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*(Acts whose publication is obligatory)*

# COUNCIL REGULATION (EC) No 960/2003

## of 2 June 2003

## imposing a definitive countervailing duty on imports of recordable compact disks 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]) and in particular Article 15 thereof,

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

Whereas:

### A. **PROCEDURE**

#### 1. **Present proceeding**

(1) On 17 May 2002, the Commission announced, by notice published in the *Official Journal of the European Communities* ([2]), the initiation of an anti-subsidy proceeding with regard to imports into the Community of recordable compact disks ('CD-Rs') originating in India and commenced an investigation.

(2) The initiation of a parallel anti-dumping proceeding concerning imports of the same product originating in the same country was announced by a notice published in the *Official Journal of the European Communities* ([3]), on the same date.

(3) The proceeding was initiated as a result of a complaint lodged in April 2002 by the Committee of European CD-Rs Manufacturers ('CECMA'), acting on behalf of producers representing a major proportion of the total Community production of CD-Rs. The complaint contained evidence of subsidisation of the product concerned and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding.

(4) The Commission officially advised the complainant Community producers, as well as the other known Community producers, the exporting producer, importers and users association known to be concerned and the representatives of India 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.

(5) The Government of India, the sole exporting producer in India during the IP, as well as the complainant and other Community producers, importers, consumers association and suppliers, made their views known in writing. All parties who so requested within the above time limit and indicated that there were particular reasons why they should be heard were granted a hearing.

(6) Certain parties contended that the applicant Community producers did not fulfil the requirements of Article 10(8) of Council Regulation (EC) No 2026/97 ('basic Regulation') and that the initiation of the investigation was not warranted. In this respect, it should be noted that the conditions for initiation, and in particular the 25 % and 50 % thresholds of Article 10(8), were met and, therefore, the initiation of the investigation was warranted.

(7) It has been claimed that one of the complainant Community producers should not have been taken into account for the purpose of determining the representativity of the applicants since this company allegedly lost its right to produce the product concerned for reasons of intellectual property rights.

(8) It should be noted that the company in question was de facto producing and selling the product concerned on the Community market during the IP and that it cooperated in this investigation. The mere fact that this producer was involved in a legal proceeding does not imply automatically its exclusion from the definition of the Community industry. In addition, it was found that the company appealed the Court decision according to which it would have lost its licence. Given that no final decision has been taken it was in any event not possible to conclude that the producer had definitely lost its right to produce CD-Rs. The argument was therefore rejected.

([1]) OJ L 288, 21.10.1997, p. 1. Regulation as amended by Regulation (EC) No 1973/2002 (OJ L 305, 7.11.2002, p. 4).
([2]) OJ C 116, 17.5.2002, p. 4.
([3]) OJ C 116, 17.5.2002, p. 2.

(9) The Commission sought, by means of questionnaires sent to all known parties, and verified all the information it deemed necessary for the purpose of a determination of subsidy, injury and Community interest. In this regard, the Commission carried out verification visits at the premises of the Government of India in New Delhi ('GOI') and the following companies:

(a) *Exporting producer in India*

— Moser Baer India Ltd, New Delhi, India;

(b) *Producers in the Community*

— Computer Support Italcard S.R.L., Milan, Italy

— C.D.A Datenträger Albrechts GmbH, Albrechts, Germany

— CPO Magnetic Products B.V., Oosterhout, The Netherlands

— Fuji Magnetics G.m.b.H., Kleve, Germany

— Mitsui Advanced Media S.A., Ensisheim, France

— MPO Media S.A.S, Averton, France

— TDK Recording Media Europe S.A., Bascharage, Luxembourg

— Prime Disc Technologies GmbH, Wiesbaden, Germany

— IMAG Optical Storage Ltd, Limerick, Ireland

— Multimedia Info-Tech Ltd, Belfast, Northern Ireland;

(c) *Suppliers in the Community*

— Bayer AG, Leverkusen, Germany

— Steag Hamatech, Sternenfels, Germany.

(10) The investigation of subsidy and injury covered the period from 1 April 2001 to 31 March 2002 ('investigation period' or 'IP'). The examination of trends relevant for the assessment of injury covered the period from 1 January 1998 to the end of the investigation period ('period considered' or 'IIP').

### 2. **Provisional measures**

(11) Given the need to further examine certain aspects of subsidy, no provisional countervailing duties were imposed on CD-Rs originating in India.

### 3. **Subsequent procedure**

(12) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive countervailing duties. They were also granted a period within which they could make representations subsequent to this disclosure. The oral and written comments submitted by the parties were considered and, where appropriate, the findings have been modified accordingly.

### 4. **Measures in force on imports of CD-Rs originating in Taiwan**

(13) In June 2002, by Regulation (EC) No 1050/2002 [1] the Council imposed a definitive anti-dumping duty on imports of CD-Rs originating in Taiwan.

## B. **PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT**

### 1. **Product under consideration**

(14) The product under consideration is the same as in the anti-dumping proceeding against Taiwan i.e. CD-Rs currently classifiable under CN code ex 8523 90 00.

(15) A CD-R is a polycarbonate disk, which is coated with a layer of dye, a layer of reflective material such as gold or silver and a protective layer. Recording on such a disk can be done only once and therefore the disk is said to be of the type 'WORM' (Write Once Read Many). The disk is an optical storage medium for digital data or music. Recording is realised by exposing the dye-layer to an infrared laser beam in a CD-R recorder.

CD-Rs can be distinguished according to the type of data stored (data CD-R versus music CD-R), the storage capacity, the reflective metal layer (mainly silver) and whether or not the CD-R is printed upon.

The product is also sold in different qualities and comes on the market in different types of packaging of which the most frequently encountered are regular or slim jewel cases containing one CD-R, shrink-wrapped spindles of 10 to 100 CD-Rs, cake-boxes of 10 to 100 CD-Rs, envelopes containing one CD-R packed in cellophane, or in a carton or paper sleeve, etc.

Although the use and the quality of the various types of CD-Rs sold may differ, this does not entail any significant differences in the basic physical and technical characteristics of the different types. They are therefore considered as one product for the purpose of this investigation.

### 2. **Like product**

(16) The investigation showed that CD-Rs produced and sold on the domestic market of India have similar basic physical and technical characteristics and uses compared with that exported from this country to the Community. Similarly, CD-Rs manufactured by the applicant and other Community producers and sold on the Community market have similar basic physical and technical characteristics and uses as compared to those exported to the Community from the country in question.

[1] OJ L 160, 18.6.2002, p. 2.

(17) Consequently, CD-Rs sold on the domestic market of India and exported to the Community as well as CD-Rs produced and sold in the Community are considered as a like product within the meaning of Article 1(5) of the basic Regulation.

## C. **SUBSIDIES**

### 1. **Introduction**

(18) On the basis of the information contained in the complaint and the replies to the Commission's questionnaires, the following schemes, which allegedly involved the granting of export subsidies, were investigated:

(i) — Income Tax Exemption Scheme;

(ii) — Export Processing Zones/Export Oriented Units (EPZ/EOU) scheme.

(19) In addition to these two schemes, the complaint lists three other schemes: Duty Entitlement Passbook scheme (DEPB), Export Promotion Capital Goods scheme (EPCG) and Advance License scheme as possible source of subsidies for the Indian exporting producers of CD-Rs. However, the investigation has shown that there is only one exporting producer of CD-Rs in India operating an EOU. This exporting producer has fully cooperated with the investigation and has not availed itself of any schemes other than those listed in recital 16. Practically, it does not need to use other schemes because it obtains the same benefits under the EOU scheme. These schemes were, therefore, not considered further in the context of this investigation.

The Income Tax Exemption Scheme is based on the Income Tax Act of 1961 which is amended yearly by the Finance Act.

The current EPZ/EOU scheme is based on the Foreign Trade (Development and Regulation) Act 1992 (No 22 of 1992) which entered into force on 7 August 1992 ('Foreign Trade Act'). The Foreign Trade Act (Section 5) authorises the GOI to issue notifications regarding the export and import policy. These are summarised in the 'Export and Import Policy' documents which are issued by the Ministry of Commerce every five years and updated annually. One Export and Import Policy document is relevant to the investigation period of this case i.e. the five-year plan relating to the period 1.4.1997-31.3.2002. In addition, the GOI also sets out the procedures governing India's foreign trade policy in the 'Handbook of Procedures for Exports and Imports 1.4.1997-31.3.2002' (Volume 1).

Income Tax Exemption Scheme (ITES)

(a) *Legal basis*

(20) The Income Tax Act 1961 is the legal basis under which ITES operates. The Act, which is amended yearly by the annual Finance Act, sets out the basis for the collection of taxes as well as for the various exemptions/deductions which can be claimed. Among the exemptions which can be claimed by firms are those covered by sections 10A, 10B and 80HHC of the Act, which provide an income tax exemption on profits from export sales.

(b) *Eligibility*

(21) Exemption under Section 10A can be claimed by firms located in Export Processing Zones (EPZ). Exemption under Section 10B can be claimed by Export Oriented Units (EOU). Exemption under Section 80HHC can be claimed by any firm which exports goods.

(c) *Practical implementation*

(22) To benefit from the abovementioned tax deductions/exemptions, a company must make the deduction/exemption claim when submitting its tax return to the Tax Authorities at the end of the tax year. The tax year runs from 1 April to 31 March. The tax return must be submitted to the authorities by the following 30 November at the latest. The final assessment by the authorities can take up to three years following the submission of the tax return. A company may only claim one of the deductions available under the three sections mentioned above.

(d) *Conclusion on ITES*

(23) Item (e) of the Illustrative List of export subsidies (Annex I to the basic Regulation) refers to the 'full or partial exemption … specifically related to exports, of direct taxes' as constituting an export subsidy. Under the ITES, the GOI confers a financial contribution to the company by forgoing government revenue in the form of direct taxes which would be due if the income tax exemptions were not claimed by the company. This financial contribution would confer a benefit on the recipient by reducing its income tax liability.

(24) The subsidy is contingent in law upon export performance within the meaning of Article 3(4)(a) of the basic Regulation, since it exempts profits from export sales only, and is therefore deemed to be specific.

(e) *Calculation of the subsidy amount*

(25) The investigated company manufactures CD-Rs in an EOU. Thus it can claim income tax exemption under Section 10B on profits from the export sales of the EOU. The company, although it has incorporated a computation for the 10B exemption in its tax return, did not finally claim an income tax exemption under 10B, because its income tax return did not show any taxable profits for the company as a whole during the IP. It is noted that the company operates other units for different products outside the EOU. However, the computations of the income tax in the tax return made by the company and the attached specifications showed that the company increased its depreciation of fixed assets significantly by changing assets from a category (machines) with a lower depreciation rate in the previous year's tax calculation to a category (moulds) with a significantly higher depreciation rate in the IP's tax calculation.

(26) The Commission considered the reclassification of assets for taxation purposes to be legally questionable, in particular since the company reclassified the assets only for taxation purposes and not in its accounting records, as would appear to be required by law. Indeed, both the Indian Companies Act (applicable for accounting purposes) and the Indian Income Tax Act (applicable for taxation) provide the same depreciation rate for the category in which the assets were reclassified for taxation purposes. For this reason, the Commission requested explanations from the Indian tax authorities and the company. The Indian tax authorities failed to provide any reply which could clarify the situation. The company originally claimed that this change was necessary to correct a mistake in the classification of certain assets for taxation purposes in previous years. But, following the disclosure of the findings of the investigation, it claimed that this change of category of the assets was advised by tax consultants and that the purpose of this change was to reduce the taxable profits in order to avoid paying income tax.

(27) However, it appears that the cash benefit the company obtained through this reclassification of assets was already available to it through the provisions of Section 10B of the Indian Income Tax Act. Moreover, the benefit that the company could have obtained under Section 10B without the questionable reclassification of assets equals the income tax benefit from the same questionable reclassification of assets.

(28) The situation outlined above has shown that the company did not, at this stage, directly benefit from a countervailable subsidy under Section 10B during the IP. This is decided on the basis that for a subsidy to be countervailable it must have been actually received by the company or a decision must have been made to grant it.

(29) Export Processing Zones (EPZ)/Export Oriented Units (EOU)

(a) *Legal basis*

(30) The EPZ/EOU scheme, which was introduced in 1965, is an instrument under the 'Export Import Policy' involving export related incentives. During the IP the scheme was regulated by Customs Notifications No 53/97 and 133/94. Details of the schemes are contained in Chapter 9 and Appendix I of the 1997/2002 'Export and Import Policy' document, as well as the relevant Handbook of Procedures.

(b) *Eligibility*

(31) In principle, companies undertaking to export their entire production of goods and services may be set up under the EPZ/EOU scheme. Once the EPZ/EOU status is granted, those companies can avail themselves of certain benefits. There are four identified EPZs in India. EOUs can be located anywhere in India. They are bonded units under the surveillance of Customs officials in accordance with Section 65 of the Customs Act. The investigated exporting producer has been granted the status of EOU for the production unit manufacturing CD-Rs. Although companies operating within the EOU/EPZ scheme are normally expected to export their entire production, the GOI does allow these units to sell a part of their production on the domestic market under certain conditions.

(c) *Practical implementation*

(32) Companies requesting treatment as EOUs or located in an EPZ must apply to the competent authorities. Such application must include details for a period of the next five years, on, *inter alia*, planned production quantities, projected value of exports, import requirements and indigenous requirements. If the authorities accept the company's application, the terms and conditions attached to the acceptance will be communicated to the company. Companies in EPZs and EOUs can be involved in the production of any product. The agreement to be recognised as a company in an EPZ/EOU is valid for a five-year period. The agreement may be renewed for further periods.

EPZ/EOU units are entitled to the following benefits:

(i) exemption from import duties on all types of goods (including capital goods, raw materials and consumables) required for the manufacture, production, processing, or in connection therewith;

(ii) exemption from excise duty on goods procured from indigenous sources;

(iii) exemption from income tax normally due on profits realised on export sales in accordance with Section 10A or 10B of the Income Tax Act, up to 2010 (see ITES above);

(iv) reimbursement of central sales tax paid on goods procured locally;

(v) possibility of 100 % foreign equity ownership;

(vi) facility to sell a part of production in the domestic market on payment of applicable duties, as an exception to the general requirement to export the entire production.

(33) EOUs or companies located in an EPZ should maintain, in the specified format, a proper account of all imports concerned and of the consumption and utilisation of all imported materials and of all exports made. These should be submitted periodically, as may be required, to the competent authorities.

(34) They must also ensure minimum foreign exchange earnings as a percentage of exports and export performance as stipulated in the Export Import Policy. The entire operations of an EOU/EPZ must take place in customs bonded premises.

(d) *Conclusions on EPZ/EOU*

(35) In the present investigation, the EPZ/EOU scheme was used for the import of raw materials, capital goods and for the procurement of goods in the domestic market. It was found that concessions related to the exemption from customs duties on raw materials and capital goods, as well as the exemption from excise duty on goods procured from indigenous sources, were used by the exporting producer. Therefore, the Commission examined the countervailability of these concessions. In this regard, the exemption from customs duties on raw materials and capital goods involves the granting of subsidies as these concessions constitute financial contributions by the GOI, since government revenues otherwise due are forgone and a benefit is conferred on the recipient. As the granting of this subsidy is contingent according to Indian law upon export performance within the meaning of Article 3(4)(a) of the basic Regulation, it is therefore deemed to be specific and thus countervailable. In the case of the excise duty exemption, it was found that the duty paid on purchases by a non-EOU unit is credited as a drawback (CENVAT) and is utilised towards payment of excise duty on domestic sales. Thus, by exempting excise duty on purchases by an EOU unit, no additional government revenue is forgone and consequently no additional benefit accrues to the EOU.

(e) *Calculation of the subsidy amount*

Exemption from import duties on raw materials

(36) Although the company operating within the scheme is normally expected to export its entire production, the scheme allows the company to sell a part of its production on the domestic market under certain conditions. During the verification visit, the company was able to show that all imported raw materials, which were exempted from import duties, were either used in the production of exported goods, or, when selling goods incorporating such raw materials on the domestic market, the relevant conditions were met. In particular, it was established that the applicable duties paid by the company on domestic sales covered all duties forgone on imported raw materials used for the productions of goods sold on the domestic market.

(37) In view of the above, it was concluded that the exemption from import duties on raw materials granted to the company concerned fulfils the criteria of Annexes I and II of the basic Regulation, especially since no excess remissions of import duty have occurred in this case. Therefore, it is considered that the investigated company did not obtain any countervailable benefit when importing raw materials during the IP in this case.

Exemption from import duties on capital goods

(38) Unlike raw materials, capital goods are not physically incorporated into the finished goods. For calculation purposes, the amount of duty forgone is equivalent to a grant on each import of capital good. Consequently, the benefit to the investigated company has been calculated on the basis of the amount of unpaid customs duty on imported capital goods by spreading this amount across a depreciation period applicable for accounting purposes.