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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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], as amended by Regulation (EC) No 1973/2002 [2], and in particular Article 12 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

(1) In July 2002, the Commission announced, by notice published in the *Official Journal of the European Communities* [3], the initiation of an anti-subsidy proceeding with regard to imports into the Community of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea (Korea) and commenced an investigation.

(2) The proceeding was initiated as a result of a complaint lodged in June 2002 by Infineon Technologies AG (the complainant) representing a major proportion of the total Community production of DRAMs. 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. The Complaint was supported by Micron Europe Ltd, the only other Community producer of DRAMs.

(3) The Commission officially advised the Government of Korea (GOK), the complainant, the other Community producer, the exporting producers, the importers and users known to be concerned 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.

(4) The Government of Korea, the exporting producers, the complainant, as well as the other Community producer, importers and users, 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.

(5) The Commission sent questionnaires to all parties known to be concerned and received replies from the GOK and a number of Korean banks as well as from a number of companies in the Community.

(6) The Commission sought and verified all the information it deemed necessary for the purpose of a preliminary determination of subsidy, injury and Community interest. In this regard, the Commission carried out verification visits at the premises of the GOK in Seoul and the following companies:

(a) *Exporting producers in Korea*

— Hynix Semiconductor Inc., Seoul, Korea,

— Samsung Electronics Co. Ltd, Seoul, Korea;

(b) *Banks in Korea*

— Korea Development Bank (KDB), Seoul Korea,

— Korea Exchange Bank (KEB), Seoul, Korea,

— Chohung Bank, Seoul, Korea,

— Woori Bank (WB), Seoul, Korea;

(c) *Other institutions in Korea*

— Financial Supervisory Service (FSS), Seoul, Korea,

— Financial Supervisory Commission (FSC), Seoul, Korea,

— Korea Export Insurance Corporation (KEIC), Seoul, Korea,

— Korea Deposit Insurance Corporation (KDIC), Seoul, Korea;

(d) *Producers in the Community*

— Infineon Technologies AG, Munich, Germany,

— Micron Europe Ltd, East Kilbride, United Kingdom;

(e) *Importers in the Community related to Korean exporting producers*

— Hynix Semiconductor UK Limited, Weybridge, United Kingdom,

— Hynix Semiconductor Deutschland GmbH, Raunheim, Germany.

(7) The investigation of subsidisation covered the period from 1 January 2001 to 31 December 2001 (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).

[1] OJ L 288, 21.10.1997, p. 1.
[2] OJ L 305, 7.11.2002, p. 4.
[3] OJ C 177, 25.7.2002, p. 2.

B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

1. Product under consideration

(8) The product under investigation (product concerned) is 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. This 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.

(9) The product concerned is currently classifiable within CN codes 8542 21 11 (until 31.12.2001 within CN code 8542 13 11), 8542 21 13 (until 31.12.2001 within CN code 8542 13 13), 8542 21 15 (until 31.12.2001 within CN code 8542 13 15), 8542 21 17 (until 31.12.2001 within CN code 8542 13 17), 8542 21 01 (until 31.12.2001 within CN code 8542 13 01), 8542 21 05 (until 31.12.2001 within CN code 8542 13 05), 8548 90 10, ex 8473 30 10 and ex 8473 50 10.

2. Like product

(10) The investigation showed that DRAMs produced and sold on the domestic market of Korea have similar basic physical and technical characteristics and uses compared with that exported from this country to the Community. Similarly, DRAMs manufactured by the complainant and the other Community producer and sold on the Community market have similar basic physical and technical characteristics and uses when compared to those exported to the Community from the country in question.

(11) Consequently, DRAMs sold on the domestic market of Korea and exported to the Community as well as DRAMs produced and sold in the Community are considered as a like product within the meaning of Article 1(5) of Regulation (EC) No 2026/97 (basic Regulation).

C. SUBSIDIES

1. Introduction

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

1. tax benefits in the form of tax reserves, tax exemption and tax credit;
2. syndicated loan of KRW 800 billion ([1]);
3. Korea Export Insurance Corporation (KEIC) guarantee for export credits in the amount of USD 600 million;
4. Seoul Guarantee Insurance Corporation (SGICO) guarantee for bonds to be purchased by investment trusts;
5. bond purchase by creditor banks in the amount of KRW one trillion;
6. first roll-over of debt in May 2001;
7. Korea Development Bank (KDB) Debenture Programme;
8. the October 2001 rescue package, consisting of debt to equity swap and the second roll-over of debt;
9. loan of KRW 658 billion.

(13) As regards the tax reserves, the legal basis for the reserves for export losses, overseas market development, overseas investment losses and technology development is the Tax Exemption and Reduction Control Law (TERCL). This law was replaced by the Special Tax Treatment Control Law (STTCL) on 1 January 1999. STTCL is the legal basis for the tax exemption, tax credit, the reserve for research and human resources development and the reserve for losses on the disposal of treasury stock.

(14) The legal basis for the KDB Debenture Programme is Article 18(4) of the Korea Development Bank Act (KDBA). The programme was announced in December 2000 by GOK with the purpose of supporting the bond market. The programme lasted only for the year 2001 and the selection of participating companies was carried out in January 2001. Under the programme, KDB was refinancing maturing bonds of companies which were selected to participate in the programme.

(15) Measures 2, 5, 6 and 9 listed above are ad hoc measures taken by the creditor banks of Hynix Semiconductor Inc. (Hynix). In addition to the creditor banks, other creditor financial institutions were also involved in measure 8.

([1]) The exchange rate as of 31.12.2001: USD 1 = Korean won 1 326.

(16) According to Article 2 of the basic Regulation, a subsidy is deemed to exist when there is a *financial contribution by a government* conferring *a benefit* to the recipient. Furthermore, only specific subsidies can be countervailed in accordance with Article 3 of the basic Regulation. In many of the schemes examined, the issue of whether the financial contribution has been made by the government is disputed. Therefore, for reasons of economy, the Commission will generally examine the issue of benefit first; only if a benefit is found will the question be considered whether there is a financial contribution by the government and specificity.

2. **Tax reserves, tax exemption and tax credit**

(a) *Tax reserves under TERCL*

(17) TERCL was enacted in 1964 and expired on 31 December 1998. The following tax reserves investigated had TERCL as a legal basis: reserve for export losses (Article 16), overseas market development (Article 17), overseas investment losses (Article 23) and technology development (Article 8). These provisions provided two to three years grace periods for the reserves concerned before they were to be added back to the taxable income.

(18) The reserves enable the beneficiaries to defer taxes and thus confer a benefit to the extent that interest is not collected during the grace period.

(19) During the investigation, the status and historical movements of the reserves in the tax returns of the exporting producers were examined. It was confirmed that the reserves under TERCL were exhausted before the IP and that there were no outstanding balances left at the end of 2001. Consequently, no benefit provided by these reserves was found.

(b) *Tax reserves, tax exemption and tax credit under STTCL*

(20) STTCL entered into force on 1 January 1999 replacing TERCL. The following tax exemption, tax credit and tax reserves investigated have STTCL as a legal basis: tax exemption for income from technology transfer (Article 12), tax credit for research and human resources development expenses (Article 10), reserve for research and human resources development (Article 9) and reserve for loss on disposal of treasury stock (Article 104(3)). Article 9 provides for a three-year grace period for the reserve concerned, whereas Article 104(3) provides for up to five years grace period before the reserve in question is to be added back to the taxable income.

(21) The reserves constitute a tax deferral system as under the TERCL. The tax exemption and tax credit confer a benefit in the form of forgone or not collected government revenue that is otherwise due.

(22) As regards Hynix, it was confirmed during the investigation that there were no reserves with outstanding balances left at the end of 2001 and no tax exemption or credit. Consequently, no benefit provided under STTCL was found.

(23) As regards Samsung Electronics Co. Ltd (Samsung), it was confirmed during the investigation that the company received a tax exemption for income from technology transfer, a tax credit for research and human resources development expenses, and benefits under the reserves for research and human resources development and loss on disposal of treasury stock.

(c) *Calculation of the amount of subsidy for Samsung*

(24) As for the tax exemption and tax credit received during the IP, the amount of subsidy was the amount of tax forgone or not collected. As for the tax reserves, they function as tax deferral systems and such tax deferrals are to be regarded as interest-free loans. The amount of subsidy with regard to the tax reserves concerned was therefore calculated as the amount of interest that Samsung would have to pay on a comparable commercial loan during the IP, i.e. on a loan for an amount equivalent to the amount of tax deferred. The interest rate used in the calculation of the subsidy was the average commercial interest rate in Korea during the IP. The amounts of taxes deferred in tax years prior to that falling within the IP were included in the amount of such loans to the extent that they have not been fully repaid. The full subsidy amount was allocated over total turnover.

(25) However, since this benefit amounted to only 0,92 % ad valorem and no other subsidy is alleged for Samsung, the amount would in any event be *de minimis*. Consequently, it is not necessary to examine whether a countervailable subsidy is involved.

3. **Syndicated loan of KRW 800 billion**

(a) *Description of the measure*

(26) In the second half of 2000, the financial advisor of Hynix, Salomon Smith Barney Inc. (SSB), worked out a financing plan to resolve the problem of a mismatch between Hynix's cash flow and the extent of debt obligations that matured and had to be repaid in 2001. SSB's financing plan was supposed to address what at the time were called 'short-term liquidity problems' due to the fact that most of Hynix loans were scheduled due and payable during 2001. One of the measures proposed under the financing plan was a syndicated loan. Hynix appointed Citibank as lead manager of the syndicated loan and during December 2000 Citibank held meetings with domestic banks to present its plan.

(27) Ten banks participated in the loan, which amounted to KRW 800 billion. These banks were Korea Development Bank, Hanvit Bank, Chohung Bank, Korea Exchange Bank, Korea First Bank, Kookmin Bank, Citibank, Shinhan Bank, Hana Bank and KorAm Bank. The loan was released in two tranches. The interest rate of the tranches was set at that of unsecured three-year corporate bonds for BBB- rated companies plus an additional margin to reflect the risky nature of this financing bearing in mind the high debt ratio of Hynix. One of the conditions of the loan was the separation of Hynix from the Hyundai group. According to the loan agreement, the loan amount was to be used exclusively for redeeming the previously issued corporate bonds, refinancing the existing debt or securing liquidity.

(b) *Findings of the investigation*

(28) The first question to be examined is whether the loan provided to Hynix conferred to it a benefit compared with what would have been available to it in the market at the time of the granting of the loan.

(29) According to the information in the possession of the Commission, the banks made their assessment on whether to participate in the loan on the basis of the SSB report and their own evaluation of the market situation and the situation of Hynix. The assessments were done in December 2000, when the demand and prices for DRAMs were still good and the industry outlook was positive. It was acknowledged that Hynix had a great debt burden since its debts almost doubled following its merger with LG Semiconductor in 1999, but since the price trend was expected to remain stable and Hynix had essentially been able to serve its debts during the 'good year of 2000', the documents in the possession of the Commission indicates that it was not unreasonable for the banks to expect to recover the loan under those circumstances.

(30) It was verified that the credit rating of Hynix at the time of the granting of the loan was BBB- ([1]). Consequently, considering the terms of the loan granted as explained above under recital 27, the information in the possession of the Commission does not allow it to conclude that the interest rate of the loan and the maturity periods were not in conformity with market conditions.

(31) For these reasons, it is concluded that there is no benefit, and the granting of the syndicated loan of KRW 800 billion is not considered to constitute a subsidy in the meaning of Article 2 of the basic Regulation.

4. **KEIC guarantee for export credits in the amount of USD 600 million**

(a) *Description of the measure*

(32) Korea Export Insurance Corporation (KEIC) is the official export credit agency of Korea, established in 1992 under Article 37 of the Export Insurance Act. KEIC provides export insurance and guarantees to manage the risks associated with overseas transactions. KEIC is a specialised non-profit corporation that operates under the authority of the Ministry of Commerce, Industry and Energy. The National Assembly determines total limits for business underwritten and contributions to the Export Insurance Fund, which is the basis of the KEIC operations. According to the bylaws of the KEIC, it shall transfer all its profits to reserves which are used to cover its deficits. In case of shortage of reserves, the Government shall provide the funding to cover the losses.

(33) In January 2001, 14 Hynix creditor banks increased the ceiling of the export credit facility for D/As (documents against acceptance) provided to Hynix from USD 800 million to USD 1,4 billion, an increase of USD 600 million. KEIC granted the short-term export credit insurance for the extended D/A limit as regards the transactions between Hynix and its overseas subsidiaries. The exports are financed by D/As of 90 days maturity. Hynix collects the foreseen payment for the export transaction from the banks concerned, which hold the D/A document. The importer in the country of destination then makes the payment for the goods concerned directly to the banks against the D/A. Hynix pays a premium to KEIC for the insurance and interest to the banks concerned for the D/A amounts withdrawn until the importer makes the final payment. In the case under investigation, KEIC insurance covers the amounts due to the banks which cannot be collected due to bankruptcy of either the exporter or the importer.

(34) KEIC grants short-term export insurance upon application after assessing the details of the export transaction concerned, credits status of the exporter and importer and the sovereign risk of the importing country. If KEIC decides to provide the insurance, the premium is set accordingly pursuant to the premium tables of KEIC.

([1]) Standard & Poor's.

(b) *Findings of the investigation*

(35) The first question to be examined is whether the insurance in question was provided in more favourable terms than what was available in the market and whether it therefore provided a benefit to Hynix.

(36) During the investigation it was confirmed that the premiums paid to KEIC were in line with the general premium tables of KEIC and reflected the sovereign risks of the importing countries (mainly OECD countries with a low risk factor) and the credit rating of Hynix at the time of providing the insurance. It was also confirmed that Hynix had actually paid the premium with regard to each transaction for which the D/A facility was used. For these reasons it is confirmed that Hynix was treated in accordance with the general terms and conditions regarding KEIC short-term export credit insurance. The Commission has no indication that the general terms and conditions provided by KEIC for short-term export credit insurance would significantly deviate from those available in the market.

(37) As regards the level of the premium charged, the Commission has no indication allowing it to conclude that the premiums charged by KEIC for the short term export credit insurance would not be sufficient to cover the long-term operating costs and losses of such insurance programmes provided by KEIC.

(38) For these reasons, it is concluded that there is no benefit, and therefore the export insurance granted for KEIC for the additional D/A facility of USD 600 million provided by the banks is not considered to constitute a subsidy within the meaning of Article 2 of the basic Regulation.

5. **SGICO guarantee for bonds to be purchased by investment trusts**

(39) During the investigation it was confirmed that the planned bond issuance, contrary to what had been alleged in the complaint, actually never took place and consequently no guarantee was provided.

6. **Bond purchase by creditor banks in the amount of KRW one trillion and the first roll-over of debt in May 2001**

(a) *Description of the measures*

(40) In March 2001, 17 Hynix creditor banks established a 'Creditors' Financial Institution Council' (CFIC) by signing the 'Creditors' Financial Institution Council Agreement' between themselves. The financial advisor SSB prepared, in April 2001, a recapitalisation plan for Hynix, in which it recommended measures involving: (a) an injection of fresh capital into Hynix through the offering of KRW 1,3 trillion worth of global depository receipts (GDR), (b) an extension of the maturities of both short and long-term debts and a further purchase of convertible bonds (CB) worth KRW one trillion by the creditor banks. In May 2001, the creditor banks agreed to support this financial restructuring on the condition that the GDR offering in the international capital markets would be successful. If not, the roll-over of maturities would be cancelled and the CBs repurchased by Hynix. In addition, the funds received from the CB issuance had to be maintained in an escrow account and could only be used for the repayment of corporate bonds maturing in the first half of 2002.

(41) In mid-June, Hynix raised USD 1,25 billion by GDR issuance and on 20 June 2001 the creditor banks purchased CBs in proportion of their total exposure to Hynix as of 30 November 2000. The maturities of the short-term debts were prolonged until June 2002/2003 and those of long term debts until 2004/2005.

(b) *Findings of the investigation*

(42) The first question to be examined is whether the measures carried out by the banks in favour of Hynix were compatible with the behaviour of a market investor in the same situation.

(43) It is noted that the DRAM prices started to decrease from their very high levels throughout much of the year 2000 from September 2000 onwards. The prices stabilised in January 2001 but they resumed their decrease in February 2001. In March 2001 the prices started to rise again. The SSB report was made at the time when there was an increase in DRAM prices. The SSB report forecast that the DRAM market would recover in the third quarter of 2001 so that the equity infusion and the extension of maturities would be sufficient to help Hynix to overcome its liquidity crisis. The credit rating of Hynix at the time of the measures was set at BB+ by Korean rating agencies ([1]) and at B- by international ones ([2]). It is noted, however, that some analysts at the same time were more cautious about the price recovery and raised doubts about Hynix's ability to meet its debt repayment obligations ([3]).

([1]) Korea Information Service, Korea Management Consulting & Credit Rating Corporation.
([2]) Standard & Poor's.
([3]) Deutsche Bank, 'Hyundai Electronics Inc., Digging a Deeper Hole', 23 February 2001; Morgan Stanley Dean Witter, 'Hynix Semiconductor, Huge Losses from Poor Balance Sheet Again', 20 April 2001.