2004	2005	IP
Production (tonnes)	823 728	1 016 682	953 522	971 137
<i>Index (2003 = 100)</i>	100	123	116	118

(b) *Production capacity and capacity utilisation rates*

- (47) The production capacity of the Community industry remained stable at the level of around 1,1 million tonnes throughout the period considered. Capacity utilisation was 75 % in 2003. It increased to 93 % in 2004, decreased slightly to 87 % in 2005, and picked up again to 89 % in the IP. It should be noted that this industry is particular in the sense that its production capacity utilisation rate is rather fixed, since the production process cannot be temporarily stopped.

	2003	2004	2005	IP
Production capacity (tonnes)	1 092 472	1 092 472	1 092 472	1 092 472
<i>Index (2003 = 100)</i>	100	100	100	100
Capacity utilisation	75 %	93 %	87 %	89 %
<i>Index (2003 = 100)</i>	100	123	116	118

(c) *Sales volume*

- (48) Sales volumes by the Community industry of its own production to unrelated customers on the Community market increased sharply in 2004 (40 %), but levelled down during 2005 (decline of 12 percentage points) and the IP (decline of further 3 percentage points). Overall, the sales volumes increased by 25 % over the whole period considered, i.e. by a percentage corresponding to the growth in the Community consumption.

	2003	2004	2005	IP
EC sales volume (tonnes)	658 641	921 347	845 688	825 013
<i>Index (2003 = 100)</i>	100	140	128	125

(d) *Market share*

- (49) The market share held by the Community industry remained relatively stable over the period considered, being at around 51 % both in 2003 and during the IP. A peak was experienced in 2004, due to the shortage of Chinese imports. Over the whole period considered, the Community industry has thus been able to benefit from the growth of the market, i.e. the increased Community consumption, by maintaining its market share. However, as for the IP, the Community industry lost around 2,5 % of its market share as compared to year 2005.

	2003	2004	2005	IP
Market share of the Community industry	51,2 %	60,3 %	53,8 %	51,3 %
<i>Index (2003 = 100)</i>	100	118	105	100

(e) *Growth*

- (50) Between 2003 and the IP, when the Community consumption increased by 25 percentage points, the volume of sales by the Community industry on the Community market increased in equivalent amount and its market share thus remained stable. During the same time period, dumped imports gained around 4 percentage points of market share, corresponding to an increase of around 141 000 tonnes sold on the Community market.

(f) *Sales prices in the Community*

- (51) Average unit prices for Community industry's sales to unrelated customers increased significantly from 2003 (EUR 154/tonne) to 2005 (EUR 244/tonne), then took a downward turn during the IP, but still remained at a level 29 % higher than in 2003 (EUR 199/tonne).

	2003	2004	2005	IP
Unit price EC market (EUR/tonne)	154	192	244	199
Index (2003 = 100)	100	125	158	129

- (52) Given the level of price undercutting of the imports concerned, these imports were undoubtedly a factor affecting the Community industry's sales prices.

(g) *Stocks*

- (53) The level of closing stocks of the Community industry increased considerably during the period considered. The stocks increased first by 29 % in 2004, by further 41 percentage points in 2005 and by 88 percentage points during the IP. The level of inventories as compared to the annual production volume is, however, relatively insignificant (around 3,5 % in 2003 and 7,6 % during the IP). Since the Community industry's EC sales volume increased overall during the period considered, as described in recital 48, the increase in closing stocks is explained by the decrease in the Community industry's export sales during the period considered, as described in recital 70.

	2003	2004	2005	IP
Closing stock (tonnes)	28 761	37 007	48 834	74 127
Index (2003 = 100)	100	129	170	258

(h) *Investments*

- (54) The Community industry's annual investments in the production of the like product remained stable over the period considered, at the level of around EUR 9 million per annum, except for a temporary lower level in 2004. The Community industry's investments were for the maintenance and renewal of existing equipment (partly to meet certain EU environmental legislation requirements) and not for the purpose of increasing capacity.

	2003	2004	2005	IP
Net investments (EUR 1 000)	8 951	8 139	9 059	9 070
Index (2003 = 100)	100	91	101	101

(i) *Profitability, return on investment, cash flow and ability to raise capital*

- (55) During the period considered, profitability of the Community industry, expressed as a percentage of net sales, increased significantly from 2003 (11 %) to 2005 (18 %), but the situation changed dramatically in the IP, when the Community industry started to make losses (– 1 %). The dramatic drop in profitability achieved by the Community industry was due to steep decline in sales prices between 2005 and the IP.
- (56) The return on investments (ROI), expressed as the profit in percent of the net book value of investments, broadly followed the profitability trend.
- (57) With regard to the cash flow generated by the Community industry, a similar negative trend was found, resulting in a significant overall deterioration of the Community industry's financial situation during the IP.
- (58) The Community industry did not report any actual difficulties encountered in raising capital. However, due to the specific nature of the industry, i.e. that the production process cannot be stopped without destroying the ovens, closing down some ovens and then later restarting them would require large additional investments (estimated by the Community industry to be in the region of EUR 2 million per oven.). The Community industry estimates that the ability to raise additional capital for such investments would be limited unless there is reliance by the investors on the profitability of the Coke 80+ market. Consequently, the production capacity of the Community industry is necessarily rather fixed.

	2003	2004	2005	IP
Profitability of EC sales to unrelated customers (% of net sales)	11 %	17 %	18 %	– 1 %
<i>Index (2003 = 100)</i>	100	158	169	– 8
ROI (profit in % of net book value of investments)	5 %	23 %	17 %	– 9 %
<i>Index (2003 = 100)</i>	100	460	340	– 180
Cash flow (1 000 EUR)	17 641	13 633	34 600	4 669
<i>Index (2003 = 100)</i>	100	77	196	26

(j) *Employment, productivity and wages*

- (59) The employment level of the Community industry increased by 13 % from 2003 to the IP. When compared to the increased production, productivity of the Community industry's workforce, measured as output (tonnes) per person employed per year, remained stable. Average annual labour costs per employee increased by 9 % over the period considered.

	2003	2004	2005	IP
Number of employees	680	754	734	767
<i>Index (2003 = 100)</i>	100	111	108	113
Productivity (tonnes/employee)	1 676	1 954	1 760	1 697
<i>Index (2003 = 100)</i>	100	117	105	101
Annual labour cost per employee (1 000 EUR)	28	28	29	31
<i>Index (2003 = 100)</i>	100	100	105	109

(k) *Magnitude of the dumping margin*

- (60) Given the volume, the market share and the price of the dumped imports, the impact on the Community industry of the magnitude of the actual dumping margin cannot be considered negligible.
- (61) As indicated in recital 3, the previous anti-dumping measures were suspended in March 2004, since given the temporary change in market conditions it was considered that the injury linked to the imports of the product concerned originating in the PRC was unlikely to resume. The period for which the evolution of volumes and prices of the product concerned was then investigated was from 1 October 2002 to 30 September 2003. The suspension was extended until December 2005, when the measures expired. In light of this, it is considered that past dumping did not influence significantly the situation of the Community industry during the period considered in this investigation.

6. Conclusion on injury

- (62) Between 2003 and the IP, the volume of the dumped imports of the product concerned originating in the PRC increased by 45 % and their share of the Community market increased by around 4 percentage points. The average prices of dumped imports were lower than those of the Community industry during the period considered, except for the exceptional year 2004. Moreover, during the IP, the prices of the imports from the country concerned significantly undercut those of the Community industry. Indeed, a 10,2 % undercutting margin was found.
- (63) Most injury indicators developed positively for the Community industry up to 2005 (even though some levelling down from the exceptional year 2004 was evidenced already in 2005), but took a downward turn during the IP. This is the case especially regarding the financial indicators of the Community industry, in particular, the profitability: the profit margins of 17-18 % attained during 2004-2005 dropped dramatically during the IP, and the Community industry ended up making a loss. Also the return on investments and cash flow developed negatively. This dramatic drop was due to a steep decline in sales prices between 2005 and the IP, when the average sales prices of the like product produced by the Community industry decreased by 19 %, to the detriment of its profitability.
- (64) Also, many other injury indicators developed negatively between 2005 and the IP, albeit less markedly than the profitability: sales volume of the Community industry decreased by around 3 %, the Community industry lost 2,5 % of its market share, its average sales prices declined by 19 %. On the other hand, the production volume, capacity utilisation rate and employment showed a slightly positive development from 2005 to the IP.
- (65) In the light of the foregoing, it is provisionally concluded that the Community industry has suffered material injury within the meaning of Article 3(5) of the basic Regulation.

E. CAUSATION

1. Introduction

- (66) In accordance with Article 3(6) and (7) of the basic Regulation, the Commission has examined whether dumped imports of the product concerned originating in the PRC have caused injury to the Community industry to a degree that may be considered material. Known factors other than the dumped imports, which could at the same time have injured the Community industry, were also examined to ensure that possible injury caused by these other factors was not attributed to the dumped imports.

2. Effect of the dumped imports

- (67) Between 2003 and the IP, the volume of the imports of the product concerned originating in the PRC increased by 45 % and their share of the Community market was at significant levels during the whole period considered, i.e. constantly representing 24 % market share or more. During the IP, this market share was 28 %. The average price of these imports increased by 46 % overall between 2003 and the IP, but prices were generally lower than those of the Community industry during the period considered, except for the exceptional year of 2004. In the IP, the average prices of imports from the PRC undercut the average Community industry prices by 10,2 %. The Community industry, in order to ensure its presence on its home market and due to the low market prices set by imports from the PRC, felt obliged to decrease its sales prices by 29 % during the IP. Nevertheless, it lost 2,5 % of its market share from 2005 to the IP.
- (68) Therefore, the effect of this unfair pricing behaviour of the dumped imports from the PRC was that the Community industry's prices were suppressed and that they could no longer cover the high cost of raw materials. This was confirmed by the plummeting profitability of the Community industry during the IP.
- (69) Based on the above, it is provisionally concluded that the low-priced imports from the PRC which significantly undercut the prices of the Community industry during the IP and which also increased in volume have had a determining role in the deterioration of the situation of the Community industry, which is reflected in the sharp decrease of profitability and deterioration of other financial indicators during the IP, as well as in loss of market share.

3. Effect of other factors

(a) Export performance of the Community industry

- (70) As can be seen from the table below, the volume of export sales of Coke 80+ by the Community industry decreased by 36 % during the period considered. However, during the IP, when the profitability of the Community industry plummeted, as explained above, the export sales picked up considerably. In addition, the level of export sales is not very important in the context of the Community industry's overall sales, representing only 10 % of total sales in the IP. It is therefore considered that the drop in these exports did not have a significant impact on the material injury suffered by the Community industry.

	2003	2004	2005	IP
Export sales volume (tonnes)	140 511	103 409	56 453	90 402
<i>Index (2003 = 100)</i>	100	74	40	64

(b) Imports from other third countries

- (71) According to the best facts available mentioned in recital 38, there were no imports from third countries other than the PRC during the period considered. Therefore, it is concluded that imports into the EC originating in other third countries did not contribute to the material injury suffered by the Community industry.

(c) Competition from other Community producers

- (72) As indicated in recital 35, the two other Community producers did not cooperate with the investigation. These two producers, however, provided the Commission with certain information concerning their overall production and sales volumes, which was cross-checked against information obtained from the cooperating Community producers. No information was available concerning the sales prices of the other Community producers.

- (73) On the basis of the available data, it is estimated that the sales volume of the two other Community producers in the Community was in the range of 280 000 and 380 000 tonnes during the IP ⁽¹⁾. Similarly, their corresponding market share was around 20 %. As established above, the Community industry's market share remained relatively stable over the whole period considered, whereas the Chinese imports gained market share over the same period by 4 percentage points. Therefore, the Chinese imports must logically have gained volumes mainly from other Community producers when considering the whole period. However, the 3 percentage points gain of market share obtained by the Chinese imports during the IP corresponds to a loss of market share by the Community industry of a similar magnitude (2,5 percentage points).
- (74) Given the above, and in the absence of information to the contrary, it is concluded that the other Community producers have not contributed to the injury suffered by the Community industry.

(d) *Prices of raw materials*

- (75) Some interested parties claimed that the injury suffered by the Community industry was attributable to the increases in the cost of raw materials. In this respect, it was found that the basic raw material used in the production of Coke 80+, coking coal, represents around 50 % of the cost of manufacturing of Coke 80+. The coking coal used by the Community industry is sourced from the USA, except for one Community industry producer, which uses locally sourced coking coal. As regards the prices of the coking coal used by the Community industry, the investigation showed that these increased significantly and constantly over the period considered, as illustrated in the table below:

	2003	2004	2005	IP
Average coking coal cost (EUR/tonne of Coke 80+ produced)	77	97	126	127
<i>Index (2003 = 100)</i>	100	125	163	164

- (76) In this respect, it is noted that the increase in raw material prices between 2003 and 2005 could be passed on to the sales prices of the Community industry, which, as mentioned in recital 51, increased during the same period, coinciding with the higher profit margins of the Community industry. On the contrary, during the IP, despite the only 1 percentage point increase in the price of the raw material as compared to year 2005, the financial situation of the Community industry deteriorated dramatically, since its sales prices decreased significantly.

a considerable decrease in the sales prices of the Community industry, which in turn coincided with a sharp drop in the Community industry's profitability, return on investments and cash flow. In addition, the increased Chinese imports during the IP led to a gain in market share (3 percentage points), which is reflected in a loss of Community industry's market share by a similar percentage (2,5 percentage points).

- (77) Consequently, it is considered that the prices of the raw materials did not contribute to the material injury suffered by the Community industry.
- (79) On the other hand, the examination of other factors which could have injured the Community industry revealed that none of these could have had a significant negative impact.

4. Conclusion on causation

- (78) In conclusion, the above analysis has demonstrated that imports from the PRC provoked a substantial price depression on the Community market during the IP, when the imports from the PRC severely undercut the Community industry prices. This price depression led to
- (80) Based on the above analysis, which has properly distinguished and separated the effects of all known factors on the situation of the Community industry from the injurious effects of the dumped imports, it is provisionally concluded that the dumped imports originating in the country concerned have caused material injury to the Community industry within the meaning of Article 3(6) of the basic Regulation.

⁽¹⁾ For confidentiality reasons, given that the analysis concerns only two companies, only ranges are given.

F. COMMUNITY INTEREST

- (81) The Commission examined whether, despite the conclusions on dumping, injury and causation, compelling reasons exist which would lead to the conclusion that it is not in the Community interest to adopt measures in this particular case. For this purpose, and pursuant to Article 21(1) of the basic Regulation, the Commission considered the likely impact of measures for all parties concerned, as well as the likely consequences of not taking measures. For reasons of confidentiality, instead of actual figures, data relating to individual importers or users are given below in ranges.

1. Interest of the Community industry

- (82) As indicated in recital 35, the Community industry is composed of five companies, with production facilities in the Czech Republic, Italy and Spain, and it employs around 750 persons directly involved in the production, sales and administration of the like product. If measures are imposed, it is expected that the price depression on the Community market will come to an end and that sales prices of the Community industry will start to recover, as a consequence of which the financial situation of the Community industry will improve.

- (83) On the other hand, should anti-dumping measures not be imposed, it is likely that the negative trend in the development of the Community industry's financial indicators, and notably its profitability, will continue. The Community industry will then be likely to continue losing market share, as it will no longer be able to follow the market prices set by dumped imports from the PRC. This will likely lead to cuts in production and investments, closure of certain production capacities and job reductions in the Community.

- (84) In conclusion, the imposition of anti-dumping measures would allow the Community industry to recover from the effects of injurious dumping found.

2. Interest of unrelated importers/traders in the Community

- (85) As indicated in recital 9, only one importer/trader submitted a questionnaire reply. On the basis of information mentioned in recital 36, during the IP, this company accounted for almost all Community imports of the product concerned.
- (86) On the basis of information submitted by the importer concerned, it was established that the proportion of imports of the product concerned from the PRC represented around 20 % of the company's total turnover

during the IP. The importer/trader purchases Coke 80+ not only from the PRC but also from other sources, including the Community industry. The average profit margin attained by the importer in question, on its trading of Coke 80+, is around 5-10 %.

- (87) The cooperating importer is not in favour of the imposition of measures. However, given the very strong position this importer has in the imports of the product concerned, it would likely be able to pass on most, if not all, additional costs caused by the anti-dumping measures to users. In this respect, the imposition of an anti-dumping duty on imports from the PRC, as explained in recital 82, will most likely lead to an upwards correction of market prices. Therefore, it can be expected that importers which buy the product from the PRC will be able to pass on these duty costs to the final customer. In any case, in view of the relatively limited weight of this product in the importer's activities, and the profit margin currently attained with regard to its trading of Coke 80+, it is expected that a duty, as provisionally established, would not affect the financial situation of this economic operator to a significant extent.

3. Interest of users

- (88) As indicated in recital 9, questionnaire replies and other submissions were received from a large number of users and their associations. The Community user industry is comprised of two major sectors, namely producers of stone wool and foundries.

(a) Stone-wool producers

- (89) Users' questionnaires were submitted by subsidiaries of Rockwool International A/S (Rockwool), the major stone wool producer group in the Community. Rockwool uses Coke 80+ in stone wool production as a combustion agent to melt stone. Stone wool is used mainly as insulation material. The profit margin attained by the whole Rockwool group during the IP was above 10 %.
- (90) It was found that Rockwool represented around 13 % of the total consumption of Coke 80+ in the Community during the IP and around 18 % of total imports of Chinese Coke 80+.
- (91) The company has 15 production plants in the Community, employing a total of around 6 600 persons. Chinese Coke 80+ is used in its plants in three EU Member States, employing altogether 2 400 employees, while the rest are using EC Coke 80+. During the IP, Coke 80+ was found to represent between 4 % and 8 % of the total costs of production of those Rockwool companies that used Chinese Coke 80+.

(b) *Foundries*

- (92) Foundries are estimated to represent close to 80 % of the total consumption of coke 80+ in the Community. In the foundry industry, Coke 80+ is used as a combustion agent to melt scrap for the production of ferrous castings, which are used as input in the production of parts for the automotive, engineering, machinery and public utilities sectors.
- (93) The possible impact of any anti-dumping measures on foundries was estimated based on users' questionnaire responses received from Community foundries representing around 18 % of total consumption of Coke 80+ in the Community and also around 18 % of total imports of the product concerned from the PRC during the IP. Substantiated claims were also received from the CAEF and from the German National Foundry Association.
- (94) Coke 80+ was found to represent during the IP 3 %-6 % of the total cost of production of the foundries included in the analysis. This differs from the estimate made by the CAEF that the coke price might have a share in the production cost of castings of up to 15 %.

(c) *Arguments presented by users*

- (95) The first main argument put forward by the users against the imposition of measures is that the demand for coke in the Community cannot be met by the European producers alone. This has been acknowledged also by the Community industry, and it is also clearly reflected in the fact that the EC consumption during the IP was at 1,6 million tonnes (and which according to projections of users is likely to increase in the coming years), whereas the total Community production, based on information obtained from both the Community industry producers and the other Community producers (see recital 72) was at that time around 1,3 million tonnes. Given that the Community industry operates at a high capacity utilisation rate, it is evident that imports are needed to meet the user demand, even if all the EC production were consumed within the Community.
- (96) In this regard, it should be noted that the purpose of anti-dumping measures is to remedy unfair trading practices having an injurious effect on the Community industry and re-establish a situation of effective competition on the Community market, not to stop imports. As concerns the competitive environment in the Community market, it should be noted that although the effect of the imposition of anti-dumping measures would probably be that the price levels of the exports originating in the PRC in the Community would increase,

the measures as proposed are not such as to close the Community market to the Chinese exporters and therefore will allow the continued presence of Chinese products in the market.

- (97) Moreover, users have argued that the imposition of measures would result in an increase in purchase costs, which could affect their competitiveness and thus compromise their manufacturing operations in the Community. It was also argued that the situation would be even more dismal for those users that cannot switch from Chinese Coke 80+ to European Coke 80+, since they would have no other option than bear the additional burden of an anti-dumping duty.
- (98) The investigation showed that Coke 80+ represents between 4 % and 8 % of the total costs of stone wool production and 3-6 % of the total costs of foundries. Therefore, even if the importers were to pass on the cost of duty fully to the users, an anti-dumping duty as proposed would cause a maximum hypothetical increase in the cost of production of both Rockwool and of foundries of around 1 %.
- (99) Furthermore, it should be noted that, in the event of a reduction or the eventual disappearance of the Community industry of Coke 80+, the available sources of supply would also be reduced with the consequent negative effect for the Community users, for which Coke 80+ is of strategic importance. In such an event, the supply of Coke 80+ in the Community could become entirely dependent on Chinese production, which would then enjoy a dominant position in the Community market. In this respect, it is considered that the existence of alternative sources of supply is vital for guaranteeing proper access to raw materials.
- (100) Information available to the Commission indicates that shortages of supply of Chinese Coke 80+ for export are currently taking place for reasons unrelated to the anti-dumping proceeding, but instead based on measures adopted by the Chinese Government to curb exports of, *inter alia*, the product concerned. The export tax on Coke 80+ has been increased from 5 % to 15 % as of 1 June 2007. The reduction or even disappearance of the Community industry could exacerbate such problems and create supply shortage to the user industry. On the other hand, the removal of the unfair advantages gained by the dumping practices is designed to prevent the further decline of the Community industry and thus help to maintain the availability of a wide choice of supply sources and even strengthen competition among existing producers.

(d) *Conclusion*

- (101) The evidence available to the Commission at this stage indicates that Coke 80+ represents only a marginal proportion of the total costs of both stone-wool producers and foundries and that therefore the impact of any anti-dumping measure on their costs of production is likely to be limited. In addition, it is not excluded that importers would carry part of the cost increase or that users could pass part or all of the increase in costs to their final customers. Therefore, it is concluded that the impact of an anti-dumping measure such as the one proposed is not likely to significantly affect the economic situation of users. In view of the limited impact of an anti-dumping measure on the costs of users, it is unlikely that any closures would take place as a result of the imposition of measures. Therefore, impact on the employment of the user industry is not likely to be significant.

4. Conclusion on Community interest

- (102) The effects of the imposition of measures are expected to enable the Community industry to improve its profitability, with consequent beneficial effects on the competitive conditions on the Community market. In view of the unfavourable financial situation of the Community industry, there is a risk that, in the absence of measures, the Community industry may close down production facilities and lay off workforce. In that event, the Community market would become more dependent on imports.
- (103) As for importers, whilst negative effects could result in the form of price increases, the extent of these may be reduced by decreasing margins or by passing part of the increase on to the user industry.
- (104) As regards users, an anti-dumping duty as proposed would have a very limited effect on their cost of production.
- (105) In light of the above, it is provisionally concluded that no compelling reasons exist for not imposing measures in the present case and that the application of measures would be in the interest of the Community.

G. PROPOSAL FOR PROVISIONAL ANTI-DUMPING MEASURES

- (106) In view of the conclusions reached with regard to dumping, injury, causation and Community interest,

provisional measures should be imposed in order to prevent further injury to the Community industry by the dumped imports.

1. Injury elimination level

- (107) The level of the provisional anti-dumping measures should be sufficient to eliminate the injury to the Community industry caused by the dumped imports, without exceeding the dumping margin found. When calculating the amount of duty necessary to remove the effects of the injurious dumping, it was considered that any measures should allow the Community industry to cover its costs of production and to obtain overall a profit before tax that could be reasonably achieved under normal conditions of competition, i.e. in the absence of dumped imports. The pre-tax profit margin used provisionally for this calculation was 15,3 % of turnover, corresponding to the average profit margin attained by the Community industry during 2003-2005.
- (108) The necessary price increase was then determined on the basis of a comparison of average import price, as established for the price undercutting calculations (see recital 43), with the non-injurious price of the like product sold by the Community industry on the Community market. The non-injurious price has been obtained by adjusting the sales price of the Community industry in order to reflect the above mentioned profit margin. The difference resulting from this comparison, when expressed as a percentage of the total cif import value, amounted to 35,7 %, i.e. less than the dumping margin found.
- (109) Given that no exporting producer from the PRC requested individual treatment, a single country-wide injury elimination level was calculated for all exporters in the PRC.

2. Provisional measures

- (110) In the light of the foregoing and pursuant to Article 7(2) of the basic Regulation, it is considered that a provisional anti-dumping duty should be imposed at the level of the lowest of the dumping and injury margins found, in accordance with the lesser duty rule.

- (111) On the basis of the above, the provisional anti-dumping duty should therefore amount to 35,7 %.

3. Form of the measures

- (112) Anti-dumping measures may take different forms, while the purpose remains to remove the effects of the injurious dumping. After the IP, significant increases have been observed in the prices of Chinese imports of the product concerned; indeed beyond injurious levels. Under these circumstances and given that this market has been characterised by high price volatility in the past, it is considered that a duty in the form of a minimum import price (MIP) is the most appropriate form of measures in this case. A MIP will ensure that the product concerned is not sold at injurious prices, while at the same time it will not unduly increase prices at moments when prices are at sufficiently high levels. A MIP can be expected to bring stability to the market because it will ensure an adequate price level for the Community industry, allowing it to operate under viable economic conditions, and, at the same time, it will constitute a point of reference for importers and users to plan their economic activities sufficiently in advance.
- (113) The amount of the minimum import price results from the application of the injury margin to the export prices used in the calculation of the injury elimination level during the IP. The minimum import price thus calculated amounts to EUR 227 per tonne.

4. Implementation

- (114) As explained in recital 14, Coke 80+ is imported under the same customs nomenclature as Coke 80-. These two products are only distinguished by their size, but are destined for two different industries and are primarily manufactured by different producers in the Community. This Regulation is meant only to regulate the import of Coke 80+ entered into free circulation in the Community. Since imports of Coke 80- may contain a certain percentage of Coke 80+, there is a need to ensure that imposition of the duty of Coke 80+ does not lead to an undue application of the duties to Coke 80- in case of mixed shipments.
- (115) Therefore, the anti-dumping duty should apply to coke of coal in pieces with a diameter of more than 80 mm, when shipped in mixtures containing both coke of coal in pieces with a diameter of more than 80 mm and coke of coal in pieces with smaller diameters, unless it is determined that the quantity of coke of coal in pieces with a diameter of more than 80 mm does not constitute more than 20 % of dry net weight of the mixed shipment. The quantity of coke of coal in pieces with a diameter of more than 80 mm contained in mixtures may be determined on the basis of samples in accordance with Articles 68 to 70 of Council Regulation (EEC) No 2913/92⁽¹⁾. In cases where the quantity of

coke of coal in pieces with a diameter of more than 80 mm is determined on the basis of samples, the sample shall be selected in accordance with the norm ISO 18238:2006.

- (116) However, should it be found that mixed coke of coal (Coke 80+ and Coke 80-) landed and entered into free circulation into the Community under CN code ex 2704 00 19, and subsequently screened and sold as Coke 80+, it will be considered as the product concerned and will therefore be subject to the provisions of this Regulation.

5. Final provision

- (117) It is recognised that, before arriving at a definitive determination, a number of elements such as import volumes and prices, in particular for the year 2004, the effects on the Community and world markets of the recent decisions of the Chinese government in respect of coke exports, as well as the feasibility of an indexation system to be applied to MIP will require further analysis. However, the information collected and examined up to this stage of the investigation clearly shows the existence of dumping, injury, a causal link between the dumping and injury and the fact that the imposition of measures would not be against the Community interest. It is therefore concluded that the need to obtain more information and to deepen the analysis in respect of the abovementioned elements before a definitive determination is made in no way constitutes an impediment to the imposition of provisional measures.
- (118) In the interest of sound administration, a period should be fixed within which the interested parties which made themselves known within the time limit specified in the notice of initiation may make their views known in writing and request a hearing. Furthermore, it should be stated that the findings concerning the imposition of duties made for the purposes of this Regulation are provisional and may have to be reconsidered for the purposes of any definitive duty,

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on imports of coke of coal in pieces larger than 80 mm in maximum diameter (Coke 80+) originating in the People's Republic of China and falling within CN code ex 2704 00 19 (TARIC code 2704 00 19 10). The diameter of the pieces shall be determined in accordance with the norm ISO 728:1995.

⁽¹⁾ OJ L 302, 19.10.1992, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

2. The amount of the provisional anti-dumping duty applicable for products described in paragraph 1 shall be the difference between the minimum import price of EUR 227 per tonne and the net, free-at-Community-frontier price, before duty, in all cases where the latter is less than the minimum import price.

3. The anti-dumping duty shall also apply to coke of coal in pieces with a diameter of more than 80 mm when shipped in mixtures containing both coke of coal in pieces with a diameter of more than 80 mm and coke of coal in pieces with smaller diameters unless it is determined that the quantity of coke of coal in pieces with a diameter of more than 80 mm does not constitute more than 20 % of dry net weight of the mixed shipment. The quantity of coke of coal in pieces with a diameter of more than 80 mm contained in mixtures may be determined on the basis of samples in accordance with Articles 68 to 70 of Council Regulation (EEC) No 2913/92. In cases where the quantity of coke of coal in pieces with a diameter of more than 80 mm is determined on the basis of samples, the samples shall be selected in accordance with the norm ISO 18238:2006.

4. In cases where goods have been damaged before entry into free circulation and, therefore, the price actually paid or payable is apportioned for the determination of the customs value pursuant to Article 145 of Commission Regulation (EEC) No 2454/93 ⁽¹⁾, the minimum import price set out above shall be reduced by a percentage which corresponds to the apportioning of the price actually paid or payable. The duty payable will then be equal to the difference between the reduced minimum import price and the reduced net, free-at-Community-frontier price, before customs clearance.

5. The release for free circulation in the Community of the product referred to in paragraph 1 shall be subject to the provision of a security equivalent to the amount of the provisional duty.

6. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

Without prejudice to Article 20 of Council Regulation (EC) No 384/96, interested parties may request disclosure of the essential facts and considerations on the basis of which this regulation was adopted, make their views known in writing and apply to be heard orally by the Commission within one month of the date of entry into force of this regulation.

Pursuant to Article 21(4) of Regulation (EC) No 384/96, the parties concerned may comment on the application of this Regulation within one month of the date of its entry into force.

Article 3

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union*.

Article 1 of this Regulation shall apply for a period of six months.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 18 September 2007.

For the Commission

Peter MANDELSON

Member of the Commission

⁽¹⁾ OJ L 253, 11.10.1993, p. 1. Regulation as last amended by Regulation (EC) No 214/2007 (OJ L 62, 1.3.2007, p. 6).

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,

had doubts about the compatibility with the common market of various measures granted by public bodies to Chupa Chups.

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

(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 Catalan 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

CORRIGENDA

Corrigendum to Guideline of the European Central Bank of 31 May 2007 amending Guideline ECB/2004/15 on the statistical reporting requirements of the European Central Bank in the field of balance of payments and international investment position statistics, and the international reserves template

(Official Journal of the European Union L 159 of 20 June 2007)

On page 50, Annex I, table 2:

for: 'Monthly national contributions to the euro area balance of payments',

read: 'Quarterly national contributions to the euro area balance of payments'
