

**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<sup>(1)</sup>, as amended by Regulation (EC) No 1973/2002<sup>(2)</sup>, 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*<sup>(3)</sup>, 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).

<sup>(1)</sup> OJ L 288, 21.10.1997, p. 1.

<sup>(2)</sup> OJ L 305, 7.11.2002, p. 4.

<sup>(3)</sup> 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 (!);
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.

(!) 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-<sup>(1)</sup>. 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.

<sup>(1)</sup> 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 <sup>(1)</sup> and at B- by international ones <sup>(2)</sup>. 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 <sup>(3)</sup>.

<sup>(1)</sup> Korea Information Service, Korea Management Consulting & Credit Rating Corporation.

<sup>(2)</sup> Standard & Poor's.

<sup>(3)</sup> 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.

- (44) The information verified during the investigation confirms that the banks made their participation in the measures conditional upon the success of the GDR issuance. Once the GDR issuance was carried out and the USD 1,25 billion secured on 15 June 2001, the banks executed the rest of the measures as proposed by SSB in its recapitalisation plan. Under these circumstances, the behaviour of the banks is considered to be equal to that of the other market investors, who invested in Hynix GDRs at the same time. However, there is some evidence in the records that indicate that the investors' interest to invest in Hynix GDRs at the time might have been influenced by the belief that the GOK would ultimately make sure that Hynix does not default on bonds and loans <sup>(1)</sup>. The Commission however has no indication that there was an actual GOK guarantee granted for the bonds in question.
- (45) In view of the above, the information in the possession of the Commission is not sufficient to allow it to conclude that the measures of May 2001 conferred a benefit to Hynix. Therefore, the bond purchase by creditor banks in the amount of KRW one trillion and the first roll-over of debt in May 2001 are not considered to constitute a subsidy within the meaning of Article 2 of the basic Regulation.

## 7. KDB Debenture Programme

### (a) Legal basis and description of the facility

- (46) The KDB Debenture Programme is based on Article 18(4) of the KDBA, which provides that KDB may engage in the subscription, acceptance and investment or guarantee of debentures issued to finance certain major projects, or bonds issued by public organisations.
- (47) According to the GOK, the programme was designed to address the instability in the financial system that arose from a large amount of bonds maturing simultaneously and issued mainly by a few companies. The programme was announced in December 2000 and it only lasted for year 2001.
- (48) Under the Debenture Programme, the KDB helps roll-over maturing debt obligations and repackages the debt for investors. A participating company repays on its own 20 % of its corporate bonds falling due and KDB assumes the remaining 80 %. KDB then sells 20 % of the 80 % to the creditor banks on a pro-rata basis in proportion to their loans to the participating company. KDB then repackages and transfers 70 % of the bonds it holds

to the primary 'collateralised bond obligations' (CBOs) and/or 'collateralised loan obligations' (CLOs) guaranteed by the Korea Credit Guarantee Fund (KCGF) and continues to hold the remaining 10 %. The CBOs and CLOs are asset-backed securities that are sold to investment trusts. The participating company has to repurchase at least 3 % of any CBOs and 5 % of any CLOs issued under the programme.

### (b) Eligibility

- (49) The nomination of a company to participate in the programme is made by that company's principal creditor bank. The lead creditor nominates the company and then submits for approval by the Creditor Financial Institutions Council (CFIC) a credit risk evaluation, based on the prospects of the company's future operations, the financing plan, the redemption capability plan and the restructuring plan. The inclusion of a company into the programme is decided by the CFIC. CFIC consists of the representatives of KCGF, KDB and 17 other creditor banks. If banks holding 75 % of the loans of the company concerned approve the nomination, CFIC considers that such decision is made in unanimity.
- (50) In order to be admitted to participate in the programme, the company needs to fulfil the following eligibility criteria: 1. the company must be able to redeem at least 20 % of its maturing bonds on its own; 2. the company should be likely to be able to normalise its business operations by a credible restructuring plan, but its credit rating is below A and it has difficulties in refinancing its bonds. However, the credit rating of the company must remain higher than BB <sup>(2)</sup>; 3. any company under workout programs, court receivership or insolvency proceedings is excluded from participation.
- (51) The participating company also needs to enter into a special agreement with its creditor banks entitling the banks to demand the disposal of equity interests held by its majority shareholders and the replacement of management in case of insolvency.

### (c) Practical implementation

- (52) Seven companies applied for the programme and six of them were admitted. Four of them, including Hynix, belonged to the Hyundai group. Hynix was admitted on 4 January 2001. At the time Hynix credit rating was BBB- <sup>(3)</sup>.

<sup>(1)</sup> Hynix GDS Offering Memorandum, June 2001; 'Korea's Hynix Says Hikes GDR Issue to \$ 1.25 bln', Reuters English News Service, 13 June 2001.

<sup>(2)</sup> Standard & Poor's.

<sup>(3)</sup> Standard & Poor's.

- (53) The total amount originally foreseen for Hynix bonds was KRW 2,9 trillion out of the total foreseen programme budget of KRW 6,2 trillion. However, the total amount used under the programme was KRW 2,9 trillion, of which KRW 1,2 trillion was used for purchasing Hynix bonds. Although Hynix stopped participating in the programme in August 2001, the amount used for purchasing Hynix bonds amounted to 41 % of the total expenditure. It is noted that the amount used by the other three Hyundai companies amounted to 38 % of the total expenditure.
- (d) *Findings of the investigation*
- (i) Existence of the subsidy
- (54) In case of the KDB Debenture Programme, the funds were provided by KDB. In the particular case of examining this programme, the first question would be to examine whether the financing provided by KDB constitutes a 'financial contribution by a government'.
- (55) KDB was founded in 1954 under the Korea Development Bank Act as a special purpose bank to supply long-term credit for industries to stabilise the economy and promote industrial rehabilitation. The major businesses of KDB consist of: 1. loans with longer than one-year maturity; 2. investment in the form of underwriting of bonds and stocks; and 3. payment guarantees to help finance industrial projects.
- (56) KDB is owned 100 % by the GOK. According to Article 18 of the KDB Act, KDB must undertake business 'necessary to realise the objectives and goals stipulated in Article 1.' Article 1 of the KDB Act provides that, 'The purpose of the Korea Development Bank is to supply and manage key industrial capital to facilitate the development of businesses as well as the national economy'.
- (57) According to Article 44 of the KDB Act, annual net losses are compensated by the GOK, if the reserve funds are insufficient. KDB also regularly receives capital injections from the GOK. The capital injected by GOK 1998 to 1999 was KRW 5,7 trillion. In 2001, the GOK injected 3 trillion KRW into KDB.
- (58) Furthermore, KDB itself recognises that it has a special relationship with the GOK and that it has a special public policy role in the Korean economy. The KDB website states that, 'In addition to its public policy role as the Government's flagship financial institution, KDB also acts as the Government's funding vehicle for external borrowing. The Government has stated its intention to use KDB as the primary vehicle for raising funds in the international markets' <sup>(1)</sup>.
- (59) Considering the above, it can be concluded that not only is KDB 100 % owned by the GOK, but it is also entrusted with a specific public policy role which obliges it to carry out policies normally followed by the Government. The GOK provides its funding, can inject capital to it and covers its losses. On this basis KDB can be considered as a 'public body' carrying out specific public policy tasks as defined in the KDB Act. For these reasons, financing provided by KDB, i.e. the purchase of corporate bonds, is considered a financial contribution by a Government, involving a direct transfer of funds, within the meaning of Article 2(1)(a)(i) of the basic Regulation.
- (60) The next question is to examine, whether the funding provided by KDB conferred a benefit upon Hynix.
- (61) Both the conditions of the programme and the information provided in the replies to the Commission's questionnaires indicate that the programme was created exclusively for certain companies, among which Hynix, which were not able to refinance their bonds via financial markets. The GOK itself states in its reply to Commission questionnaires that at the time of the measures there was a 'fight of quality' in the Korean financial markets which meant that only companies with very strong credit ratings could issue bonds and companies with moderate grade rating were not able to do so. Hynix at the time had already a weak rating and accordingly would have been unable to make such a financial operation through the markets. Therefore, the financing provided via the KDB Debenture Programme conferred a benefit upon Hynix which was not available to it under market conditions at the time of the financing. For these reasons the financing provided by KDB Debenture Programme is considered a subsidy in the meaning of Article 2 of the basic Regulation.
- (ii) Countervailability
- (62) According to Article 3 of the basic Regulation, only specific subsidies are countervailable. The first question to be addressed is whether the subsidy is specific in law under Article 3(2)(a). On the face of it, there was no restriction on which companies could apply for the programme. There is, however, some circumstantial evidence that the scheme was aimed at particular enterprises. The information provided in the replies to the Commission's questionnaires indicates that the programme was targeted to specific companies which had a large amount of maturing bonds which they could not refinance through the financial market. This implies that the purpose of the programme was to provide

<sup>(1)</sup> KDB website <http://www.kdb.co.kr/>.

financial assistance to the companies concerned, above all Hynix, which was foreseen from the onset to be the major beneficiary of the programme. Nevertheless, there is insufficient evidence to support the argument that the legislation creating the programme explicitly limited its access to certain enterprises.

- (63) Article 3(2)(c) of the basic Regulation stipulates that if notwithstanding any appearance of non-specificity there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors can be the use of the subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises or the granting of disproportionately large amounts of subsidy to certain enterprises.
- (64) It is noted that the Debenture Programme was used by only six enterprises, despite involving KRW 2,9 trillion of expenditure. In addition, it was predominantly used by enterprises who at the time of the granting of the measures were members of the Hyundai group. These enterprises used 79 % of the total expenditure under the programme. However, and more importantly, Hynix received a disproportionately large amount of the total expenditure of the programme, namely 41 %. Under the original set up of the debenture programme, Hynix was allocated to receive an even greater amount, namely 47 % of the total expenditure. For these reasons, the financing received by Hynix under the KDB Debenture Programme is considered a specific subsidy in the meaning of the Article 3(2)(c) of the basic Regulation and therefore countervailable.

(iii) Calculation of the subsidy amount

- (65) The amount of Hynix bonds financed by KDB was KRW 1,2 trillion. Hynix paid back KRW 280,4 billion according to the conditions of the programme<sup>(1)</sup>. The amount to be taken as the basis of the calculation of the subsidy is the amount received by Hynix under the programme during the IP, i.e. KRW 919,6 billion.
- (66) The Commission considered whether it would be appropriate to compare this amount to a 'market benchmark' (i.e. the amount of finance that would have been provided by commercial operators in similar circumstances), and to use the difference between the two figures as the amount of subsidy. However, the evidence on the record, including the statements of the GOK itself, shows that the credit rating of Hynix at the time of the measures render impossible for it to issue bonds due to the tightened standards existing on the financial markets and, therefore, no commercial entity would have undertaken this sort of operation. Also, it was evident at the time of the assumption of Hynix debt by

KDB, that KDB was highly unlikely ever to recuperate its funds. Therefore, KDB's assumption of Hynix's bonds is considered to be pure debt forgiveness, which is the equivalent of a grant. This measure is therefore considered as subsidy in accordance with Section E (a) of the Guidelines for the Calculation of the Amount of Subsidy in Countervailing Duty Investigation<sup>(2)</sup> (the Guidelines).

- (67) This subsidy confers a large, non-recurring benefit. According to Article 7(4) of the basic Regulation, such a subsidy should in principle be attributed to the IP, unless special circumstances justify attribution over a different period. In the present case, however, since the subsidy is of such nature that it is benefiting the company over a period of time longer than only the IP, it is considered that the allocation method used in Article 7(3), according to which the amount of subsidy is spread over time, is considered appropriate under these circumstances. Indeed, the DRAM industry is an industry in which the main costs are occasioned by the requirement to have state of art machinery and equipment, which constitute its main assets needed for operations. Therefore, the most appropriate allocation period in this case is the useful life of the assets (machinery and equipment), which is considered to be five years in accordance with the financial accounts of the company and the usual practice in the industry concerned. The amount of subsidy so allocated was expressed as a percentage of the total sales of Hynix in 2001. With interest, using the average commercial interest rate applicable in Korea for the investigation period, the subsidy amounts to 4,9 %.

**8. The October 2001 rescue package, consisting of debt to equity swap, the second roll-over of debt and the provision of a new loan of KRW 658 billion**

(a) *Description of the measures*

- (68) The second Hynix CFIC was set up on 4 October 2001 in accordance with the provisions of the Corporate Restructuring Promotion Act (CRPA). CRPA was enacted in August 2001 and its purpose was to facilitate corporate restructuring, which before was based on agreements between creditor banks and the companies concerned. The CFIC consisted of 110 financial institutions including 17 banks and 15 investment trust companies. The decisions of the CFIC were taken by 75 % majority. The votes were allocated in proportion of each institution's exposure of the total loans to Hynix. Any financial institution exercising its dissenter's rights by disagreeing with a CFIC resolution would be excluded from the CFIC permanently.

<sup>(1)</sup> This amount consists of the 3 % and 5 % payments of the CBOs/CLOs issued and an advance repayment of the total amount of these bonds.

<sup>(2)</sup> OJ C 394, 17.12.1998, p. 6.



- (69) In its second meeting held on 31 October 2001, CFIC decided on the so-called 'second restructuring package' for Hynix. The following measures were proposed:
- provision of new loan of KRW 1 trillion to Hynix with an interest rate of 7 %,
  - debt to equity swap by provision of bonds convertible into shares,
  - extending the maturities of existing loans until 31 December 2004, converting the maturing corporate bonds into corporate bonds with a three year maturity and an interest rate of 6,5 % and adjusting the interest rate of the remaining loans in Korean currency to 6 %.
- (70) The financial institutions were given three options by CFIC in the 31 October meeting. The first option was to agree with the proposals by extending new credit and participating in a debt-to-equity swap. Secondly, the banks which did not want to participate in the new loan were, under the conditions of the second CFIC (see recital 68), obliged to swap 28,5 % of their loans into equity and waive the rest of the Hynix debt. Thirdly, the CFIC also decided that those banks which objected to the measures and used their dissenter's rights would have their loans purchased back at the liquidation value as established by Arthur Andersen, who was commissioned to conduct a study on the financial situation of Hynix at the time.
- (71) Nevertheless, only six banks agreed to extend new credit, which amounted to KRW 658 billion instead of the planned KRW 1 trillion. These banks swapped a considerable amount of their loans into equity. Eight banks refused to extend new loans, so they swapped approximately one-third of their loans into equity and wrote off the rest of them as a loss. The remaining banks objected the restructuring and were to receive the liquidation value of their loans, and had to write the remaining debt off as a loss. The loans remaining with the banks of the first category were subject to maturity extensions and interest rate cuts as explained under recital 69.
- (b) *Findings of the investigation*
- (72) 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 or a market creditor in the same situation. If it were established that the banks' behaviour did not correspond to that of a private investor or creditor, thereby conferring a benefit to Hynix, the next step would be to examine whether such behaviour and the resulting benefit can be attributed to the Government involvement in the banks concerned.
- (73) Almost immediately after the successful GDR issuance of June 2001 it became clear that the DRAM market would not recover in the foreseeable future. On the contrary, the situation was set to become much worse. Indeed, the DRAM prices continued to fall. From June 2001 to August 2001 128 Mbit DRAM prices fell on average by 68 %. The prices continued to fall by a further 52 % by November 2001. The prices for 64 Mbit fell by 62 % from August 2001 to September 2001. Analysts agreed that the DRAM market was at its lowest point ever <sup>(1)</sup>.
- (74) Hynix stock price collapsed almost immediately after the 15 June GDR issuance. Only five days after, on 20 June 2001, SSB announced that it would not exercise its over-allotment option to buy more GDRs since they were traded for less than the issue price. On 3 August 2001, SSB issued a report on Hynix in which it admitted that its earlier more optimistic projections on the situation were wrong. SSB's new Hynix projections cut its revenue forecast in half and reduced both gross and operating profit to a substantial loss. By 6 September 2001, the price of GDRs had fallen by 72 %, resulting in great losses for the purchasers.
- (75) This development was recognised also by the Hynix creditor banks. The information in the possession of the Commission shows that the banks downgraded the credit rating of Hynix and also their industry ratings for the semiconductor industry in general during summer 2001. Standard and Poor's classified Hynix's outlook 'negative' in August 2001 and downgraded it to CC on 9 September 2001 and to SD (selective default) in October 2001. It is noted that Hynix, due to its negative financial outlook, had to stop participating in the KDB Debenture Programme in August 2001. The information in the possession of the Commission indicates that this was due to the fact that the banks refused to buy Hynix bonds and KCGF refused to guarantee all the foreseen CBOs/CLOs.
- (76) In October 2001, Hynix financial situation had deteriorated again. It again faced liquidity problems and it did not have sufficient cash-flow to meet its obligations, its debts being six times greater than its equity. It was virtually bankrupt, which was also acknowledged by its creditor banks. Raising capital in the financial markets was no longer possible.

<sup>(1)</sup> SSB, September 2001, CFO Asia, December 2001, In-Stat MDR, July 2002.

(77) As regards the October 2001 measures carried out by the creditor financial institutions, it is noted that the banks which opted for the first option to extend new loans to Hynix, i.e. to carry out an extensive debt to equity swap and to extend the maturity and cut the interest rates of the existing loans, were the following: KEB, Woori Bank, Chohung Bank, KDB <sup>(1)</sup>, NACF <sup>(2)</sup> and Citibank. The banks who waived most of their debts but had to swap part of it into equity were Shinhan Bank, Kookmin Bank, Housing and Commercial Bank, KorAm Bank, Hana Bank, Seoul Bank, Industrial Bank of Korea and Pusan Bank. Korea First Bank used its dissenter's rights <sup>(3)</sup>. According to information in the possession of the Commission, the banks participating in the second and third option, wrote off their Hynix debts as a loss and sold their Hynix bonds resulting from the debt to equity swap, so that by 2002 they had eliminated all their Hynix loans. The behaviour of the six banks of the first category, on the other hand, was significantly different. These banks actually extended even more loans to Hynix, extended the maturities of the existing loans and held a great amount of Hynix shares <sup>(4)</sup>. Also, as regards the interest rate of the new loans granted to Hynix, it is noted that the interest rate was set at 7 %, which was the rate for financially sound companies, but was not available to risk capital operation, let alone a company in the situation Hynix was in at the time <sup>(5)</sup>.

(78) Accordingly, considering the above described circumstances, it appears evident that no market investor would have invested in Hynix in October 2001. This was also reflected by the Creditor institutions' choice of the measures to be taken: there was no proposal to issue GDRs or other similar instruments to the markets to raise cash, which would have been the most logical way to proceed in a normal situation. In view of this, it appears that the banks which objected the measures or which wrote off their debts as a loss at this stage only receiving the liquidation value, acted in a way any normal market investor would have done in this situation. They eliminated their exposure to Hynix for good and wrote off their losses resulting from this decision. On the contrary, the rationale of the banks who continued financing Hynix in that situation cannot be reconciled with any commercial considerations, and indeed it appears that each of them did not expect any

return for their further financing. Therefore, continuing financing Hynix in October 2001 conferred a benefit upon Hynix that was not available to it under market conditions. The next question is therefore to examine, whether this apparently non-commercial behaviour is due to the involvement of GOK in the banks concerned.

(79) It is noted that of the nine banks which stopped financing Hynix in October 2001, seven were private banks. Of the six banks involved in the continuous financing of Hynix on the other hand, the four largest creditors are either totally or by a large majority owned by the GOK. One of them is a special bank with a public policy role and three others are under GOK control due to the fact that they are themselves under restructuring, have agreements with the GOK regulating their business operations and are subject to capital injections by GOK. Three of the four major creditor banks of Hynix are briefly described below. A description of KDB, and the reasoning for it being considered as a 'public body', is provided above in recitals 55 to 59.

#### Woori Bank (WB)

(80) Hanvit Bank (currently Woori Bank) is under restructuring following the Korean financial crisis. From October 1998 onwards, Korea Deposit Insurance Corporation <sup>(6)</sup> (KDIC) was a major shareholder of Hanvit Bank and at the end of 2000, KDIC became the 100 % shareholder. In March 2001 KDIC set up Woori Financial Holdings Company (WFH) as its fully owned subsidiary and transferred the shares of Hanvit Bank into WFH. Hanvit bank was renamed Woori Bank which remains 100 % owned by GOK via KDIC.

(81) KDIC injected KRW 3,2 trillion into Woori Bank (Hanvit at that time) in 1998. In December 2000, Woori Bank and KDIC entered into an agreement for the implementation of the management improvement plan for the bank (Memorandum of Understanding or MOU). Woori Bank was assessed not to be viable by the Financial Supervisory Commission, and its share capital was reduced to zero. Pursuant to the MOU, KDIC injected KRW 2,724 trillion in December 2000 as an investment in the common stock, representing the entire share

<sup>(1)</sup> KDB did not participate in the new loan of 658 billion, but otherwise went on with option 1.

<sup>(2)</sup> National Agricultural Cooperative Federation.

<sup>(3)</sup> Kwangju Bank and Kyongnam Bank objected the refinancing proposal already in the 4 October 2001 meeting.

<sup>(4)</sup> It is noted that following the conversion of the CBs into Hynix shares in June 2002, the banks own 66,84 % of Hynix shares.

<sup>(5)</sup> It is noted that in January 2001 when Hynix credit rating was BBB- the loan granted to it by the same banks had a considerably higher interest rate than 7 %. As by October 2001 the rating had deteriorated to 'selective default' (see recital 75), the interest rate would have been much higher had the loan been granted on commercial terms.

<sup>(6)</sup> The main task of KDIC is to pay off insured depositors in case of an insolvency of a financial institution. It is a special legal entity established in 1996 in order to operate the deposit insurance system in accordance with the Depositor Protection Act. KDIC was also the main vehicle used by GOK in recapitalising financial institutions during and after the financial crisis. As a result of KDIC equity participation and capital injections to financial institutions, it became their shareholder. KDIC represents GOK in the exercise of shareholder rights in these institutions. KDIC is considered a public body, and GOK in its replies to the Commission questionnaire equals KDIC shareholding in the banks concerned to that of the GOK.

capital. A further capital injection of KRW 1,878 trillion was provided in September 2001. According to the MOU, in case of failure of Woori Bank to implement it, KDIC may order Woori Bank to increase or decrease its capital, pursue a merger, assign contracts such as loans and deposits or close or sell part of its business operations.

- (82) In July 2001, Woori Bank and WFH entered into an MOU. Woori Bank shall, *inter alia*, consult WFH on material business decisions before execution and prepare and implement a detailed business plan in accordance with the business strategy of WFH. If Woori Bank fails to implement the business plan, WFH may order Woori Bank to limit sales of the specific financial items and/or investments, or to close or merge its operations.

#### Chohung Bank

- (83) Chohung Bank was the first Korean financial institution set up in 1897. It started international banking business in 1963. In 1999, KDIC injected KRW 2,7 trillion into Chohung Bank and became its largest shareholder with 80 % of shares. In 2001, the two largest shareholders were KDIC with 80 % and Hyundai Group with 3,4 %. KDIC and Chohung Bank entered into MOU in November 1999 which was amended in May 2000 and which gave KDIC a decisive influence over Chohung Bank's business decisions <sup>(1)</sup>.

#### Korea Exchange Bank (KEB)

- (84) KEB was established as a government-owned bank in 1967, when it was separated from the Bank of Korea to specialise in the foreign exchange and trade business. In 1977 KEB moved into commercial banking. KEB was hit by financial difficulties in the wake of the Korean financial crisis. Commerzbank AG of Germany acquired 30 % of KEB shares in 1998 and KEXIM <sup>(2)</sup> injected KRW 336 billion into KEB in 1999 and KRW 400 billion in 2000. In 2000, the bank implemented a two-to-one capital reduction on all shares for the purpose of disposition of accumulated deficit. The largest shareholders of KEB in 2001 are GOK by 43,17 % (32,50 % KEXIM and 10,67 % Bank of Korea) and Commerzbank AG by 32,55 %.

<sup>(1)</sup> It is noted that a new MOU between Chohung Bank and KDIC was entered into in January 2002.

<sup>(2)</sup> The Export-Import Bank of Korea. KEXIM was established in 1976 pursuant to the Export-Import Bank of Korea Act. According to the Act KEXIM aims to promote growth and development of the Korean economy and to facilitate trade with foreign countries. KEXIM is owned by GOK (54,8 %), Bank of Korea (39 %) and Korea Development Bank (6,2 %). In its replies to the Commission's questionnaires, GOK equals KEXIM shareholding to that of the GOK. For these reasons, KEXIM is considered a public body.

- (85) Due to KEB continued financial difficulties the Financial Supervisory Service had imposed a management improvement recommendation on KEB in 1998. In 2000, KEB submitted its management improvement plan which received in 2001 'conditional approval', subject to certain conditions.

#### National Agricultural Cooperative Federation (NACF)

- (86) NACF was formed on 1 July 2000 when the former National Agricultural Cooperative Federation, National Livestock Cooperative Federation and National Ginseng Cooperative Federation were merged further to the 1999 Agricultural Cooperative Law. According to the NACF itself, its objective is to improve the economic, social and cultural status and quality of life of farmers. In pursuing that objective, NACF performs diversified business activities including credit and banking service, which accounted for 31,7 % of its revenues and 75,7 % of its operating income in 2001. The number of member cooperatives was 1 383 in 2001. According to the information provided to the Commission, none of the members holds a stake of 1 % or more of NACF. It is noted that KDIC took KRW 96,2 billion equity participation in NACF in 2001. It is also noted that the GOK intervened a number of times either directly or indirectly in order to assist NACF financially.

#### Citibank Seoul

- (87) Citibank Seoul is 100 % owned by Citigroup, a United States financial group. Citibank was one of the first foreign banks authorised to operate in Korea in 1967, and characterises itself as a 'committed partner of both Korean government and industry' <sup>(3)</sup>. Citibank and its subsidiary SSB were the financial advisors of Hynix in 2000 to 2001.

#### (i) Government involvement in banks

- (88) As regards WB, the records show that the bank was very well aware of the rather gloomy financial situation of Hynix. However, the documents received during the investigation show that WB approved the measures on the basis of public interest considerations, referring to the impact on the national economy of Hynix going bankrupt. It is noted that such considerations are not commercial and not used by commercial banks when assessing whether to grant further financing to a company in serious financial difficulties. On the contrary, such public interest considerations are typically

<sup>(3)</sup> 'Citibank in Korea', [www.Citibank.com/korea](http://www.Citibank.com/korea).

used by governments when pursuing measures of supporting national economy, employment or other public policy goals. Such considerations in the WB loan decisions can therefore only be understood as reflecting the fact that GOK as the 100 % shareholder of the company is using its influence in directing the business decisions of the bank, as any major shareholder would.

- (89) As regards Chohung Bank, similar evidence is in the records. The internal rating of Hynix by the bank does not support the decision to grant further loans, and Hynix bonds, according to the bank, were being rated 'inappropriate for investment' by credit rating agencies. Chohung Bank also did immediately raise its loss reserves after participating in the measures to cover 80 % of the Hynix debt and it accounted the whole debt-to equity conversion as a loss. Nevertheless, according to the documents received during the investigation, Chohung Bank approved the measures by referring to its need to comply with its MOU with the GOK. This illustrates that the banks under restructuring are restricted in their business decisions to comply with the conditions set for them by GOK. In such situation, the fact that GOK was also the majority shareholder of Chohung Bank with 80 % of the shares, reinforces the conclusion that GOK used its influence in directing the business decisions of the bank, as any major shareholder would.
- (90) As regards KEB, the situation is similar to the WB and Chohung Bank. The bank was very well aware of the risks involved, having given Hynix a rating at the time of the October financing measures that did not support granting further credit. Yet it nevertheless continued to provide financing to Hynix. It is important to note that the bank was under restructuring itself at the time of the granting of the October financing measures, and was therefore supposed to be extremely prudent in its credit decisions and in particular to avoid 'bad debts'. Regardless of this, it nevertheless provided the financing to Hynix. The resulting dangerous commercial situation was acknowledged by the 2001 Annual Report by independent accountants who stated that the actual losses resulting from outstanding loans to Hynix and the Hyundai group of companies may exceed the allowances made by the bank for such losses and that the ultimate effects of these significant uncertainties on the financial position of the bank cannot be determined.
- (91) It is noted that KEB used to be a specialised government bank and GOK has been a major shareholder of the bank until 1998 when Commerzbank acquired its shares in the bank. The bank therefore has a past and culture of GOK influence in its business decisions that cannot be ignored. It is considered unlikely that this has significantly altered since the acquisition of shares by Commerzbank in 1998, in particular considering that the GOK still remains the largest shareholder of KEB with 43 % of the shares. Furthermore, despite being under restructuring, the KEB continued to make a large amount of funds available to Hynix on manifestly non-commercial and very risky terms. As explained in recital 77, the October 2001 loans were made at a rate available in the market for financially sound companies, but not for risk capital, let alone a company in a situation such as Hynix. Indeed, considering the risk involved in the loans to Hynix, which was rated selective default at the time, no market loans would have been available in any event. Given the extent of government involvement, past and present, in KEB, the totality of the facts on the record of the investigation indicates that GOK must have used its influence as the largest shareholder of KEB as regards the decision to participate in the October 2001 measures, from which there can be no commercial benefit for KEB. In support of this conclusion, we note that there is no other rational explanation than that of GOK interference for the decision of KEB to continue to finance Hynix.
- (92) The two remaining financial institutions involved in the continuous financing of Hynix are NACF and Citibank. It is noted that these banks were not among the major creditor banks of Hynix and their shares of the total Hynix loans in October 2001 were between 1 % and 2 %<sup>(1)</sup>. Citibank refused to cooperate with the Commission investigation, so the Commission must base its assessment on the involvement of Citibank on the facts available in accordance with Article 28 of the basic Regulation.
- (93) Given that Citibank did not cooperate with the Commission investigation, the Commission was not able to verify its motives in participating in the October 2001 measures. On the basis of the information available, the Commission notes that Citibank Seoul has had a very close and special relationship with the GOK since 1967.
- (94) In this respect, it is noted that Citibank has had an unusually close and symbiotic relationship with GOK since 1967, when it was authorised to operate in Korea. This close relationship between GOK and Citibank is witnessed in the role played by Citibank in assisting GOK to extricate itself from the Korean financial crisis of 1997. Citibank led and successfully completed Korea's bank debt restructuring for a total of USD 21,75 billion in 1998. Moreover, Citibank helped GOK and government related institutions to access capital markets during the Korean financial crisis by successfully sponsoring a USD 4 billion global bond offering. On the basis of

<sup>(1)</sup> NACF around 1,9 % and Citibank around 1,3 %.



these facts it appears that Citibank indeed have had very close relationship with GOK. Considering this, and the fact that Citibank's own rating of Hynix at the time of the October financing measures does not support a decision to grant further financing, it appears that the decision of Citibank to participate in the measures concerned may not have been coherent with commercial considerations.

- (95) In the absence of cooperation by Citibank, and thus failing any other explanation, it cannot be excluded on the facts available that Citibank Seoul had participated in the measures on the basis of non-commercial considerations and that in doing so it has been directed to participate in them by the GOK.
- (96) As regards NACF, it is noted that KDIC injected in 2001 KRW 87 billion into NACF to compensate for the accumulated deficit in the former National Livestock Cooperatives Federation that NACF took over in 2000. KDIC also provided NACF KRW 96,2 billion in equity participation in 2001. In 2000, NACF was exempted of its long-term borrowings of KRW 275 billion from the Livestock Development Fund by the Ministry of Agriculture and Forestry. In 2001, NACF also borrowed KRW 38 billion from the GOK with no interest. These measures demonstrate that NACF is not carrying out its business according to purely commercial considerations and principles but appears to be systematically underwritten by GOK, which in 2001 also took a considerable equity participation in NACF.
- (97) It is also noted that the purpose of NACF is to improve the economic, social and cultural status and quality of life of farmers, which is a typical purpose of a cooperative, but also an economic policy objective. In this purpose, NACF was made to merge with other cooperatives in 1999 by GOK, a decision which was not based on a commercial considerations of NACF, but decided upon and imposed on it by the GOK in striving for the abovementioned policy goals. This fact, and the evidence provided in the preceding recital of the continuous financial support provided by GOK indicates that NACF, even if being a cooperative, appears to be a body which carries out an economic policy of supporting the agricultural sector and being underwritten by the GOK for the losses resulting from its activities. It is also noted that the rating given by NACF to Hynix at the time of the October measures did not justify extending a further loan and participating in the October 2001 measures under commercial considerations, and the interest rate of the loan was below market rate (see recital 77).
- (98) The totality of the facts therefore indicates that NACF carries out its activities, including its banking business by pursuing public policy goals and is underwritten by GOK for these activities. NACF appears therefore not to carry out its activities according to purely commercial considerations but under the direction and influence of GOK, and in any event, there is no other rationale explanation for the continued support of Hynix.
- (ii) Conclusion on countervailable subsidy
- (99) The measures taken in October 2001 can be attributed to the GOK, either as acting as a public body in the meaning of Article 1(3) of the basic Regulation, or as directing the banks to provide the financing in the meaning of Article 2(1)(a)(iv) of the basic Regulation. The measures are considered as subsidies because:
- (100) The provision of the loan of KRW 658 billion is a financial contribution under Article 2(1)(a)(i) of the basic Regulation and confers a benefit to Hynix since the company was rated selective default at the time the benefit was granted and therefore no financing was available to it on the commercial markets.
- (101) The 'debt to equity swap' of KRW 2,994 trillion can be seen in two ways. Firstly, the GOK gave up source of revenue by waiving debt and relieved Hynix of its existing obligation to repay the loan, thus conferring a benefit. Secondly, the GOK invested in a non credit-worthy company, something no market investor would have done. In this way, the government actions (involving financial contributions under Articles 2(1)(a)(ii) and 2(1)(a)(i) of the basic Regulation) put Hynix in a better financial position that it would have enjoyed absent this action and that it could have obtained from the commercial market.
- (102) The extension of maturities and the rate cuts of existing loans are also inconsistent with commercial considerations, since they relieved Hynix of existing obligations, and are financial contributions under Article 2(1)(a)(ii) and Article 2(1)(a)(iv) of the basic Regulation.
- (103) According to Article 3 of the basic Regulation, only specific subsidies are countervailable. The measures of October 2001 were ad hoc measures providing financing only to a specific enterprise, Hynix. For this reason the subsidies provided in October 2001 are considered as specific and thereby countervailable.

(iii) Calculation of the amount of subsidy

- (104) The Commission considered whether it would be appropriate to compare the amounts granted to a 'market benchmark' (i.e. the amount of finance that would have been provided by commercial market investors in similar circumstances), and to use the difference between the two figures as the amount of subsidy. However, the evidence on the record shows that at the time of the measures no market investor would have invested in Hynix and no normal financial institution acting under commercial considerations would have provided financing to it. It can therefore be concluded that the measures provided to it were not available to it in the market and that no market operator would have undertaken these kind of measures <sup>(1)</sup>.
- (105) As regards the loan of KRW 658 billion, the information on the records indicates that the providers of the loan did not expect to recover the loan at the time of granting it. Hynix had not repaid any principle of its KRW 800 billion syndicated loan granted to it in January 2001 and had even defaulted on the interest payments. As regards loans granted before 2001 which formed the major part of the debt-to-equity swap, these had not been paid back either during 2001. Indeed, the total amount of loans and liabilities had only increased during 2001 regardless of the May 2001 measures which were to be used only for paying off existing debt. In addition, Hynix rating at the time of the October 2001 loan was 'SD' and it was therefore not able to raise money from the financial markets. For these reasons, the total amount of the loan of KRW 658 billion is considered as subsidy in accordance with section E(b)(v) of the Guidelines. As regards the debt to equity swap of KRW 2,994 trillion, the same principles apply. No market investor would have invested in Hynix shares at the time of the measure. In addition, the GOK had also forgiven the same amount of outstanding debt to Hynix. For the sake of clarity, the forgiveness of KRW 2,994 trillion is considered as subsidy.
- (106) As regards the benefit conferred by the roll-over of debt, the 2001 financial accounts of Hynix indicate that the value of extension of maturities and reductions of interest rates was KRW 1,586 trillion. This is effectively debt forgiveness, as reflected in the financial accounts of the company and considering that this is the audited evaluation of the company itself, it is taken as the amount of benefit.
- (107) Consequently, the total amount of the benefit provided by the October 2001 measures is KRW 5,238 trillion.
- (108) These subsidies confer large, non-recurring benefits. According to Article 7(4) of the basic Regulation, such a subsidy should, in principle, be attributed to the IP, unless special circumstances justify attribution over a

different period. In the present case, however, since the subsidies are of such nature that they are benefiting the company over a period of time longer than only the IP, it is considered that the allocation method used in Article 7(3), according to which the amount of subsidy is spread over time, provides an appropriate basis for attribution under these circumstances. Indeed the DRAM industry is an industry in which the main costs are occasioned by the requirement to have state-of-the-art machinery and equipment, which constitute its main assets needed for operations. Therefore, the most appropriate allocation period in this case is the useful life of the assets (machinery and equipment), which is considered to be five years in accordance with the financial accounts of the company and the usual practice in the industry concerned. The amount of subsidy so allocated was expressed as a percentage of the total sales of Hynix in 2001. With interest, using the average commercial interest rates applicable in Korea for the investigation period, the subsidy amounts to 28,1 %.

## 9. Amount of countervailable subsidies

- (109) The provisional amount of countervailable subsidies in accordance with the provisions of the basic Regulation, expressed *ad valorem*, for the investigated exporting producer Hynix Semiconductor Inc. is 33 %. The subsidy for Samsung Electronics Co. Ltd is *de minimis*. There is no other exporting producer of the product concerned in Korea.

Type of subsidy	KDB debenture programme	October 2001 measures	Total
	4,9 %	28,1 %	33 %

## D. DEFINITION OF THE COMMUNITY INDUSTRY

### 1. Community production

- (110) During the IP the product concerned was manufactured in the Community by two Community producers that fully cooperated with the proceeding. One of these companies was the complainant. The other company supported the proceeding.

### 2. Definition of the Community industry

- (111) The product concerned produced by the two cooperating Community producers represented 100 % of the total Community production of the product concerned during the IP. The two cooperating companies, therefore, constitute the Community industry within the meaning of Article 9(1) of the basic Regulation. They are referred to as the 'Community industry' hereafter.

<sup>(1)</sup> See, in particular, recital 76.

## E. INJURY

## 1. Preliminary remarks

- (112) It is noted that the DRAM market is characterised by a high degree of technological innovation which has led to considerable developments in DRAM density and configuration over the recent years. The DRAM density is expressed in Mbit, which is the statistical parameter commonly used in the DRAM industry to measure trade flows. The assessment of volume effects is therefore based on the number of Mbits and not on the number of units. An assessment on the basis of units would be less accurate as the industry considers both a DRAM component and a DRAM module (which contains several DRAM components) each as being a single unit.
- (113) Eurostat data were not used in the evaluation of volume and price trends as the Eurostat volume and price data are not considered reliable for the purpose of establishing accurate trends in the DRAM industry. Eurostat volume data are expressed in kilograms whilst statistical data used and presented by the DRAM industry are expressed in Mbit. The essential features of the product concerned rely on technical characteristics such as density, memory and speed. DRAMs with completely different features and architecture may have the same weight. Therefore, the product concerned cannot be reasonably compared on the basis of kilograms. In addition, Eurostat figures may register the origin of the product concerned on the basis of the country of assembly and not on the basis of the actual country of origin (i.e. country where the wafer is produced). Therefore, information derived from Eurostat cannot be reasonably used for the purposes of the investigation.
- (114) In considering the situation of the Community industry one should note that Micron Technology only started production in the Community in October 1998 after acquiring the Texas Instruments production plant in Italy. Therefore, the 1998 data on Community production, capacity, sales volume, market share, profitability, employment and productivity reflect this start-up situation. It is also noted that Infineon, a former division of Siemens, became an independent company in 1999.
- (115) Where necessary, for reasons of confidentiality, indices are used to show the evolution of trends. Given that for one exporting producer (Samsung) the subsidy provisionally established is *de minimis*, certain injury indicators have been analysed with regard to the other exporting producer only (Hynix). As far as imports from Korea are concerned, the injury and causal link analysis focused on those from Hynix. This is due to the fact that there are only two Korean exporters, i.e. Hynix and Samsung, with more or less similar export shares and that only Hynix's exports were heavily subsidised.

## 2. Community consumption

- (116) Apparent consumption of the product concerned in the Community was established on the basis of publicly available external sources. The total figure for Community consumption of the product concerned has been calculated on the basis of total imports plus all sales in the Community produced by the Community industry.
- (117) As shown in the table below, Community consumption of the product concerned increased by 416 % over the period considered. As shown, the volume of DRAM consumption has risen each year as a result of growing demand for products using DRAM and because of an increase in Mbit per product. However, the growth rate slowed throughout the period from 70 % at the beginning to around 50 % during the IP.

Consumption in '000 Mbits	1998	1999	2000	2001 (IP)
DRAMs	16 593 400	28 961 100	45 873 600	68 967 600
Index	100	175	276	416

### 3. Imports of the product concerned into the Community

#### (a) Volume of imports from Korea

- (118) The volume of imports from Korea increased by 431 % during the period considered. Imports from Hynix increased a little faster, i.e. by 461 % during the period.

Imports	1998	1999	2000	2001 (IP)
Index Korea	100	141	251	431
Index Hynix	100	194	372	461

#### (b) Prices of imports from Korea and Hynix

- (119) The average import price of the product concerned from Korea remained stable from 1998 to 2000. It dropped dramatically by 76 % during the IP. The prices in the IP were at substantial loss-making levels for the Korean exporters. The drop in the prices of Hynix was slightly higher but this was probably due to the fact that it was selling more of the lower density 64 Mbit DRAMs which were at the low end of the market and hence more subject to price pressure.

Average import price	1998	1999	2000	2001 (IP)
Index Korea	100	105	99	23
Index Hynix	100	91	77	20

- (120) For the determination of price undercutting, the Commission analysed price data in the IP. The relevant sales prices of the Community industry are prices to the first unrelated customer after deduction of discounts and rebates, i.e. net prices. During the IP, all sales of Korean imports were made via related companies. Therefore, the relevant sales prices compared are net resale prices to the first independent customer in the Community after deduction of discounts and rebates.
- (121) Different product families of the product concerned could be defined for comparison purposes based on the following criteria: product type (i.e. dies, components, modules), density, quality, DRAM type, performance (speed) and packaging.
- (122) The Community industry's sales prices and the resale prices of Korean imports of the like product were compared at the same level of trade, namely independent users within the Community market, and for the same time period on the basis of weighted average prices per product family. On this basis, it was found that price undercutting on an overall weighted average basis was not taking place. However, price undercutting was found to be taking place on a substantial proportion of transactions, namely 41 % of the transactions representing 32 % of the value of Hynix sales. This price undercutting, expressed as a percentage of the Community industry's prices, averaged 16,2 %.
- (123) It was also found in the case of Hynix that this undercutting was predominantly taking place on sales of the higher density DRAMs (the 128 Mbit and 256 Mbit DRAMs). These are the technologically more advanced DRAMs the comparatively higher sales returns of which are used to finance the next generation products.



(c) *Market share of imports from Korea*

- (124) Korea increased its market share over the period considered. There was a significant drop in the Korean market share between 1998 and 1999, but the market share was more than recovered by the end of the IP, when the Korean market share was almost 7 % more than the 1998 level. In the case of Hynix, its market share rose faster, i.e. by 20 % over the period. It is also reasonable to assume that the Hynix market share, in terms of Mbit, was somewhat constrained by its relative delay in moving from production of 64 Mbit to the 128 Mbit DRAMs.

<b>Market shares</b>	1998	1999	2000	2001 (IP)
Index Korea	100	80	91	107
Index Hynix	100	111	136	120

#### 4. Situation of the Community industry

(a) *Production, capacity and capacity utilisation*

	1998	1999	2000	2001 (IP)
Capacity (Mbits) Index	100	179	631	1 213
Production (Mbits) Index	100	175	446	891
Capacity utilisation Index	100	97	70	73

- (125) The production capacity of the Community industry showed a 12-fold increase over the period considered. This is due to important investments in buildings, machinery and equipment, which were made particularly in 2000 and 2001 and were largely driven by the need to invest in new higher density DRAMs. These higher density DRAMs inevitably lead to a much higher capacity in terms of Mbits, particularly towards the end of the period considered when 64 Mbit capacity had largely been replaced by 128 Mbit capacity.
- (126) As a consequence of the steady expansion of Community consumption, the Community industry's production, of the product concerned, increased continuously over the period considered. Capacity utilisation followed a decreasing trend up to 2000 and increased slightly during the IP.

(b) *Sales volume, sales price, market share and growth*

<b>Sales in the Community Mbits</b>	1998	1999	2000	2001 (IP)
Index Volume	100	451	1 384	2 491
Index Average sales price	100	98	93	21
Index Market share	100	134	166	193

- (127) Based on the favourable evolution of Community consumption, the volume of sales of the Community industry in the Community in terms of Mbits significantly expanded over the period considered. The Community industry's sales volume showed a higher growth than the growth of Community consumption. This higher growth can be explained as Community production of the higher density 128 Mbit DRAMs moved slightly ahead of consumption thus showing an increased market share.
- (128) Whilst the average sales prices of the Community industry showed relatively small falls from 1998 to 2000, it fell dramatically by 77 % during the IP.
- (129) The Community industry almost doubled its market share over the period considered. In this respect, it should be noted that half this increase can be accounted for the fact that Micron Technology, after having acquired the Texas Instruments production plant in Italy in October 1998, replaced its earlier imports into the Community by Community production. In addition, some of the remaining increase results from the fact that the Community industry's move to higher density DRAMs was faster than that of the Korean exporters concerned. This move inevitably results in a considerable leap in capacity, and in effect also of sales which are measured in Mbits, given that each unit produced and sold is twice the previous size in terms of Mbits.

(c) *Stocks*

- (130) The Community industry's year-end stock levels as a percentage of production in Mbits varied over the period considered though it fell in the latter part of the period. The higher levels in the early part of the period examined were due to exceptional circumstances such as the start-up phase of one Community producer.

Stocks	1998	1999	2000	2001 (IP)
<i>Index</i>	100	156	75	56

(d) *Profitability*

- (131) The profitability of the Community industry expressed in terms of return on net sales improved significantly from 1998 to 2000. However, after becoming profitable in 2000 the Community industry made heavy losses in the IP.

Profitability	1998	1999	2000	2001 (IP)
<i>Index</i>	- 100	- 3	29	- 79

(e) *Investments, return on investment, cash flow and the ability to raise capital*

Investments	1998	1999	2000	2001 (IP)
<i>Index</i>	100	100	157	193
Return on investments				
<i>Index</i>	- 100	- 11	93	- 85
Cash flow				
<i>Index</i>	Not available	Not available	100	- 27

- (132) Investments of the Community industry over the period considered almost doubled. This is due to the peculiarities of the DRAM sector where production facilities must continuously be upgraded in order to lower costs of production. Maintaining reasonable investment levels is crucial for the Community industry in order for it to be able to maintain 'state-of-the-art' facilities and to remain competitive. However, the growth rate of investments slowed down during the IP as the dramatic decline of sales prices affected cash flow levels, which the Community industry relies on to sustain its investment levels.
- (133) The evolution of the Community industry's return on investment showed a clear deterioration of the financial situation of the Community industry.
- (134) Data on the Community industry's cash flow for 1998 and 1999 could not be obtained in an accurate manner as no comparable data was available for the years concerned. The cash flow figures obtained for 2000 and the IP reflect internal calculations for the business group within the Community industry to which the product concerned belongs. The evolution of the Community industry's cash flow as shown in the table above clearly confirms the deterioration of the financial situation of the Community industry during the IP as costs like depreciation, value adjustments and other provisions could no longer be supported. The continuation of the very significant investments that are vital for the Community industry to remain competitive and viable could therefore not be sustained at appropriate levels.
- (135) The Community industry's ability to raise capital was hindered by a negative cash flow and a gloomy outlook concerning the market price evolution of the product concerned. Moreover, funds from the capital markets could only be obtained at high cost given the recognition that the projected returns on investments would remain weak.

(f) *Employment and productivity*

Employment	1998	1999	2000	2001 (IP)
<i>Index</i>	100	121	146	176
Productivity				
<i>Index</i>	100	144	307	507

- (136) Employment for the product concerned and productivity per employee increased considerably over the period considered.

(g) *Magnitude of the subsidy amount*

- (137) Given the volume and the price of the subsidised imports, the impact of the subsidies on the Community industry must be considered to be substantial. The volume of the subsidised imports amounted to almost 50 % of the Community industry's sales volume. The sheer scale of the subsidy must have had a negative effect on the prices, which dropped as dramatically by 77 % between 2000 and the IP.

(h) *Effects from past subsidisation or dumping*

- (138) The question of whether the Community industry was in a state of recovery from past subsidisation or dumping was examined, but it was found not to be relevant in this case, as there was no evidence indicating past subsidies or dumping.

## 5. Conclusion on injury

- (139) Due to technological developments in the DRAM industry, demand in Mbit terms, has risen each year as the user industry changed over to higher density DRAMs to increase system performance. This growth of demand in Mbit terms explains why, during the period considered the Community industry benefited from the favourable evolution of the Community consumption of the product concerned in terms of sales volume and market share. In addition, it increased its market share. However, almost half the increase was the result of one Community producer replacing its share of imports from the United States, prior to 1998, with actual Community production thereafter.
- (140) In addition, the apparently higher increase of the market share of the Community industry can be explained to a certain extent by the fact that the sales volume measured in Mbits reflects the generally more advanced technological stage of the Community industry as compared with that of Korean exporters. That is, the Community industry moved more swiftly from production of 64 Mbit DRAMs to production of 128 Mbit DRAMs than at least one of their Korean counterparts. This results in a considerable leap in capacity, and thereafter sales (which are measured in Mbits), given that each unit produced and sold is twice the previous size in terms of Mbits.
- (141) The sales prices of the Community industry, however, fell dramatically between the year 2000 and the IP, i.e. by 77 % and this fall had immediate and very serious consequences for the Community industry. The impact of the massive fall in prices during the IP was quickly reflected in negative effects on cash flow, profitability and return on investment of the Community industry and hence the ability to raise capital. The effect on profitability was huge since during the IP, every unit was sold with heavy losses which on average amounted to 96 %. Although investments of the Community industry as well as productivity and employment grew in absolute terms during the period considered, the levels fell well short of what is normal for this industry to remain competitive, to maintain the state of art facilities, to continue with a high level of investments on research and development and to keep abreast with leading-edge technology.
- (142) Taking into account all the factors mentioned above, it is provisionally concluded that the Community industry has suffered material injury within the meaning of Article 8 of the basic Regulation. Though the position of the Community industry improved in certain respects

during the period because of the growing market for DRAMs, this was more than offset by the very substantial injury caused by the drastic drop in sales prices and the consequent heavy losses suffered by the producers.

## F. CAUSATION OF INJURY

### 1. Introduction

- (143) In accordance with Article 8(6) and (7) of the basic Regulation, the Commission examined whether the subsidised imports of the product concerned originating in Korea have caused injury to the Community industry to a degree that enables it to be classified as material. Known factors other than the subsidised imports, which could at the same time be injuring the Community industry, were also examined to ensure that possible injury caused by these other factors was not attributed to the subsidised imports.

### 2. Effect of the subsidised imports

- (144) Community consumption of the product concerned increased four-fold over the period considered. Production by the Community industry increased nine-fold over the same period whereas subsidised imports originating in Korea only increased at a slightly higher pace than the Community consumption. Over the same period, the development of market shares followed the same trend. The evolutions of market share and production of the Community industry during the period considered were influenced by the fact that the Community industry replaced its share of imports from the United States prior to 1998 with actual Community production thereafter. Furthermore, the Community industry increased its market share also by absorbing market shares from Japanese producers. Moreover, the faster investments made by the Community industry (from 64 Mbit DRAMs to 128 and 256 Mbit DRAMs) as compared to their Korean counterparts, has meant that they have inevitably increased their production and market shares in terms of Mbits.
- (145) The investigation found that the average import prices of Hynix over the period considered fell very sharply, i.e. by 80 % and that the prices of the Community industry fell by a similar rate. In fact, it was found that during the IP, the Korean import prices and those of the Community industry were, on average, largely at the same level. This can be explained by the fact that the DRAM market is fully price transparent and price moves by one producer are almost immediately followed by other producers so that it is difficult to establish a price leader.



(146) This fall in prices can, to a limited extent, be explained by the slowdown in market growth but it is reasonable to assume that other reasons may have been responsible for the sheer magnitude and suddenness of this drop. During the IP, the Community prices suddenly dropped by 77 %, to levels where massive losses of 96 % were being sustained by the Community industry.

(147) By the middle of year 2001 it was becoming increasingly clear that the first bail-out of Hynix would not be sufficient for the company to survive. This perception confirmed the market's fears that the existing world overcapacity (approximately 20 %) would continue for the foreseeable future<sup>(1)</sup>. It also became clear that government intervention was a distinct possibility and these events coincided with a very sharp and sudden fall in prices both in the Community and worldwide.

(148) Moreover, a closer examination of prices showed that Hynix's import prices were undercutting the prices of the Community industry on a substantial proportion of its transactions (i.e. 41 % by number of transactions and 32 % by value) and can thus be said to have contributed significantly to the fall in prices of the Community producers during the IP. The most damaging aspect of this undercutting was that it was focussed mainly on the higher density DRAMs the higher returns from which the Community industry would under normal circumstances use to finance the next generation DRAMs. This industry can only remain competitive if sufficient investments are made in the development of DRAMs technology. It is considered likely that but for the subsidies received, Hynix could not have been able to survive in the market and sell at these aggressively below cost prices. Moreover, various market analysts have recognised that Hynix's precarious financial situation meant that selling was absolutely essential irrespective of the price. This was in order to generate cash flow to serve its considerable debts and to be able to maintain the high level of capacity utilisation to keep its unit costs down<sup>(2)</sup>. Accordingly, during the IP, Hynix had all incentive to sell at whatever price in the Community, thereby contributing to the injury.

(149) It is therefore concluded that the subsidisation has led in a very substantial way to the very low price levels on the Community market. Without the subsidies in question it is reasonable to assume that prices would have been higher and that Hynix would not have been able to charge the very low prices that they practised in the IP, and which as a result forced the Community industry to

continuously adapt their prices downwards. Moreover, these low-priced subsidised imports had a significant negative impact on the situation of the Community industry.

### 3. Impact of other factors

#### (a) General economic downturn during the IP

(150) Despite the general economic downturn of the PC and telecommunication markets in 2001, consumption of the product concerned continued its upward trend though at levels below those applicable before the downturn. The increased consumption in terms of Mbits stemmed to a large degree from the introduction of Microsoft XP, which has much higher Mbit requirements than previous systems, and increased sales of 'upgrade' products generated by the low prices. Whilst the economic downturn may have had some downward effect on prices, it can be assumed that, with consumption rising, this effect was not substantial.

#### (b) Imports of the product concerned from other countries than Korea

(151) The imports of the product concerned from other countries (e.g. United States of America, Japan, Taiwan) in market share terms dropped from 41 % to 20 % during the period considered. This drop of market share reflects the fact that some producers closed down their operations. The lost market share of third countries was to a large extent taken over by the Community industry, though as indicated above the move in market share is somewhat exaggerated both by the Mbit measurement and the faster move to more sophisticated technology by the Community industry. There is no evidence that imports from countries, other than Korea, contributed in any significant way to the injury suffered by the Community industry.

#### (c) Export activity of the Community industry

(152) The evolution of export volume and prices of the Community industry during the period considered is in line with the evolution of its sales in the Community over the same period. However, given the lower volume of exports in relation to the volume of sales in the Community during the IP, the injury suffered by the Community industry cannot be attributed to its exports.

<sup>(1)</sup> Hynix counted for 17 % of world production during the IP.

<sup>(2)</sup> International analysts share this view. See J.P. Morgan, September 2002, Morgan Stanley, September 2002.

(d) *Overcapacity*

- (153) The worldwide DRAM market still suffers from structural over-capacity resulting from the expectations of the late 1990s that the market would continue its rapid growth. This over-capacity can be said to have contributed to the severity of the current downturn from which this industry is suffering. As is the case with all downturns, it is reasonable to assume that this one had downward effect on prices. However, it is also reasonable to assume, that had the Korean government not intervened with the subsidies, the situation in both Community and worldwide as regards overcapacity would not have been so pronounced. It should be noted that during the IP, Hynix was the third biggest DRAM producer in the world (around 17 % of world production) after Samsung and Micron. Furthermore, the over-capacity existed, albeit to varying degrees, throughout the period considered, but only during the IP did prices suddenly drop very sharply. Hence, it is considered that the overcapacity as such did not significantly contribute to injury.

#### 4. Conclusion on causation

- (154) Factors other than the subsidised imports originating in Korea, such as the general economic downturn, the export activity of the Community industry and the over-capacity in the market, may well have contributed to the injury which the Community industry was found to be suffering from during the IP. However, the general economic downturn could not have had a significant effect on the situation of the Community industry since the Community consumption continued to increase.
- (155) The reduced prices of the Community industry's export sales may have also contributed to the injury. However, given the lower volume of exports in relation to the volume of sales in the Community during the IP, the injury suffered by the Community industry cannot be attributed to its exports.
- (156) As far as over-capacity is concerned, this worldwide situation existed during a number of years including the period considered. Therefore, this overcapacity cannot be considered as the main cause of the very significant sudden drop in prices which led to the injury suffered by the Community industry.
- (157) However, the investigation has shown that during the period considered subsidised imports originating in Korea were sold on the Community market at prices which caused very considerable injury to the Commu-

nity industry. These imports were found to be a substantial cause of prices in the Community falling dramatically to levels which generated huge losses. This situation had grave consequences on the profitability of the Community industry and its ability to maintain the necessary investment levels. In view of the analysis, which has properly distinguished and separated the effects of all known factors on the situation of the Community industry from the injurious effects of the subsidised imports, it is provisionally concluded that these other factors are not such as to break the causal link between subsidisation and injury. Accordingly, it is provisionally concluded that these imports have caused material injury to the Community industry within the meaning of Article 8(6) of the basic Regulation.

## G. COMMUNITY INTEREST

### 1. Introduction

- (158) The Commission examined whether, despite the conclusions on injurious subsidisation, compelling reasons existed that could lead to the conclusion that it is not in the Community interest to adopt measures in this particular case. For this purpose, and pursuant to Article 31(1) of the basic Regulation, the impact of possible measures on all interests concerned by this proceeding and also the consequences of not taking measures were considered on the basis of all evidence submitted.
- (159) In order to assess the likely impact of the imposition of measures, information was requested from all interested parties. The Commission sent questionnaires to unrelated importers and users of the product concerned. In total, eight questionnaires were sent to unrelated importers and 37 to users.
- (160) Questionnaire responses were received within the time limits from five users (i.e. Dane-Elec Memory, France; Dataram International ApS, Denmark; MMT Ltd, United Kingdom; Olidata SpA., Italy and Time Group, United Kingdom) and two distributors/unrelated importers (i.e. Avnet BV, Netherlands and CHI, Austria).
- (161) Two cooperating users (i.e. Dane-Elec Memory and MMT Ltd) failed to provide a non-confidential version of their questionnaire reply and one cooperating unrelated importer (i.e. Avnet BV) did not import the product concerned during the IP. Therefore, their questionnaire replies were not taken into account further in the investigation.

## 2. Interest of the Community industry

- (162) The situation of the Community industry has deteriorated sharply due to the low-priced subsidised imports of the product concerned from Korea which has led to very low prices and huge losses. These, in turn, are adversely affecting the ability of the Community industry both to remain profitable and to invest in order to remain competitive.
- (163) The Community industry is viable under normal market conditions following substantial rationalisation over the last decade. The number of producers has fallen from seven to two in that period. The existing Community producers have made great efforts to keep at the front end of technological developments for this product and they are now considered to be very competitive in world terms.
- (164) The DRAM industry is considered an important high-technology industry. Unless countervailing measures are imposed, the precarious financial situation of the Community industry will deteriorate to a point where its very existence could be at risk. Under normal economic conditions producers cannot sustain the very heavy losses which they are currently incurring for very long. The disappearance of the two remaining Community producers would adversely affect the level of competition because the Community supply for the product concerned would become dependent on imports by only a few producers operating outside the Community. Furthermore, the negative impact on employment will be significant if this technologically advanced industry with more than 10 000 employees at the time being would disappear. It is noted that the market entry costs are high and re-entry by existing producers or even by new ones would be highly unlikely.
- (165) It should be noted that the United States imposed provisional countervailing measures on DRAMs originating in Korea recently. Under the circumstances, these measures would have led to significant diversion of trade from the United States market to the Community if measures had not been imposed by the Community.
- (166) The adoption of countervailing measures would re-establish fair competition in the DRAM market in the Community by preventing further price depression caused by unfairly subsidised Korean imports. The Community industry could then renew and even enhance its previous levels of investment and maintain its competitiveness.

## 3. Interest of users and distributors

- (167) As regards the users, only three of the 37 users cooperated with the investigation. These cooperating users represent according to the information provided around

1 % of the Community consumption. The absence of cooperation by the vast majority of users in this case leads to the conclusion that should any measures be imposed, they will not have any significant impact on their situation.

- (168) The available information indicates that even if the DRAMs prices in the Community would increase by the full countervailing duty rate, the impact on the prices of PCs will be limited to around 1 %. However, all cooperating parties recognised that the imposition of measures will only have a limited impact on DRAM prices at least in the short-term, mainly because of the chronic overcapacity which exists worldwide. It is therefore expected that users and consumers would not be significantly affected by the imposition of countervailing measures.
- (169) The sole cooperating distributor stated that it is against the imposition of countervailing measures as the limited DRAMs availability of the Community industry, could only result in an increased market share of third countries producers and in particular Taiwanese producers.
- (170) The argument put forward by the cooperating distributor is not persuasive. In fact, the Community industry still has significant spare capacity available which can be used if the market conditions allow fair competition.
- (171) The Commission also notes that there is no indication that the re-establishment of open and fair market conditions would prevent producers in third countries from competing in the Community market. The countervailing measures would merely remove the distortion of competition arising from subsidies and allow a faster recovery from the current very heavy losses. In a stable market, increasing productivity from non-subsidised suppliers should increase output of technologically advanced DRAMs at very competitive prices. Indeed, where the level of the countervailing measures is equal to the subsidy amount, but lower than the amount required to remove fully the injury, it is only the unfair element of the exporters' price advantage which will be eliminated. In such a situation, the exporters can fully compete on the basis of their actual competitive advantage.
- (172) As already indicated above, the non-imposition of measures may lead to the disappearance of a high-skilled technologically advanced industry which in turn would reduce the level of competition and increase the dependence of the electronics and telecommunications industry in the Community on supplies from third countries.

- (173) This indicates that neither users nor consumers would be unduly affected by the imposition of measures.

#### 4. Conclusion on Community interest

- (174) On the basis of the above, it is concluded that the imposition of provisional countervailing measures would not be against the Community interest.

### H. PROVISIONAL COUNTERVAILING MEASURES

#### 1. Injury elimination level

- (175) In view of the conclusions reached with regard to subsidy, injury, causation and Community interest, provisional measures should be taken in order to prevent further injury being caused to the Community industry by the subsidised imports.
- (176) For the purpose of establishing the level of the provisional measures, account has been taken of both the subsidy amount found and the amount of injury sustained by the Community industry.
- (177) The provisional measures should be imposed at a level sufficient to eliminate the injury caused by these imports without exceeding the subsidy amount established. When calculating the amount of duty necessary to remove the effects of the injurious subsidies, it was considered that any measures should allow the Community industry to cover its costs and obtain overall a profit before tax that could be reasonably achieved under normal conditions of competition, i.e. in the absence of subsidised imports, on the sales of the like product in the Community. The pre-tax profit margin used for this calculation was 15 % which is necessary for the industry to maintain reasonable levels of investment.
- (178) It is noted that the product life of DRAMs is short and that the industry needs substantial profits in order to finance the necessary annual investments (at a range of EUR billion) in order to simply remain competitive. It is also noted that during the last profitable period the Community industry realised much higher profits than 15 % on net turnover. Therefore, the 15 % is considered a reasonable profit margin in this context. It could be even argued that a higher profit level would have been more appropriate. However, it was not necessary to address this issue in view of the findings set out in the next recitals.
- (179) The necessary price increase was then determined on the basis of a comparison of the weighted average import price, as established for the undercutting calculations, with the non-injurious price of the different models sold

by the Community industry on the Community market. The non-injurious price per model has been obtained by adding the above mentioned profit margin of 15 % to the cost of production per model. Any difference resulting from this comparison was then expressed as a percentage of the total cif import value. These differences were in all cases above the subsidy amount established.

#### 2. Provisional measures

- (180) As the injury elimination level is higher than the subsidy amount established, the provisional measures should be based on the latter. The rate of the provisional countervailing duty should therefore be set at 33 %. No duty should be imposed on Samsung Electronics Co., Ltd.

#### I. FINAL PROVISION

- (181) In the interests of sound administration, a period should be fixed within which the interested parties which made themselves known within the time limit specified in the notice of initiation may make their views known in writing and request a hearing. Furthermore, it should be stated that the findings concerning the imposition of duties made for the purposes of this Regulation are provisional and may have to be reconsidered for the purpose of any definitive duty,

HAS ADOPTED THIS REGULATION:

#### Article 1

1. A provisional countervailing duty is hereby imposed on imports of 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, currently classifiable within CN codes 8542 21 11, 8542 21 13, 8542 21 15, 8542 21 17, ex 8542 21 01 (TARIC code 8542 21 01 10), ex 8542 21 05 (TARIC code 8542 21 05 10), ex 8548 90 10 (TARIC code 8548 90 10 10), ex 8473 30 10 (TARIC code 8473 30 10 10) and ex 8473 50 10 (TARIC code 8473 50 10 10), originating in the Republic of Korea.



2. The rate of the provisional duty applicable to the net free-at-Community-frontier price, before duty, shall be as follows:

Korean exporters	Rate of duty (%)	TARIC additional code
Samsung Electronics Co., Ltd 24th Fl., Samsung Main Bldg 250, 2-Ga, Taepyeong-Ro, Jung-Gu, Seoul	0 %	A437
All other companies	33 %	A999

3. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

4. The release for free circulation in the Community of the product referred to in paragraph 1 shall be subject to the provision of a security, equivalent to the amount of the provisional duty.

#### Article 2

Without prejudice to Article 30 of Regulation (EC) No 2026/97, interested parties may request disclosure of the essential facts and considerations on the basis of which this Regulation was adopted, make their views known in writing and apply to be heard orally by the Commission within 20 days of the date of entry into force of this Regulation.

Pursuant to Article 31(4) of Regulation (EC) No 2026/97, the parties concerned may comment on the application of this Regulation within one month of the date of its entry into force.

#### Article 3

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 1 of this Regulation shall apply for a period of four months.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 23 April 2003.

*For the Commission*

Pascal LAMY

*Member of the Commission*

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