Council Regulation (EC) No 320/2008 of 7 April 2008 repealing the countervailing duty imposed on imports of certain electronic microcircuits known as DRAMs (Dynamic Random Access Memories) originating in the Republic of Korea and terminating the proceeding

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community[(1)] (the basic Regulation) and in particular Article 19 thereof,

Having regard to the proposal submitted by the Commission after consulting the Advisory Committee,

Whereas:

A. PROCEDURE

I. Existing measures

(1) By Council Regulation (EC) No 1480/2003[(2)] (the definitive duty Regulation), the Council imposed a definitive countervailing duty of 34,8 % on imports of certain electronic microcircuits known as Dynamic Random Access Memories (DRAMs) originating in the Republic of Korea and manufactured by all companies other than Samsung Electronics Co., Ltd (Samsung), for which a 0 % duty rate was established. The definitive duty Regulation was preceded by Commission Regulation (EC) No 708/2003 of 23 April 2003 imposing a provisional countervailing duty on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea[(3)] (the provisional duty Regulation).

(2) Following a report adopted by the Dispute Settlement Body of the World Trade Organisation[(4)] (the EC-Korea DRAMs Panel Report), the Council adopted Regulation (EC) No 584/2006[(5)], implementing the recommendations made by the Panel Report and lowering the definitive countervailing duty to 32,9 % (the implementing Regulation).

II. Ex officio initiation of a partial interim review

(3) The Community producers Micron Europe Ltd and Qimonda AG (formerly, Infineon Technologies AG) provided prima facie evidence to the Commission

indicating that Hynix Semiconductor Inc. (Hynix) was in receipt of additional subsidies in the period following the investigation period of the original investigation. Additionally, Hynix submitted a request for a partial interim review alleging that the subsidies found to be countervailable in the original investigation had ceased to exist.

(4) In view of the submissions above, the Commission decided to proceed ex officio.

III. Investigation

(5) Having determined that sufficient evidence existed to justify the initiation of a partial interim review and having consulted the Advisory Committee, the Commission announced on 18 March 2006, by a Notice of Initiation published in the *Official Journal of the European Union*[6], the ex officio initiation of a partial interim review, in accordance with Article 19 of the basic Regulation.

(6) The review was limited in scope to the examination of subsidisation of one exporting producer, Hynix, in order to assess the need for the continuation, removal or amendment of the existing measures. The investigation period ran from 1 January 2005 to 31 December 2005 (IP).

(7) The Commission officially advised the exporting producer concerned (Hynix), the Government of the Republic of Korea (the GOK) and the Community producers of the initiation of the partial interim review. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limits set out in the Notice of Initiation.

(8) In order to obtain the information necessary for its investigation, the Commission sent questionnaires to all parties known to be concerned and received replies from the company, the GOK and a number of Korean banks, as well as Deutsche Bank AG.

(9) The Commission sought to verify the information received and carried out verification visits at the premises of the GOK (Ministry of Finance and Economy — MOFE and the Financial Supervisory Commission — FSC) and the following companies and institutions in Seoul:

— Hynix Semiconductor Inc.,
— Korea Exchange Bank (KEB),
— Korea Development Bank (KDB),
— Woori Bank,
— Shinhan Bank,
— Deutsche Bank AG,
— National Agricultural Cooperative Federation (NACF),
— Hyundai Marine & Fire Insurance.

B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

(10) The product under consideration and the like product are the same as that covered in the original investigation, i.e. certain electronic microcircuits known as Dynamic Random Access Memories (DRAMs) of all types, densities and variations, whether assembled, in processed wafer or chips (dies), manufactured using variations of Metal Oxide-Semiconductors (MOS) process technology, including complementary MOS types (CMOS), of all densities (including future densities), irrespective of access speed, configuration, package or frame etc. originating in the Republic of Korea. The product concerned also includes DRAMs presented in (non-customised) memory modules or (non-customised) memory boards or in some other kind of aggregate form provided the main purpose of which is to provide memory.

(11) The product concerned is currently classifiable within CN codes ex 8473 30 20, ex 8473 50 20, ex 8542 32 10, ex 8542 32 31, ex 8542 32 39 and ex 8548 90 20.

C. SUBSIDIES

I. Introduction

(12) On the basis of the information available to the Commission at initiation and the replies given to the Commission's questionnaires, the following measures were investigated:

(a) a rescue package approved by the Hynix Creditors' and Financial Institutions Council (CFIC) on 30 December 2002 (the new restructuring), comprising a debt-to-equity swap, a debt rollover and changes in the interest payment conditions;

(b) alleged preferential financing provided by Korean banks to Beijing Orient Electronics (BOE) to facilitate the purchase of Hydis, a Hynix operation;

(c) alleged preferential financing provided by Korean banks to CVC to facilitate the purchase of System IC, a Hynix operation, including the transfer of Hynix debt to another entity at a discount;

(d) a discounted cash buyout of the Hynix debt;

(e) preferential tax treatment allegedly given to Hynix by GOK;

(f) the July 2005 refinancing of Hynix debt.

(13) All the measures listed above were ad hoc measures. With the exception of (e) above, all investigated measures were taken by the creditor banks/institutions of Hynix, allegedly under direction by the GOK. The issue of ‘financial contribution by a government’, within the meaning of Article 2 of the basic Regulation, is, as in the original investigation, central to this proceeding and recitals 9 to 15 of the definitive duty Regulation are hereby recalled.

II. The financial situation of Hynix after the original investigation

Changes to legislation: *There are currently no known outstanding effects for the Council Regulation (EC) No 320/2008. (See end of Document for details)*

(14) Despite the large bail-out packages received by Hynix in 2001, its financial situation did not improve and in 2002 it was still rated Selective Default by Standard & Poor. It reported a loss of KRW 1,03 trillion for the first nine months of 2002; it was obvious that it was in no position to pay any maturing debt. Its ratios, based on its 2002 financial statement, show that it could not cover its current liabilities with current assets, could not cover its interest expense with its earning, was financed with significantly more debt than equity and had large net losses. Although the October 2001 bail out had helped matters to some degree, the company was still in considerable distress. Morgan Stanley Dean Witter, one of Hynix's external advisors, in a report produced in September 2002, stated that Hynix would be very unlikely to 'accumulate enough cash in the next two years to meet maturing debt obligations' or 'expand capacity and fund the technological upgrades and R&D necessary for it to remain a competitive DRAM producer.' Morgan Stanley Dean Witter went on to say that 'Hynix is technically bankrupt, kept alive only though debt restructuring programmes' and that 'The financial commitment required to bring the company back to a competitive level looks too great. Creditors cannot afford to nurse the company back to health. Whatever the outcome, the message is clear to investors: Hynix is not an investment grade company.'

(15) Merrill Lynch, again in September 2002, stated, 'We are increasingly concerned about Hynix's dismal earnings prospects. We are cutting 02-03 estimates into deficit territory as cost improvements and supply growth is constrained by lack of investment in the process technology upgrade'. Another one of Hynix's advisors, Deutsche Bank Korea, admitted that their equities department, although it followed the semiconductor industry, did not follow Hynix, as 'there was a lack of investor appetite'. The company itself does not dispute the severity of its financial difficulties at the relevant time.

III. The New Restructuring

(16) In October 2001, a business normalisation plan was adopted by the CFIC to pursue the reconstruction of the company. The CFIC was made up of banks and other institutions which were Hynix's creditors. The decisions of the CFIC were taken by a 75 % majority. The voting rights of each institution were determined in accordance with its exposure to Hynix.

(17) Hynix was under the Corporate Restructuring Promotion Act (the CRPA) and, as such, was effectively under the control of its creditors. The CFIC decided to sell the business or part of the business to a third party. In December 2002, the Restructuring Committee, which is a sub-committee of the CFIC, initiated negotiations with Micron Technology Inc. These lasted for five months; a Memorandum of Understanding was signed between the parties, but the terms of the sale were eventually rejected by the Hynix Board of Directors.

(18) In May 2002, as a follow-up measure given the continuing deterioration of Hynix's finances, the CFIC hired a number of external advisors, including Deutsche Bank (DB), Morgan Stanley Dean Witter, Deloitte & Touche and A. D. Little, to analyse Hynix and come up with a plan to rescue the company. Together with these

external advisors, KEB, which was the head of the CFIC as lead creditor, performed due diligence on Hynix until November 2002. The resulting report, prepared by Deutsche Bank and KEB (the DB Report), was submitted to the CFIC.

(19) On 30 December 2002, the CFIC decided to implement a corporate turnaround and sell-off of the business, as outlined in the DB Report. The corporate turnaround involved a restructuring, comprising:

— a debt-to-equity swap of KRW 1 861,5 bn,

— a capital write-down on a ratio of 21:1,

— a rollover of debt amounting to KRW 3 293 bn, and

— changes to the interest payment conditions of the rolled-over debt.

IV. Description of the Measures

(i) Debt-to-equity swap

(20) The CFIC decided to swap debt amounting to KRW 1 861,5 bn for Hynix shares; this amounted to approximately 50 % of Hynix's unsecured loans. The swap share price was fixed to KRW 435 at the time the decision was taken in December 2002, by taking the one-month average market price. Although there is an obligation under the CRPA on the CFIC to use a reasonable method in calculating the swap price, no specific method is provided.

(21) The restructuring plan involved a capital write-down prior to the swap taking place, which required shareholder approval; hence the swap could not take place immediately. Once the capital write-down was implemented, at a ratio of 21:1, the share swap price became KRW 9 135 (21 × KRW 435) and the swap went ahead. As the shares pursuant to the swap were not to be issued until April 2003, this price was to serve as a floor, but no ceiling was set. The actual share price at the time of the decision was in fact KRW 280; it fell to KRW 167 in April 2003.

(ii) Debt rollover

(22) The maturity of the Hynix debt which was not converted to equity was extended to December 2006. This rolled-over debt amounted, in total, to KRW 3 293 bn.

(iii) Changes in the terms of interest payments

(23) The interest rate on the rolled-over debt was reduced to 3,5 % from 6,5 %. The 3 % difference was treated as additional principal and was added on to the outstanding debt, with a maturity date of December 2006, as well. Interest on this additional principal was set at 6 %, to be paid quarterly.

V. The Policy of the GOK as regards Hynix

(24) As described in the provisional and the definitive duty Regulations, the GOK had a keen interest in the fact of Hynix. The GOK admitted that, due to Hynix's situation, foreign investors were not willing to invest in Korea, because the Korean banks' exposure to Hynix was so high. It need the Hynix problem to be solved, in order