Council Regulation (EC) No 2116/2005 of 20 December 2005 amending Regulation (EC) No 1480/2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea

COUNCIL REGULATION (EC) No 2116/2005

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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 24(3) thereof,

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

Whereas:

A. PROCEDURE

1. Existing measures

(1) By Regulation (EC) No 1480/2003[(2)] (the original Regulation), the Council imposed a definitive countervailing duty of 34,8 % (the countervailing duty) 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.

(2) Two exporting producers located in the Republic of Korea cooperated in the investigation which lead to the imposition of the existing measures (the original investigation), Samsung and Hynix Semiconductor Inc., which also owns a production facility in the United States. The Community industry in the original investigation consisted of two producers which accounted for the major proportion of the total Community production of DRAMs, Infineon Technologies AG, Munich, Germany, and Micron Europe Ltd, Crowthorne, United Kingdom.

2. Grounds for the current investigation

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(3) In the context of the monitoring of trade defence measures, the Commission was informed that the countervailing duty in force on imports of DRAMs originating in the Republic of Korea was possibly not being levied on certain imports of said DRAMs.

3. Opening of an investigation

(4) On 22 March 2005, by a notice (the notice) published in the *Official Journal of the European Union*[3], the Commission announced the opening of an investigation with a view to determining to what extent special provisions may need to be adopted in accordance with Article 24(3) of the basic Regulation in order to ensure that the countervailing duty is correctly levied on imports of DRAMs originating in the Republic of Korea.

4. Submissions

(5) The Commission officially advised the authorities of the exporting country and all the parties known to be concerned of the opening of this investigation. Copies of the notice and of the non-confidential documents on the basis of which the notice was published were sent to the two exporting producers in the Republic of Korea, as well as to importers, users and to the two producers in the Community, named in the original investigation or otherwise known to the Commission. 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.

(6) Submissions were received from the two exporting producers in the Republic of Korea and from the two producers and one user in the Community. Given the availability of all necessary information and data needed, it was not considered necessary to carry out verification visits at the premises of the companies that made the above submissions.

B. PRODUCT CONCERNED

(7) The product concerned by this investigation is the same as that covered by 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.

(8) The product concerned is currently classifiable within CN codes 8542 21 11, 8542 21 13, 8542 21 15, 8542 21 17, ex 8542 21 01, ex 8542 21 05, ex 8548 90 10, ex 8473 30 10 and ex 8473 50 10.

C. RESULTS OF THE INVESTIGATION

(9) In order to determine to what extent special provisions may need to be adopted to ensure that the countervailing duty is correctly levied, the investigation focused on the following elements: 1. the description of the product concerned and its transposition into the Combined Nomenclature (CN)/TARIC nomenclature, and 2. the anomalies resulting from the analysis of the trade flows of the product concerned imported into the Community.

1. Description of the product concerned and transposition into the CN/TARIC nomenclature

(10) Article 1(1) of the original Regulation establishes that the product concerned subject to the countervailing duty is certain electronic microcircuits known as DRAMs of all types originating in the Republic of Korea. The product concerned is such regardless of the density, access speed, configuration, package or frame, etc. In addition, the manufacturing process is also mentioned (variations of metal oxide-semiconductors — MOS-process technology, including complementary MOS types — CMOS).

(11) On the one hand, Article 1(1) of the original Regulation identifies the CN/TARIC codes under which the product concerned is classifiable. The following types of DRAMs are covered by these CN/TARIC codes: wafers, chips (dies), memories (chips mounted, i.e. with their terminals or leads, whether or not encased in ceramic, metal, plastics or other materials, hereafter referred to as 'mounted DRAMs' and known commercially as DRAM components) and DRAM modules, memory boards and some other kind of aggregate form (hereafter referred to as multi-combinational forms of DRAMs).

(12) With regard to mounted DRAMs, this type of DRAM results from the so-called 'back-end process', that is chips which underwent an assembly (connection of the memory cell on the chip with a wire to the connectors on the outside of the capsule), testing (to check whether the encapsulated chips are functioning) and marking process.

(13) On the other hand, the types of the product concerned explicitly mentioned in Article 1(1) of the original Regulation are wafers, chips (dies), assembled DRAMs (meaning mounted DRAMs and multi-combinational forms of DRAMs) and DRAMs presented in (non-customised) memory modules or memory boards or in some other kind of aggregate form (hereafter referred to as DRAM chips and/or mounted DRAMs incorporated in multi-combinational forms of DRAMs).

(14) The above elements show that the description of the product concerned and the CN/TARIC codes are not fully in line. On the one hand, mounted DRAMs, although clearly falling within the definition of product concerned — which includes all types of DRAMs — and specifically mentioned in the description of the CN/TARIC codes indicated in Article 1(1) of the original Regulation, were referred to in the description of the product concerned with the ambiguous wording 'assembled', which also refers to multi-combinational forms of DRAMs. On the other hand, DRAM chips and/or mounted DRAMs incorporated in multi-combinational forms of DRAMs, although

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explicitly mentioned in the description of the product concerned, were not specifically mentioned in the description of any of the CN/TARIC codes indicated in Article 1(1) of the original Regulation. Indeed, the latter either specifically mention DRAMs in multi-combinational forms or the chips and mounted DRAMs imported as such — and, as a consequence, the countervailing duty has not been levied so far on this type of DRAMs.

(15) With regard to mounted DRAMs, these are distinct both from DRAM chips and from multi-combinational forms of DRAMs. Consequently, for the sake of coherence and legal certainty, it appears appropriate that the product description makes explicit reference thereto.

(16) With respect to DRAM chips and/or mounted DRAMs incorporated in multi-combinational forms of DRAMs, the fact that these are not specifically mentioned by any of the CN/TARIC codes becomes relevant **[**[X1]in situations where (non-customised) multi-combinational forms of DRAMs**]** are not originating in the Republic of Korea and are therefore not subject to the countervailing duty when imported into the Community, despite the fact that they incorporate DRAM chips and/or mounted DRAMs of Korean origin.

(17) Indeed, in line with the constant practice within the EU Member States to use the EC negotiating position in the WTO Harmonisation Working Programme as the basis for the interpretation of Article 24 of the Community Customs Code[(4)], the non-preferential rules of origin applicable in the Community to multi-combinational forms of DRAMs, falling within CN codes ex 8473 30 10, ex 8473 50 10, and ex 8548 90 10, establish that the country of origin shall be the last country of manufacture where the increase in value acquired as a result of working and processing, and if applicable, the incorporation of parts originating in that country, represent at least 45 % of the ex-works price of the multi-combinational form of DRAMs. In case this rule is not satisfied, DRAMs are considered to be originating in the country in which the major portion of the materials used originated.

(18) The documents and pieces of evidence submitted during the investigation enabled to conclude that multi-combinational forms of DRAMs of non-Korean origin could incorporate DRAM chips and/or mounted DRAMs of Korean origin. Three types of evidences allowed to draw the above conclusion. First of all, *prima facie* evidence was submitted showing that some multi-combinational forms of DRAMs declared as originating in countries other than the Republic of Korea incorporated mounted DRAMs originating in the Republic of Korea and manufactured by companies subject to the countervailing duty. Secondly, Binding Origin Information issued in 2003 concerned multi-combinational forms of DRAMs falling within CN code ex 8548 90 10 (TARIC code 8548 90 10 *10), which were manufactured partly in the United States of America and partly in the Republic of Korea. Finally, two press articles were submitted, in which reference was made to the fact that non-preferential rules of origin applicable in the Community allowed Korean companies to export to the Community DRAM chips or mounted DRAMs manufactured by Korean companies subject to the countervailing duty, by incorporating them in DRAM modules which were declared with origin other than the Republic of Korea.

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(19) In the light of the above, it is considered that special provisions are needed in order to ensure that the countervailing duty is levied on DRAM chips or mounted DRAMs manufactured by companies subject to the countervailing duty and **[**[X1]incorporated in (non-customised) multi-combinational forms of DRAMs**]** originating in countries other than the Republic of Korea.

(20) One of the companies subject to the countervailing duty argued that **[**[X1]once DRAM chips or mounted DRAMs are incorporated in (non-customised) multi-combinational forms of DRAMs, they can no longer be considered as a product potentially subject to the countervailing duty. In this respect, it is considered that DRAM chips or mounted DRAMs once incorporated in (non-customised) multi-combinational forms of DRAMs still maintain their properties and functions. The fact of being incorporated in (non-customised) multi-combinational forms of DRAMs does not alter their basic physical and technical characteristics. Moreover, the function performed by the (non-customised) multi-combinational forms of DRAMs, which is to provide memory, is exactly, although on a larger scale, the same as the one of DRAM chips or mounted DRAMs when considered individually. Therefore, it is concluded that the incorporation of DRAM chips or mounted DRAMs in (non-customised) multi-combinational forms of DRAMs**]** does not change their nature and cannot be considered as a reason to exclude them from the application of the countervailing duty. For these reasons, the claim was rejected.

(21) The same party and the Government of the Republic of Korea argued that DRAM chips and mounted DRAMs presented in multi-combinational forms of DRAMs are not referred to in Article 1(1) of the original Regulation since they would not have been covered by the original investigation. As already mentioned in recital 13, Article 1(1) of the original Regulation clearly specifies that the countervailing duty is also imposed on DRAM chips and mounted DRAMs presented in multi-combinational forms. As to the claim that mounted DRAMs presented in multi-combinational forms of DRAMs would not have been investigated in the original investigation, no evidence was provided which could show that this was the case. On the contrary, given the nature of the subsidies received, all the sales of the investigated companies were taken into account to assess the level of subsidisation in the original investigation. For these reasons, the claim was rejected.

2. Anomalies resulting from the analysis of the trade flows

(22) In the light of the non-preferential rules of origin applicable in the Community to DRAMs, import flows were analysed in relation to two main categories of the product concerned: on the one hand DRAM wafers, chips and mounted DRAMs, which originate in the country where the operation of diffusion takes place[(5)] and, on the other hand, multi-combinational forms of DRAMs, which originate in the country that meets the criteria indicated in recital (17). The analysis covered the period running from May 2003 to May 2005 and was based on Comext statistics at TARIC code level.

(23) With regard to the first category of the product concerned, it was established on the basis of information submitted by the Community industry that the operation