

## II

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

## DECISIONS

## COMMISSION

## COMMISSION DECISION

of 13 May 2009

on measures C 20/07 (ex NN 31/07) implemented by Spain in favour of Pickman

(notified under document C(2009) 3541)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2009/849/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having called on interested parties to submit their comments <sup>(1)</sup> pursuant to the article cited above and having regard to their comments,

Whereas:

#### 1. PROCEDURE

- (1) Following allegations made by a complainant by letter registered on 5 April 2006 that the Spanish authorities had granted State aid to *Pickman — La Cartuja de Sevilla SA* (hereinafter 'Pickman' or 'the company'), the European Commission (hereinafter 'the Commission') requested information from the Spanish authorities by letters dated 12 April 2006 and 12 February 2007, to which the Spanish authorities replied by letters registered on 7 June 2006, 30 August 2006 and 18 April 2007.

- (2) On 27 June 2007, the Commission informed the Spanish authorities that it had decided to initiate proceedings and received their comments by letters of 15 September 2007 and 26 November 2007.

- (3) Following the publication in the *Official Journal of the European Union* on 10 October 2007 of the Decision to initiate proceedings pursuant to Article 88(2) of the EC Treaty (hereinafter 'the opening Decision'), in which it invited the interested parties to submit their comments, the Commission received comments from the aid beneficiary, by letters registered on 26 November 2007 and 7 April 2008. On 12 February 2008 and 11 April 2008, these comments were forwarded to the Spanish authorities, who replied on 2 April 2008. No observations from third parties were received.

#### 2. THE BENEFICIARY

- (4) Pickman is a producer of dishes and chinaware established in Seville since 1841. The company has traditionally focused on the production of high-range artisanal products, and their direct marketing to hotels, restaurants and catering companies or through collaborating retail outlets. Recently, it has diversified its activities into the market of corporate gifts and hostelry. Pickman currently employs some 140 workers, and in 2005 its turnover was EUR 4,28 million. It must therefore be regarded as a medium-sized enterprise <sup>(2)</sup>.

<sup>(1)</sup> OJ C 239, 11.10.2007, p. 12.

<sup>(2)</sup> Within the meaning of Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

(5) Pickman operates in the ceramics market, which as a whole records total sales of approximately EUR 26 billion, estimated to constitute one third of total global production, and employs 222 000 people. More specifically, the segment of that market defined as 'table and ornamental ware' has certain specific characteristics, namely being very labour-intensive, closely linked to the end-consumer and manifesting a great need to compete on design and quality. This market is open to intra-Community trade, where the United Kingdom and Germany are the main producing and consuming countries, while Spain's share is less than 5 %, and there is competition between manufacturers. At national level, there are 11 companies active in Spain, with some 3 000 workers and a total annual sales volume of 60 million items with a total annual value of EUR 84 million <sup>(1)</sup>.

### 3. MEASURES

(6) The measures forming the subject matter of the opening Decision are the following <sup>(2)</sup>:

— Measure 2: a waiver of Pickman's Social Security debt of EUR 3,29 million by means of a special agreement concluded on 11 April 2000 which differed from the general agreement for creditors,

— Measures 3 to 6: a series of participation loans totalling EUR 1,87 million and subsidies intended for tangible and intangible investments totalling EUR 2,59 million provided for in a restructuring plan submitted by Pickman to the *Junta de Andalucía* [Regional Government of Andalusia], which approved it on 2 March 2004 as detailed in paragraphs 50, 51 and 52 of the opening Decision,

— Measure 7: a guarantee granted by the *Agencia de Innovación y Desarrollo de Andalucía* [Andalusian Innovation and Development Agency] (hereinafter 'IDEA'), covering EUR 1,3 million, i.e. 80 % of a EUR 1,65 million loan negotiated by Pickman with a bank and concluded by the parties on 28 December 2005. The guarantee has not been enforced.

### 4. REASONS FOR INITIATING THE PROCEDURE

(7) In the opening Decision, the Commission's interim conclusion was that measures 2 to 7 might constitute State aid within the meaning of Article 87(1) of the EC Treaty.

<sup>(1)</sup> Data from the website of the European Ceramics Industry [www.cerameunie.eu](http://www.cerameunie.eu) and Eurostat [http://epp.eurostat.ec.europa.eu/portal/page?\\_pageid=1073,46587259&\\_dad=portal&\\_schema=PORTAL&p\\_product\\_code=KS-BW-07-001](http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1073,46587259&_dad=portal&_schema=PORTAL&p_product_code=KS-BW-07-001)

<sup>(2)</sup> For the sake of clarity, the numbering used in the opening Decision will also be used in the present Decision.

(8) As the primary objective of the measures appeared to be to assist a company in difficulty, the Commission took the view that the Community Guidelines on State aid for rescuing and restructuring firms in difficulty <sup>(3)</sup> (hereinafter 'the 2004 Guidelines') applied, since measure 7, in the event that it were to constitute State aid, was adopted after those guidelines entered into force.

(9) In particular, the Commission's preliminary assessment was that:

— the measures cannot be regarded as rescue aid, taking into account both their form and their duration,

— Pickman could have benefited from restructuring aid but, in the absence of a restructuring plan, it would not be possible to assess whether the measure would restore the company's long-term viability.

(10) On the basis of the information available, the Commission decided to initiate the formal investigation procedure in order to allay its doubts both as to the nature of the measures at issue as State aid and their compatibility with the common market.

### 5. OBSERVATIONS FROM SPAIN

(11) After being informed of the opening Decision, the Spanish authorities sent the following observations on the individual measures at issue.

#### Measure 2: Waiver of debt to the *Tesorería de la Seguridad Social* [Social Security Treasury]

(12) As regards measure 2, the Spanish authorities point out that the Social Security Treasury, as a preferential creditor, took priority over ordinary creditors, being ranked immediately after creditors with guarantees and debts owed to the company's staff. Therefore, the advantage of this preferential status is not an absolute priority, but that it enables the creditor to refrain from signing the general creditors' agreement and to opt for a special agreement in order to obtain conditions which, on the basis of the applicable national law, must be more favourable than those provided for in the general creditors' agreement. The Spanish authorities also describe in detail the only two possible alternatives, namely the seizure of specific tangible and intangible assets. This, however, does not take priority over other previously registered mortgages or over workforce payments and would therefore very probably result in a lower reimbursement of Pickman's debts.

<sup>(3)</sup> OJ C 244, 1.10.2004, p. 2.

(13) The Spanish authorities correct the statement made in paragraph 16 of the opening Decision, specifying that, under the general creditors' agreement, there were two alternatives rather than just two cumulative possibilities: to recover either 5 % of claims within 75 days or 20 % within 17 years without interest.

(14) However, taking advantage of its preferential position, the Social Security Treasury refrained from signing the general creditors' agreements and opted for a special agreement which, in its view, gave a better prospect of recovery than the general creditors' agreement. Accordingly, Pickman, which owed EUR 4 million to the Social Security Treasury, agreed to pay 18 % of that amount over eight years, plus interest at an annual rate of 3,25 %. In addition, the special agreement included a guarantee that it would be terminated automatically if any other creditor received more favourable treatment. In fact, after the payment of EUR 595 676,89 for workers' contributions, the amount of 2 012 786,39 was paid by Pickman on 27 May 2004.

(15) Finally, the Spanish authorities maintain that 'the general interest', referred to in paragraph 18 of the opening Decision, forms part of a generic formula used in all agreements concluded in debt recovery proceedings. In fact, the Social Security Treasury sought to recover the maximum possible sum from the debtor, thus acting in line with the market economy investor principle, and denies that it had any other intention than to seek the maximum recovery possible.

#### Measure 7: Public guarantee for a loan

(16) The Spanish authorities claim that, in the light of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees<sup>(1)</sup> (hereinafter 'the Guarantee Notice'), the measure does not constitute State aid. Firstly, Pickman cannot be regarded as a firm in difficulty and that was the status required to obtain a loan without the intervention of the State, since its situation improved significantly in 2005, to the point that it achieved positive results in 2006, and it enjoyed the confidence of banks, which in fact gave it a loan on normal market terms, i.e. at the Euribor rate, which at that time was 2,783 points, plus 1,25 points.

(17) Furthermore, the Spanish authorities maintain that no State aid was involved, since the guarantee related solely to one specific financial transaction, namely coverage of 80 % (EUR 1,3 million) of the total sum of a loan with a limited term of 10 years. Moreover, the Spanish authorities point out that Pickman paid the market price for the guarantee, as it paid an annual premium of 1,5 % and also registered a mortgage in favour of IDEA which in itself represented 13 % of the real estate's value of 10 950 000.

#### Measures 3 to 6: Participation loans and subsidies

(18) The Spanish authorities do not deny that measures 3 to 6 constituted aid, but claim that they did not notify them as they took the view that the measures formed part of an aid scheme to support investment, job creation and SMEs in Andalusia which also provided for the possibility of granting rescue and restructuring aid to SMEs in difficulty, and that had already been approved by the Commission<sup>(2)</sup> (hereinafter 'the approved scheme').

(19) In this regard, the Spanish authorities maintain that all the conditions laid down under the approved scheme were satisfied. They concede that the provision which fixed the maximum total amount authorised and per beneficiary at EUR 4 million was not respected precisely, since measures 3 to 6 amounted to a total of EUR 4,46 million. However, they take the view that failure to notify the Commission of the small excess of EUR 0,46 million, or even the total amount of the aid, constitutes an administrative irregularity which does not affect the substantive conformity of the measure with the approved scheme, a fact which the Commission should also reasonably acknowledge.

(20) On the other hand, the Spanish authorities submit that measures 3 to 6 should be assessed in the light of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty<sup>(3)</sup> adopted in 1999 (hereinafter 'the 1999 Guidelines'), since these were the only guidelines in force at the time the aid was granted, as being a one-off transaction under a restructuring plan sent to the Spanish authorities in the context of the approved scheme. In fact, contrary to the preliminary assessment conducted by the Commission in the opening Decision, the Spanish authorities take the view that measure 7 should not be regarded as State aid (see recitals 15 and 16 above) since no restructuring aid was granted after the publication of the 2004 Guidelines.

<sup>(1)</sup> OJ C 71, 11.3.2000, p. 14.

<sup>(2)</sup> N 507/2000 Regional aid scheme to promote investment and employment linked and SMEs.

<sup>(3)</sup> OJ C 288, 9.10.1999, p. 2.

- (21) Moreover, the Spanish authorities point to the fact that, under both the 1999 and 2004 Guidelines, the aid would be regarded as compatible restructuring aid. In fact, in 2003 Pickman employed 128 people and had a turnover of EUR 2,35 million, thus qualifying as an SME, a type of company for which the Commission does not need to approve a plan. In any event, the restructuring plan satisfies the Commission's requirements, given that it is for 6 years, is limited to the minimum required to restore Pickman's viability, as set out in the enclosed market study, and provides that Pickman is to make a significant contribution to ensuring its viability. In this regard, the Spanish authorities refer to a Decision in which the Commission approved non-notified restructuring aid in favour of another Spanish SME operating in the same sector as Pickman, *Porcelanas del Principado*<sup>(1)</sup>, on the basis of the substantive compliance with the conditions under the 1999 Guidelines and of the limited distortion of competition resulting from the aid.
- (22) Finally, the Spanish authorities point to Pickman's importance to the local industry in Andalusia and Spain, balancing its long historical and cultural tradition against the limited distortion of competition resulting from aid granted to an SME with a very limited market share.

#### 6. OBSERVATIONS FROM THIRD PARTIES

- (23) Following publication of the opening Decision in the *Official Journal of the European Union*, the Commission received observations only from the beneficiary, Pickman, on the various measures at issue. These observations are contained in paragraphs 24 to 32.

##### Measure 2: Waiver of debt to the Social Security Treasury

- (24) Pickman contests the Commission's preliminary analysis that measure 2 constitutes State aid and endorses the arguments put forward by the Spanish authorities that the special agreement signed with the Social Security Treasury was preferential and guaranteed the highest and quickest recovery rate possible, which is consistent with the rationale of a private creditor in a market economy. The beneficiary also points out that, since then, all Pickman's outstanding debts to the Social Security Treasury have been recovered and subsequent contributions have been paid on a regular basis.

##### Measure 7: Public guarantee for a loan

- (25) Pickman contends that measure 7 cannot be regarded as State aid since it satisfies all four of the conditions laid down in the Guarantee Notice.
- (26) In fact, in December 2005, Pickman was emerging from the crisis, its losses having fallen from more than EUR 2

million in 2004 to approximately EUR 0,15 million in 2005. In addition, it was able to obtain a loan on normal market terms and did in fact receive a loan of EUR 3,3 million from Monte de Piedad y Caja de Ahorros de Huelva y Sevilla when it was still in difficulty, securing the totality of that loan with a mortgage. The public guarantee for the EUR 1,6 million loan did not cover more than 80 % of that loan and lasted for only ten years. Finally, it paid the market price for the loan: Pickman paid an annual premium of 1,5 % and secured the guarantee in full with a mortgage in favour of IDEA on part of its real estate.

- (27) In response to a request from the Commission for an estimate of the value of Pickman's real estate in recent years, Pickman sent two independent estimates dated 31 May 2005 (EUR 10 962 598,56) and 4 October 2007 (EUR 12 512 066,27). On 20 May 2004, the real estate was not mortgaged, whereas on 8 May 2007 it was charged with two mortgages, the first in favour of Monte de Piedad y Caja de Ahorros de Huelva y Sevilla and the second in favour of IDEA, in the amounts of EUR 3 300 000 plus interest and costs and of EUR 1 300 000 plus EUR 104 000 in costs respectively. Pickman maintains that the total amount of these two mortgages was still significantly lower than the estimated value of the real estate, and the, very limited, risk borne by IDEA was therefore amply covered, on the basis of the overall market price payable normally. Consequently, Pickman is of the opinion that the four conditions are satisfied and that no State aid is involved.

##### Measures 3 to 6: Participation loans and subsidies

- (28) Pickman makes no reference to the Commission's initial assessment that the measures constitute State aid, but does claim that they are compatible with Article 87(3)(c) of the EC Treaty and covered by the approved scheme, which provides for the possibility of granting rescue and restructuring aid to SMEs in difficulty.
- (29) Pickman points out that the measures comply with the requirement laid down under the approved scheme and that they exceed the EUR 4 million ceiling by only EUR 0,46 million, significantly below the EUR 10 million threshold established in point 68 of the 1999 Guidelines for schemes to assist SMEs.
- (30) The approved scheme, like the 1999 Guidelines, requires that the aid must be limited to the minimum necessary and that the beneficiary must contribute significantly to the plan to restore its long-term viability, but makes no provision for compensatory measures. The only obligation incumbent on the aid beneficiary is to not increase its production capacity.

<sup>(1)</sup> Commission Decision 2004/32/EC (OJ L 11, 16.1.2004, p. 1).

- (31) Pickman maintains that the restructuring plan approving measures 3 to 6, which was drawn up by an independent assessor, Auditoria y Consulta SA, in October 2003 and approved by the Spanish authorities in March 2004, is fully compliant with those requirements in relation to the 'one-time, last-time' principle, necessity, own contribution, the prohibition on increasing capacity and the prospects of long-term viability in various scenarios.
- (32) Finally, Pickman points out that the measures have not caused any undue market distortion and have benefited a medium-sized company, located in an Article 87(3)(a) region, with a very limited market share in terms of the overall volume of trade, which has complied fully with the schedule of the approved restructuring plan and has duly improved its financial situation since 2006, with the result that there has been no need to implement compensatory measures.
- (33) As far as the observations made by Pickman are concerned, the Spanish authorities fully endorse the arguments put forward as well as the conclusion that measures 2 and 7 are not to be regarded as State aid, whereas measures 3 to 6 do constitute existing aid which in any event is compatible with the common market.

## 7. ASSESSMENT

### Existence of aid

- (34) Under Article 87(1) of the EC Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, be incompatible with the common market.
- (35) As a preliminary point, the Commission will evaluate measure 7 after assessing measure 2, following the order of the observations submitted by the Spanish authorities and the beneficiary. In fact, the classification of measure 7 has implications on the set of rules to be applied to the remaining measures 3 to 6, as anticipated in the opening Decision and established in this Decision.

### Measure 2: Waiver of debt to the Social Security Treasury

- (36) As far as measure 2 is concerned, the doubts raised by the Commission in the opening Decision concerned

whether the Social Security Treasury had acted as a private creditor in its negotiations concerning Pickman's debt.

- (37) Firstly, under Spanish law, credits in respect of Social Security contributions enjoy preferential treatment, inasmuch as the creditor has the option of concluding a special agreement rather than participating in the proceedings available for non-preferential creditors <sup>(1)</sup>.
- (38) In this regard, the information submitted by the Spanish authorities and confirmed by the copies of the two agreements shows that the special agreement reached by the Social Security Treasury with Pickman was more favourable than the agreement entered into by the company with general creditors. In fact, the latter gave general creditors only the choice between recovering 5 % of their claims within 75 days or 20 % of them within 17 years without interest, whereas the special agreement enabled the State to recover 18 % of its credit within 8 years at an annual interest rate of 3,25 %, and that debt was duly recovered in full in line with the agreed schedule.

- (39) The Commission also acknowledges that, in the event of Pickman's (hypothetical) winding-up, the only alternative which would have been open to the Social Security Treasury would have been to attempt to recover its credit by seizing certain specific tangible and intangible assets. However, the Spanish authorities have demonstrated adequately that this would not have been a viable alternative: the seizure of tangible assets was of no real value, given the preferential status of a mortgage previously registered in favour of the public entity RUMASA, and it is reasonable to agree with the Spanish authorities' view that any seizure of the intangible assets would have been precarious, given the necessary dependence under Spanish law on potential buyers for whom those assets, once separated from the name of the company, would be of very limited if any value. As a result, it appears that winding-up would have been less favourable than the scenario actually considered by the Spanish authorities, whose privileged position was explicitly provided for in the special agreement, clause 10 of which specifically stated that the agreement would be null and void if more favourable conditions were subsequently agreed with any other creditors.

<sup>(1)</sup> See Royal Legislative Decree 1/1994 of 20 June 1994 approving the Amended Text of the *Ley General de la Seguridad Social* [General Social Security Act], which refers to Article 1924(1) of the *Código Civil* [Civil Code] and Article 913(1)(D) of the *Código de Comercio* [Commercial Code].

(40) In the light of the foregoing, the Commission is satisfied that it has been adequately demonstrated that the Social Security Treasury acted in accordance with the principle of a creditor in a market economy, in accordance with the judgment in *Tubacex*<sup>(1)</sup>, who seeks the alternative which will in fact guarantee the recovery of the highest possible amount on the most effective terms. Therefore, the Commission concludes that the measure consisting in the waiver of Pickman's Social Security debts does not constitute State aid within the meaning of Article 87(1) of the EC Treaty.

#### Measure 7: Public guarantee for a loan

(41) As far as measure 7 is concerned, the Commission expressed its doubts in the opening Decision that Pickman could have obtained a loan of EUR 1,6 million from the Caja Provincial San Fernando de Sevilla y Jerez bank without a guarantee from IDEA covering EUR 1,3 million.

(42) The Commission has assessed the measure in the context of the Guarantee Notice. In fact, as specified in Section 4, an individual guarantee does not constitute State aid under Article 87(1) of the EC Treaty if (i) the borrower is not in financial difficulty, (ii) the borrower is in principle able to obtain a loan on market terms without State intervention, (iii) the guarantee is linked to a specific financial transaction, is for a fixed amount, does not cover more than 80 % of the loan and is for a limited duration, and (iv) a market price has been paid for the guarantee which reflects various factors, such as the guarantee's duration and the securities given.

(43) On the basis of the Guarantee Notice and the Commission's related practice, condition (iii) has been fulfilled, since the guarantee, which has not been enforced, is linked to a specific loan, limited to a term of 10 years, and covers only 80 % of that loan, i.e. a fixed amount of EUR 1,3 million.

(44) As to condition (i), the Commission takes the view that, at the time when the loan and the guarantee were entered into on 28 December 2005, the restructuring period had not come to an end. However, it is true that, in December 2005 Pickman's financial situation had improved considerably and that the restructuring plan had reached the consolidation stage, profits of EUR 0,7 million having been recorded in 2006. For those reasons, it cannot be ruled out that Pickman was no longer a firm in difficulty when the guarantee was granted. However, as the period of restructuring had not come to an end, it cannot be ruled out that Pickman was not in difficulty. Accordingly, the Commission cannot rule out that the guarantee was not valued on market terms.

(45) As far as condition (ii) is concerned, it must be stated that, in 2004, when the company certainly qualified as a firm in difficulty, Pickman obtained a EUR 3,3 million loan from Monte de Piedad y Caja de Ahorros de Huelva y Sevilla because it was able to secure it in full by mortgaging part of the company's assets.

(46) *A fortiori* it cannot be stated that Pickman would not have been able to obtain a loan without State intervention at the end of 2005. For, unlike in the case of its failure to obtain a loan without State intervention in 2004, the first part of the restructuring process had been completed and the plan had been consolidated on the basis of a healthier financial situation. In addition, Pickman guaranteed its loan in 2004 directly with the bank instead of with IDEA. Furthermore, the fact that Caja Provincial San Fernando de Sevilla y Jerez agreed to give Pickman a loan on market terms and assumed the risk corresponding to 20 % of that loan without any additional guarantee or security over that part of it confirms that finding.

(47) In the light of the foregoing, while the Commission cannot rule out that, on 28 December 2005, Pickman still qualified as a firm in difficulty, it nonetheless takes the view that Pickman could, in principle, have obtained a loan on market terms without State intervention. Accordingly, the amount of the aid does not correspond to the total amount of the loan, but rather to the potential economic advantage derived from that State guarantee.

(48) Finally, as far as condition (iv) is concerned, the Commission acknowledges that the loan had been granted for 10 years at market price, i.e. at the Euribor interest rate, which at that time was 2,783 points plus 1,25 % and was comparable to that found on the Spanish market for loans to healthy firms. With regard to the price paid for the guarantee, as pointed out above, since it cannot be ruled out that Pickman was in difficulty, it should be established whether the premium corresponded to market premiums. In this case, it cannot be ruled out, taking into account the company's situation, that that premium contained an element of aid. However, it should also be pointed out that, in the light of the Commission's practice at that time, the aid element appears to be relatively limited. Firstly, the Commission accepts a guarantee premium of 1,5 % as being free from State aid in accordance with its practice of accepting a premium of 0,5 % in the case of guarantee schemes for healthy companies without a guarantee deposit<sup>(2)</sup>. In this case, the premium is three times

<sup>(1)</sup> Judgment of the Court of Justice of the European Communities in Case C-342/96 *Spain v Commission (Tubacex)* [1996] ECR I-2459.

<sup>(2)</sup> See, for example, case N 512/07 (OJ C 12, 17.1.2009, p. 1).

higher. Secondly, the guarantee in this case was secured by a mortgage in favour of the State valued at EUR 10 962 598,56 on 31 May 2005 and at EUR 12 512 066,27 on 4 October 2007.

- (49) In the light of the above, the Commission concludes that Pickman could have obtained a loan without State intervention on the strength of the high-quality security and its improved financial situation. Therefore, the aid is not to be calculated on the basis of the total amount of the loan. The aid consists in the difference between the premium paid and the premium a company in a similar situation would have had to pay, taking into account the full financial guarantee obtained. In view of the small value of the EUR 1,6 million loan, the high quality of the guarantee and the fact that a premium of 1,5 % was charged, the Commission takes the view that the aid element will not exceed EUR 100 000, the *de minimis* threshold then applicable <sup>(1)</sup>.

#### Measures 3 to 6: Participation loans and subsidies

- (50) As far as measures 3 to 6 are concerned, the Commission expressed doubts in the opening Decision that they could be regarded as not constituting aid on the basis of the market economy investor principle.
- (51) Those doubts are confirmed in this Decision: the subsidies were non-reimbursable and the participation loans had to be paid back annually by means of a transfer of 10 % of the non-interest-bearing profits. It is therefore clear that the Regional Government of Andalusia did not act as a market economy investor would have done, since it did not expect a return on the investment. In addition, these measures, which were granted in the context of a restructuring plan for the period 2004-2009, were approved by the Regional Government of Andalusia and, therefore, attributable to the State or a public authority. The measures gave a single beneficiary, Pickman, a selective advantage in the form of preferential loans and direct subsidies which are not generally available to other companies. Pickman operates in the market segment of dishes, ceramics and chinaware. As these products are traded within the Community, the measures in question threaten to distort competition between Member States. Spain does not question the classification of these measures as State aid.
- (52) Consequently, measures 3 to 6 constitute State aid within the meaning of Article 87(1) of the EC Treaty and their possible compatibility must be assessed accordingly. The fact that the aid has already been granted, in breach of

the Member States' duty of prior notification, laid down in Article 88(3) of the EC Treaty, means that it constitutes illegal aid.

#### Compatibility of aid

- (53) Article 87(2) and (3) of the EC Treaty provide for exceptions to the general incompatibility described in paragraph 1 of that Article. In particular, under Article 87(3)(c) of the EC Treaty, aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered to be compatible with the common market.
- (54) Since measure 7 does not constitute State aid (see recitals 41 to 50 above), contrary to the preliminary assessment in the opening Decision, the Commission is of the opinion that the compatibility of measures 3 to 6 must not be assessed on the basis of the 2004 Guidelines.
- (55) In fact, paragraph 104 of the 2004 Guidelines makes clear that 'the Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation and therefore in breach of Article 88(3) of the EC Treaty on the basis of these Guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Union*'.
- (56) In this regard, the Commission acknowledges that measures 3 to 6, a one-off operation under a restructuring plan, were granted on the date the plan was approved by the Spanish authorities, 2 March 2004, no part of the aid having been granted after the publication of the 2004 Guidelines. The 1999 Guidelines therefore apply.
- (57) Section 3.2.2 of the 1999 Guidelines lays down the conditions for the authorisation of restructuring aid, subject to the special provisions of paragraph 55, which, in the case of SMEs, states that the conditions in question are applied less strictly and, in particular, compensatory measures are usually not required. The Commission has carried out this specific assessment, *inter alia*, in a case which likewise concerned an SME operating in the sector of ceramic dishes and chinaware manufacture, namely the company Porcelanas del Principado <sup>(2)</sup>.

<sup>(1)</sup> Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

<sup>(2)</sup> See Commission Decision 2004/32/EC (OJ L 11, 16.1.2004, p. 1).

- (58) Firstly, the company must be regarded as a firm in difficulty within the meaning of the Guidelines. As the Spanish authorities acknowledged, until 2004 Pickman was in such a situation, as shown by the fact that it had negative own funds and increasing losses, whilst a mortgage over some of its assets taken out in favour of the company RUMASA had been foreclosed, with the result that it was almost certainly going to go out of business in the short term.
- (59) Secondly, the grant of aid is conditional on the implementation of a restructuring plan, the duration of which must be as short as possible and which must restore the company's long-term viability within a reasonable period of time on the basis of realistic assumptions as to future operating conditions. As far as SMEs are concerned, in accordance with the Commission's practice, the provisions contained in paragraph 55 were interpreted as meaning that the Commission itself need not approve such a plan in the case of SME schemes.
- (60) As the Spanish authorities noted, Pickman sent to the national authorities a restructuring plan, drawn up by independent experts from the company Auditoría y Consulta SA, which:
- describes the circumstances which led to the company's difficulties: unstable and inadequate ownership and management, demotivation caused by over-dimensioning and an imbalance in the deployment of staff, a high failure rate and high unitary costs compared to competitors, excess stocks, poor utilisation rate, absence of any medium or long-term strategy or sales policy,
  - analyses Pickman's economic and financial situation on the basis of the data for the years 2000-2003: negative own funds, seizure of certain assets, high debt ratios and serious liquidity problems, decreasing profitability and sales value, together with the consequent relative increase in the impact of staff costs,
  - identifies the competitive position of Pickman in the relevant market, with very low market shares as compared to its competitors, underscoring its weaknesses, as well as its strengths, primarily its outstanding reputation for high quality and the historical and cultural value placed on Spanish traditions.
- (61) Furthermore, the restructuring plan was divided into two different stages: the first scheduled the vast majority of intervention measures for 2004, whilst the second stage consisted in the gradual consolidation of Pickman's overall situation in the years 2005-2009 (see Table 2 below). The intervention measures, which were aimed at rectifying the company's structural weaknesses and guaranteeing its long-term viability, related to the establishment of a new management structure, the planning of an organisational chart appropriate to the manufacturing process, the downsizing and redeployment of the workforce, the negotiation of a new collective agreement, the reorganisation of the plants' activities with the objective of optimisation, significant technical and IT modernisation, investment in a commercial department in terms of staff and marketing campaigns, the establishment of new distribution channels, the rebalancing between own funds and registered capital, adjustment of the debt ratio and the acquisition of a minimum level of liquidity.
- (62) In the plan, the abovementioned intervention measures envisage different scenarios, reflecting the best-case, worst-case and intermediate scenarios, and the adoption of the intermediate assumptions of 75 % productivity and sales levels reflecting those registered by the company in 2002 appear to form realistic financial forecasts, the key figures of which are set out in Table 1 below and have to date actually been achieved.

Table 1

(EUR million)

	2004	2005	2006	2007	2008	2009
Turnover	2,7	4,4	6,5	7,5	9,3	10,6
Own funds	- 7,1	- 7,9	- 7,2	- 5,8	- 2,9	0,9
Operating costs	- 5,5	- 5,4	- 5,5	- 5,2	- 5,3	- 5,6
Staff costs	- 3,2	- 3,2	- 3,2	- 3,1	- 3,2	- 3,3
Financial assets	0,4	0,01	0,1	0,07	0,1	0,2
Operating result	- 1,9	- 0,2	1,4	2,0	3,5	4,6



- (63) Thirdly, any undue distortion of competition must be avoided. Since 'aid to firms in the small to medium-sized category tends to affect trading conditions less than that granted to large firms', '[t]he grant of restructuring aid to SMEs will not usually be linked to compensatory measures' (paragraph 55 of the 1999 Guidelines). In this regard, it should be noted that Pickman is a medium-sized enterprise with 137 employees, sales of EUR 2 million in 2003 and a limited market share at Community level. It should also be pointed out that, in the case of Porcelanas del Principado, a medium-sized enterprise operating in the same sector, the Commission did not impose any compensatory measures. Following the same practice, the limited distortion of competition which might result from the aid to Pickman does not require the adoption of any compensatory measures.
- (64) Moreover, in the case of Pickman, it appears that (i) the restructuring plan is not expected to lead to an increase in capacity; (ii) the company's workforce will be reorganised, with downsizing taking place at certain plants and investment being made in the commercial and IT areas; (iii) Pickman is small, meaning that it can avail itself of aid; (iv) the company's potential presence in the market is very limited and was even more limited in 2003, as compared to its competitors (see the market study referred to above); and (v) according to the Spanish regional aid map for the period 2000-2006 <sup>(1)</sup>, Andalusia was a NUTS II area and, on the basis of its per capita GDP/PPS of below 60 % by comparison with the Community average, qualified under Article 87(3)(a) of the EC Treaty.
- (65) In the light of all of the foregoing, particularly Pickman's commitment not to increase its capacity, the fact that the beneficiary falls within the definition of an SME, has a limited competitive position and is located in an assisted area, the Commission, in line with its standard practice, takes the view that the third condition is satisfied, since the distortion of competition caused by the measures is limited and certainly not to an extent which is contrary to the common interest.
- (66) Fourthly, the amount and the intensity of the aid must be limited to the strict minimum necessary to enable restructuring to be undertaken in a manner commensurate with the company's existing financial resources. The aid beneficiary is expected to make a significant contribution to the restructuring plan from its own resources, since this is considered to be a sign that the markets believe that the return to viability can be achieved.
- (67) Furthermore, the amount of aid granted by the Spanish authorities to Pickman totalled EUR 4,46 million. A significant part of the aid had to be used to pay short-term creditors ('Inversiones Jara S.A' and 'Faïencerie de Bouskoura'), while the subsidies went to support labour costs and, above all, investments to be made over the years as detailed in Table 2.

Table 2

	<i>(EUR million)</i>					
	2004	2005	2006	2007	2008	2009
Tangible and intangible investments (*)	1,3	0,06	0,06	0,06	0,06	0,06

(\*) Investments take the form of the costs of IT facilities and software (45 %), construction (1,5 %), technical facilities (12 %) and other installations (3 %).

- (68) In addition, Pickman made its own contribution to its viability in the sum of EUR 6,24 million, made up of private loans obtained by the new owner on market terms without any form of public support. That sum represents 58,3 % of the total financing, which means that therefore Pickman made a 'significant contribution' fully in line with the provisions of the 1999 Guidelines. In addition, the company's financial assets, as set out in Table 1, clearly show that the plan is not expected to lead to excessive liquidity. Accordingly, the Commission takes the view that the aid is limited to the minimum necessary to restore the company's viability.

<sup>(1)</sup> See the Commission Decision in Case N 773/1999, Regional aid map for the period 2000-2006 (OJ C 184, 1.7.2000, p. 22).

- (69) In conclusion, the Commission is of the opinion that, in the light of the foregoing, measures 3 to 6 as envisaged in Pickman's restructuring plan satisfy the conditions laid down for SMEs in the 1999 Guidelines and are to be regarded as compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty.

#### 8. CONCLUSION

- (70) In the light of the foregoing, the Commission concludes that:
- (a) measure 2 does not constitute State aid, since the Social Security Treasury acted in accordance with the diligence expected of a hypothetical market economy creditor;
  - (b) measures 3 to 6 constitute State aid which is compatible with the common market, in accordance with the 1999 Guidelines;
  - (c) measure 7 does contain an element of State aid, but this was below the *de minimis* threshold applicable at the time it was granted,

HAS ADOPTED THIS DECISION:

#### Article 1

The aid granted by Spain by means of measure 2, which involves a waiver of Social Security debts under a special

agreement separate from the general creditors' agreement, does not constitute State aid within the meaning of Article 87(1) of the EC Treaty, since it is consistent with the principle of a market economy private creditor.

The aid granted by Spain by means of measures 3, 4, 5 and 6, relating to participation loans and subsidies granted by the Regional Government of Andalusia in the context of a restructuring plan submitted at national level only, constitutes illegal State aid which, on the basis of Article 87(3)(c) of the EC Treaty, is compatible with the common market.

The aid granted by Spain by means of measure 7, consisting in a guarantee from the Regional Government of Andalusia of EUR 1,3 million on a EUR 1,6 million loan constitutes *de minimis* aid which falls outside the scope of Article 87(1) of the EC Treaty.

#### Article 2

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 13 May 2009.

For the Commission

Neelie KROES

Member of the Commission