Council Regulation (EC) No 1628/2004 of 13 September 2004 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain graphite electrode systems originating in India

COUNCIL REGULATION (EC) No 1628/2004

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imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain graphite electrode systems originating in India

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 15 thereof,

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

Whereas:

A. PROVISIONAL MEASURES

(1) On 19 May, the Commission, by Regulation (EC) No 1008/2004[(2)] (the provisional Regulation), imposed a provisional countervailing duty on imports into the Community of certain graphite electrode systems originating in India.

B. SUBSEQUENT PROCEDURE

(2) Subsequent to the disclosure of the essential facts and considerations on the basis of which it was decided to impose provisional countervailing measures, several interested parties made written submissions making their views known on the provisional findings. The parties who so requested were granted an opportunity to be heard.

(3) The Commission continued to seek and verify all information it deemed necessary for the definitive findings.

(4) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of a definitive countervailing duty on imports of certain graphite electrode systems originating in India and the definitive collection of the amounts secured by way of the provisional duty. They were also granted a period within which to make representations subsequent to the disclosure of the essential facts and considerations.

(5) The oral and written comments submitted by the interested parties were considered and, where appropriate, the findings have been modified accordingly.

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C. PRODUCT CONCERNED AND LIKE PRODUCT

(6) Since no new comments were received regarding the product concerned and the like product, recitals 12 to 16 of the provisional Regulation are hereby confirmed.

D. SUBSIDISATION

1. Duty entitlement passbook scheme (DEPB)

(7) Following disclosure after the imposition of provisional measures and subsequent to final disclosure, a number of comments were received from the Government of India (the GOI) and from the exporting producers. It was firstly claimed that the DEPB on post-export basis is a drawback scheme and, as a consequence, any benefit under the scheme should be restricted to any excess remission of import duties that may have been given. It was further claimed that the quantification of any benefit should be based on the date of receipt of the DEPB licences and not on the date of their utilisation or sale, as was taken by the Commission. Finally, it was claimed that the amount of benefit should be reduced as it was alleged that the DEPB rate for the product concerned was reduced from 19 to 11 % in February 2004, namely after the IP.

(8) In response to the first claim, it is noted in recital 33 of the provisional Regulation that 'the basic Regulation provides for an exception for, *inter alia*, drawback and substitution drawback schemes which conform to the *strict rules* laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback)'.

(9) In this context, it must be noted that the GOI did not apply an effective verification system or procedure to confirm whether and in what amounts inputs were consumed in the production of the exported product (Annex II(II)(4) of the basic Regulation and, in the case of substitution drawback schemes, Annex III(II)(2) of the basic Regulation). Additionally, the GOI did not carry out a post-export examination based on actual inputs involved to determine whether an excess payment occurred, although this would normally be required in the absence of an effectively applied verification system (Annex II(II)(5) and Annex III(II)(3) to the basic Regulation). Furthermore in recital 37 of the provisional Regulation it was considered that 'the DEPB on post-export basis cannot be considered as a permitted drawback or substitution drawback scheme (Annex III) under Article 2(1)(a)(ii) of the basic Regulation'. For these reasons, the conclusion in recital 38 of the provisional Regulation, that 'the countervailable benefit is the remission of total import duties normally due on all imports' is hereby confirmed.

(10) To be eligible for benefits under this scheme, a company must export goods. At the point in time of the export transaction, a declaration must be made by the exporter to the authorities in India indicating that the export is taking place under the DEPB scheme. In order for the goods to be exported, the Indian customs authorities issue, in advance of the goods being exported, an export shipping bill which shows, *inter alia*, the amount of DEPB credit which is to be granted for that export transaction. At this point in time of export, the company knows the benefit it will receive. Once the customs

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authorities issue an export shipping bill, the GOI has no discretion over the granting of a DEPB credit. It was also verified that any change to the DEPB rates between the actual export and the issuance of a DEPB licence will not affect the level of benefit granted. The relevant DEPB rate is that which applied at the time the export declaration is made. Therefore, there is no possibility for a retroactive amendment to the level of the benefit. Accordingly, the moment the export transaction is made, the GOI is liable to forego the customs duties, which constitutes a financial contribution within the meaning of Article 2(1)(a)(i) of the basic Regulation.

(11) Article 1(1) of the basic Regulation provides that a 'countervailing duty may be imposed for the purpose of offsetting any subsidy granted […] whose release for free circulation in the Community causes injury'. The rationale for imposing such a duty is that the prices of the imported goods are lower as a result of having received subsidies and that such lower prices cause injury. In this case, when exporters of graphite electrode systems are negotiating prices for an export sale, they are aware that that sale benefits from a subsidy under the DEPB scheme. By virtue of the fact that the exporters are aware that they will receive such subsidy, and indeed benefits under other schemes, these companies are already in a competitively more advantageous position at the point in time when they are negotiating prices, that is to say they can reflect the subsidies through offering lower prices.

(12) The Indian accounting standards provide for booking credits, such as those received under the DEPB scheme, on an accrual basis as income, once (i) such benefits have been earned; and (ii) it is reasonably certain that the ultimate collection of the proceeds of the export transaction will be made. What is relevant here is the point at which 'benefits have been earned'. As stated in recital 10 above, once the customs authorities issue an export shipping bill which shows, *inter alia*, the amount of DEPB credit which is to be granted for that export transaction, the GOI has no discretion as to whether or not to grant the subsidy and it has no discretion as to the amount of the subsidy. Also, as stated above in the same recital, any change to the DEPB rates between the actual export and the issuance of a DEPB licence has no retroactive effect on the level of benefit granted. Finally, as stated in recital 11 above, the prices of export transactions are considered to reflect the subsidies (that is to say through lower prices) from which they can benefit. In these circumstances, it is considered that benefits are earned when the export transaction is made. On this basis, companies can, in line with Indian accounting standards, book the DEPB credit as income at the stage of export transaction.

(13) In accordance with Articles 2(2) and 5 of the basic Regulation, the amount of countervailable subsidies shall be calculated in terms of the benefit conferred on the recipient, which is found to exist during the investigation period. In light of the above, it is considered appropriate to assess the benefit under this scheme as being the sum of the credits earned on all export transactions made under this scheme during the investigation period. This differs from the approach followed in the provisional Regulation where the sum of the credits utilised was assessed. In accordance with

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Article 7(1)(a) of the basic Regulation, fees necessarily incurred to obtain the subsidy were deducted.

(14) In respect of the final argument relating to the alleged reduction of the DEPB rate, it is accepted that *prima facie* evidence has been submitted to show that the DEPB rate for the product concerned was reduced to 11 % with effect from 9 February 2004. However, as the amount of benefit is assessed on the basis of the amount of benefit earned on all export transactions made during the IP, the reduction in the DEPB rate after this period will have no effect on the level of subsidy determined.

(15) On the basis of these changes, the benefit under this scheme for the two cooperating companies was revised to 16,6 and 14,4 % respectively.

2. Export promotion capital goods scheme (EPCGS)

(16) In the absence of any comments from interested parties, the conclusions outlined in recitals 56 to 58 of the provisional Regulation, are hereby confirmed.

3. Advance licence scheme (ALS)

(17) At the provisional stage, one exporting producer in India was deemed to have received a countervailable benefit under this scheme. The representatives of this exporter claimed both that (i) the scheme was not countervailable; and (ii) in any case, any benefit received was only granted to a business unit of the company which did not manufacture the product concerned and which had been sold off by the company subsequent to the IP. Accordingly, it was claimed that no benefit under the ALS should be attributed to the exporter.

(18) In respect of the first claim, no new evidence was provided to show that the ALS was not a countervailable export subsidy. In this context, it is recalled that the GOI did not apply an effective verification system or procedure to confirm whether and in what amounts inputs were consumed in the production of the exported product (Annex II(II)(4) of the basic Regulation and, in the case of substitution drawback schemes, Annex III(II)(2) of the basic Regulation). Additionally, the GOI did not carry out a post-export examination based on actual inputs involved to determine whether an excess payment occurred, although this would normally be required in the absence of an effectively applied verification system (Annex II(II)(5) and Annex III(II)(3) to the basic Regulation). For these reasons, the conclusions in recitals 64 to 70 of the provisional Regulation are hereby confirmed.

(19) In respect of the second claim, it was found that during the IP the exporter concerned had benefited from the scheme and had, as a result, received a countervailable benefit. Furthermore, the fact that the business unit producing this product was sold subsequent to the IP, is not relevant for determining whether the company benefited of a subsidy during the IP. In addition, it is not considered to be relevant when assessing the level of the subsidisation of the company as a whole, whether the subsidy scheme was targeted at a unit of the company that did not itself produce the product concerned. Indeed, it is the company as a whole which is examined, and thus any benefit to one of the units is considered to represent a benefit for the company as a whole. To that

end, it is confirmed that during the IP, the business unit which benefited from the ALS scheme and the business units which manufactured the product concerned, formed one legal economic entity. Therefore, the conclusion outlined in recital 71 of the provisional Regulation is hereby confirmed.

4. Export processing zones (EPZ)/export orientated unit (EOU)

(20) In the absence of any comments from interested parties, the conclusion outlined in recital 72 of the provisional Regulation, is hereby confirmed.

5. Income tax exemption (ITE)

(21) In the absence of any comments from interested parties, the conclusion outlined in recital 74 of the provisional Regulation, is hereby confirmed.

6. Amount of countervailable subsidies

(22) In light of the conclusions outlined above, the amount of countervailable subsidies is definitively confirmed, as follows:

Type of subsidy	**DEPB**	**EPCGS**	**ALS**	**EPZ/ EOU**	**ITE**	**TOTAL**
Graphite India Limited (GIL)	16,6 %	0,1 %				16,7 %
Hindustan Electro Graphite (HEG) Limited	14,4 %	0,3 %	0,2 %			14,9 %
All others						16,7 %

E. COMMUNITY INDUSTRY

(23) In the absence of any substantially new information or argument in this particular respect, recitals 76 to 79 of the provisional Regulation are hereby confirmed.

F. INJURY

(24) Following the provisional disclosure, the Indian exporters pointed to the divergence in the undercutting margin of one particular type of the product concerned, as compared with the undercutting margins of similar types. The claim was properly examined and it was found that the discrepancy was due to a mistake in the reporting of a number of credit notes and discounts of one particular Community producer. The claim was therefore accepted and the undercutting margin of this particular type and, where applicable, of other types were corrected accordingly.