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Contents



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EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

**Note to the reader** (see page 3 of the cover)

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*(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)*

# REGULATIONS

## COUNCIL REGULATION (EC) No 1353/2008

## of 18 December 2008

## amending Regulation (EC) No 74/2004 imposing a definitive countervailing duty on imports of cotton-type bedlinen originating in India

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community [1] (the 'basic Regulation'), and in particular Articles 15 and 19 thereof,

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

Whereas:

### 1. PROCEDURE

#### 1.1. Previous investigation and measures in force

(1) The Council, by Regulation (EC) No 74/2004 [2], imposed a definitive countervailing duty on imports of cotton-type bedlinen falling within CN codes ex 6302 21 00, ex 6302 22 90, ex 6302 31 00 and ex 6302 32 90 and originating in India. The rate of the duty ranges between 4,4 % and 10,4 % for individual sampled companies, with an average cooperating company rate of 7,6 % and a residual duty of 10,4 %.

#### 1.2. Ex officio initiation of the partial interim review

(2) Following the imposition of the definitive countervailing duty the Government of India (GOI) made submissions that the circumstances with regard to two subsidy schemes (the Duty Entitlement Passbook Scheme and the Income Tax Exemption under Section 80 HHC of the Income Tax Act) had changed and that these changes were of a lasting nature. They argued that the level of subsidisation was therefore likely to have decreased and thus measures that had been established partly on these schemes should be revised.

(3) The Commission examined the evidence submitted by the GOI and considered it sufficient to justify the initiation of a review in accordance with the provisions of Article 19 of the basic Regulation. After consultation of the Advisory Committee, the Commission initiated an *ex officio* partial interim review of the measures in force by a notice published in the *Official Journal of the European Union* [3].

(4) The purpose of this partial interim review investigation is to assess the need for the continuation, removal or amendment of the existing measures in respect of those companies which benefited from one or both the allegedly changed subsidy schemes where sufficient evidence was provided in line with the relevant requirements of the notice of initiation. Depending on its findings, the investigation will also assess the need to revise the measures applicable to other companies that cooperated in the original investigation and/or the residual measure applicable for all other companies.

#### 1.3. Review investigation period

(5) The investigation covered the period from 1 October 2006 to 30 September 2007 ('the review investigation period' or 'RIP').

#### 1.4. Parties concerned by the investigation

(6) The Commission officially informed the Government of India (GOI) of the initiation of the partial interim review investigation, along with those Indian exporting producers who cooperated in the previous investigation and that were found to benefit from one or both of the two allegedly changed subsidy schemes and who were listed in the notice of initiation of the partial interim review, as well as the representatives of the Community

[1] OJ L 288, 21.10.1997, p. 1.
[2] OJ L 12, 17.1.2004, p. 1.
[3] OJ C 230, 2.10.2007, p. 5.

industry. Interested parties had the opportunity to make their views known in writing and to request a hearing. The written and oral comments submitted by the parties were considered and, where appropriate, taken into account.

(7) In view of the apparent number of parties involved in this review, the use of sampling for the investigation of subsidisation was proposed in accordance with Article 27 of the basic Regulation.

(8) In order to enable the Commission to select a sample, pursuant to Article 27(2) of the basic Regulation, exporters and representatives acting on their behalf were requested to make themselves known within three weeks of the initiation of the proceeding and to provide basic information on their export and domestic turnover, on some particular subsidy schemes, and the names and activities of all related companies. The authorities of India were also informed.

(9) More than 80 companies made themselves known and provided the information requested for the sampling. These companies represented 95 % of the total exports of India to the Community during the sampling period.

(10) Given the large number of companies, a sample of 11 exporting companies and groups with the largest export volumes to the Community was chosen, in consultation with the Community industry, the Indian textiles association Texprocil and the GOI.

(11) The sample represented 64 % of the total exports to the EU of the product concerned from India in the sampling period (1 April 2006 to 31 March 2007). In accordance with Article 27 of the basic Regulation, the selected sample covered the largest possible representative volume of exports that could reasonably be investigated within the time available.

(12) Requests for the determination of an individual subsidy margin in accordance with Article 27(3) of the basic Regulation were submitted by four companies not selected in the sample. However, in view of the large number of requests and the large number of companies selected in the sample, it was considered that such individual examinations would be unduly burdensome within the meaning of Article 27(3) and would have prevented completion of the investigation in good time. The claims for the determination of individual margins by the four non-sampled companies were therefore rejected.

(13) During the investigation it was identified that two related companies of two sampled exporting companies did not produce, export or sell domestically the product concerned produced during the RIP. They did not express any intention to do so in the future. It has therefore been decided to exclude those related companies from the sample and calculation of individual subsidy margins.

(14) Companies not selected for the sample were informed that any anti-subsidy duty on their exports would be calculated in accordance with Article 15(3) of the basic Regulation, i.e. without exceeding the weighted average amount of countervailable subsidies established for the companies in the sample.

(15) The companies that did not make themselves known within the deadline set in the notice of initiation were not considered as interested parties.

(16) Questionnaire replies were received from all sampled exporting producers in India.

(17) The Commission sought and verified all information it deemed necessary for the determination of subsidisation. Verification visits were carried out at the premises of the following interested parties:

Government of India (GOI)

— Ministry of Commerce, New Delhi

Exporting producers in India

— Anunay Fab. Limited, Ahmedabad

— Brijmohan Purusottamdas, Mumbai and Incotex Impex Pvt Limited, Mumbai

— Divya Global Pvt Ltd, Mumbai

— Intex Exports, Pattex Exports and Sunny Made-ups, Mumbai

— Jindal Worldwide Ltd, Progressive Enterprise and Texcellence Overseas, Ahmedabad and Mumbai

— Madhu Industries Limited and Madhu International, Ahmedabad

— Mahalaxmi Exports and Mahalaxmi Fabric Mills Pvt Ltd, Ahmedabad

— Prakash Cotton Mills Pvt, Ltd, Mumbai

— Prem Textiles, Indore

— The Bombay Dyeing and Manufacturing Co. Ltd, N W Exports Limited and Nowrosjee Wadia & Sons Limited, Mumbai

— Vigneshwara Exports Limited, Mumbai

### 1.5. **Disclosure and comments on procedure**

(18) The GOI and the other interested parties were informed of the essential facts and considerations upon which it was intended to propose to amend the duty rates applicable and continue application of existing measures. They were also given a reasonable time to comment. All submissions and comments were taken duly into consideration as set out below.

## 2. **PRODUCT CONCERNED**

(19) The product under review is bedlinen of cotton fibres, pure or mixed with man-made fibres or flax (flax not being the dominant fibre), bleached, dyed or printed, originating in India (the product concerned), currently classifiable within CN codes ex 6302 21 00, ex 6302 22 90, ex 6302 31 00 and ex 6302 32 90, and as defined in the original investigation.

## 3. **SUBSIDIES**

### 3.1. **Introduction**

(20) On the basis of the information available and the replies to the Commission's questionnaire, the following schemes allegedly granting subsidies were investigated:

Subsidy schemes investigated in the original investigation:

1. Duty Entitlement Passbook (DEPB) scheme

2. Duty Free Replenishment Certificate (DFRC) scheme/Duty Free Imports Authorisation (DFIA) scheme

3. Export Promotion Capital Goods (EPCG) scheme

4. Advance Licence Scheme (ALS)/Advance Authorisation Scheme (AAS)

5. Export Processing Zones/Export Oriented Units (EPZs/EOUs)

6. Income Tax Exemptions scheme (ITES)

Subsidy schemes not investigated in the original investigation:

7. Duty Drawback Scheme (DDS)

8. Technology Upgradation Fund Scheme (TUFS)

9. Export Credit Scheme (pre-shipment and post-shipment) (ECS)

(21) The schemes 1 to 5 above are based on the Foreign Trade (Development and Regulation) Act 1992 (No 22 of 1992) which entered into force on 7 August 1992 (Foreign Trade Act). The Foreign Trade Act authorises the GOI to issue notifications regarding the export and import policy. These are summarised in 'Export and Import Policy' documents, which are issued by the Ministry of Commerce every five years and updated regularly. One Export and Import Policy document is relevant to the RIP of this case; i.e. the five-year plan relating to the period 1 September 2004 to 31 March 2009 (EXIM policy 04-09). In addition, the GOI also sets out the procedures governing the EXIM policy 04-09 in a 'Handbook of Procedures — 1 September 2004 to 31 March 2009, Volume I' (HOP I 04-09). The Handbook of Procedures is also updated on a regular basis.

(22) The Income Tax Exemptions Scheme is based on the Income Tax Act of 1961, which is amended yearly by the Finance Act.

(23) The Duty Drawback Scheme is based on Section 75 of the Customs Act 1962, Section 37(2)(xvi) of the Excise Act 1944 and Sections 93A and 94 of the Finance Act 1994. This is a new scheme that has not been previously investigated.

(24) The Technology Upgradation Fund Scheme is based on a Resolution of the Ministry of Textiles, Government of India, published in the Official Gazette of India Extraordinary Part I Section I on 31 March 1999. This is a new scheme that has not been previously investigated.

(25) The Export Credit Scheme is based on sections 21 and 35A of the Banking Regulation Act 1949, which allow the Reserve Bank of India (RBI) to direct commercial banks in the field of export credits.

(26) In accordance with Article 11(10) of the basic Regulation, the Commission invited the GOI for additional consultations with respect to changed and unchanged schemes, as well as those not previously investigated, with the aim of clarifying the factual situation as regards the alleged schemes and arriving at a mutually agreed solution. Following these consultations, and in the absence of a mutually agreed solution in relation to these schemes, the Commission included all of them in the investigation of subsidisation.

3.2. **Specific schemes**

3.2.1. *Duty Entitlement Passbook (DEPB) scheme*

3.2.1.1. Legal basis

(27) The detailed description of the DEPB scheme is contained in paragraph 4.3 of the EXIM policy 04-09 and in chapter 4 of the HOP I 04-09.

3.2.1.2. Eligibility

(28) Any manufacturer-exporter or merchant-exporter is eligible for this scheme.

3.2.1.3. Practical implementation

(29) An eligible exporter can apply for DEPB credits which are calculated as a percentage of the value of products exported under this scheme. Such DEPB rates have been established by the Indian authorities for most products, including the product concerned. They are determined on the basis of standard input-output norms (SIONs), taking into account a presumed import content of inputs in the export product and the customs duty incidence on such presumed imports, regardless of whether import duties have actually been paid or not.

(30) To be eligible for benefits under this scheme, a company must export. The exporter must declare that the export is taking place under DEPB to the Indian authorities at the time of export. In order for the goods to be exported, the Indian customs authorities issue an export shipping bill during the dispatch procedure. This document declares the amount of DEPB credit which is to be granted for that export and therefore the exporter knows the benefit it will receive at that time.

(31) Once the customs authorities issue an export shipping bill, the GOI has no discretion over the granting of a DEPB credit. The relevant DEPB rate to calculate the benefit is that which applied at the time the export declaration is made. An unusual retroactive increase of the DEPB rates took place during the RIP, increasing the DEPB benefit for exports from 1 April 2007 to 12 July 2008. However, it is not possible to assume that a retroactive decrease of DEPB rates could be implemented under the principle of legal certainty as a negative administrative decision. Therefore it can be concluded that the ability of the GOI to retroactively amend the level of the benefit is limited.

(32) DEPB credits are freely transferable and valid for 12 months from the date of issue. They can be used for payment of customs duties on subsequent imports of any goods without import restriction, except capital goods. Goods imported against such credits can be sold on the domestic market (subject to sales tax) or otherwise used.

(33) Applications for DEPB credits are electronically filed and can cover an unlimited amount of export transactions. *De facto* no strict deadlines exist to apply for DEPB credits. The electronic system used to manage the DEPB scheme does not automatically exclude export transactions outside the deadline submission periods mentioned in chapter 4.47 HOP I 04-09. Furthermore, as clearly provided in chapter 9.3 HOP I 04-09, applications received after the expiry of submission deadlines can always be considered with a minor penalty fee (10 % on the entitlement).

(34) While the DEPB rates for exports of the product concerned during the IP of the original investigation was 8 %, at the beginning of the RIP it was only 3,7 %, which was revised during the RIP to 6,7 % (on 12 July 2007), which was unusually backdated to exports since 1 April 2007.

3.2.1.4. Disclosure comments

(35) GOI and Texprocil alleged that no excess remissions occurred in the application of the DEPB scheme and argued that therefore the scheme was not countervailable. This argument is rejected in the light of the conclusion in recital 38 that this scheme cannot be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 2(1)(a)(ii) and Annexes I(i), II and III to the basic Regulation. Consequently, the whole amount of duties foregone is countervailable.

3.2.1.5. Conclusion

(36) The DEPB scheme provides subsidies within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation. A DEPB credit is a financial contribution by the GOI, since the credit will eventually be used to offset import duties, thus decreasing the GOI's duty revenue which would be otherwise due. In addition, the DEPB credit confers a benefit upon the exporter, because it improves their liquidity.

(37) The DEPB scheme is contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation.

(38) This scheme cannot be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 2(1)(a)(ii) of the basic Regulation. It does not conform to the strict rules laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback) to the basic Regulation. An exporter is under no obligation to actually consume the goods imported free of duty in the production process and the amount of credit is not calculated in relation to actual inputs used. Moreover, there is no system or procedure in place to confirm which inputs are consumed in the production process of the exported product or whether an excess payment of import duties occurred within the meaning of item (i) of Annex I and Annexes II and III to the basic Regulation. Lastly, an exporter is eligible for the DEPB benefits regardless of whether it imports any inputs at all. In order to obtain the benefit, it is sufficient for an exporter to simply export goods without demonstrating that any input material was imported. Thus, even exporters which procure all of their inputs locally and do not import any goods which can be used as inputs are still entitled to benefit from the DEPB scheme.

3.2.1.6. Calculation of the subsidy amount

(39) In accordance with Articles 2(2) and 5 of the basic Regulation, the amount of countervailable subsidies was calculated in terms of the benefit conferred on the recipient which was found to exist during the RIP. In this regard, it was considered that the benefit is conferred on the recipient when an export transaction is made under this scheme. At this moment, the GOI is liable to forgo the customs duties, which constitutes a financial contribution within the meaning of Article 2(1)(a)(ii) of the basic Regulation. Once the customs authorities issue an export shipping bill which shows, *inter alia*, the amount of DEPB credit which is to be granted for that export transaction, the GOI has no discretion as to whether or not to grant the subsidy. Furthermore, the cooperating exporting producers booked the DEPB credits on an accrual basis as income at the time of the export transaction.

(40) In order to take account of the impact of the backdated increase in rates, the value of the DEPB credit booked for exports made between 1 April to 12 July 2007 was increased where necessary, as the actual benefit the companies will be entitled to on receipt of the credit from the GOI is higher than formally claimed at the time of exportation.

(41) Where justified claims were made, fees necessarily incurred to obtain the subsidy were deducted from the credits so established to arrive at the subsidy amount as numerator, pursuant to Article 7(1)(a) of the basic Regulation. In accordance with Article 7(2) of the basic Regulation this subsidy amount has been allocated over the total export turnover during the review investigation period as the appropriate denominator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(42) Several comments concerning certain details of calculation of benefit under the DEPB were submitted. Where it was found to be justified, the calculations were adjusted as a result.

(43) Contrary to the submission of some exporting producers, even DEPBS credit generated by exporting products other than the product concerned had to be considered when establishing the amount of countervailable DEPBS credit. Under the DEPBS no obligation exists which limits the use of the credits to the importation of duty-free input material linked to a specific product. On the contrary, DEPBS credits are freely transferable, can even be sold and used for imports of any unrestrictedly importable goods (the input materials of the product concerned belong to this category), except capital goods. Consequently, the product concerned can benefit from all DEPBS credits generated.

(44) Five companies in the sample benefited from the DEPB scheme during the RIP with subsidy margins ranging from 0,15 % to 3,96 %.

3.2.2. *Duty Free Imports Authorisation (DFIA) scheme/Duty Free Replenishment Certificate (DFRC) scheme*

3.2.2.1. Legal basis

(45) The detailed description of the DFIA is contained in chapter 4 of the EXIM policy 04-09 and in chapter 4 of the HOP I 04-09. The scheme was introduced in 1 May 2006 and replaced the DFRC scheme, which was countervailed by the original Regulation.

3.2.2.2. Eligibility

(46) The DFIA is issued to any merchant-exporter or manufacturer-exporter for the imports of inputs used in the manufacture of goods for exports free of basic customs duty, additional customs duty, education cess, anti-dumping duty and safeguard duty, if any.

3.2.2.3. Practical implementation

(47) The DFIA is a post- and pre-export scheme which allows imports of goods determined according to SION norms, but which, in case of transferable DFIA, do not have to be necessarily used in the manufacture of the exported product.

(48) The DFIA only covers the import of inputs as prescribed in the SION. The import entitlement is limited to the quantity and value mentioned in the SION, but can be revised by regional authorities on request.

(49) The export obligation is subject to the minimum value addition requirement of 20 %. The exports may be performed in anticipation of a DFIA authorisation, in which case the import entitlement is set in proportion of the provisional exports.

(50) Once the export obligation is fulfilled, the exporter can request the transferability of the DFIA authorisation, which in practice means a permission to sell the duty-free import licence on the market.

3.2.2.4. Disclosure comments

(51) The GOI and Texprocil alleged that the DFRC is a legitimate substitution drawback scheme, since the scheme provides for replenishment of inputs used in the exported product and was considered reasonable, effective and based on the generally accepted commercial practices in India. Because the quantity, quality and technical characteristics and specifications match with inputs used in the export product, the scheme would be in the view of the GOI and Texprocil permissible under the Agreement on Subsidies and Countervailing Measures (ASCM). The GOI and Texprocil also argued that, when assessing whether it is a legitimate substitution drawback scheme, the relevant condition is to look at what is being imported and not who is importing. It was further argued that in so far as the Government is concerned, no additional benefit is granted. It was argued that the scheme was therefore not countervailable No new evidence was provided to support these arguments and therefore these arguments are rejected in the light of the findings under recitals 52 to 55 that neither of the sub-schemes be considered as permissible duty drawback systems or substitution drawback systems within the meaning of Article 2(1)(a)(ii) and Annexes I(i), II and III to the basic Regulation. Consequently, the whole amount of benefit is countervailable.

3.2.2.5. Conclusion

(52) Though there are some differences in the application of the new DFIA scheme, as compared with the formerly countervailed DFRC scheme, the new DFIA has to be considered as a continuation of the DFRC scheme, because it takes over the main elements of the DFRC.

(53) Both DFRC and DFIA are subsidies within the meaning of Article 2(1)(a)(i) and (ii) and Article 2(2) of the basic Regulation, i.e. a financial contribution in form of a grant. They involve a direct transfer of funds, as they can be sold and converted into cash, or used to offset the import duties, causing the GOI to forego revenue which is otherwise due. In addition, the DFRC and DFIA confer a benefit upon the exporter, because they improve their liquidity.

(54) Both DFRC and DFIA are contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation.

(55) Furthermore, neither of the schemes can be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 2(1)(a)(ii) of the basic Regulation. They do not conform to the strict rules laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback) to the basic Regulation. In particular: (i) they allow for *ex post* refund or drawback of import charges on inputs which are consumed in the production process of another product; (ii) there is no verification system or procedure in place to confirm whether and which inputs are consumed in the production of process of the exported product or whether excess benefit occurred within the meaning of point (i) of Annex I and Annexes II and III to the basic Regulation; and (iii) the transferability of certificates/authorisations implies that an exporter granted a DFRC or DFIA is under no obligation actually to use the certificate to import the inputs.

3.2.2.6. Calculation of the subsidy amount

(56) For the establishment of the benefit it has been considered that, unlike in DEPB, the DFRC and DFIA licences have no notional value or credit rates. The licence indicates the total quantity of the permitted inputs to be imported and the maximum total CIF value of such imports. Consequently, the benefit is not known at the time of exports, and it can be determined and booked into accounts only when the licence is used for importation or sold.

(57) Therefore, in cases where the licences were used for imports, the benefit for the companies was calculated on the basis of the amount of the import duties forgone. In cases where the licences were transferred (sold), the benefit was calculated on the basis of revenue on such sales during the RIP.

(58) The investigation established that five companies exporting under the DFRC and/or DFIA sold their authorisations/certificates to third parties.

(59) One exporting producer argued that it had used one of its DFI authorisations as a substitution drawback and that it did not have excess remissions of duties on imports under the particular licence. The investigation established that the import and export quantities under that particular licence were not exhausted and that the licence was not yet closed and verified according to the rules prescribed by the EXIM policy. Therefore, and taking into account the findings under recital 55, it was concluded that the company could not prove that no excess remission was incurred under that particular licence. The whole amount of duties saved on the imports made under that licence are therefore deemed a subsidy, and the claim was therefore rejected.

(60) Where justified claims were made, fees necessarily incurred to obtain the subsidy were deducted from the benefits so established to arrive at the subsidy amount as numerator pursuant to Article 7(1)(a) of the basic Regulation. In accordance with Article 7(2) of the basic Regulation this subsidy amount has been allocated over the total export turnover during the review investigation period as appropriate denominator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(61) Several comments concerning certain details of calculation of benefit under the DFRC/DFIA were submitted. Where it was found to be justified, the calculations were adjusted as a result.

(62) Contrary to the submission of some exporting producers, even DFRC/DFIA credit generated by exporting products other than the product concerned had to be considered when establishing the amount of countervailable benefit. No obligation exists under DFRC/DFIA which limits the use of the credits to the importation of duty-free input material linked to a specific product. On the contrary, DFRC/DFIA credits are freely transferable, can even be sold and be used for imports of any unrestrictedly importable goods (the input materials of the product concerned belong to this category), except capital goods. Consequently, the product concerned can benefit from all DFRC/DFIA benefit generated.

(63) Four companies in the sample were found to benefit from these schemes during the RIP with subsidy margins ranging from 0,09 % to 2,03 %.

3.2.3. *Export Promotion Capital Goods (EPCG) scheme*

3.2.3.1. Legal basis

(64) The detailed description of the EPCG scheme is contained in chapter 5 of the EXIM policy 04-09 and in chapter 5 of the HOP I 04-09.

3.2.3.2. Eligibility

(65) Manufacturer-exporters, merchant-exporters 'tied to' supporting manufacturers and service providers are eligible for this scheme.

3.2.3.3. Practical implementation

(66) Under the condition of an export obligation, the GOI will issue upon application and payment of a fee an EPCG licence. This licence allows a company to import capital goods (new and — since April 2003 — second-hand capital goods up to 10 years old) at a reduced rate of duty. Until 31 March 2000, an effective duty rate of 11 % (including a 10 % surcharge) and, in case of high value imports, a zero duty rate was applicable. From April 2000, the scheme provided for a reduced import duty rate of 5 % applicable to all capital goods imported under the scheme. In order to meet the export obligation, the imported capital goods must be used to produce a certain amount of export goods during a certain period. On 9 May 2008, i.e. outside the RIP, the GOI announced that the duty payable on import under EPCG was lowered to 3 %.

(67) The EPCG licence holder can also source the capital goods indigenously. In such a case, the EPCG licence holder applies for invalidation of its EPCG licence. The indigenous manufacturer of capital goods specified in the invalidation letter becomes eligible for deemed export benefit and is entitled for the benefit of duty-free import of components required to manufacture such capital goods. However, the excise duty payable on a domestic purchase of the capital good by the EPCG licence holder can be refunded or is exempted. The EPCG licence holder stays liable to fulfil the export obligation, which is set with reference to the notional customs duties saved on FOB value of the import goods.

3.2.3.4. Disclosure comments

(68) The GOI argued that no benefit occurred in cases where EPCG licence holder applies for invalidation of its EPCG licence and purchases the capital goods indigenously, as no corresponding government regulation was issued granting exemption from payment of excise duties for such purchases. However, it was also confirmed by the GOI that under certain circumstances, the EPCG licence holder could purchase capital goods without payment of excise duty, i.e. in cases where this duty would not been

set off under the Indian Central Value Added Tax (Cenvat) credit system. Moreover, the domestic supplier of capital goods is eligible in such cases for fiscal benefits which will be reflected in the price of the capital goods supplied. As this is a benefit that could be obtained on condition of export, as there are no changes in the export obligation of the EPCG licence holder in case of invalidation, it has been considered that the argument has to be rejected and the findings remain unchanged.

3.2.3.5. Conclusion

(69) The EPCG scheme provides subsidies within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation. The duty reduction, or in case of domestic sourcing, the refund of the taxes or exemption therefrom, constitute a financial contribution by the GOI, since this concession decreases the GOI's revenue, which would be otherwise due.

(70) In addition, the duty reduction confers a benefit upon the exporter, because the duties saved upon importation improve its liquidity. In case of excise duty refund/exemption, the refund or exemption from excise duty confers a benefit to the exporter, because the duties saved on purchase of the capital goods improve its liquidity.

(71) Furthermore, the EPCG scheme is contingent in law upon export performance, since such licences can not be obtained without a commitment to export. Therefore, it is deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation.

(72) This scheme cannot be considered a permissible system for remission of prior-stage cumulative indirect taxes or a permissible duty drawback or substitution drawback system within the meaning of Article 2(1)(a)(ii) of the basic Regulation. Capital goods are not covered by the scope of such permissible systems, as set out in Annex I, items (h) and (i), to the basic Regulation, because they are not consumed in the production of the exported products. In case of remission of prior-stage cumulative indirect taxes, it should be noted that the exporters would not be entitled to the same remission if they were not bound by the export obligation.

3.2.3.6. Calculation of the subsidy amount

(73) The subsidy amount was calculated, in accordance with Article 7(3) of the basic Regulation, on the basis of the unpaid customs duty on imported capital goods or unpaid/refunded excise duty on domestically purchased goods, as applicable, spread across a period which reflects the normal depreciation period of such capital goods. In accordance with the established practice, the amount so calculated, which is attributable to the RIP, has been adjusted by adding interest during this period in order to reflect the full value of the benefit over time. The commercial interest rate during the review investigation period in India was considered appropriate for this purpose. Fees necessarily incurred to obtain the subsidy were deducted in accordance with Article 7(1)(a) of the basic Regulation from this sum to arrive at the subsidy amount as numerator. In accordance with Article 7(2) and 7(3) of the basic Regulation, this subsidy amount has been allocated over the export turnover during the RIP as appropriate denominator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(74) Several comments concerning certain details of calculation of benefit under the EPCG were submitted. Where it was found to be justified, the calculations were adjusted as a result.

(75) Contrary to the submission of some exporting producers, even EPCG benefit generated by exporting products other than the product concerned had to be considered when establishing the amount of countervailable benefit. No obligation exists under EPCGS which limits the use of the benefit to the importation of duty-free input material linked to a specific product. Consequently, the product concerned can benefit from all EPCG benefit generated.

(76) Four companies in the sample benefited from this scheme during the RIP with subsidy margins ranging up to 1,45 %, for one company the benefit was found negligible.

3.2.4. *Advance Licence Scheme (ALS)/Advance Authorisation Scheme (AAS)*

3.2.4.1. Legal basis

(77) The detailed description of the scheme is contained in paragraphs 4.1.1 to 4.1.14 of the EXIM policy 04-09 and chapters 4.1 to 4.30 of the HOP I 04-09. This scheme was called 'Advance Licence Scheme' during the previous review investigation that led to the imposition of the definitive countervailing duty currently in force.

3.2.4.2. Eligibility

(78) The AAS consists of six sub-schemes, as described in more detail in recital 79. Those sub-schemes differ, *inter alia*, in the scope of eligibility. Manufacturer-exporters and merchant-exporters 'tied to' supporting manufacturers are eligible for the AAS physical exports and for the AAS for annual requirement. Manufacturer-exporters supplying the ultimate exporter are eligible for AAS for intermediate supplies. Main contractors which supply to the 'deemed export' categories mentioned in paragraph 8.2 of the EXIM policy 04-09, such as suppliers of an export oriented unit (EOU), are eligible

for AAS deemed export. Finally, intermediate suppliers to manufacturer-exporters are eligible for 'deemed export' benefits under the sub-schemes Advance Release Order (ARO) and back-to-back inland letter of credit.

3.2.4.3. Practical implementation

(79) Advance authorisations can be issued for:

*physical exports:* this is the main sub-scheme. It allows for duty-free import of input materials for the production of a specific resultant export product. 'Physical' in this context means that the export product has to leave Indian territory. Import allowance and export obligation, including the type of export product are specified in the licence;

*annual requirement:* such an authorisation is not linked to a specific export product, but to a wider product group (e.g. chemical and allied products). The licence holder can — up to a certain value threshold set by its past export performance — import duty-free any input to be used in manufacturing any of the items falling under such a product group. It can choose to export any resultant product falling under the product group using such duty-exempt material;

*intermediate supplies:* this sub-scheme covers cases where two manufacturers intend to produce a single export product and divide the production process. The manufacturer-exporter produces the intermediate product. It can import duty-free input materials and can obtain for this purpose an AAS for intermediate supplies. The ultimate exporter finalises the production and is obliged to export the finished product;

*deemed exports:* this sub-scheme allows a main contractor to import inputs free of duty which are required in manufacturing goods to be sold as 'deemed exports' to the categories of customers mentioned in paragraph 8.2(b) to (f), (g), (i) and (j) of the EXIM policy 04-09. According to the GOI, deemed exports refer to those transactions in which the goods supplied do not leave the country. A number of categories of supply is regarded as deemed exports provided the goods are manufactured in India, e.g. supply of goods to an EOU or to a company situated in a special economic zone (SEZ);

*ARO:* the AAS holder intending to source the inputs from indigenous sources, in lieu of direct import, has the option to source them against AROs. In such cases the Advance Authorisations are validated as AROs and are endorsed to the indigenous supplier upon delivery of the items specified therein. The endorsement of the ARO entitles the indigenous supplier to the benefits of deemed exports as set out in paragraph 8.3 of the EXIM policy 04-09 (i.e. AAS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty). The ARO mechanism refunds taxes and duties to the supplier instead of refunding the same to the ultimate exporter in the form of drawback/refund of duties. The refund of taxes/duties is available both for indigenous inputs as well as imported inputs;

*back-to-back inland letter of credit:* this sub-scheme again covers indigenous supplies to an Advance Authorisation holder. The holder of an Advance Authorisation can approach a bank for opening an inland letter of credit in favour of an indigenous supplier. The authorisation will be invalidated by the bank for direct import, only in respect of the value and volume of items being sourced indigenously instead of importation. The indigenous supplier will be entitled to deemed export benefits as set out in paragraph 8.3 of the EXIM policy 04-09 (i.e. AAS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty).

(80) It was established that during the RIP two cooperating exporters availed of benefits from two of the sub-schemes above, linked to the product concerned, i.e. (i) ALS/AAS physical exports and (ii) ALS for intermediate supplies. It was therefore not necessary to establish the countervailability of the remaining sub-schemes.

(81) Following the imposition of the definitive countervailing duty currently in force, the GOI modified the verification system applicable to ALS/AAS. For verification purposes by the Indian authorities, an Advance Authorisation holder is legally obliged to maintain 'a true and proper account of consumption and utilisation of duty-free imported/domestically procured goods' in a specified format (chapters 4.26, 4.30 and Appendix 23 HOP I 04-09), i.e. an actual consumption register. This register has to be verified by an external chartered accountant/cost and works accountant who issues a certificate stating that the prescribed registers and relevant records have been examined and the information furnished under Appendix 23 is true and correct in all respects. Nevertheless, the aforesaid provisions apply only to Advance Authorisations issued on or after 13 May 2005. For all Advance Authorisations or Advance Licenses issued before that date, holders are requested to follow the previously applicable verification provisions, i.e. to keep a true and proper account of licence-wise consumption and utilisation of imported goods in the specified format of Appendix 18 (chapter 4.30 and Appendix 18 HOP I 02-07).

(82) In regard to the sub-schemes used during the RIP by the two exporting producers in the sample, i.e. physical exports and intermediate supplies, both the import allowance and the export obligation are fixed in volume and value by the GOI and are documented on the licences. In addition, at the time of import and of export, the corresponding transactions are to be documented by Government officials on the licence. The volume of imports allowed under this scheme is determined by the GOI on the basis of standard input-output norms (SIONs). SIONs exist for most products, including the product concerned and are published in the HOP II 04-09.

(83) Imported input materials are not transferable and have to be used to produce the resultant export product. The export obligation must be fulfilled within a prescribed time frame after issuance of the licence (24 months with two possible extensions of 6 months each).

3.2.4.4. Disclosure comments

(84) The GOI alleged that it had a proper verification system for the scheme according to Appendix 23 of the HOP I 04-09, and that no excess remissions occurred in application of ALS/AAS. It was argued that therefore the scheme was not countervailable. No new evidence was provided support these allegations and therefore this argument is rejected in the light of the findings that neither of the sub-schemes be considered as permissible duty drawback systems or substitution drawback systems within the meaning of Article 2(1)(a)(ii) and Annexes II and III to the basic Regulation, as there was no proper verification system.

(85) Furthermore, according to Annex II(II)(5) and Annex III(II)(3) to the basic Regulation, where it has been found that there is no proper verification system, this may be overcome by carrying out a further examination by the exporting country to prove whether an excess payment occurred. As no such examinations were carried out before the verification visits, as well as it was not proven that no excess payments were received, the arguments are rejected.

3.2.4.5. Conclusion

(86) The exemption from import duties is a subsidy within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation, i.e. a financial contribution of the GOI which conferred a benefit upon the exporters.

(87) In addition, ALS/AAS physical exports and ALS for intermediate supply are clearly contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation. Without an export commitment a company cannot obtain benefits under these schemes.

(88) Neither of the two sub-schemes used in the present case, ALS/AAS physical exports and ALS for intermediate supply, can be considered as permissible duty drawback systems or substitution drawback systems within the meaning of Article 2(1)(a)(ii) of the basic Regulation. They do not conform to the strict rules laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback) to the basic Regulation.

(89) As regards the exporting producer that used AAS, the investigation established that the new verification requirements stipulated by the Indian authorities had not yet been tested in practice since the licenses had not been closed by the time of verification, and therefore had not been verified according to the rules prescribed by the EXIM policy. Therefore, that company could not prove that no excess remission was incurred under that particular licence. The whole amount of duties saved on imports made under that licence shall therefore be deemed a subsidy.

(90) The GOI did not effectively apply its verification system or procedure to confirm whether and in what amounts inputs were consumed in the production of the exported product (Annex II(II)(4) to the basic Regulation and, in the case of substitution drawback schemes, Annex III(II)(2) to the basic Regulation). The SIONs themselves cannot be considered a verification system of actual consumption, since duty-free input materials imported under authorisations/licenses with different SION yields are mixed in the same production process for an exporting good. This type of process does not enable the GOI to verify with sufficient precision what amounts of inputs were consumed in the export production and under which SION benchmark they should be compared.

(91) Furthermore, an effective control done by the GOI based on a correctly kept actual consumption register either did not take place or has not yet been completed. In addition, the GOI did not carry out a further examination based on actual inputs involved, although this would normally need to be carried out in the absence of an effectively applied verification system (Annex II(II)(5) and Annex III(II)(3) to the basic Regulation).

(92) These two sub-schemes are therefore countervailable.

3.2.4.6. Calculation of the subsidy amount

(93) In the absence of a permitted duty drawback system or substitution drawback system, the countervailable benefit is the amount of total remitted import duties normally due upon importation of inputs. In this respect, it is noted that the basic Regulation does not only provide for the countervailing of an 'excess' remission of duties. According to Article 2(1)(a)(ii) and Annex I(i) to the basic Regulation only an excess remission of duties can be countervailed, provided the conditions of Annexes II and III to the basic Regulation are met. However, these conditions were not fulfilled in the present case. Thus, if an absence of an adequate monitoring process is established, the above exception for drawback schemes is not applicable and the normal rule of the countervailing of the amount of (revenue forgone) unpaid duties, rather than any purported excess remission, applies. As set out in Annexes II(II) and III(II) to the basic Regulation the burden is not upon the investigating authority to calculate such excess remission. To the contrary, according to Article 2(1)(a)(ii) of the basic Regulation it only has to establish sufficient evidence to refute the appropriateness of an alleged verification system.

(94) The subsidy amount was calculated on the basis of import duties forgone (basic customs duty and special additional customs duty) on the material imported under the two sub-schemes used for the product concerned during the RIP. In accordance with Article 7(1)(a) of the basic Regulation, fees necessarily incurred to obtain the subsidy were deducted from the subsidy amount where justified claims were made. In accordance with Article 7(2) of the basic Regulation, this subsidy amount has been allocated over the export turnover generated by the product concerned during the RIP as appropriate denominator, because the subsidy is contingent upon export performance and was not granted by reference to the quantities manufactured, produced, exported or transported.

(95) Several comments concerning certain details of calculation of benefit under the ALS/AAS were submitted. Where such comments were found to be justified, the calculations were adjusted accordingly.

(96) Contrary to the submission of some exporting producers, even ALS/AAS benefit generated by exporting products other than the product concerned had to be considered when establishing the amount of countervailable benefit. No obligation exists under ALS/AAS which limits the use of the benefit to the importation of duty-free input material linked to a specific product. Consequently, the product concerned can benefit from all ALS/AAS benefit generated.

(97) Two companies in the sample benefited from ALS or AAS with the benefit ranging from 0,17 % to 1,74 %.

3.2.5. *Export Processing Zones/Export Oriented Units (EPZs/EOUs)*

(98) It was found that none of the cooperating exporting producers was located in an SEZS or in an EPZS, or had a status of EOU. Therefore, it was found not necessary to further analyse this scheme in this investigation.

3.2.6. *Income Tax Exemptions scheme (ITES)*

(99) Under this scheme exporters could avail the benefit of a partial income tax exemption on profits derived from export sales. The legal basis for this exemption was set by Section 80HHC of the ITA.

(100) This provision was abolished for the assessment year 2005-2006 (i.e. for the financial year from 1 April 2004 to 31 March 2005) onwards and thus 80HHC of the ITA does not confer any benefits after 31 March 2004. None of the cooperating exporting producers availed benefits under this scheme during the RIP. It was therefore not found necessary to further analyse this scheme in this investigation.

3.2.7. *Duty Drawback Scheme (DDS)*

3.2.7.1. Legal basis

(101) The scheme is based on Section 75 of the Customs Act 1962, Section 37(2)(xvi) of the Excise Act 1944 and Sections 93A and 94 of the Finance Act 1994.

3.2.7.2. Eligibility

(102) Any exporter is eligible for this scheme.

3.2.7.3. Practical implementation

(103) There are two types of duty drawback rates set by the GOI — 'all-industry' rates applied on a lump-sum basis to all exporters of a specific product, and 'brand' rates applied on a company basis for products not covered by 'all industry' rates. The first type (all-industry rate) is the one relevant to the product concerned.

(104) The all-industry drawback rates are calculated as a percentage of the value of products exported under this scheme. Such all-industry drawback rates have been established by the Indian authorities for various products, including the product concerned. They are determined on the basis of presumed indirect taxes and import charges charged on goods and services used in the manufacturing process of the export product (import duties, excise duty, service tax etc.), including presumed indirect taxes and import charges charged on goods and services for manufacturing the inputs, and regardless of whether those taxes have actually been paid or not. The amount of DDS is subject to a maximum value cap of the export product per unit. If the company can reclaim some of these duties from the Cenvat system then the drawback rate is lower.

(105) The duty drawback rates on the product concerned have been revised several times during the RIP. Until 1 April 2007 the applicable rates were from 6,4 % to 6,9 % depending on the product type, until 1 September 2007 from 9,1 % to 9,8 %. On 13 December 2007, i.e. after the ed of the RIP, the drawback rates were increased to 10,1 % to 10,3 % and the increase backdated to imports from 1 September 2007, i.e. within the RIP.

(106) To be eligible for benefits under this scheme, a company must export. A declaration must be made by the exporter to the authorities in India indicating that the export is taking place under the DDS at the time of export. In order for the goods to be exported, the Indian customs authorities issue, during the dispatch procedure, an export shipping bill. This document shows, *inter alia*, the amount of DDS which is to be granted for that export transaction. The exporter then knows the benefit it will receive and books it into accounts as an amount receivable. Once the customs authorities issue an export shipping bill, the GOI has no discretion over the granting of DDS. The relevant DDS rate to calculate the benefit is generally that which applied at the time the export declaration is made. A retroactive increase of the drawback rates took place during the RIP, which was taken into account in the calculation of the subsidy amount.

3.2.7.4. Disclosure comments

(107) Several parties argued that the DDS could not be countervailed in this investigation because it was not specifically mentioned in the anti-subsidy questionnaires issued at the beginning of the investigation. This argument is rejected for the following reasons. The purpose of this review according to the notice of initiation is the 'level of subsidisation', which has conferred benefit on the exporting producers of the product concerned, i.e. it includes all subsidy schemes operated by the GOI.

(108) It was argued that the DDS was not contingent on export performance because the benefit under this scheme did not relate to the level of exports performed by the exporters. This argument is rejected, because the benefit of DDS can be claimed only if the goods are exported, which is sufficient to fulfil the criterion of export contingency laid down in Article 3(4)(a) of the basic Regulation. In the light of this conclusion, it is not necessary to analyse the argument that the DDS is not specific in the meaning of Article 3(2) and (3) of the basic Regulation.

(109) The GOI submitted that DDS is a drawback system compatible with the provisions of the basic Regulation, and that the procedure for setting the all-industry drawback rates was reasonable, effective and based on generally accepted commercial practices in the country of export according to Annex II (II)(4) and Annex III (II)(2). As set out also in recital 104 above, this procedure involved an industry-wide estimation of the inputs used in production and import duties and indirect taxes incurred. However, this procedure was not sufficiently precise even according to the GOI submission. Indeed, the GOI confirmed that there was an element of averaging, which would imply that the actual drawback paid was more than the actual duties paid. In addition, the GOI did not carry out a further examination based on actual inputs involved, although this would normally need to be carried out in the absence of an effectively applied verification system (Annex II(II)(5) and Annex III(II)(3)), nor did it prove that no excess remission took place. The alleged parallel of the verification to the sampling techniques set out in the basic Regulation is considered irrelevant, as they clearly refer to the anti-subsidy investigations and do not form part of the criteria laid down in Annexes II and III. Therefore, these arguments are rejected.

(110) It was also submitted that no existence of excess remissions could be presumed from the fact that in the DDS the GOI did not include all indirect taxes payable in India into the DDS, but only the central indirect taxes. This argument is rejected, because according to Annex II(II)(4) and Annex III(II)(2) excess remissions need to be assessed in the framework of a particular subsidy scheme.

3.2.7.5. Conclusion

(111) The DDS provides subsidies within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation. The duty drawback amount is equivalent to government revenue forgone that would otherwise have been collected and paid to the GOI. In addition, the DDS on exportation confers a benefit upon the exporter.

(112) The DDS is contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation.

(113) Several parties to the proceeding argued that DDS is a drawback system compatible with the provisions of the basic Regulation and therefore the benefit conferred according to it should not be countervailed.

(114) The investigation has established that this scheme cannot be considered a permissible system for remission of prior-stage cumulative indirect taxes or a permissible duty drawback or substitution drawback system within the meaning of Article 2(1)(a)(ii) of the basic Regulation. It does not conform to the strict rules laid down in Annex I item (h) and (i), Annex II (guidelines on consumption of inputs) and Annex III (definition and rules for substitution drawback) to the basic Regulation. An exporter is under no obligation either (i) to keep an account of the duties and taxes paid on the imported/domestically purchased goods or incorporated services or (ii) to actually consume those goods and services in the production process, and (iii) the amount of drawback is not calculated in relation to actual inputs used by the exporter and the duties and taxes actually paid.

(115) Moreover, there is no system or procedure in place to confirm which inputs are consumed in the production process of the exported product or whether an excess refund of domestic indirect taxes within the meaning of item (h) of Annex I and Annex II to the basic Regulation or of import duties occurred within the meaning of item (i) of Annex I and Annexes II and III to the basic Regulation.

(116) Finally, an exporter is eligible for the DDS benefits regardless of whether it imports or purchases domestically any inputs at all, and has paid duties or taxes on those purchases. In order to obtain the benefit, it is sufficient for an exporter to simply export goods without demonstrating that any input material was imported or that any input material or service was purchased domestically, and import duties or domestic indirect taxes have been paid. Consequently, there is no difference in the drawback rate whether a company owns all stages of production of the inputs and the product concerned or is a mere exporting trader.

3.2.7.6. Calculation of the subsidy amount

(117) In accordance with Articles 2(2) and 5 of the basic Regulation, the amount of countervailable subsidies was calculated in terms of the benefit conferred on the recipient, which is found to exist during the RIP. In this regard, it was considered that the benefit is conferred on the recipient when an export transaction is made under this scheme. From that moment, the GOI is liable to pay the drawback amount to the respective exporters, which constitutes a financial contribution within the meaning of Article 2(1)(a)(i) of the basic Regulation. Once the customs authorities issue an export shipping bill which shows, *inter alia*, the amount of DDS which is to be granted for that export transaction, the GOI has no discretion as to whether or not to grant the subsidy. Furthermore, the cooperating exporting producers booked DDS on an accrual basis as income at the time of each export transaction.

(118) In order to take account of the impact of backdated increase in rates, the value of the DDS credit booked for exports made between 1 September to 30 September 2007 was increased where necessary as the actual benefit the companies will be entitled to receive from the GOI is higher than formally claimed at the time of exportation.

(119) In accordance with Article 7(2) of the basic Regulation this subsidy amount has been allocated over the total export turnover during the review investigation period as appropriate denominator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(120) Seven companies in the sample submitted claims that although they benefited from the DDS, they did not incur any excess remissions, as the taxes or import duties they have accrued exceeded the drawback amounts. It has been decided to reject these claims. In recitals 113 and 115 it was concluded that the GOI did not have an adequate verification system as provided in Annexes I, II and III to the basic Regulation. The investigation also showed that companies did not keep any consumption registers or any other internal reporting system to account for possible excess remissions. Such reports were created by the companies during the verification visits and largely include the taxes paid by the companies in general.

(121) In the absence of permitted duty drawback systems or substitution drawback systems, the countervailable benefit is the remission of total amount of drawback accrued under the DDS. Contrary to the disclosure submissions made by the GOI, Texprocil and some exporters, the basic Regulation does not only provide for the countervailing of an 'excess' remission of duties. According to Article 2(1)(a)(ii) and Annex I(i) to the basic Regulation, only an excess remission of duties can be countervailed, provided the conditions of Annexes II and III to the basic Regulation are met. However, these conditions were not fulfilled in the present case. Thus, if an absence of an adequate verification procedure is established, the above exception for drawback schemes is not applicable and the normal rule of the countervailing of

the amount of drawback, rather than any purported excess remission, applies. As set out in Annexes II(II) and III(II) to the basic Regulation the burden is not upon the investigating authority to calculate such excess remission. To the contrary, according to Article 2(1)(a)(ii) of the basic Regulation it only has to establish sufficient evidence to refute the appropriateness of an alleged verification system. It should further be noted, that an additional examination by the Indian authorities in the absence of an effectively applied verification system needs to be done in a timely manner, i.e. normally before the on-the-spot verification in a countervailing duty investigation.

(122) Contrary to the submission of some exporting producers, even DDS benefit generated by exporting non-product concerned had to be considered when establishing the amount of countervailable benefit. No obligation exists under DDS which limits the use of the benefit to a specific product. Consequently, the product concerned can benefit from all DDS benefit generated.

(123) All companies in the sample benefited from the DDS scheme during the RIP with subsidy margins ranging from 1,45 % to 7,57 %.

3.2.8. *Technology Upgradation Fund Scheme (TUFS)*

3.2.8.1. Legal basis

(124) TUFS was introduced by a Resolution of the Ministry of Textiles, Government of India, published in the Official Gazette of India Extraordinary Part I Section I on 31 March 1999 (Resolution). The scheme was approved to be in effect from 1 April 1999 to 31 March 2004. It was extended up to 31 March 2007 and subsequently extended again until the end of the RIP.

3.2.8.2. Eligibility

(125) Existing or new producers in the sector of cotton processing, textile and jute industry are eligible for benefits under this scheme.

3.2.8.3. Practical implementation

(126) The aim of the scheme is to provide support for modernisation of technology in the textile and jute industry, including units for processing of fibres, yarns, fabrics, garments and made-ups. The scheme provides for various kinds of benefit in the form of a capital subsidy, interest subsidy or coverage of exchange rate fluctuation in foreign currency loans. The programmes under the scheme differentiate between the textile and jute sectors, and the powerloom and handloom sector. TUFS includes the following programmes:

(a) 5 % reimbursement of the normal interest charged by the lending agency on rupee term loan; or

(b) coverage of 5 % exchange fluctuation (interest and repayment) from the base rate on foreign currency loan; or

(c) 15 % credit linked capital subsidy for the textile and jute sector; or

(d) 20 % credit linked capital subsidy for the powerloom sector; or

(e) 5 % interest reimbursement, plus 10 % capital subsidy, for specified processing machinery; and

(f) 25 % capital subsidy on purchase of the new machinery and equipment for pre-loom and post-loom operations, handlooms/up-gradation of handlooms and testing and quality-control equipments, for handloom production units.

(127) The investigation established that two companies in the sample obtained benefit under the TUFS for purchase of machinery used in production of the product concerned. Those companies used, respectively, the interest reimbursement loans (scheme (a)) and the 10 % capital subsidy for processing machinery combined with 5 % interest reimbursement (scheme (e)).

(128) The Resolution provides a list of the type of machinery the purchase of which is subsidised under the TUFS. To receive benefit from the TUFS, companies apply to commercial banks or other lending agencies, which grant the loans to the companies based upon their own independent assessment of the credit worthiness of the borrowers. If the borrower is eligible for an interest subsidy under the scheme, the commercial banks refer the claim to a 'nodal agency' who subsequently releases the benefit amount to the commercial bank involved. The commercial banks finally credit the funds so received to the account of the borrower. The nodal agencies get reimbursement from the Ministry of Textiles, Government of India. The Government of India places the required funds at the disposal of the nodal agencies on a quarterly basis.

3.2.8.4. Disclosure comments

(129) No comments were received from interested parties regarding this scheme.

3.2.8.5. Conclusion

(130) The TUFS constitutes a subsidy under the provisions of Article 2(1)(a)(i) as it involves a direct transfer of funds by the government in the form of a grant. The subsidy confers a benefit by decreasing the financing and interest costs for the purchase of the machinery.

(131) The subsidy is deemed to be specific and therefore countervailable according to Article 3(2)(a) of the basic Regulation since it is specifically provided to an industry or a group of industries, including the manufacture of the product concerned.

3.2.8.6. Calculation of the subsidy amount

(132) The capital subsidy amount was calculated, in accordance with Article 7(3) of the basic Regulation, on the basis of the amount saved by the recipient companies on the purchased machinery, spread across a period which reflects the normal depreciation period of such capital goods. In accordance with the established practice, the amount so calculated, which is attributable to the RIP, has been adjusted by adding interest during this period in order to reflect the full value of the benefit over time. The commercial interest rate during the review investigation period in India was considered appropriate for this purpose. In accordance with Article 7(2) of the basic Regulation, this subsidy amount has been allocated over the total turnover of textiles during the RIP as appropriate denominator, because the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported.

(133) The interest subsidy amount was calculated, in accordance with Article 7(3) of the basic Regulation, on the basis of the amount actually repaid during the RIP to the companies concerned linked to the interest paid on the commercial loans taken out for the purchase of the machinery concerned. In accordance with Article 7(2) of the basic Regulation, this subsidy amount has been allocated over the total turnover of textiles during the RIP as appropriate denominator, because the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported.

(134) Two companies in the sample benefited from this scheme during the RIP with subsidy margins ranging from 0,01 % to 0,31 %.

3.2.9. *Export Credit Scheme (pre-shipment and post-shipment) (ECS)*

3.2.9.1. Legal basis

(135) The details of the scheme are set out in the Master Circular IECD No 02/04.02.02/2006-07 (Export Credit in Foreign Currency), the Master Circular IECD No 01/04.02.02/2006-07 (Rupee Export Credit) and the Master Circular DBOD.DIR(Exp.)No 01/04.02.02/2007-08 (consolidated for both Rupee and Foreign Currency export credit) of the Reserve Bank of India (RBI), which was addressed to all commercial banks in India during the RIP. The Master Circulars are regularly revised and updated.

3.2.9.2. Eligibility

(136) Manufacturing exporters and merchant exporters are eligible for this scheme.

3.2.9.3. Practical implementation

(137) Under this scheme, the RBI mandatorily sets maximum ceiling interest rates applicable to export credits, both in Indian rupees or in foreign currency, which commercial banks can charge an exporter. The ECS consists of two sub-schemes, the Pre-Shipment Export Credit Scheme (packing credit), which covers credits provided to an exporter for financing the purchase, processing, manufacturing, packing and/or shipping of goods prior to export, and the Post-Shipment Export Credit Scheme, which provides for working capital loans with the purpose of financing export receivables. The RBI also directs the banks to provide a certain amount of their net bank credit towards export finance.

(138) As a result of the RBI Master Circular exporters can obtain export credits at preferential interest rates compared with the interest rates for ordinary commercial credits (cash credits), which are purely set under market conditions.

3.2.9.4. Disclosure comments

(139) The GOI claimed that with regard to the ECS the Commission failed to examine the scheme in the light of the provisions of Annex I point (k) to the Agreement on Subsidies and Countervailing Measures (ASCM) and argued that export credits, both in Indian rupees or in foreign currency, were not countervailable, especially as in foreign currency loans the banks were allowed to borrow funds at 'internationally competitive rates'.

(140) It should be noted that the export credit schemes referred to under recital 135 do not fall within the application of Annex I point (k) to the ASCM, because only export financing with a duration of two years or more can normally be regarded as 'export credits' in the meaning of that provision since this is the definition of the OECD Arrangement on Guidelines for Officially Supported Export Credits. Therefore this argument is rejected.

3.2.9.5. Conclusion

(141) The preferential interest rates of an ECS credit set by the RBI Master Circulars mentioned in recital 135 can decrease interest costs of an exporter as compared with credit costs purely set by market conditions and confer in this case a benefit in the meaning of Article 2(2) of the basic Regulation on such exporter. Export financing is not per se more secure than domestic financing. In fact, it is usually perceived as being more risky and the extent of security required for a certain credit, regardless of the finance object, is a purely commercial decision of a given commercial bank. Rate differences with regard to different banks are the result of the methodology of the RBI to set maximum lending rates for each commercial bank individually. In addition, commercial banks would not be obliged to pass through to borrowers of export financing any more advantageous interest rates for export credits in foreign currency.

(142) Despite the fact that the preferential credits under the ECS are granted by commercial banks, this benefit is a financial contribution by a government within the meaning of Article 2(1)(a)(iv) of the basic Regulation. In this context, it should be noted that neither Article 2(1)(a)(iv) of the basic Regulation nor the WTO Agreement on Subsidies and Countervailing Measures (ASCM) require a charge on the public accounts, e.g. reimbursement of the commercial banks by the GOI, to establish a subsidy, but only government direction to carry out functions illustrated in points (i), (ii) or (iii) of Article 2(1)(a) of the basic Regulation. The RBI is a public body and falls therefore under the definition of a 'government' as set out in Article 1(3) of the basic Regulation. It is 100 % government owned, pursues public policy objectives, e.g. monetary policy, and its management is appointed by the GOI. The RBI directs private bodies, since the commercial banks are bound by the conditions it imposes, *inter alia*, with regard to the maximum ceilings for interest rates on export credits mandated in the RBI Master Circular and the RBI provisions that commercial banks have to provide a certain amount of their net bank credit towards export finance. This direction obliges commercial banks to carry out functions mentioned in Article 2(1)(a)(i) of the basic Regulation, in this case loans in the form of preferential export financing. Such direct transfer of funds in the form of loans under certain conditions would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments, within the meaning of Article 2(1)(a)(iv) of the basic Regulation.

(143) This subsidy is deemed to be specific and countervailable since the preferential interest rates are only available in relation to the financing of export transactions and are therefore contingent upon export performance, pursuant to Article 3(4)(a) of the basic Regulation.

3.2.9.6. Calculation of the subsidy amount

(144) The subsidy amount has been calculated on the basis of the difference between the interest paid for export credits used during the RIP and the amount that would have been payable if the rates for ordinary commercial credits had been applied. This subsidy amount (numerator) has been allocated over the total export turnover during the RIP as appropriate denominator in accordance with Article 7(2) of the basic Regulation, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(145) Several comments concerning certain details of calculation of benefit under the ECS were submitted. Where it was found to be justified, the calculations were adjusted as a result.

(146) All companies and groups in the sample obtained subsidies from this scheme during the RIP with rates up to 1,05 %, for one company the benefit was found negligible.

3.3. **Amount of countervailable subsidies**

(147) The amount of countervailable subsidies in accordance with the provisions of the basic Regulation, expressed *ad valorem*, for the investigated exporting producers ranged between 5,2 % and 9,7 %.

(148) In accordance with Article 15(3) of the basic Regulation, the subsidy margin for the cooperating companies not included in the sample, calculated on the basis of the weighted average subsidy margin established for the cooperating companies in the sample, is 7,7 %. Given that the level of the overall cooperation for India was high (95 %), the residual subsidy margin for all other companies was set at the level for the company with the highest individual margin, i.e. 9,7 %.

| Subsidy scheme → / Company/Group ↓ | DEPBS | DFRC/ DFIA | EPCGS | ALS/AAS | EPZs/EOUs | ITES | ECS | DDS | TUFS | Total |
|---|---|---|---|---|---|---|---|---|---|---|
| Anunay Fab. Ltd | 0,15 % | 2,03 % | | | | | 1,05 % | 4,58 % | | 7,8 % |
| The Bombay Dyeing and Manufacturing Co. Ltd<br>N W Exports Limited<br>Nowrosjee Wadia & Sons Limited | 1,65 % | | 1,45 % | 1,74 % | | | 0,11 % | 4,15 % | 0,31 % | 9,4 % |
| Brijmohan Purusottamdas<br>Incotex Impex Pvt Ltd | | | | | | | 0,94 % | 7,39 % | | 8,3 % |
| Divya Global Pvt Ltd | | 0,94 % | | | | | 0,04 % | 7,26 % | | 8,2 % |
| Intex Exports<br>Pattex Exports<br>Sunny Made-Ups | | | | | | | 0,08 % | 7,57 % | | 7,6 % |
| Jindal Worldwide Ltd<br>Texcellence Overseas | 1,44 % | | 1,25 % | | | | 0,76 % | 4,57 % | | 8 % |
| Madhu Industries Ltd | 3,96 % | | | | | | negl, | 1,45 % | | 5,4 % |
| Mahalaxmi Fabric Mills Pvt Ltd<br>Mahalaxmi Exports | | | | | | | 0,07 % | 7,41 % | 0,01 % | 7,5 % |
| Prakash Cotton Mills Pvt, Ltd | | 1,41 % | 1,17 % | | | | 0,34 % | 6,78 % | | 9,7 % |
| Prem Textiles | | | | | | | 0,88 % | 7,48 % | | 8,3 % |
| Vigneshwara Exports Ltd | 0,5 % | 0,09 % | negl, | 0,17 % | | | 0,61 % | 3,84 % | | 5,2 % |

## 4. COUNTERVAILING MEASURES

(149) In line with the provisions of Article 19 of the basic Regulation and the grounds of this partial interim review stated under point 3 of the notice of initiation, it is established that the level of subsidisation with regard to the cooperating producers has changed and, therefore, the rate of countervailing duty, imposed by Regulation (EC) No 74/2004 has to be amended accordingly.

(150) The definitive duty currently in force was established on the basis of the countervailing margins, as the injury elimination level was higher. As the subsidy margins established in this review also did not exceed the injury elimination level, in accordance with Article 15(1) of the basic Regulation the duties are determined on the basis of the subsidy margins.

(151) The subsidy margin for company Pasupati Fabrics, which did not form part of this review, was maintained at the level established in the original investigation, as they were found to benefit from a subsidy scheme which was not reviewed in this investigation.

(152) The companies that were found to be related have been regarded as a single legal entity (group) for duty collection purposes and hence submitted to the same countervailing duty. The export quantities of the product concerned during the RIP of those groups were used in order to ensure a proper weighting.

(153) The sampled company Prem Textiles submitted information during the review investigation showing that it had changed its name to 'Prem Textiles (International) Pvt Ltd'. After examining this information and concluding that the change of name in no way affects the findings of the present review, it was decided to grant this request and refer to them as 'Prem Textiles (International) Pvt Ltd' in this Regulation.

(154) Given that the level of the overall cooperation for India was high (95 %), the residual countervailing duty for all other companies was set at the level for the company with the highest individual margin, i.e. 9,7 %.

(155) The following duties therefore apply:

| Company/group | Rate of duty (%) |
|---|---|
| Anunay Fab. Limited, Ahmedabad | 7,8 % |
| The Bombay Dyeing and Manufacturing Co. Ltd, Mumbai<br>N W Exports Limited, Mumbai<br>Nowrosjee Wadia & Sons Limited, Mumbai | 9,4 % |
| Brijmohan Purusottamdas, Mumbai<br>Incotex Impex Pvt Limited, Mumbai | 8,3 % |
| Divya Global Pvt Ltd, Mumbai | 8,2 % |
| Intex Exports, Mumbai<br>Pattex Exports, Mumbai<br>Sunny Made-Ups, Mumbai | 7,6 % |
| Jindal Worldwide Ltd, Ahmedabad<br>Texcellence Overseas, Mumbai | 8 % |
| Madhu Industries Limited, Ahmedabad | 5,4 % |
| Mahalaxmi Fabric Mills Pvt Ltd, Ahmedabad<br>Mahalaxmi Exports, Ahmedabad | 7,5 % |
| Prakash Cotton Mills Pvt, Ltd, Mumbai | 9,7 % |
| Prem Textiles, Indore | 8,3 % |
| Vigneshwara Exports Limited, Mumbai | 5,2 % |
| Cooperating companies not in the sample | 7,7 % |
| All other companies | 9,7 % |

(156) The individual company countervailing duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the average duty applicable to Annex I companies and the countrywide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in India and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation with its name and address, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.

(157) Any claim requesting the application of these individual company countervailing duty rates (e.g. following a change in the name of the entity or following the setting up of new production or sales entities) should be addressed to the Commission forthwith with all relevant information, in particular any modification in the company's activities linked to production and export sales associated with e.g. that name change or that change in the production and sales entities. The Commission, if appropriate, will, after consultation of the Advisory Committee, amend the Regulation accordingly by updating the list of companies benefiting from individual duty rates,

HAS ADOPTED THIS REGULATION:

*Article 1*

Article 1 of Regulation (EC) No 74/2004 is hereby replaced with the following:

'*Article 1*

1. A definitive countervailing duty is hereby imposed on imports of bedlinen of cotton fibres, pure or mixed with man-made fibres or flax (flax not being the dominant fibre), bleached, dyed or printed, originating in India, currently classifiable within CN codes ex 6302 21 00 (TARIC codes 6302 21 00 81 and 6302 21 00 89), ex 6302 22 90 (TARIC code 6302 22 90 19), ex 6302 31 00 (TARIC code 6302 31 00 90) and ex 6302 32 90 (TARIC code 6302 32 90 19).

2. The rate of duty applicable to the net, free-at-Community-frontier price, before duty, for products produced by the following companies shall be as follows:

| Company | Rate of duty (%) | TARIC additional code |
|---|---|---|
| Anunay Fab. Limited, Ahmedabad | 7,8 | A902 |
| The Bombay Dyeing and Manufacturing Co. Ltd, Mumbai | 9,4 | A488 |
| N.W. Exports Limited, Mumbai | 9,4 | A489 |
| Nowrosjee Wadia & Sons Limited, Mumbai | 9,4 | A490 |
| Brijmohan Purusottamdas, Mumbai | 8,3 | A491 |
| Incotex Impex Pvt Limited, Mumbai | 8,3 | A903 |
| Divya Global Pvt Ltd, Mumbai | 8,2 | A492 |
| Intex Exports, Mumbai | 7,6 | A904 |
| Pattex Exports, Mumbai | 7,6 | A905 |
| Sunny Made-Ups, Mumbai | 7,6 | A906 |

| Company | Rate of duty (%) | TARIC additional code |
|---|---|---|
| Jindal Worldwide Ltd, Ahmedabad | 8 | A494 |
| Texcellence Overseas, Mumbai | 8 | A493 |
| Madhu Industries Limited, Ahmedabad | 5,4 | A907 |
| Mahalaxmi Fabric Mills Pvt Ltd, Ahmedabad | 7,5 | A908 |
| Mahalaxmi Exports, Ahmedabad | 7,5 | A495 |
| Pasupati Fabrics, New Delhi | 8,5 | A496 |
| Prakash Cotton Mills Pvt, Ltd, Mumbai | 9,7 | 8048 |
| Prem Textiles (International) Pvt Ltd, Indore | 8,3 | A909 |
| Vigneshwara Exports Limited, Mumbai | 5,2 | A497 |

3. The rate of duty applicable to the net, free-at-Community-frontier price, before duty, for products produced by the companies listed in the Annex, shall be 7,7 % (TARIC additional code A498).

4. The rate of duty applicable to the net, free-at-Community-frontier price, before duty, for products produced by the companies not specified in paragraphs 2 and 3, shall be 9,7 % (TARIC additional code A999).

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

*Article 2*

The Annex to Regulation (EC) No 74/2004 shall be replaced by the Annex to this Regulation.

*Article 3*

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

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

Done at Brussels, 18 December 2008.

*For the Council*
*The President*
M. BARNIER

*ANNEX*

*'ANNEX*

**TARIC Additional Code: A498**

| | |
|---|---|
| Ajit Impex | Mumbai |
| Alok Industries Limited | Mumbai |
| Alps Industries Ltd | Ghaziabad |
| Ambaji Marketing Pvt Ltd | Ahmedabad |
| Anglo French textiles | Pondicherry |
| Anjal Garments | Ghaziabad |
| Anjani Synthetics Limited | Ahmedabad |
| Aravali | Jaipur |
| Ashok Heryani Exports | New Delhi |
| At Home India Pvt Ltd | New Delhi |
| Atul Impex Pvt Ltd | Dombivli |
| Balloons | New Delhi |
| Beepee Enterprise | Mumbai |
| Bhairav India International | Ahmedabad |
| Bunts Exports Pvt Ltd | Mumbai |
| Chemi Palace | Mumbai |
| Consultech Dynamics | Mumbai |
| Cotfab Exports | Mumbai |
| Country House | New Delhi |
| Creative Mobus Fabrics Limited | Mumbai |
| Deepak Traders | Mumbai |
| Dimple Impex (India) Pvt Ltd | New Delhi |
| Eleganza Furnishings Pvt Ltd | Mumbai |
| Emperor Trading Company | Tirupur |
| Estocorp (India) Pvt Ltd | New Delhi |
| Exemplar International | Hyderabad |
| Falcon Finstock Pvt Ltd | Ahmedabad |
| G-2 International Export Ltd | Ahmedabad |
| Gauranga Homefashions | Mumbai |
| GHCL Ltd | Gujarat |
| Good Shepherd Health Education & Dispensary | Tamilnadu |
| Harimann International Private Limited | Mumbai |
| Heirloom Collections (P) Ltd | New Delhi |
| Hemlines Textile Exports Pvt Ltd | Mumbai |

| | |
|---|---|
| Himalaya Overseas | New Delhi |
| Home Fashions International | Kerala |
| Ibats | New Delhi |
| Indian Arts and Crafts Syndicate | New Delhi |
| Indian Craft Creations | New Delhi |
| Indo Euro Textiles Pvt Ltd | New Delhi |
| Kabra Brothers | Mumbai |
| Kalam Designs | Ahmedabad |
| Kanodia Fabrics (International) | Mumbai |
| Karthi Krishna Exports | Tirupur |
| Kaushalya Export | Ahmedabad |
| Kirti Overseas | Ahmedabad |
| La Sorogeeka Incorporated | New Delhi |
| Lalit & Company | Mumbai |
| Manubhai Vithaldas | Mumbai |
| Marwaha Exports | New Delhi |
| Milano International (India) Pvt Ltd | Chennai |
| Mohan Overseas (P) Ltd | New Delhi |
| M/s. Opera Clothing | Mumbai |
| M/S Vijayeswari Textiles Limited | Coimbatore |
| Nandlal & Sons | Mumbai |
| Natural Collection | New Delhi |
| Oracle Exports Home Textiles Pvt Ltd | Mumbai |
| Pacific Exports | Ahmedabad |
| Petite Point | New Delhi |
| Pradip Exports | Ahmedabad |
| Pradip Overseas Pvt Ltd | Ahmedabad |
| Punch Exporters | Mumbai |
| Radiant Expo Global Pvt Ltd | New Delhi |
| Radiant Exports | New Delhi |
| Raghuvir Exim Limited | Ahmedabad |
| Ramesh Textiles India Pvt Ltd | Indore |
| Ramlaks Exports Pvt Ltd | Mumbai |
| Redial Exim Pvt Ltd | Mumbai |
| S. D. Entreprises | Mumbai |
| Samria Fabrics | Indore |
| Sanskrut Intertex Pvt Ltd | Ahmedabad |
| Sarah Exports | Mumbai |

| | |
|---|---|
| Shades of India Crafts Pvt Ltd | New Delhi |
| Shanker Kapda Niryat Pvt Ltd | Baroda |
| Shetty Garments Pvt Ltd | Mumbai |
| Shivani Exports | Mumbai |
| Shivani Impex | Mumbai |
| Shrijee Enterprises | Mumbai |
| S.P. Impex | Indore |
| Starline Exports | Mumbai |
| Stitchwell Garments | Ahmedabad |
| Sumangalam Exports Pvt Ltd | Mumbai |
| Summer India Textile Mills (P) Ltd | Salem |
| Surendra Textile | Indore |
| Suresh & Co. | Mumbai |
| Synergy Lifestyles Pvt Ltd | Mumbai |
| Syntex Corporation Pvt Ltd | Mumbai |
| Texel Industries | Chennai |
| Texmart Import export | Ahmedabad |
| Textrade International Private Limited | Mumbai |
| The Hindoostan Spinning & Weaving Mills Ltd | Mumbai |
| Trend Setters | Mumbai |
| Trend Setters K.F.T.Z. | Mumbai |
| Utkarsh Exim Pvt Ltd | Ahmedabad |
| V & K Associates | Mumbai |
| Valiant Glass Works Private Ltd | Mumbai |
| Visma International | Tamilnadu |
| VPMSK A Traders | Karur |
| V.S.N.C. Narasimha Chettiar Sons | Karur |
| Welspun India Limited | Mumbai |
| Yellows Spun and Linens Private Limited | Mumbai' |

# COUNCIL REGULATION (EC) No 1354/2008

## of 18 December 2008

## amending Regulation (EC) No 1628/2004 imposing a definitive countervailing duty on imports of certain graphite electrode systems originating in India and Regulation (EC) No 1629/2004 imposing a definitive anti-dumping duty on imports of certain graphite electrode systems originating in India

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not member of the European Community [1] (the basic Regulation), and in particular Articles 15 and 19 thereof,

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

Whereas:

### A. PROCEDURE

#### I. Previous investigation and existing measures

(1) The Council, by Regulation (EC) No 1628/2004 [2], imposed a definitive countervailing duty on imports of graphite electrodes of a kind used for electric furnaces, with an apparent density of 1,65 g/cm$^3$ or more and an electrical resistance of 6,0 μΩ.m or less, falling within CN code ex 8545 11 00 and nipples used for such electrodes, falling within CN code ex 8545 90 90 whether imported together or separately, originating in India. The rate of the duty ranges between 7,0 % and 15,7 % for individually named exporters with a residual duty rate of 15,7 % imposed on imports from other exporters.

(2) At the same time, by Regulation (EC) No 1629/2004 [3], the Council imposed a definitive anti-dumping duty on imports of the same product originating in India.

#### II. Initiation of a partial interim review

(3) Following the imposition of the definitive countervailing duty the Government of India (GOI) made submissions that the circumstances with regard to two subsidy schemes (the Duty Entitlement Passbook Scheme and the Income Tax Exemption under Section 80 HHC of the Income Tax Act) have changed and that these changes are of a lasting nature. Consequently, it was argued that the level of subsidisation is likely to have decreased and thus measures that have been established partly on these schemes should be revised.

(4) The Commission examined the evidence submitted by the GOI and considered it sufficient to justify the initiation of a review in accordance with the provisions of Article 19 of the basic anti-subsidy Regulation. After consultation of the Advisory Committee, the Commission initiated an *ex officio* partial interim review of the measures in force by a notice published in the *Official Journal of the European Union* [4].

(5) The purpose of this partial interim review investigation is to assess the need for the continuation, removal or amendment of the existing measures in respect of those companies having benefited from one or both the changed subsidy schemes including, for those companies, in respect of other schemes where sufficient evidence is provided in line with the relevant provisions of the notice of initiation.

#### III. Investigation period

(6) The investigation covered the period from 1 October 2006 to 30 September 2007 (the review investigation period or RIP).

#### IV. Parties concerned by the investigation

(7) The Commission officially informed the GOI, the two Indian exporting producers listed in the notice of initiation of the partial interim review, as well as the Community producers, of the initiation of the partial interim review investigation. Interested parties had the opportunity to make their views known in writing and to request a hearing. The written and oral comments submitted by the parties were considered and, where appropriate, taken into account.

[1] OJ L 288, 21.10.1997, p. 1.
[2] OJ L 295, 18.9.2004, p. 4.
[3] OJ L 295, 18.9.2004, p. 10.
[4] OJ C 230, 2.10.2007, p. 9.

(8) The Commission sent questionnaires to two cooperating exporting producers and to the GOI. Replies were received from both the cooperating exporting producers and the GOI.

(9) The Commission sought and verified all information it deemed necessary for the determination of subsidisation. Verification visits were carried out at the premises of the following interested parties:

1. Government of India

— Ministry of Commerce, New Delhi;

2. exporting producers in India

— Graphite India Limited (GIL), Kolkatta

— Hindustan Electro Graphite (HEG) Limited, Noida.

### V. **Disclosure and comments on procedure**

(10) The GOI and the other interested parties were informed of the essential facts and considerations upon which it was intended to propose the amendment of the duty rate applicable to the two cooperating Indian producers and maintain the existing measures for all other companies which did not cooperate with this partial interim review. They were also given a reasonable time to comment. All submissions and comments were taken duly into consideration as set out below.

## B. **PRODUCT CONCERNED**

(11) The product covered by this review is the same product as the one concerned by Council Regulation (EC) No 1628/2004, namely graphite electrodes of a kind used for electric furnaces, with an apparent density of 1,65 g/cm$^3$ or more and an electrical resistance of 6,0 μΩ.m or less, falling within CN code ex 8545 11 00 and nipples used for such electrodes, falling within CN code ex 8545 90 90 whether imported together or separately, originating in India.

## C. **SUBSIDIES**

### I. **Introduction**

(12) On the basis of the information submitted by the GOI and the cooperating exporting producers and the replies to the Commission's questionnaire, the following schemes, which allegedly involve the granting of subsidies, were investigated:

(a) Advance Authorisation Scheme (formerly known as Advance Licence Scheme),

(b) Duty Entitlement Passbook Scheme,

(c) Export Promotion Capital Goods Scheme,

(d) Income Tax Exemption,

(e) Electricity Duty Exemption of the State of Madhya Pradesh.

(13) The schemes (a) to (c) specified above are based on the Foreign Trade (Development and Regulation) Act 1992 (No 22 of 1992) which entered into force on 7 August 1992 (Foreign Trade Act). The Foreign Trade Act authorises the GOI to issue notifications regarding the export and import policy. These are summarised in Export and Import Policy documents, which are issued by the Ministry of Commerce every five years and updated regularly. One Export and Import Policy document is relevant to the RIP of this case, namely the one covering the period 1 September 2004 to 31 March 2009 (EXIM-policy 04-09). In addition, the GOI also sets out the procedures governing the EXIM-policy 04-09 in a 'Handbook of Procedures — 1 September 2004 to 31 March 2009, Volume I' (HOP I 04-09). The Handbook of Procedure is also updated on a regular basis.

(14) The Income Tax Scheme specified above under (d) is based on the Income Tax Act of 1961, which is amended yearly by the Finance Act.

(15) The Electricity Duty Exemption scheme specified in recital 12(e) is based on Section 3-B of the Madhya Pradesh Electricity Duty Act of 1949.

(16) In accordance with Article 11(10) of the basic anti-subsidy Regulation, the Commission invited the GOI for additional consultations with respect to both changed and unchanged schemes with the aim of clarifying the factual situation as regards the alleged schemes and arriving at a mutually agreed solution. Following these consultations, and in the absence of a mutually agreed solution in relation to these schemes, the Commission included all these schemes in the investigation of subsidisation.

II. **Specific Schemes**

1. *Advance Authorisation Scheme (AAS)*

(a) Legal basis

(17) The detailed description of the scheme is contained in paragraphs 4.1.1 to 4.1.14 of the EXIM-policy 04-09 and Chapters 4.1 to 4.30 of the HOP I 04-09. This scheme was called Advance Licence Scheme during the previous review investigation that led to the imposition by Regulation (EC) No 1628/2004 of the definitive countervailing duty currently in force.

(b) Eligibility

(18) The AAS consists of six sub-schemes, as described below in more detail. Those sub-schemes, *inter alia*, differ in the scope of eligibility. Manufacturer-exporters and merchant-exporters 'tied to' supporting manufacturers are eligible for the AAS physical exports and for the AAS for annual requirement. Manufacturer-exporters supplying the ultimate exporter are eligible for AAS for intermediate supplies. Main contractors which supply to the 'deemed export' categories mentioned in paragraph 8.2 of the EXIM-policy 04-09, such as suppliers of an export oriented unit (EOU), are eligible for AAS deemed export. Eventually, intermediate suppliers to manufacturer-exporters are eligible for 'deemed export' benefits under the sub-schemes Advance Release Order (ARO) and back to back inland letter of credit.

(c) Practical implementation

(19) Advance authorisations can be issued for:

(i) Physical exports: This is the main sub-scheme. It allows for duty-free import of input materials for the production of a specific resultant export product. 'Physical' in this context means that the export product has to leave Indian territory. Import allowance and export obligation including the type of export product are specified in the licence.

(ii) Annual requirement: Such an authorisation is not linked to a specific export product, but to a wider product group (e.g. chemical and allied products). The licence holder can — up to a certain value threshold set by its past export performance — import duty free any input to be used in manufacturing any of the items falling under such a product group. It can choose to export any resultant product falling under the product group using such duty-exempt material.

(iii) Intermediate supplies: This sub-scheme covers cases where two manufacturers intend to produce a single export product and divide the production process. The manufacturer-exporter produces the intermediate product. It can import duty free input materials and can obtain for this purpose an AAS for intermediate supplies. The ultimate exporter finalises the production and is obliged to export the finished product.

(iv) Deemed exports: This sub-scheme allows a main contractor to import inputs free of duty which are required in manufacturing goods to be sold as 'deemed exports' to the categories of customers mentioned in paragraph 8.2(b) to (f), (g), (i) and (j) of the EXIM policy 04-09. According to the GOI, deemed exports refer to those transactions in which the goods supplied do not leave the country. A number of categories of supply is regarded as deemed exports provided the goods are manufactured in India, e.g. supply of goods to an EOU or to a company situated in a special economic zone (SEZ).

(v) ARO: The AAS holder intending to source the inputs from indigenous sources, in lieu of direct import, has the option to source them against AROs. In such cases the Advance Authorisations are validated as AROs and are endorsed to the indigenous supplier upon delivery of the items specified therein. The endorsement of the ARO entitles the indigenous supplier to the benefits of deemed exports as set out in paragraph 8.3 of the EXIM-policy 04-09 (i.e. AAS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty). The ARO mechanism refunds taxes and duties to the supplier instead of refunding the same to the ultimate exporter in the form of drawback/refund of duties. The refund of taxes/duties is available both for indigenous inputs as well as imported inputs.

(vi) Back to back inland letter of credit: This sub-scheme again covers indigenous supplies to an Advance Authorisation holder. The holder of an Advance Authorisation can approach a bank for opening an inland letter of credit in favour of an indigenous supplier. The authorisation will be invalidated by the bank for direct import, only in respect of the value and volume of items being sourced indigenously instead of importation. The indigenous supplier will be entitled to deemed export benefits as set out in paragraph 8.3 of the EXIM-policy 04-09 (i.e. AAS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty).

(20) It was established that during the RIP one of the cooperating exporters obtained concessions under the first sub-scheme, i.e. AAS physical exports. It is therefore not necessary to establish the countervailability of the remaining sub-schemes.

(21) Following the imposition by Regulation (EC) No 1628/2004 of the definitive countervailing duty currently in force, the GOI has modified the verification system applicable to AAS. In concrete terms, for verification purposes by the Indian authorities, an Advance Authorisation holder is legally obliged to maintain 'a true and proper account of consumption and utilisation of duty-free imported/domestically procured goods' in a specified format (Chapters 4.26, 4.30 and Appendix 23 HOP I 04-09), i.e. an actual consumption register. This register has to be verified by an external chartered accountant/cost and works accountant who issues a certificate stating that the prescribed registers and relevant records have been examined and the information furnished under Appendix 23 is true and correct in all respects. Nevertheless, the aforesaid provisions apply only to Advance Authorisations issued on or after 13 May 2005. For all Advance Authorisations or Advance Licences issued before that date, holders are requested to follow the previously applicable verification provisions, i.e. to keep a true and proper account of licence-wise consumption and utilisation of imported goods in the specified format of Appendix 18 (Chapter 4.30 and Appendix 18 HOP I 02-07).

(22) With regard to the sub-scheme used during the RIP by the cooperating exporting producer, i.e. physical exports, both the import allowance and the export obligation are fixed in volume and value by the GOI and are documented on the Authorisation. In addition, at the time of import and of export, the corresponding transactions are to be documented by Government officials on the Authorisation. The volume of imports allowed under this scheme is determined by the GOI on the basis of standard input-output norms (SIONs). SIONs exist for most products, including the product concerned, and are published in the HOP II 04-09.

(23) Imported input materials are not transferable and have to be used to produce the resulting export product. The export obligation must be fulfilled within a prescribed time frame after issuance of the licence (24 months with two possible extensions of six months each).

(24) The review investigation established that the Advanced Licences used for importing raw materials during the RIP had been issued before 13 May 2005. Therefore, the new verification requirements stipulated by the Indian authorities in HOP I 04-09, as described in recital 21, had not yet been tested in practice. Furthermore, the company could not show that the necessary actual consumption and stock registers had been kept in the format required by Chapter 4.30 and Appendix 18 of HOP I 02-07, as applicable to Advanced Licences issued before 13 May 2005. Account taken of this situation, it is considered that the investigated exporter was not able to demonstrate that the relevant EXIM provisions at the time were met.

(d) Disclosure comments

(25) The cooperating exporter who had made use of AAS during the RIP argued that it had voluntarily submitted the advance licenses used, although they were issued before 13 May 2005, to verification by a certified accountant according to the requisites of the HOP I 04-09, and that this demonstrates that a proper verification system now exists under the new provisions of the HOP.

(26) A certificate in the form of Appendix 23 of the HOP, signed by a certified accountant and dated 1 February 2008, was indeed submitted to the Commission services during the verification at the company's premises. However, given that the advance licences were dated as of 2004, and the new HOP provisions did not apply to them, it must be concluded that this was a voluntary exercise by the company, which does not demonstrate that an effective verification system was actually implemented by the GOI. Furthermore, it was not shown that the excess duty remission, as calculated by the certified accountant, was actually repaid to the government.

(e) Conclusion

(27) The exemption from import duties is a subsidy within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation, i.e. a financial contribution of the GOI which conferred a benefit upon the investigated exporters.

(28) In addition, AAS for physical exports is clearly contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation. Without an export commitment a company cannot obtain benefits under these schemes.

(29) The sub-scheme used in the present case cannot be considered as permissible duty drawback system or substitution drawback system within the meaning of Article 2(1)(a)(ii) of the basic Regulation. It does not conform to the strict rules laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution

drawback) of the basic Regulation. The GOI did not effectively apply any verification system or procedure to confirm whether and in what amounts inputs were consumed in the production of the exported product (Annex II(II)(4) of the basic Regulation and, in the case of substitution drawback schemes, Annex III(II)(2) of the basic Regulation). The SIONs themselves cannot be considered a verification system of actual consumption, since they do not enable the GOI to verify with sufficient precision what amounts of inputs were consumed in the export production. Furthermore, an effective control done by the GOI based on a correctly kept actual consumption register did not take place during the RIP. In addition, the GOI did not carry out a further examination based on actual inputs involved, although this would normally need to be carried out in the absence of an effectively applied verification system (Annex II(II)(5) and Annex III(II)(3) to the basic Regulation).

(30) This sub-scheme is therefore countervailable.

(f) Calculation of the subsidy amount

(31) In the absence of permitted duty drawback systems or substitution drawback systems, the countervailable benefit is the remission of total import duties normally due upon importation of inputs. In this respect, it is noted that the basic Regulation does not only provide for the countervailing of an 'excess' remission of duties. According to Article 2(1)(a)(ii) and Annex I(i) of the basic Regulation only an excess remission of duties can be countervailed, provided the conditions of Annexes II and III of the basic Regulation are met. However, these conditions were not fulfilled in the present case. Thus, if an absence of an adequate monitoring process is established, the above exception for drawback schemes is not applicable and the normal rule of the countervailing of the amount of (revenue forgone) unpaid duties, rather than any purported excess remission, applies. As set out in Annexes II(II) and III(II) of the basic Regulation the burden is not upon the investigating authority to calculate such excess remission. To the contrary, according to Article 2(1)(a)(ii) of the basic Regulation it only has to establish sufficient evidence to refute the appropriateness of an alleged verification system.

(32) The subsidy amount for the exporter which used the AAS was calculated on the basis of import duties forgone (basic customs duty and special additional customs duty) on the material imported under the subscheme used for the product concerned during the RIP (numerator). In accordance with Article 7(1)(a) of the basic Regulation, fees necessarily incurred to obtain the subsidy were deducted from the subsidy amount where justified claims were made. In accordance with Article 7(2) of the basic Regulation, this subsidy amount has been allocated over the export turnover generated by the product concerned during the RIP as appropriate denominator, because the subsidy is contingent upon export performance and was not granted by reference to the quantities manufactured, produced, exported or transported.

(33) The subsidy rate established in respect of this scheme during the RIP for the cooperating producer concerned amounts to 0,3 %.

2. *Duty Entitlement Passbook Scheme (DEPBS)*

(a) Legal basis

(34) The detailed description of the DEPBS is contained in paragraph 4.3 of the EXIM-policy 04-09 and in Chapter 4 of the HOP I 04-09.

(b) Eligibility

(35) Any manufacturer-exporter or merchant-exporter is eligible for this scheme.

(c) Practical implementation of the DEPBS

(36) An eligible exporter can apply for DEPBS credits which are calculated as a percentage of the value of products exported under this scheme. Such DEPBS rates have been established by the Indian authorities for most products, including the product concerned. They are determined on the basis of SIONs, taking into account a presumed import content of inputs in the export product and the customs duty incidence on such presumed imports, regardless of whether import duties have actually been paid or not.

(37) To be eligible for benefits under this scheme, a company must export. At the point in time of the export transaction, a declaration must be made by the exporter to the authorities in India indicating that the export is taking place under the DEPBS. In order for the goods to be exported, the Indian customs authorities issue, during the dispatch procedure, an export shipping bill. This document shows, *inter alia*, the amount of DEPBS credit which is to be granted for that export transaction. At this point in time, the exporter knows the benefit it will receive. Once the customs authorities issue an export shipping bill, the GOI has no discretion over the granting of a DEPBS credit. The relevant DEPBS rate to calculate the benefit is that which applied at the time the export declaration is made.

(38) DEPBS credits are freely transferable and valid for a period of 12 months from the date of issue. They can be used for payment of customs duties on subsequent imports of any goods unrestrictedly importable, except capital goods. Goods imported against such credits can be sold on the domestic market (subject to sales tax) or used otherwise.

(39) Applications for DEPBS credits are electronically filed and can cover an unlimited amount of export transactions. *De facto* no strict deadlines exist to apply for DEPBS credits. The electronic system used to manage DEPBS does not automatically exclude export transactions outside the deadline submission periods mentioned in chapter 4.47 HOP I 04-09. Furthermore, as clearly provided in Chapter 9.3 HOP I 04-09 applications received after the expiry of submission deadlines can always be considered with the imposition of a penalty fee (i.e. 10 % on the entitlement).

(d) Disclosure comments

(40) One cooperating exporter argued that all the DEPBS credits obtained by the company had been used to import materials used in the production of the product concerned, despite being in principle allowed to use them for other purposes, as stated above. This exporter claimed that therefore their actual use of DEPBS was, in that respect, in line with a normal duty drawback system, and that therefore only the excess remission, if any should be countervailed. However, according to Article 2(1)(a)(ii) and Annex I(i) of the basic Regulation only if the conditions of Annexes II and III of the basic Regulation are met can an excess remission of duties can be countervailed. These conditions, as explained in recital 43 were not fulfilled in the present case. Thus, the normal rule of the countervailing of the amount of unpaid duties (revenue forgone), rather than any purported excess remission, applies.

(e) Conclusions on the DEPBS

(41) The DEPBS provides subsidies within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation. A DEPBS credit is a financial contribution by the GOI, since the credit will eventually be used to offset import duties, thus decreasing the GOI's duty revenue which would be otherwise due. In addition, the DEPBS credit confers a benefit upon the exporter, because it improves its liquidity.

(42) The DEPBS is contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation.

(43) This scheme cannot be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 2(1)(a)(ii) of the basic Regulation. It does not conform to the strict rules laid down in Annex I item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback) of the basic Regulation. An exporter is under no obligation to actually consume the goods imported free of duty in the production process and the amount of credit is not calculated in relation to actual inputs used. Moreover, there is no system or procedure in place to confirm which inputs are consumed in the production process of the exported product or whether an excess payment of import duties occurred within the meaning of item (i) of Annex I and Annexes II and III of the basic Regulation. Lastly, an exporter is eligible for the DEPBS benefits regardless of whether it imports any inputs at all. In order to obtain the benefit, it is sufficient for an exporter to simply export goods without demonstrating that any input material was imported. Thus, even exporters which procure all of their inputs locally and do not import any goods which can be used as inputs are still entitled to benefit from the DEPBS.

(f) Calculation of the subsidy amount

(44) In accordance with Articles 2(2) and 5 of the basic Regulation, the amount of countervailable subsidies was calculated in terms of the benefit conferred on the recipient, which is found to exist during the RIP. In this regard, it was considered that the benefit is conferred on the recipient at the point in time when an export transaction is made under this scheme. At this moment, the GOI is liable to forgo the customs duties, which constitutes a financial contribution within the meaning of Article 2(1)(a)(ii) of the basic Regulation. Once the customs authorities issue an export shipping bill which shows, inter alia, the amount of DEPBS credit which is to be granted for that export transaction, the GOI has no discretion as to whether or not to grant the subsidy and it has no discretion as to the amount of the subsidy. Furthermore, the cooperating exporting producers booked the DEPBS credits on an accrual basis as income at the stage of export transaction.

(45) Where justified claims were made, fees necessarily incurred to obtain the subsidy were deducted from the credits so established to arrive at the subsidy amount as numerator, pursuant to Article 7(1)(a) of the basic Regulation. In accordance with Article 7(2) of the basic Regulation this subsidy amount has been allocated over the total export turnover during the review investigation period as appropriate denominator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(46) The subsidy rates established in respect of this scheme during the RIP for the cooperating exporting producers amount to 6,2 % and 5,7 %.

3. *Export Promotion Capital Goods Scheme (EPCGS)*

(a) Legal basis

(47) The detailed description of the EPCGS is contained in Chapter 5 of the EXIM-policy 04-09 and in Chapter 5 of the HOP I 04-09.

(b) Eligibility

(48) Manufacturer-exporters, merchant-exporters 'tied to' supporting manufacturers and service providers are eligible for this scheme.

(c) Practical implementation

(49) Under the condition of an export obligation, a company is allowed to import capital goods (new and — since April 2003 — second-hand capital goods up to 10 years old) at a reduced rate of duty. To this end, the GOI issues, upon application and payment of a fee, an EPCGS licence. Until 31 March 2000, an effective duty rate of 11 % (including a 10 % surcharge) and, in case of high value imports, a zero duty rate was applicable. Since April 2000, the scheme provides for a reduced import duty rate of 5 % applicable to all capital goods imported under the scheme. In order to meet the export obligation, the imported capital goods must be used to produce a certain amount of export goods during a certain period.

(50) The EPCGS licence holder can also source the capital goods indigenously. In such case, the indigenous manufacturer of capital goods may avail of the benefit for duty-free import of components required to manufacture such capital goods. Alternatively, the indigenous manufacturer can claim the benefit of deemed export in respect of supply of capital goods to an EPCGS licence holder.

(d) Conclusion on EPCG Scheme

(51) The EPCGS provides subsidies within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation. The duty reduction constitutes a financial contribution by the GOI, since this concession decreases the GOI's duty revenue, which would be otherwise due. In addition, the duty reduction confers a benefit upon the exporters, because the duties saved upon importation improve its liquidity.

(52) Furthermore, the EPCGS is contingent in law upon export performance, since such licences cannot be obtained without a commitment to export. Therefore, it is deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation.

(53) Eventually, this scheme cannot be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 2(1)(a)(ii) of the basic Regulation. Capital goods are not covered by the scope of such permissible systems, as set out in Annex I, item (i), of the basic Regulation, because they are not consumed in the production of the exported products.

(e) Calculation of the subsidy amount

(54) The subsidy amount was calculated, in accordance with Article 7(3) of the basic Regulation, on the basis of the unpaid customs duty on imported capital goods spread across a period which reflects the normal depreciation period of such capital goods. In accordance with the established practice, the amount so calculated, which is attributable to the RIP, has been adjusted by adding interest during this period in order to reflect the full value of the benefit over time. The commercial long-term interest rate during the review investigation period in India was considered appropriate for this purpose. Where justified claims were made, fees necessarily incurred to obtain the subsidy were deducted in accordance with Article 7(1)(a) of the basic Regulation from this sum to arrive at the subsidy amount as numerator. In accordance with Article 7(2) and 7(3) of the basic Regulation, this subsidy amount has been allocated over the export turnover during the RIP as appropriate denominator, because the subsidy is contingent upon export performance and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(55) The subsidy rates established in respect of this scheme during the RIP for the cooperating producers amount to 0,7 % and 0,3 %.

(f) Disclosure comments

(56) One cooperating exporter pointed out a mistake in the methodology initially used for calculating the benefits of EPCG, in particular with regard to the amount of interest applied. This mistake, which affected both cooperating exporters, was corrected.

4. *Income Tax Exemption Scheme (ITES)*

Section 80HHC of the Income Tax Act 1961 (ITA)

(57) Under this scheme exporters could avail the benefit of a partial income tax exemption on profits derived from export sales. The legal basis for this exemption was set by Section 80HHC of the ITA.

(58) This provision was abolished for the assessment year 2005-06 (i.e. for the financial year from 1 April 2004 to 31 March 2005) onwards and thus 80HHC of the ITA does not confer any benefits after 31 March 2004. The cooperating exporting producers did not avail of any benefits under this scheme during the RIP. Consequently, since the scheme has been withdrawn, it shall therefore not be countervailed, in accordance with Article 15(1) of the Regulation.

Section 80 I A of the ITA

(a) Legal basis

(59) The scheme is based on Section 80 I A of the ITA. This provision was brought into the ITA through the Finance Act of 2001.

(b) Eligibility

(60) Section 80 I A of the ITA applies to companies engaged in the setting up of infrastructure facilities, including the generation and distribution of power, in any part of India.

(c) Practical implementation

(61) According to the provisions of the ITA Section 80 I A, an amount corresponding to the profit generated by the power generating activities is exempted from profit tax, for 10 consecutive years within the first 15 years of operation of the generating unit. The unit in question must be new and have started operation on or after the 1 April 2003 and up to 31 March 2010.

(62) The calculation of the income tax deduction forms part of the company's annual tax return, and is audited together with the company's profit and loss and other financial statement. It must comply with the rules stipulated in the ITA, namely that the accounting valuation of the electricity generated must reflect its market value. It is the role of the Income Tax authorities to verify if the calculation of the income tax deduction is according to ITA rules and the companies' audited accounts. The investigation has shown evidence that the authorities have in practice verified the calculation and made adjustments to the calculations when justified.

(63) The investigation has shown that both investigated exporting producers have set up captive power plants as part of their graphite production units. They have therefore requested the corresponding deduction in income tax, according to the provisions of the ITA.

(d) Conclusion on ITES under Section 80 I A of the ITA

(64) The exemption from income tax is a subsidy within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation, i.e. a financial contribution of the GOI which conferred a benefit upon the investigated exporters.

(65) However, the investigation has shown that access to the ITES under Section 80 I A of the ITA is not limited to certain enterprises in the sense of Article 3(2)(a) of the basic Regulation. This scheme appears to be available to all companies on the basis of objective criteria. Neither has any other evidence been found in this case that the scheme is specific.

(66) Furthermore, it is tied to a product (electricity) other than the product concerned and benefits under the scheme therefore occur on the basis of an activity which is not the production of sales of the product concerned. In these circumstances, it is considered that any benefits accruing to the exporters concerned under this scheme should not be countervailed.

5. *Electricity Duty Exemption (EDE)*

(67) Under the Industrial Promotion Policy of 2004, the State of Madhya Pradesh (MP) offers exemption of electricity duty to industrial companies investing in electricity generation for captive consumption.

(a) Legal basis

(68) The description of the electricity duty exemption scheme applied by the MP Government is set out in Section 3-B of the Electricity Duty Act of 1949.

(b) Eligibility

(69) Any industries located in the jurisdiction of the MP Government, investing in new captive power plants.

(c) Practical implementation

(70) According to a 29 September 2004 notification of the MP Government, companies or persons investing in new captive power plants of more than 10 KW capacity can obtain from the MP Electrical Inspectorate a certificate of exemption from electricity duty. The exemption is only given for electricity generated for self-consumption, and only if the new captive power plant is not a replacement of an older one. The exemption is granted for a period of five years.

(71) A notification from the MP Government dated of 5 April 2005 exempted the new power plant established by one of the cooperating exporting producers in this investigation from electricity duty for a period of 10 years.

(d) Disclosure comments

(72) The cooperating exporter who was granted an exemption from electricity duty claimed that the EDE scheme is not specific, and is applied without discrimination to all eligible companies. According to that exporter, the initial policy of granting an exemption for five years was subsequently revised by the Government of Madhya Pradesh to confer an exemption for ten years. However, no published notification of such a policy change was submitted either by the cooperating exporter or by the GOI in their replies.

(e) Conclusion on EDE Scheme

(73) This scheme is a subsidy within the meaning of Articles 2(1)(a)(ii) and 2(2) of the basic Regulation. It constitutes a financial contribution by the MP Government, since this incentive decreases the state revenues which would be otherwise due. In addition, it confers a benefit upon the recipient company.

(74) Although the Industrial Promotion Policy of 2004 and the 29 September 2004 notification of the MP Government foresee a period of exemption of five years, the exporting producer in question was granted an exemption of ten years. Therefore, this incentive does not appear to be granted according to criteria and conditions clearly set out by law, regulation, or other official document.

(f) Calculation of the subsidy amount

(75) The benefit to the exporting producer has been calculated on the basis of the amount of electricity duty normally due during the review investigation period but which remained unpaid under this scheme. In accordance with Article 7(2) of the basic Regulation, the amount of subsidy (numerator) has then been allocated over total sales during the review investigation period (denominator), because it relates to all sales, domestic and export, and it was not granted by reference to the quantities manufactured, produced, exported or transported.

(76) A subsidy margin of 0,7 % was thus established for one company which received benefits under the EDE.

III. **Amount of countervailable subsidies**

(77) It is recalled that in Regulation (EC) No 1628/2004 the amount of countervailable subsidies, expressed *ad valorem*, was found to be 15,7 % and 7 % respectively for the two exporting producers cooperating with the present partial interim review.

(78) During the present partial interim review the amounts of countervailing subsidies, expressed *ad valorem*, were found to be as listed hereunder:

| Company | ALS | DEPB | EPCG | EDE | Total |
|---|---|---|---|---|---|
| Graphite India Ltd | nil | 6,2 % | 0,1 % | nil | 6,3 % |
| HEG Ltd | 0,3 % | 5,7 % | 0,5 % | 0,7 % | 7,2 % |

IV. **Countervailing measures**

(79) In line with the provisions of Article 19 of the basic anti-subsidy Regulation and the grounds of this partial interim review stated under point 3 of the notice of initiation, it is established that the level of subsidisation with regard to the cooperating producers has changed and, therefore, the rate of countervailing duty imposed by Regulation (EC) No 1628/2004 has to be amended accordingly.

(80) The countervailing duty under review resulted from parallel anti-subsidy and anti-dumping investigations (the original investigations). According to Article 24(1) of the basic Regulation and Article 14(1) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Communities [1] the anti-dumping duties imposed by Regulation (EC) No 1629/2004, were adjusted to the extent that the subsidy amounts and the dumping margins arose from the same situation.

(81) The subsidy schemes investigated and found to be countervailable in the current review proceeding, with the exception of EDE, constituted export subsidies within the meaning of Article 3(4)(a) of the basic Regulation.

[1] OJ L 56, 6.3.1996, p. 1.

(82) It is therefore appropriate that the anti-dumping duty be readjusted to reflect the new levels of subsidisation found in the present review, as far as export subsidies are concerned. Moreover, in accordance with Article 15(1) of the basic Regulation, the level of countervailing duties should not be higher than the injury elimination margin found in the original investigation. As in the original investigation, given that the level of cooperation was high (100 %) the residual subsidy margin was set at the level of the company with the highest individual margin.

(83) Accordingly, the levels of countervailing and anti-dumping duties should be adjusted as follows:

| Company | Subsidy margin | Dumping margin | Injury elimination margin | Countervailing duty | Anti-dumping duty |
|---|---|---|---|---|---|
| Graphite India Ltd | 6,3 % | 31,1 % | 15,7 % | 6,3 % | 9,4 % |
| HEG Ltd | 7,2 % | 24,4 % | 7,0 % | 7,0 % | 0 % |
| All others | 7,2 % | 31,1 % | 15,7 % | 7,2 % | 8,5 % |

(84) One cooperating exporter claimed that since the present partial interim review was limited to the level of subsidisation, the anti-dumping duties should not be modified.

(85) In this respect, it is recalled that the notice of initiation of the present review stated that 'for those companies which are subject to both anti-dumping and countervailing measures, the anti-dumping measure may be adjusted accordingly should there be a change in the countervailing measure.' The change in the anti-dumping duties is not the result of any new findings concerning the level of dumping, but an automatic consequence of the fact that the original dumping margins had been adjusted to reflect the level of export subsidies found, and that the latter have now been revised.

(86) The individual company countervailing duty rates specified in this Regulation reflect the situation found during the partial interim review. Thus, they are solely applicable to imports of the product concerned produced by these companies. Imports of the product concerned manufactured by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.

(87) Any claim requesting the application of these individual countervailing duty rates (e.g. following a change in the name of the entity or following the setting up of new production or sales entities) should be addressed to the Commission [1] forthwith with all relevant information, in particular any modification in the company's activities linked to production, domestic and export sales associated with, for instance, that name change or that change in the production and sales entities. If appropriate, and after consultation of the Advisory Committee, the Commission is hereby empowered to amend the Regulation accordingly by updating the list of companies benefiting from individual duty rates,

HAS ADOPTED THIS REGULATION:

*Article 1*

Article 1(2) of Regulation (EC) No 1628/2004 shall be replaced by the following:

'The rate of the definitive countervailing duty applicable to the net free-at-Community-frontier price, before duty, for products produced by the companies listed below shall be as follows:

| Company | Definitive duty | TARIC additional code |
|---|---|---|
| Graphite India Limited (GIL), 31 Chowringhee Road, Kolkatta — 700016, West Bengal | 6,3 % | A530 |
| Hindustan Electro Graphite (HEG) Limited, Bhilwara Towers, A-12, Sector- 1, Noida — 201301, Uttar Pradesh | 7,0 % | A531 |
| All others | 7,2 % | A999' |

[1] European Commission, Directorate-General for Trade, Directorate H, Office N-105 4/92, 1049 Brussels, Belgium.

*Article 2*

Article 1(2) of Regulation (EC) No 1629/2004 shall be replaced by the following:

'The rate of the definitive anti-dumping duty applicable to the net free-at-Community-frontier price, before duty, for products produced by the companies listed below shall be as follows:

| Company | Definitive duty | TARIC additional code |
|---|---|---|
| Graphite India Limited (GIL), 31 Chowringhee Road, Kolkatta — 700016, West Bengal | 9,4 % | A530 |
| Hindustan Electro Graphite (HEG) Limited, Bhilwara Towers, A-12, Sector — 1, Noida — 201301, Uttar Pradesh | 0 % | A531 |
| All others | 8,5 % | A999' |

*Article 3*

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

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

Done at Brussels, 18 December 2008.

*For the Council*
*The President*
M. BARNIER

# COUNCIL REGULATION (EC) No 1355/2008

## of 18 December 2008

## imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community [1] (the 'basic Regulation') and in particular Article 9 thereof,

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

Whereas:

### A. PROVISIONAL MEASURES

(1) On 20 October 2007 the Commission announced by a notice published in the *Official Journal of the European Union* the initiation of an anti-dumping proceeding concerning imports into the Community of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (PRC) [2]. On 4 July 2008, the Commission, by Regulation (EC) No 642/2008 [3] (the 'provisional Regulation') imposed a provisional anti-dumping duty on imports of certain prepared or preserved citrus fruits originating in the PRC.

(2) The proceeding was initiated as a result of a complaint lodged on 6 September 2007 by the Spanish National Federation of Associations of Processed Fruit and Vegetables (FNACV) (the complainant) on behalf of producers representing 100 % of the total Community production of certain prepared or preserved citrus fruits (namely mandarins etc.). The complaint contained evidence of dumping of the product concerned and of material injury resulting there from, which was considered sufficient to justify the initiation of a proceeding.

(3) As set out in recital 12 of the provisional Regulation, the investigation of dumping and injury covered the period from 1 October 2006 to 30 September 2007 (IP). The examination of trends relevant for the assessment of injury covered the period from 1 October 2002 to the end of the investigation period (period considered).

(4) On 9 November 2007, the Commission made imports of the same product originating in the PRC subject to registration by Regulation (EC) No 1295/2007 [4].

(5) It is recalled that safeguard measures were in force against the same product until 8 November 2007. The Commission imposed provisional safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) by Regulation (EC) No 1964/2003 [5]. Definitive safeguard measures followed by Regulation (EC) No 658/2004 (the 'safeguard Regulation') [6]. Both the provisional and definitive safeguard measures consisted of a tariff rate quota i.e. a duty was only due once the volume of duty free imports had been exhausted.

### B. SUBSEQUENT PROCEDURE

(6) Following the imposition of provisional anti-dumping duties on imports of the product concerned originating in the PRC; several interested parties submitted comments in writing. The parties who so requested were also granted the opportunity to be heard.

(7) The Commission continued to seek and verify all information it deemed necessary for its definitive findings. In particular, the Commission completed the investigation with regard to Community interest aspects. In this respect, verification visits were carried out at the premises of the following unrelated importers in the Community:

— Wünsche Handelsgesellschaft International (GmbH & Co KG), Hamburg, Germany,

— Hüpeden & Co (GmbH & Co), Hamburg, Germany,

— I. Schroeder KG. (GmbH & Co), Hamburg, Germany,

[1] OJ L 56, 6.3.1996, p. 1.
[2] OJ C 246, 20.10.2007, p. 15.
[3] OJ L 178, 5.7.2008, p. 19.
[4] OJ L 288, 6.11.2007, p. 22.
[5] OJ L 290, 8.11.2003, p. 3.
[6] OJ L 104, 8.4.2004, p. 67.

— Zumdieck GmbH, Paderborn, Germany,

— Gaston spol. s r.o., Zlin, Czech Republic.

(8) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of a definitive anti-dumping duty on imports of the product concerned originating in the PRC and the definitive collection of the amounts secured by way of the provisional duty. They were also granted a period of time within which they could make representations subsequent to this disclosure.

(9) Some importers proposed a joint meeting of all interested parties, pursuant to Article 6(6) of the basic Regulation; however the request was refused by one of them.

(10) The oral and written comments submitted by the interested parties were considered and taken into account where appropriate.

## C. **PRODUCT CONCERNED AND LIKE PRODUCT**

(11) Two unrelated EC importers argued that certain types of mandarins should be excluded from the definition of the product concerned either because of their sweetness level or because of their packing when exported. In this respect, it is noted that these claims were not accompanied with any type of verifiable information and data proving that these types have characteristics that differentiate them from the product concerned. It is also noted that differences in packing cannot be considered as a critical element when defining product concerned, especially when formats of packing were already taken into account when defining the product concerned as set out in recital 16 of the provisional Regulation. These arguments are therefore rejected.

## D. **SAMPLING**

### 1. **Sampling for exporting producers in the PRC**

(12) Two unrelated EC importers disputed that the Chinese exporting producers selected for the sample represented 60 % of the total exports to the Community. Nevertheless, they were not able to provide any verifiable information that could undermine the accuracy of the sampling information submitted by the cooperating Chinese exporting producers and largely confirmed in the course of the further investigation. This argument is therefore rejected.

(13) Three Chinese cooperating exporting producers submitted representations claimed that their related companies were exporting producers of the product concerned and should therefore be included in the Annex of cooperating exporting producers. These claims were considered warranted and it was decided to revise the relevant Annex accordingly. One unrelated EC importer argued that exports made to the EC through traders should automatically be allowed to benefit from the measures applicable to the Chinese exporting producers. In this respect, it is noted that anti-dumping measures are imposed on products manufactured by exporting producers in the country under investigation that are exported to the EC (irrespective of which company trades them) and not to business entities engaged only in trading activities. The claim was therefore rejected.

## E. **DUMPING**

### 1. **Market economy treatment (MET)**

(14) Following the imposition of provisional measures, no comments were submitted by the Chinese cooperating exporting producer with respect to the MET findings. In the absence of any relevant comments, recitals 29 to 33 of the provisional Regulation are hereby confirmed.

### 2. **Individual treatment**

(15) In the absence of any relevant comments, recitals 34 to 37 of the provisional Regulation concerning individual treatment are hereby confirmed.

### 3. **Normal value**

(16) It is recalled that the normal value determination was based on the data provided by the Community Industry. This data was verified at the premises of the cooperating Community producers.

(17) Following the imposition of provisional measures, all three Chinese sampled cooperating exporting producers and two unrelated EC importers questioned the use of Community Industry prices for the calculation of normal value. It was submitted that normal value should have been calculated on the basis of the PRC production costs account taken of any appropriate adjustments relating to the differences between the EC and the PRC markets. In this respect it is noted that the use of information from a non-market economy country and in particular from companies which have not been granted MET would be contrary to the provisions of Article 2(7)(a) of the basic Regulation. This argument is therefore rejected. It was also argued that data on prices from all other importing countries or relevant published information could have been used as a reasonable solution account taken of the lack of analogue country cooperation. However, such general information, in contrast to the data used by the Commission, could not have been verified and cross checked with regard to their accuracy in line with the provisions of Article 6(8) of the basic Regulation. This argument is therefore rejected. No other argument was submitted that could cast doubt on the fact that the methodology used by the Commission is in line with the provisions of Article 2(7)(a) of the basic Regulation and, in particular, the fact that it constitutes in this particular case the only remaining reasonable basis for calculation of normal value.

(18) In the absence of any other comments, recitals 38 to 45 of the provisional Regulation are hereby confirmed.

### 4. **Export price**

(19) Following the imposition of provisional measures, one Chinese sampled cooperating exporting producer submitted that its export price should be adjusted in order to take into account certain cost elements (in particular ocean freight). In this respect it is noted that this issue was dealt with during the on-the-spot verification both with regard to this company as well with regard to the other companies in the sample. On that occasion, each company submitted information with regard to the costs in question. The amount claimed now by the company is considerably higher than the amount originally reported. It is noted that this new claim is based simply on a declaration by a freight forwarder and does not reflect data relating to a real transaction. None of the other sampled exporting producers questioned the figures used with respect to ocean freight. Moreover, given the late submission, this claim can not be verified. In particular, the adjustment requested does not relate to any data already on the file. Following this claim the Commission has nevertheless reviewed the amount of the cost in question account taken of the importance of this particular cost to the EC export transactions reported by the company. As a consequence, the Commission came to the conclusion that it is more appropriate to use the average ocean freight cost verified on-the-spot for all the sampled Chinese companies. Consequently, the company's export price was adjusted accordingly.

(20) One other Chinese sampled cooperating exporting producer highlighted two computation errors on the calculation of its export price related to its submitted export listings. The claim was considered warranted and the producer's relevant export price was revised accordingly.

(21) In the absence of any other comments in this respect, recital 46 of the provisional Regulation is hereby confirmed.

### 5. **Comparison**

(22) In the absence of any comments in this respect, recitals 47 and 48 of the provisional Regulation are hereby confirmed.

### 6. **Dumping margins**

(23) In light of the above, the definitive dumping margins, expressed as a percentage of the CIF Community frontier price duty unpaid, are the following:

— Yichang Rosen Foods Co., Ltd, Yichang, Zhejiang 139,4 %,

— Huangyan No 1 Canned Food Factory, Huangyan, Zhejiang 86,5 %,

— Zhejiang Xinshiji Foods Co., Ltd, Sanmen, Zhejiang and its related producer Hubei Xinshiji Foods Co., Ltd, Dangyang City, Hubei Province 136,3 %,

— Cooperating exporting producers not included in the sample 131 %.

All other companies 139,4 %.

## F. **INJURY**

### 1. **Community production and Community industry**

(24) In the absence of substantiated comments, the findings set out in recitals 52 to 54 of the provisional Regulation are confirmed.

2. **Community consumption**

(25) One of the exporting parties argued that there is a discrepancy between the level of the consumption set out in the safeguard Regulation No 658/2004 and the level set in the provisional Regulation. It is underlined that the difference in the level of consumption was basically due to the different product scope in the current investigation and to the different number of Member States in those two investigations. No further and substantiated information was received in this respect. The findings set out in recitals 55 to 57 of the provisional Regulation are therefore confirmed. As a corollary, the subsequent parts of the analysis which draw on consumption are also confirmed in this respect.

3. **Imports from the country concerned**

*(a) Volume and market share of imports of the product concerned*

(26) In respect of the market share some interested parties opposed the Commission statement set out in recital 58 that indicated an increase of the market share of the dumped imports. They argued that contrary to the Commission findings the market share of imports from China decreased. The evaluation of imports from the PRC in volume and market share was verified. As set out in recital 58 of the provisional Regulation there was only one year where the market share of the Chinese imports decreased. For the rest of the period examined the market share of imports from China remained consistently high. Therefore the findings presented at the provisional stage are confirmed.

(27) Some parties argued that post-IP volumes should also be examined to assess whether Chinese imports are increasing. It is to be noted that trends on imports from China were evaluated for the period 2002/2003 to 2006/2007 and a clear increase was observed. In accordance with the provisions of the basic Regulation, post-IP events are not taken into account, except in exceptional circumstances. In any event, as stated below in recital 48 the level of imports post-IP was examined and was found to be significant.

*(b) Price undercutting*

(28) Three cooperating exporting producers contested the Commission's findings on undercutting. One contested the methodology used to calculate undercutting and requested an adjustment to reflect costs borne by traders for their indirect sales. Where justified, calculations were adapted. The revised comparison showed that, during the IP, imports of the product concerned were sold in the Community at prices which undercut the Community industry's prices by a range of 18,4 % to 35,2 % based on the data submitted by the sampled cooperating exporting producers.

4. **Situation of the Community industry**

(29) Two importers and the importers' association contested the duration of the packing season indicated in recital 79 of the provisional Regulation. They argued that the packing season in Spain lasts only three months instead of four to five as indicated in the provisional Regulation. However this allegation is linked to the crop (variable by nature) and to the quantity produced and in any case has no impact on the injury factors as analysed by the Commission services.

(30) In the absence of any other substantiated information or argument concerning the situation of the Community industry, recitals 63 to 86 of the provisional Regulation are hereby confirmed.

5. **Conclusion on injury**

(31) Following disclosure of the provisional Regulation, some importers and some exporting producers claimed, with reference to recitals 83 to 86 of the provisional Regulation, that data used by the Commission to establish the injury level was neither correct nor objectively evaluated. They argued that almost all injury-related indicators showed positive trends and that therefore no evidence of injury can be found.

(32) In this regard, it is noted that even if some indicators show small improvements, the situation of the Community industry has to be evaluated as a whole and in consideration of the fact that safeguard measures were in place until the end of the investigation period. This matter was explored at length in recitals 51 to 86 of the provisional Regulation. The deep restructuring process which these measures allowed for, resulting in a large reduction in production and capacity, would have under normal circumstances led to a significant improvement in the Community producers' overall situation, including production, capacity utilisation, sales, and price/cost differentials. Instead, volume indicators have remained weak, stocks have increased substantially and financial indicators have continued to be in the red – some even worsening.

(33) On this basis, it is considered that the conclusions regarding the material injury suffered by the Community industry as set out in the provisional Regulation are not altered. In the absence of any other substantiated information or arguments, they are therefore definitively confirmed.

## G. **CAUSATION**

### 1. **Effect of the dumped imports**

(34) Some parties argued that the volume of the Chinese imports had been stable since 1982 and that therefore they could not have caused injury as explained in the provisional Regulation (see recital 58). Indeed, as explained above in recital 26, imports from China during the period examined have increased significantly to the detriment of the EU industry market share. Moreover, the argument refers to the trend in imports that exceed well above the period in question therefore the argument is rejected.

(35) As mentioned in recital 28 above, it is definitively concluded that during the IP, the prices of imports from the sampled Chinese exporting producers undercut the average Community industry prices by percentages ranging from 18,4 % to 35,2 %. The revision of the undercutting margin leaves unaffected the conclusions on the effect of the dumped imports set out in recitals 100 and 101 of the provisional Regulation.

### 2. **Exchange rate fluctuations**

(36) After the imposition of the provisional duties some importers further argued the negative influence of the exchange rate on the price level. They argued that the exchange rate level is the main factor that caused injury. Nevertheless, the Commission's assessment refers merely to a difference between price levels with no requirement to analyse the factors affecting the level of those prices. As a consequence a clear causal link between the high dumping level and the injury suffered by the Community industry was found and therefore recital 95 of the provisional Regulation can be confirmed.

### 3. **Supply and price of raw materials**

(37) Some interested parties argued that injury is not caused by dumped imports but rather by the scarce supply of fresh fruit i.e. the raw material for canned mandarins.

(38) However, official data from the Spanish Ministry for Agriculture confirm that the quantity available for the canning industry is more than sufficient to cover all the production capacity of the Spanish producers.

(39) Producers compete to a certain extent for fresh fruit with the direct fresh produce consumer market. However, this competition does not break the causal link. A clear, significant reason for the Community industry's relatively low production, sales and market share is rather to the pressure of the massive imports from China at very low prices. In this situation, and considering that the market price is dictated by the imports covering more than 70 % of the market, which engage in price undercutting, suppression and depression, it would be uneconomic to produce more without reasonable expectations for selling the product at prices allowing for a normal profit. Therefore the Spanish industry could reasonably provide significantly higher quantities under the condition that the market price would not penalise their economic results.

(40) Another fact confirming this analysis is the consistent existence of a significant amount of stocks by Community producers, underlining that the Community industry's injurious situation occurred not because of insufficient production, but due to production that cannot be sold due to the pressure of Chinese imports.

(41) As an agricultural product, the price of the raw material is subject to seasonal fluctuations due to its agricultural nature. Nevertheless, in the five-year period analysed, which included harvests with lower and higher prices, the Commission observes that injury (e.g. in the form of financial losses) occurs irrespectively of these fluctuations and therefore the economic results of the Community industry are not directly correlated to such seasonal fluctuations.

### 4. **Quality differences**

(42) Some parties claimed that the Chinese product was of a higher quality than the Community production. However, any price differences resulting therefrom were not sufficiently substantiated, and there is no evidence that the alleged consumer preference for Chinese products would be so intense as to be the cause of the deteriorated situation for the Community industry. In any case such alleged price differences would favour the Chinese product, increasing the undercutting/underselling level. In the absence of any further new and substantiated information or argument, recital 99 of the provisional Regulation is hereby confirmed.

5. **Cost increases**

(43) Some parties argued that extraordinary cost increases by some producers were at the root of the injury. These allegations were not sufficiently substantiated. The Commission analysis did not detect any such events which could reverse the assessment of causation or affect the calculation of the injury elimination level.

(44) Some parties submitted comments on the increased costs of production and inability of the Community industry to reduce them. Certain cost items (such as energy) have increased, but their impact is not such as to break the causal link in a context where a very significant amount of dumped Chinese exports are depressing sales and production (thereby increasing the Community industry's unit costs) and suppressing and depressing Community industry prices.

6. **Aid schemes**

(45) It was alleged that the EC aid schemes caused artificial growth of processing in the EC and then encouraged reduced levels of raw material supply for the product concerned. This allegation was of a general nature and was not sufficiently substantiated. In any event, the schemes in question were modified in 1996 when the aid was allowed to the farmers instead than to the processors of the product concerned. The Commission's analysis has not detected any residual effects during the investigation period which could break the causal link. Regarding supply, reference is made to recitals 40 and 41 above.

7. **Conclusion on causation**

(46) In the absence of any further new and substantiated information or arguments, recitals 87 to 101 of the provisional Regulation are hereby confirmed.

(47) In the light of the above, the provisional finding of the existence of a causal link between the material injury suffered by the Community industry and the dumped Chinese imports is confirmed.

H. **COMMUNITY INTEREST**

1. **Developments after the investigation period**

(48) As from 9 November 2007 imports from the PRC were subject to registration pursuant to the Commission Regulation (EC) No 1295/2007 of 5 November 2007 making imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China subject to registration ('Registration Regulation') [1]. This was done with a view to the possible retroactive imposition of anti-dumping duties. Consequently and exceptionally, developments after the IP have also been analysed. Eurostat data confirms that imports from China remain significant and this has been corroborated by certain importers. The volume for the last 10 months after the IP reached a level of 74 000 tonnes at stable low prices.

2. **Ability of Community producers to supply the Community market**

(49) A number of parties commented on the low level of the Spanish production, which they claimed is unable to fully supply the community market. While it is correct to state that in the present situation the Community industry does not supply the overall EU market, it should be noted that this fact is linked to the effect of injurious imports, as explained above. In any event, the intended effect of the measures is not to close the Community market to Chinese imports, but to remove the effects of injurious dumping. Given, *inter alia*, the existence of only two sources of supply of these products, it is considered that in the event definitive measures are imposed, Chinese products would continue to enjoy a significant demand in the Community.

3. **Interest of the Community industry and suppliers**

(50) One importers' association alleged that any anti-dumping measures without any limitation of quantities would not help protect the Spanish industry but would automatically trigger illegal trading activities. This is an argument which rather points to the need for the institutions to ensure proper monitoring of the enforcement of measures, rather than against the benefit measures could have for Community producers.

(51) Another importer argued that imposition of anti-dumping measures would not improve the situation of the Spanish producers, due to the existence of large stocks built by the importers in the EU, which would be able to satisfy the market demand in the nearest future. The size of the stocks and the phenomenon of stockpiling were supported by another importer. These comments confirm the Commission analysis in the provisional Regulation and elsewhere in this Regulation. However, it is recalled that measures are intended to provide relief from injurious dumping over a period of five years — not only one.

[1] OJ L 288, 6.11.2007, p. 22.

(52) In the absence of any other new and substantiated information or argument in this respect, the conclusion made in recitals 103 to 106 and 115 of the provisional Regulation regarding the interest of the Community industry are hereby confirmed.

4. **Interest of unrelated importers/traders in the Community**

(53) Cooperating importers expressed a general interest in maintaining two sources of supply of the product concerned, namely Spain and China, in order to maintain the security of supply at competitive prices.

(54) Nevertheless the majority of the importers, should definitive measures be imposed, would prefer a measure which contains also quantitative elements. This is not considered adequate, as explained below in recital 68.

(55) Data from the sampled cooperating importers were verified and confirmed that the canned mandarins sector represents less than 6 % of their total turnover and that they achieved, on average, a level of profitability exceeding 10 % during both the investigation period and the period of 2004-2008.

(56) The foregoing underlines that, on balance, the potential impact of measures on importers/traders would not be disproportional to the positive effects emanating therefrom.

5. **Interest of users/retailers**

(57) One user, representing less than 1 % of consumption, submitted generic comments on the reduced availability of mandarins in the EU and on the superior quality of the Chinese product. He was invited to further cooperate providing individual data but declined and did not substantiate his allegations. Another retailer, a member of the main importer's association, generally opposed a price increase. No other submission concerning the interest of users/retailers was received in the course of the investigation. In this situation and in absence of any substantiated comments from users/retailers, the conclusions made in recitals 109 to 112 of the provisional Regulation are hereby confirmed.

6. **Interest of consumers**

(58) Contrary to what was claimed by one importer, the interest of consumers was taken into consideration at the provisional stage. The Commission's findings were outlined in recitals 113 and 114 of the provisional Regulation. Other parties suggested that the impact on consumers would be significant. However, no information was provided that could cast doubt on the findings in the aforementioned recitals. Even if duties were to lead to an increase in consumer prices, no party has disputed the fact that this product is a very small part of household food expenditure. Therefore in the absence of any comments from consumers and of any further new and substantiated information these recitals are confirmed.

7. **Conclusion on Community interest**

(59) The additional analysis above concerning the interests at stake has not altered the provisional conclusions in this respect. Data of the sampled cooperating importers were verified and confirmed that the canned mandarins sector represents for them less than 6 % of their total turnover and that they achieved, in average terms a comfortable result during both the investigation period and the period of 2004-2008 examined, so the impact of the measures on importers will be minimal. It has been also ascertained that the financial impact on the final consumer would be negligible, considering that marginal quantities per capita are bought in the consumer countries. It is considered that the conclusions regarding the Community interest as set out in the provisional Regulation have not changed. In the absence of any other comments, these conclusions set out in the provisional Regulation are therefore definitively confirmed.

I. **DEFINITIVE MEASURES**

1. **Injury elimination level**

(60) One importer claimed that the profit margin at the level 6,8 % used as reference at the provisional stage is overestimated. In this respect it should be noted that the same level was used and accepted for safeguard measures as the actual profit achieved by the Community industry in the period 1998/99 to 2001/02. It refers to profits of the Community producers in a normal trading situation before the increase in imports which led to injury in the industry. The argument is therefore rejected.

(61) Community producers claimed that provisional duties did not take into account the peculiar situation of the canned mandarins market, where the production is concentrated in only one country and the vast majority of sales and of imports are concentrated in another European country. For that it was requested that final calculations take into account the transport cost from the producer country to the consumer country. The claim was justified and warranted and calculations were adapted accordingly to reflect the concentration of sales in the relevant areas of the Community.

(62) One party made comments on the undercutting and underselling calculation. Where warranted adjustments were made at definitive stage.

(63) The resulting injury margins, taking into account, when warranted, the requests from interested parties, expressed as a percentage of the total cif import value of each sampled Chinese exporter were less than dumping margins found, as follows:

— Yichang Rosen Foods Co., Ltd, Yichang, Zhejiang 100,1 %,

— Huangyan No 1 Canned Food Factory, Huangyan, Zhejiang 48,4 %,

— Zhejiang Xinshiji Food Co., Ltd, and related producer Hubei Xinshji Foods Co., Ltd, Sanmen 92,0 %,

— Cooperating exporting producers not included in the sample 90,6 %.

All other companies 100,1 %.

2. **Retroactivity**

(64) As specified in recital 4, on 9 November 2007 the Commission made imports of the product concerned originating in the PRC subject to registration on the basis of a request by the Community industry. This request has been withdrawn and therefore the matter has not been further examined.

3. **Definitive measures**

(65) In view of the conclusions reached with regard to dumping, injury, causation and Community interest, and in accordance with Article 9(4) of the basic Regulation, a definitive anti-dumping duty should be imposed at the level of the lowest of the dumping and injury margins found, in accordance with the lesser duty rule. In this case, the duty rate should accordingly be set at the level of the injury found.

(66) On the basis of the above and in line with the corrigendum published in the Official Journal L 258 [1] the definitive duty should amount as follows:

— Yichang Rosen Foods Co., Ltd, Yichang, Zhejiang 531,2 EUR/tonne,

— Huangyan No 1 Canned Food Factory Huangyan, Zhejiang, 361,4 EUR/tonne,

— Zhejiang Xinshiji Foods Co., Ltd, Sanmen, Zhejiang and its related producer HubeiXinshiji Foods Co., Ltd, Dangyang City, Hubei Province 490,7 EUR/tonne,

— Cooperating exporting producers not included in the sample 499,6 EUR/tonne.

All other companies 531,2 EUR/tonne.

4. **Form of the measures**

(67) A number of parties requested measures which combined price and quantity elements, whereby for an initial import volume no duty or a reduced duty would be paid. In certain cases, this was linked to a license system.

(68) This option was considered but rejected for, in particular, the following reasons. Anti-dumping duties are imposed because the export price is lower than the normal value. The amounts exported to the Community are relevant for the analysis whether dumped imports cause injury. However, these amounts are, normally, irrelevant for the level of the duty that should be imposed. In other words, if it is found that dumped imports cause injury, the dumping may be offset by a duty which applies as of the first shipment imported after the entry into force of the duty. Finally, to the extent that it would be found that it is in the Community's interest that during a certain period, products may be imported without imposing anti-dumping duties, Article 11(4) of the basic Regulation allows for suspension under certain conditions.

[1] OJ L 258, 26.9.2008, p. 74.

(69) Some parties have alleged that any form of measures without a quantitative limitation will lead to duty avoidance. Parties made reference again to the stockpiling which occurred in the wake of the enlargement of the European Union on 1 May 2004. The Commission services' analysis has confirmed that this was a clear attempt to avoid the duties. Given these statements and the facts described in the provisional Regulation in recitals 123 and 125, the Commission will monitor developments in order to take the necessary actions to ensure proper enforcement of measures.

(70) Other parties have argued that measures should exclude volumes already subject to existing sales contracts. This would in practice amount to an exemption of duties which would undermine the remedial effect of measures, and is therefore rejected. Reference is also made to recitals 51 and 52 above.

(71) The provisional Regulation imposed an anti-dumping duty in the form of a specific duty for each company resulting from the application of the injury elimination margin to the export prices used in the calculation of the dumping during the IP. This methodology is confirmed at the level of definitive measures.

5. **Undertakings**

(72) At a late stage in the investigation several exporting producers in the PRC offered price undertakings. These were not considered to be acceptable given the significant price volatility of this product, the risk of duty avoidance and circumvention for this product (see recitals 124 and 125 of the provisional Regulation), and the fact that, no guarantees were contained in the offers on the part of the Chinese authorities to allow for adequate monitoring in a context of companies not having been granted market economy treatment.

J. **DEFINITIVE COLLECTION OF THE PROVISIONAL DUTY**

(73) In view of the magnitude of the dumping margin found and given the level of the injury caused to the Community industry, it is considered necessary that the amounts secured by way of provisional anti-dumping duty imposed by the provisional Regulation should be definitively collected to the extent of the amount of provisional duties imposed. As for the exporting producers for whom the definitive duty is slightly higher than the provisional duty, amounts provisionally secured should be collected at the level determined in the provisional Regulation, in accordance with Article 10(3) of the basic Regulation,

HAS ADOPTED THIS REGULATION:

*Article 1*

1. A definitive anti-dumping duty is hereby imposed on imports of prepared or preserved mandarins (including tangerines and satsumas), clementines, wilkings and other similar citrus hybrids, not containing added spirit, whether or not containing added sugar or other sweetening matter, and as defined under CN heading 2008, originating in the People's Republic of China, falling within CN codes 2008 30 55, 2008 30 75 and ex 2008 30 90 (TARIC codes 2008 30 90 61, 2008 30 90 63, 2008 30 90 65, 2008 30 90 67, 2008 30 90 69).

2. The amount of the definitive anti-dumping duty applicable for products described in paragraph 1 produced by the companies below shall be as follows:

| Company | EUR/tonne net product weight | TARIC additional code |
|---|---|---|
| Yichang Rosen Foods Co., Ltd, Yichang, Zhejiang | 531,2 | A886 |
| Huangyan No 1 Canned Food Factory, Huangyan, Zhejiang | 361,4 | A887 |
| Zhejiang Xinshiji Foods Co., Ltd, Sanmen, Zhejiang and its related producer Hubei Xinshiji Foods Co., Ltd, Dangyang City, Hubei Province | 490,7 | A888 |
| Cooperating exporting producers not included in the sample as set out in the Annex | 499,6 | A889 |
| All other companies | 531,2 | A999 |

*Article 2*

1. In cases where goods have been damaged before entry into free circulation and, therefore, the price actually paid or payable is apportioned for the determination of the customs value pursuant to Article 145 of Commission Regulation (EEC) No 2454/93 [1] the amount of anti-dumping duty, calculated on the basis of Article 1 above, shall be reduced by a percentage which corresponds to the apportioning of the price actually paid or payable.

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

[1] OJ L 253, 11.10.1993, p. 1.

*Article 3*

1. Amounts secured by way of the provisional anti-dumping duty pursuant to Regulation (EC) No 642/2008 shall be definitively collected at the rate of the provisional duty.

2. For the cooperating exporting producers that were erroneously not listed under the Annex of cooperating exporting producers to Regulation (EC) No 642/2008, namely Ningbo Pointer Canned Foods Co., Ltd, Xiangshan, Ningbo, Ninghai Dongda Foodstuff Co., Ltd, Ningbo, Zhejiang and Toyoshima Share Yidu Foods Co., Ltd, Yidu, Hubei, the amounts secured in excess of the provisional duty applicable to cooperating producers not included to the sample shall be released.

*Article 4*

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

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

Done at Brussels, 18 December 2008.

*For the Council*
*The President*
M. BARNIER

*ANNEX*

Cooperating exporting producers not included in the sample (TARIC additional code A889)

Hunan Pointer Foods Co., Ltd, Yongzhou, Hunan

Ningbo Pointer Canned Foods Co., Ltd, Xiangshan, Ningbo

Yichang Jiayuan Foodstuffs Co., Ltd, Yichang, Hubei

Ninghai Dongda Foodstuff Co., Ltd, Ningbo, Zhejiang

Huangyan No 2 Canned Food Factory, Huangyan, Zhejiang

Zhejiang Xinchang Best Foods Co., Ltd, Xinchang, Zhejiang

Toyoshima Share Yidu Foods Co., Ltd, Yidu, Hubei

Guangxi Guiguo Food Co., Ltd, Guilin, Guangxi

Zhejiang Juda Industry Co., Ltd, Quzhou, Zhejiang

Zhejiang Iceman Group Co., Ltd, Jinhua, Zhejiang

Ningbo Guosheng Foods Co., Ltd, Ninghai

Yi Chang Yin He Food Co., Ltd, Yidu, Hubei

Yongzhou Quanhui Canned Food Co., Ltd, Yongzhou, Hunan

Ningbo Orient Jiuzhou Food Trade & Industry Co., Ltd, Yinzhou, Ningbo

Guangxi Guilin Huangguan Food Co., Ltd, Guilin, Guangxi

Ningbo Wuzhouxing Group Co., Ltd, Mingzhou, Ningbo

# COMMISSION REGULATION (EC) No 1356/2008

## of 23 December 2008

## amending Regulation (EC) No 593/2007 on the fees and charges levied by the European Aviation Safety Agency

**(Text with EEA relevance)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC [1], and in particular Article 64(1) thereof,

After consulting the Management Board of the European Aviation Safety Agency,

Whereas:

(1) The rules for calculating the fees and charges laid down in Commission Regulation (EC) No 593/2007 of 31 May 2007 on the fees and charges levied by the European Aviation Safety Agency [2] have to be reviewed periodically to ensure that the amount of the fees and charges to be paid by the applicant reflects the complexity of the task carried out by the Agency and the actual workload involved. Future amendments to that Regulation will fine tune those rules, also on the basis of the data which will become available inside the European Aviation Safety Agency (hereinafter 'the Agency') following the implementation of its Enterprise Resource Planning system.

(2) Agreements referred to in Article 12(1) of Regulation (EC) No 216/2008 should provide a basis for the evaluation of the actual workload involved in the certification of third countries' products. In principle, the process for validation by the Agency of certificates issued by a third country with which the Community has an appropriate agreement is described in these agreements and should result in a different workload from the process required for certification activities by the Agency.

(3) While ensuring the balance between overall expenditure incurred by the Agency in carrying out certification tasks and overall income from the fees and charges it levies, the rules for calculating the fees and charges have to remain effective and fair towards all applicants. This must be true also for the calculation of travel costs outside the territory of the Member States. The present formula has to be refined to make sure that it refers exclusively to the direct costs incurred for those travels.

(4) The experience gained from the application of Regulation (EC) No 593/2007 has shown that it is necessary to specify when the Agency may invoice the fee due and to set up the method to calculate the amount to be refunded in case a certification task is interrupted. Similar rules have to be provided in case a certificate is surrendered or suspended.

(5) For technical reasons, changes should be introduced in the Annex to Regulation (EC) No 593/2007 in order to enhance some definitions or classifications.

(6) Regulation (EC) No 593/2007 should therefore be amended accordingly.

(7) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 65 of Regulation (EC) No 216/2008,

HAS ADOPTED THIS REGULATION:

*Article 1*

Regulation (EC) No 593/2007 is amended as follows:

1. Article 6 is replaced by the following:

'*Article 6*

Without prejudice to Article 4, where a certification task is conducted, fully or in part, outside the territories of the Member States, the fee invoiced to the applicant shall include the corresponding travel costs outside those territories, according to the formula:

$$d = f + v + h - e$$

[1] OJ L 79, 19.3.2008, p. 1.
[2] OJ L 140, 1.6.2007, p. 3.

where:

d = fee due

f = fee corresponding to the task carried out, as set out in the Annex

v = travel costs

h = time spent by experts in the means of transport, invoiced at the hourly fee set out in Part II

e = average travel costs inside the territories of the Member States, including the average time spent in the means of transport inside the territories of the Member States multiplied by the hourly fee set out in Part II.'

2. Article 8 is amended as follows:

(a) paragraph 2 is replaced by the following:

'2. The issue, maintenance or amendment of a certificate shall be subject to prior payment of the full amount of the fee due, unless agreed differently between the Agency and the applicant. The Agency may invoice the fee in one instalment after having received the application or at the start of the annual or surveillance period. In the event of non-payment, the Agency may refuse to issue or may revoke the relevant certificate after having given formal warning to the applicant.';

(b) paragraph 3 is deleted;

(c) paragraph 7 is replaced by the following:

'7. If a certification task has to be interrupted by the Agency because the applicant has insufficient resources or fails to comply with the applicable requirements, or because the applicant decides to abandon its application or to postpone its project, the balance of any fees due, calculated on an hourly basis for the ongoing period of twelve months but not exceeding the applicable flat fee, shall be payable in full at the time the Agency stops working, together with any other amounts due at that time. The relevant number of hours shall be invoiced at the hourly fee set out in Part II of the Annex. When, on demand of the applicant, the Agency starts again a certification task previously interrupted, this task shall be charged as a new project.';

(d) the following paragraphs 8 and 9 are added:

'8. If the certificate holder surrenders the corresponding certificate or the Agency revokes the certificate, the balance of any fees due, calculated on an hourly basis but not exceeding the applicable flat fee, shall be payable in full at the time the surrender or revocation takes place, together with any other amounts due at that time. The relevant number of hours shall be invoiced at the hourly fee set out in Part II of the Annex.

9. If the Agency suspends a certificate, the balance of any fees due, calculated on a pro-rata temporis basis shall be payable in full at the time of the suspension, together with any other amounts due at that time. If the certificate is subsequently re-instated, a new period of twelve months shall start on the date of re-instatement.'

3. In Article 12, the fifth paragraph is deleted.

4. In Article 14, paragraph 3 is deleted.

5. The Annex is amended in accordance with the Annex to this Regulation

*Article 2*

This Regulation shall enter into force on 1 January 2009.

It shall apply subject to the following conditions:

(a) the fees shown in Tables 1 to 5 of Part I of the Annex shall apply to any application for certification task received after 1 January 2009;

(b) the fees shown in Table 6 of Part I of the Annex shall apply to the annual fees levied after 1 January 2009.

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

Done at Brussels, 23 December 2008.

*For the Commission*
Antonio TAJANI
*Vice-President*

*ANNEX*

The Annex to Regulation (EC) No 593/2007 is amended as follows:

(1) Explanatory note 7 is replaced by the following:

'(7) "Derivative" means an amended Type Certificate as defined and applied for by the Type Certificate Holder.'

(2) Explanatory note 9 is replaced by the following:

'(9) In Tables 3 and 4 of Part I, "Simple", "Standard" and "Complex" refer to the following:

| | Simple | Standard | Complex |
|---|---|---|---|
| EASA Supplemental Type Certificate (STC)<br>EASA major design changes<br>EASA major repairs | STC, major design change, or repair, only involving current and well-proven justification methods, for which a complete set of data (description, compliance check-list and compliance documents) can be communicated at time of application, and for which the applicant has demonstrated experience, and which can be assessed by the project certification manager alone, or with a limited involvement of a single discipline specialist | All other STC, major design changes or repairs | Significant (*) STC or major design change |
| Validated STC under a bilateral arrangement | Basic (**) | Non-basic (**) | Non-basic STC (**) when the Certificating Authority (**) has classified the change as "significant" (*) |
| Validated major design change under a bilateral arrangement | Level 2 (**) major design changes when not automatically accepted (***). | Level 1 (**) | Level 1 (**) major design change when the Certificating Authority (**) has classified the change as "significant" (*) |
| Validated major repair under a bilateral arrangement | N/A<br>(automatic acceptance) | Repairs on critical component (**) | N/A |

(*) "Significant" is defined in paragraph 21A.101 (b) of the Annex to Regulation (EC) No 1702/2003.
(**) For the definitions of "basic", "non-basic", "level 1", "level 2", "critical component" and "Certificating Authority", see the applicable bilateral agreement under which the validation takes place.
(***) Automatic acceptance criteria by EASA for level 2 major changes are defined in EASA Executive Director Decision 2004/04/CF, or in the applicable bilateral agreement under which the validation takes place.'

(3) In Part I, tables 1 to 6 are replaced by the following:

*'Table 1: Type Certificates and Restricted Type Certificates (referred to in subpart B and subpart O of the Annex to Regulation (EC) No 1702/2003 [1])*

*(EUR)*

| | Flat fee |
|---|---|
| *Fixed wing aircraft* | |
| Over 150 000 kg | 2 600 000 |
| Over 50 000 kg up to 150 000 kg | 1 330 000 |
| Over 22 000 kg up to 50 000 kg | 1 060 000 |
| Over 5 700 kg up to 22 000 kg | 410 000 |
| Over 2 000 kg up to 5 700 kg | 227 000 |
| Up to 2 000 kg | 12 000 |
| Very Light Aeroplanes, Powered Sailplanes, Sailplanes | 6 000 |
| *Rotorcraft* | |
| Large | 525 000 |
| Medium | 265 000 |
| Small | 20 000 |
| *Other* | |
| Balloons | 6 000 |
| *Propulsion* | |
| Turbine engines with take-off thrust over 25 KN or take-off power output over 2 000 kW | 365 000 |
| Turbine engines with take-off thrust up to 25 KN or take-off power output up to 2 000 kW | 185 000 |
| Non turbine engines | 30 000 |
| Non turbine engines CS 22 H, CS VLR App. B | 15 000 |
| Propeller for use on aircraft over 5 700 kg MTOW | 10 250 |
| Propeller for use on aircraft up to 5 700 kg MTOW | 2 925 |
| *Parts* | |
| Value above EUR 20 000 | 2 000 |
| Value between EUR 2 000 and 20 000 | 1 000 |
| Value below EUR 2 000 | 500 |

[1] OJ L 243, 27.9.2003, p. 6.

*Table 2: Derivatives to Type certificates or Restricted Type Certificates*

*(EUR)*

| | Flat fee [1] |
|---|---|
| *Fixed wing aircraft* | |
| Over 150 000 kg | 1 000 000 |
| Over 50 000 kg up to 150 000 kg | 500 000 |
| Over 22 000 kg up to 50 000 kg | 400 000 |
| Over 5 700 kg up to 22 000 kg | 160 000 |
| Over 2 000 kg up to 5 700 kg | 80 000 |
| Up to 2 000 kg | 2 800 |
| Very Light Aeroplanes, Powered Sailplanes, Sailplanes | 2 400 |
| *Rotorcraft* | |
| Large | 200 000 |
| Medium | 100 000 |
| Small | 6 000 |
| *Other* | |
| Balloons | 2 400 |
| *Propulsion* | |
| Turbine engines with take-off thrust over 25 KN or take-off power output over 2 000 kW | 100 000 |
| Turbine engines with take-off thrust up to 25 KN or take-off power output up to 2 000 kW | 50 000 |
| Non turbine engines | 10 000 |
| Non turbine engines CS 22 H, CS VLR App. B | 5 000 |
| Propeller for use on aircraft over 5 700 kg MTOW | 2 500 |
| Propeller for use on aircraft up to 5 700 kg MTOW | 770 |
| *Parts* | |
| Value above EUR 20 000 | 1 000 |
| Value between EUR 2 000 and 20 000 | 600 |
| Value below EUR 2 000 | 350 |

[1] For Derivatives involving Substantial Changes(s) to the Type Design, as described in Subpart B of the Annex to Regulation (EC) No 1702/2003, the respective Type Certificate or Restricted Type Certificate fee, as defined in Table 1, shall apply.

*Table 3: Supplemental Type Certificates (referred to in subpart E of the Annex to Regulation (EC) No 1702/2003)*

*(EUR)*

| | Flat fee [1] | | |
|---|---|---|---|
| | Complex | Standard | Simple |
| *Fixed wing aircraft* | | | |
| Over 150 000 kg | 25 000 | 6 000 | 3 000 |
| Over 50 000 kg up to 150 000 kg | 13 000 | 5 000 | 2 500 |
| Over 22 000 kg up to 50 000 kg | 8 500 | 3 750 | 1 875 |
| Over 5 700 kg up to 22 000 kg | 5 500 | 2 500 | 1 250 |
| Over 2 000 kg up to 5 700 kg | 3 800 | 1 750 | 875 |
| Up to 2 000 kg | 1 600 | 1 000 | 500 |
| Very Light Aeroplanes, Powered Sailplanes, Sailplanes | 250 | 250 | 250 |
| *Rotorcraft* | | | |
| Large | 11 000 | 4 000 | 2 000 |
| Medium | 5 000 | 2 000 | 1 000 |
| Small | 900 | 400 | 250 |
| *Other* | | | |
| Balloons | 800 | 400 | 250 |
| *Propulsion* | | | |
| Turbine engines with take-off thrust over 25 KN or take-off power output over 2 000 kW | 12 000 | 5 000 | 2 500 |
| Turbine engines with take-off thrust up to 25 KN or take-off power output up to 2 000 kW | 5 800 | 2 500 | 1 250 |
| Non turbine engines | 2 800 | 1 250 | 625 |
| Non turbine engines CS 22 H, CS VLR App. B | 1 400 | 625 | 300 |
| Propeller for use on aircraft over 5 700 kg MTOW | 2 000 | 1 000 | 500 |
| Propeller for use on aircraft up to 5 700 kg MTOW | 1 500 | 750 | 375 |

[1] For Supplemental Type Certificates involving Substantial Changes (s) as defined in Subpart B of the Annex to Regulation (EC) No 1702/2003, the respective Type Certificate or Restricted Type Certificate fee, as defined in Table 1, shall apply.

*Table 4: Major changes and major repairs (referred to in subparts D and M of the Annex to Regulation (EC) No 1702/2003)*

*(EUR)*

| | Flat fee [1] [2] | | |
|---|---|---|---|
| | Complex | Standard | Simple |
| *Fixed wing aircraft* | | | |
| Over 150 000 kg | 20 000 | 6 000 | 3 000 |
| Over 50 000 kg up to 150 000 kg | 9 000 | 4 000 | 2 000 |
| Over 22 000 kg up to 50 000 kg | 6 500 | 3 000 | 1 500 |
| Over 5 700 kg up to 22 000 kg | 4 500 | 2 000 | 1 000 |
| Over 2 000 kg up to 5 700 kg | 3 000 | 1 400 | 700 |
| Up to 2 000 kg | 1 100 | 500 | 250 |
| Very Light Aeroplanes, Powered Sailplanes, Sailplanes | 250 | 250 | 250 |
| *Rotorcraft* | | | |
| Large | 10 000 | 4 000 | 2 000 |
| Medium | 4 500 | 2 000 | 1 000 |
| Small | 850 | 400 | 250 |
| *Other* | | | |
| Balloons | 850 | 400 | 250 |
| *Propulsion* | | | |
| Turbine engines with take-off thrust over 25 KN or take-off power output over 2 000 kW | 5 000 | 2 000 | 1 000 |
| Turbine engines with take-off thrust up to 25 KN or take-off power output up to 2 000 kW | 2 500 | 1 000 | 500 |
| Non turbine engines | 1 300 | 600 | 300 |
| Non turbine engines CS 22 H, CS VLR App. B | 600 | 300 | 250 |
| Propeller for use on aircraft over 5 700 kg MTOW | 250 | 250 | 250 |
| Propeller for use on aircraft up to 5 700 kg MTOW | 250 | 250 | 250 |

[1] For significant Major Changes, involving Substantial Change(s) as defined in Subpart B of the Annex to Regulation (EC) No 1702/2003, the respective Type Certificate or Restricted Type Certificate fee, as defined in Table 1, shall apply.

[2] Changes and repairs on Auxiliary Power Unit (APU) shall be charged as changes and repairs on engines of the same power rating.

*Table 5: Minor changes and minor repairs (referred to in subparts D and M of the Annex to Regulation (EC) No 1702/2003)*

*(EUR)*

| | Flat fee [1] [2] |
|---|---|
| *Fixed wing aircraft* | |
| Over 150 000 kg | 500 |
| Over 50 000 kg up to 150 000 kg | 500 |
| Over 22 000 kg up to 50 000 kg | 500 |
| Over 5 700 kg up to 22 000 kg | 500 |
| Over 2 000 kg up to 5 700 kg | 250 |
| Up to 2 000 kg | 250 |
| Very Light Aeroplanes, Powered Sailplanes, Sailplanes | 250 |
| *Rotorcraft* | |
| Large | 500 |
| Medium | 500 |
| Small | 250 |
| *Other* | |
| Balloons | 250 |
| *Propulsion* | |
| Turbine engines | 500 |
| Non turbine engines | 250 |
| Propeller | 250 |

[1] The fees set out in this Table shall not apply to minor Changes and Repairs carried out by Design Organisations in accordance with Part 21A.263(c)(2) of Subpart J of the Annex to Regulation (EC) No 1702/2003.

[2] Changes and repairs on Auxiliary Power Units (APU) shall be charged as changes and repairs to engines of the same power rating.

*Table 6: Annual fee for holders of EASA Type Certificates and Restricted Type Certificates and other Type Certificates deemed to be accepted under Regulation (EC) No 1592/2002*

*(EUR)*

| | Flat fee (1) (2) (3) | |
|---|---|---|
| | EU Design | Non EU Design |
| *Fixed wing aircraft* | | |
| Over 150 000 kg | 270 000 | 90 000 |
| Over 50 000 kg up to 150 000 kg | 150 000 | 50 000 |
| Over 22 000 kg up to 50 000 kg | 80 000 | 27 000 |
| Over 5 700 kg up to 22 000 kg | 17 000 | 5 700 |
| Over 2 000 kg up to 5 700 kg | 4 000 | 1 400 |
| Up to 2 000 kg | 2 000 | 670 |
| Very Light Aeroplanes, Powered Sailplanes, Sailplanes | 900 | 300 |
| *Rotorcraft* | | |
| Large | 65 000 | 21 700 |
| Medium | 30 000 | 10 000 |
| Small | 3 000 | 1 000 |
| *Other* | | |
| Balloons | 900 | 300 |
| *Propulsion* | | |
| Turbine engines with take-off thrust over 25 KN or take-off power output over 2 000 kW | 40 000 | 13 000 |
| Turbine engines with take-off thrust up to 25 KN or take-off power output up to 2 000 kW | 6 000 | 2 000 |
| Non turbine engines | 1 000 | 350 |
| Non turbine engines CS 22 H, CS VLR App. B | 500 | 250 |
| Propeller for use on aircraft over 5 700 kg MTOW | 750 | 250 |
| *Parts* | | |
| Value above EUR 20 000 | 2 000 | 700 |
| Value between EUR 2 000 and 20 000 | 1 000 | 350 |
| Value below EUR 2 000 | 500 | 250 |

(1) For freighter versions of an aircraft having their own type certificate, a coefficient of 0,85 is applied to the fee for the equivalent passenger version.

(2) For holders of multiple Type Certificates and/or multiple Restricted Type Certificates, a reduction to the annual fee is applied to the second and subsequent Type Certificates, or Restricted Type Certificates, in the same product category as shown in the following table:

| Product in identical category | Reduction applied to flat fee |
|---|---|
| 1st | 0 % |
| 2nd | 10 % |
| 3rd | 20 % |
| 4th | 30 % |
| 5th | 40 % |
| 6th | 50 % |
| 7th | 60 % |
| 8th | 70 % |
| 9th | 80 % |
| 10th | 90 % |
| 11th and subsequent products | 100 % |

(3) For aircraft of which less than 50 examples are registered worldwide, continued airworthiness activities shall be charged on an hourly basis, at the hourly fee set out in Part II of the Annex, up to the level of the fee for the relevant aircraft product category. For products, parts and appliances which are not aircraft, the limitation concerns the number of aircraft on which the product, part or appliance in question is installed.'

(4) In Part II, point 2 is replaced by the following:

'2. Hourly basis according to the tasks concerned:

| | |
|---|---|
| Demonstration of design capability by means of alternative procedures | Actual number of hours |
| Production without approval | Actual number of hours |
| Alternative Methods of Compliance to AD's | Actual number of hours |
| Validation support (acceptance of EASA certificates by foreign authorities) | Actual number of hours |
| Technical assistance requested by foreign authorities | Actual number of hours |
| EASA acceptance of MRB reports | Actual number of hours |
| Transfer of certificates | Actual number of hours |
| Approval of flight conditions for Permit to fly | 3 hours |
| Administrative re-issuance of documents | 1 hour |
| Export certificate of airworthiness (E-CoA) for CS 25 aircraft | 6 hours |
| Export certificate of airworthiness (E-CoA) for other aircraft | 2 hours' |

# DECISIONS ADOPTED JOINTLY BY THE EUROPEAN PARLIAMENT AND THE COUNCIL

## DECISION No 1357/2008/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**of 16 December 2008**

**amending Decision No 1720/2006/EC establishing an action programme in the field of lifelong learning**

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 149(4) and 150(4) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) Decision No 1720/2006/EC of the European Parliament and of the Council of 15 November 2006 [3] established the action programme in the field of lifelong learning for the period 2007 to 2013.

(2) Article 9(2) of Decision No 1720/2006/EC stipulates that measures necessary for the implementation of the programme other than those listed in paragraph 1 are to be adopted in accordance with the procedure referred to in Article 10(3) of that Decision, namely in accordance with the advisory procedure established by Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [4].

(3) This wording of Decision No 1720/2006/EC results in particular in selection decisions other than those referred to in Article 9(1) of that Decision being subject to the advisory procedure and to the European Parliament's right of scrutiny.

(4) These procedural requirements add two to three months to the process of awarding grants to applicants. They cause many delays for recipients, place a disproportionate burden on the programme's administration and provide no added value given the nature of the grants awarded.

(5) In order to allow selection decisions to be implemented more quickly and efficiently, it is necessary to replace the advisory procedure with an obligation on the Commission to inform the European Parliament and the Member States without delay about any measures taken for the implementation of Decision No 1720/2006/EC without the assistance of a committee,

HAVE DECIDED AS FOLLOWS:

*Article 1*

Decision No 1720/2006/EC is amended as follows:

1. Article 9(2) shall be replaced by the following:

'2. The Commission shall inform the Committee referred to in Article 10 and the European Parliament of all other selection decisions it has taken for the implementation of this Decision within two working days of the adoption of the decisions in question. This information shall include descriptions and an analysis of the applications received, a description of the assessment and selection procedure, and lists of both the projects proposed for funding and those rejected.';

2. Article 10(3) shall be deleted.

*Article 2*

The Commission shall report to the European Parliament and to the Council on the impact of this Decision by 30 June 2010.

[1] OJ C 224, 30.8.2008, p. 115.
[2] Opinion of the European Parliament of 2 September 2008 (not yet published in the Official Journal) and Council Decision of 20 November 2008.
[3] OJ L 327, 24.11.2006, p. 45.
[4] OJ L 184, 17.7.1999, p. 23.

*Article 3*

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

Done at Strasbourg, 16 December 2008.

| *For the European Parliament* | *For the Council* |
| --- | --- |
| *The President* | *The President* |
| H.-G. PÖTTERING | B. LE MAIRE |

# DECISION No 1358/2008/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

## of 16 December 2008

## amending Decision No 1904/2006/EC establishing for the period 2007 to 2013 the programme 'Europe for Citizens' to promote active European citizenship

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 151 and 308 thereof,

Having regard to the proposal from the Commission,

After consulting the European Economic and Social Committee,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [1],

Whereas:

(1) Decision No 1904/2006/EC of the European Parliament and of the Council of 12 December 2006 [2] established the 'Europe for Citizens' programme for the period 2007 to 2013.

(2) Article 8(3) of Decision No 1904/2006/EC stipulates that measures necessary for the implementation of the programme other than those listed in paragraph 2 are to be adopted in accordance with the procedure referred to in Article 9(3) of that Decision, namely in accordance with the advisory procedure established by Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [3].

(3) This wording of Decision No 1904/2006/EC results in particular in selection decisions other than those referred to in Article 8(2) of that Decision being subject to the advisory procedure and to the European Parliament's right of scrutiny.

(4) Yet these selection decisions mainly concern small grants and do not involve any politically sensitive decision making.

(5) These procedural requirements add two to three months to the process of awarding grants to applicants. They cause many delays for recipients, place a disproportionate burden on the programme's administration and provide no added value given the nature of the grants awarded.

(6) In order to allow selection decisions to be implemented more quickly and efficiently, it is necessary to replace the advisory procedure with an obligation on the Commission to inform the European Parliament and the Member States without delay about any measures taken for the implementation of Decision No 1904/2006/EC without the assistance of a committee,

HAVE DECIDED AS FOLLOWS:

*Article 1*

Decision No 1904/2006/EC is amended as follows:

1. Article 8(3) shall be replaced by the following:

'3. The Commission shall inform the Committee referred to in Article 9 and the European Parliament of all other selection decisions it has taken for the implementation of this Decision within two working days of the adoption of the decisions in question. This information shall include descriptions and an analysis of the applications received, a description of the assessment and selection procedure, and lists of both the projects proposed for funding and those rejected.';

2. Article 9(3) shall be deleted.

*Article 2*

The Commission shall report to the European Parliament and the Council on the impact of this Decision by 30 June 2010.

[1] Opinion of the European Parliament of 2 September 2008 (not yet published in the Official Journal) and Council Decision of 20 November 2008.
[2] OJ L 378, 27.12.2006, p. 32.
[3] OJ L 184, 17.7.1999, p. 23.

*Article 3*

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

Done at Strasbourg, 16 December 2008.

| *For the European Parliament* | *For the Council* |
| --- | --- |
| *The President* | *The President* |
| H.-G. PÖTTERING | B. LE MAIRE |

III

*(Acts adopted under the EU Treaty)*

# ACTS ADOPTED UNDER TITLE VI OF THE EU TREATY

## COUNCIL FRAMEWORK DECISION 2008/977/JHA

**of 27 November 2008**

**on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 30, 31 and 34(2)(b) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Whereas:

(1) The European Union has set itself the objective of maintaining and developing the Union as an area of freedom, security and justice in which a high level of safety is to be provided by common action among the Member States in the fields of police and judicial cooperation in criminal matters.

(2) Common action in the field of police cooperation under Article 30(1)(b) of the Treaty on European Union and common action on judicial cooperation in criminal matters under Article 31(1)(a) of the Treaty on European Union imply a need to process the relevant information which should be subject to appropriate provisions on the protection of personal data.

(3) Legislation falling within the scope of Title VI of the Treaty on European Union should foster police and judicial cooperation in criminal matters with regard to its efficiency as well as its legitimacy and compliance with fundamental rights, in particular the right to privacy and to the protection of personal data. Common standards regarding the processing and protection of personal data processed for the purpose of preventing and combating crime contribute to the achieving of both aims.

(4) The Hague Programme on strengthening freedom, security and justice in the European Union, adopted by the European Council on 4 November 2004, stressed the need for an innovative approach to the cross-border exchange of law-enforcement information under the strict observation of key conditions in the area of data protection and invited the Commission to submit proposals in this regard by the end of 2005 at the latest. This was reflected in the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union [2].

(5) The exchange of personal data within the framework of police and judicial cooperation in criminal matters, notably under the principle of availability of information as laid down in the Hague Programme, should be supported by clear rules enhancing mutual trust between the competent authorities and ensuring that the relevant information is protected in a way that excludes any discrimination in respect of such cooperation between the Member States while fully respecting fundamental rights of individuals. Existing instruments at the European level do not suffice; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [3] does not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as those provided for by Title VI of the Treaty on European Union, nor, in any case, to processing operations concerning public security, defence, state security or the activities of the State in areas of criminal law.

[1] OJ C 125 E, 22.5.2008, p. 154.

[2] OJ C 198, 12.8.2005, p. 1.

[3] OJ L 281, 23.11.1995, p. 31.

(6) This Framework Decision applies only to data gathered or processed by competent authorities for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. This Framework Decision should leave it to Member States to determine more precisely at national level which other purposes are to be considered as incompatible with the purpose for which the personal data were originally collected. In general, further processing for historical, statistical or scientific purposes should not be considered as incompatible with the original purpose of the processing.

(7) The scope of this Framework Decision is limited to the processing of personal data transmitted or made available between Member States. No conclusions should be inferred from this limitation regarding the competence of the Union to adopt acts relating to the collection and processing of personal data at national level or the expediency for the Union to do so in the future.

(8) In order to facilitate data exchanges within the Union, Member States intend to ensure that the standard of data protection achieved in national data processing matches that provided for in this Framework Decision. With regard to national data processing, this Framework Decision does not preclude Member States from providing safeguards for the protection of personal data higher than those established in this Framework Decision.

(9) This Framework Decision should not apply to personal data which a Member State has obtained within the scope of this Framework Decision and which originated in that Member State.

(10) The approximation of Member States' laws should not result in any lessening of the data protection they afford but should, on the contrary, seek to ensure a high level of protection within the Union.

(11) It is necessary to specify the objectives of data protection within the framework of police and judicial activities and to lay down rules concerning the lawfulness of processing of personal data in order to ensure that any information that might be exchanged has been processed lawfully and in accordance with fundamental principles relating to data quality. At the same time the legitimate activities of the police, customs, judicial and other competent authorities should not be jeopardised in any way.

(12) The principle of accuracy of data is to be applied taking account of the nature and purpose of the processing concerned. For example, in particular in judicial proceedings data are based on the subjective perception of individuals and in some cases are totally unverifiable. Consequently, the requirement of accuracy cannot appertain to the accuracy of a statement but merely to the fact that a specific statement has been made.

(13) Archiving in a separate data set should be permissible only if the data are no longer required and used for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Archiving in a separate data set should also be permissible if the archived data are stored in a database with other data in such a way that they can no longer be used for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. The appropriateness of the archiving period should depend on the purposes of archiving and the legitimate interests of the data subjects. In the case of archiving for historical purposes a very long period may be envisaged.

(14) Data may also be erased by destroying the data medium.

(15) As regards inaccurate, incomplete or no longer up-to-date data transmitted or made available to another Member State and further processed by quasi-judicial authorities, meaning authorities with powers to make legally binding decisions, its rectification, erasure or blocking should be carried out in accordance with national law.

(16) Ensuring a high level of protection of the personal data of individuals requires common provisions to determine the lawfulness and the quality of data processed by competent authorities in other Member States.

(17) It is appropriate to lay down at the European level the conditions under which competent authorities of the Member States should be allowed to transmit and make available personal data received from other Member States to authorities and private parties in Member States. In many cases the transmission of personal data by the judiciary, police or customs to private parties is necessary to prosecute crime or to prevent an immediate and serious threat to public security or to prevent serious harm to the rights of individuals, for example, by issuing alerts concerning forgeries of securities to banks and credit institutions, or, in the area of vehicle crime, by communicating personal data to insurance companies in order to prevent illicit trafficking in stolen motor vehicles or to improve the conditions for the recovery of stolen motor vehicles from abroad. This is not tantamount to the transfer of police or judicial tasks to private parties.

(18) The rules in this Framework Decision regarding the transmission of personal data by the judiciary, police or customs to private parties do not apply to the disclosure of data to private parties (such as defence lawyers and victims) in the context of criminal proceedings.

(19) The further processing of personal data received from, or made available by, the competent authority of another Member State, in particular the further transmission of or making available such data, should be subject to common rules at European level.

(20) Where personal data may be further processed after the Member State from which the data were obtained has given its consent, each Member State should be able to determine the modalities of such consent, including, for example, by means of a general consent for categories of information or categories of further processing.

(21) Where personal data may be further processed for administrative proceedings, these proceedings also include activities by regulatory and supervisory bodies.

(22) The legitimate activities of the police, customs, judicial and other competent authorities may require that data are sent to authorities in third States or international bodies that have obligations for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.

(23) Where personal data are transferred from a Member State to third States or international bodies, these data should, in principle, benefit from an adequate level of protection.

(24) Where personal data are transferred from a Member State to third States or international bodies, such transfer should, in principle, take place only after the Member State from which the data were obtained has given its consent to the transfer. Each Member State should be able to determine the modalities of such consent, including, for example, by means of a general consent for categories of information or for specified third States.

(25) The interests of efficient law enforcement cooperation require that where the nature of a threat to the public security of a Member State or a third State is so immediate as to render it impossible to obtain prior consent in good time, the competent authority should be able to transfer the relevant personal data to the third State concerned without such prior consent. The same could apply where other essential interests of a Member State of equal importance are at stake, for example where the critical infrastructure of a Member State could be the subject of an immediate and serious threat or where a Member State's financial system could be seriously disrupted.

(26) It may be necessary to inform data subjects regarding the processing of their data, in particular where there has been particularly serious encroachment on their rights as a result of secret data collection measures, in order to ensure that data subjects can have effective legal protection.

(27) Member States should ensure that the data subject is informed that the personal data could be or are being collected, processed or transmitted to another Member State for the purpose of prevention, investigation, detection, and prosecution of criminal offences or the execution of criminal penalties. The modalities of the right of the data subject to be informed and the exceptions thereto should be determined by national law. This may take a general form, for example, through the law or through the publication of a list of the processing operations.

(28) In order to ensure the protection of personal data without jeopardising the interests of criminal investigations, it is necessary to define the rights of the data subject.

(29) Some Member States have provided for the right of access of the data subject in criminal matters through a system where the national supervisory authority, in place of the data subject, has access to all the personal data related to the data subject without any restriction and may also rectify, erase or update inaccurate data. In such a case of indirect access, the national law of those Member States may provide that the national supervisory authority will inform the data subject only that all the necessary verifications have taken place. However, those Member States also provide for possibilities of direct access for the data subject in specific cases, such as access to judicial records, in order to obtain copies of own criminal records or of documents relating to own hearings by the police services.

(30) It is appropriate to establish common rules on confidentiality and security of processing, on liability and penalties for unlawful use by competent authorities and on judicial remedies available to the data subject. It is, however, for each Member State to determine the nature of its tort rules and of the penalties applicable to violations of domestic data protection provisions.

(31) This Framework Decision allows the principle of public access to official documents to be taken into account when implementing the principles set out in this Framework Decision.

(32) When necessary to protect personal data in relation to processing which by scale or by type holds specific risks for fundamental rights and freedoms, for example processing by means of new technologies, mechanisms or procedures, it is appropriate to ensure that the competent national supervisory authorities are consulted prior to the establishment of filing systems aimed at the processing of these data.

(33) The establishment in Member States of supervisory authorities, exercising their functions with complete independence, is an essential component of the protection of personal data processed within the framework of police and judicial cooperation between the Member States.

(34) The supervisory authorities already established in Member States under Directive 95/46/EC should also be able to assume responsibility for the tasks to be performed by the national supervisory authorities to be established under this Framework Decision.

(35) Such supervisory authorities should have the necessary means to perform their duties, including powers of investigation and intervention, particularly in cases of complaints from individuals, or powers to engage in legal proceedings. These supervisory authorities should help to ensure transparency of processing in the Member States within whose jurisdiction they fall. However, their powers should not interfere with specific rules set out for criminal proceedings or the independence of the judiciary.

(36) Article 47 of the Treaty on European Union stipulates that nothing in it is to affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them. Accordingly, this Framework Decision does not affect the protection of personal data under Community law, in particular as provided for in Directive 95/46/EC, in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [1] and in Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2].

(37) This Framework Decision is without prejudice to the rules pertaining to illicit access to data laid down in Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems [3].

(38) This Framework Decision is without prejudice to existing obligations and commitments incumbent upon Member States or upon the Union by virtue of bilateral and/or multilateral agreements with third States. Future agreements should comply with the rules on exchanges with third States.

(39) Several acts, adopted on the basis of Title VI of the Treaty on European Union, contain specific provisions on the protection of personal data exchanged or otherwise processed pursuant to those acts. In some cases these provisions constitute a complete and coherent set of rules covering all relevant aspects of data protection (principles of data quality, rules on data security, regulation of the rights and safeguards of data subjects, organisation of supervision and liability) and they regulate these matters in more detail than this Framework Decision. The relevant set of data protection provisions of those acts, in particular those governing the functioning of Europol, Eurojust, the Schengen Information System (SIS) and the Customs Information System (CIS), as well as those introducing direct access for the authorities of Member States to certain data systems of other Member States, should not be affected by this Framework Decision. The same applies in respect of the data protection provisions governing the automated transfer between Member States of DNA profiles, dactyloscopic data and national vehicle registration data pursuant to the Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [4].

(40) In other cases the provisions on data protection in acts, adopted on the basis of Title VI of the Treaty on European Union, are more limited in scope. They often set specific conditions for the Member State receiving information containing personal data from other Member States as to the purposes for which it can use those data, but refer for other aspects of data protection to the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 or to national law. To the extent that the provisions of those acts imposing conditions on receiving Member States as to the use or further transfer of personal data are more restrictive than those contained in the corresponding provisions of this Framework Decision, the former provisions should remain unaffected. However, for all other aspects the rules set out in this Framework Decision should be applied.

(41) This Framework Decision does not affect the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, the Additional Protocol to that Convention of 8 November 2001 or the Council of Europe conventions on judicial cooperation in criminal matters.

[1] OJ L 8, 12.1.2001, p. 1.
[2] OJ L 201, 31.7.2002, p. 37.
[3] OJ L 69, 16.3.2005, p. 67.
[4] OJ L 210, 6.8.2008, p. 1.

(42) Since the objective of this Framework Decision, namely the determination of common rules for the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of the action, be better achieved at the Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty establishing the European Community and referred to in Article 2 of the Treaty on European Union. In accordance with the principle of proportionality as set out in Article 5 of the Treaty establishing the European Community, this Framework Decision does not go beyond what is necessary to achieve that objective.

(43) The United Kingdom is taking part in this Framework Decision, in accordance with Article 5 of the Protocol integrating the Schengen *acquis* into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article 8(2) of Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* ([1]).

(44) Ireland is taking part in this Framework Decision in accordance with Article 5 of the Protocol integrating the Schengen *acquis* into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community, and Article 6(2) of Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis* ([2]).

(45) As regards Iceland and Norway, this Framework Decision constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis* ([3]), which fall within the area referred to in Article 1, points H and I of Council Decision 1999/437/EC ([4]) on certain arrangements for the application of that Agreement.

(46) As regards Switzerland, this Framework Decision constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* ([5]), which fall within the area referred to in Article 1, point H and I of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/149/JHA ([6]) on the conclusion of that Agreement on behalf of the European Union.

(47) As regards Liechtenstein, this Framework Decision constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Protocol signed between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point H and I of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/262/JHA ([7]) on the signature of that Protocol on behalf of the European Union.

(48) This Framework Decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union ([8]). This Framework Decision seeks to ensure full respect for the rights to privacy and the protection of personal data reflected in Articles 7 and 8 of the Charter,

HAS ADOPTED THIS FRAMEWORK DECISION:

*Article 1*

**Purpose and scope**

1. The purpose of this Framework Decision is to ensure a high level of protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data in the framework of police and judicial cooperation in criminal matters, provided for by Title VI of the Treaty on European Union, while guaranteeing a high level of public safety.

2. In accordance with this Framework Decision, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy when, for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, personal data:

(a) are or have been transmitted or made available between Member States;

([1]) OJ L 131, 1.6.2000, p. 43.
([2]) OJ L 64, 7.3.2002, p. 20.
([3]) OJ L 176, 10.7.1999, p. 36.
([4]) OJ L 176, 10.7.1999, p. 31.
([5]) OJ L 53, 27.2.2008, p. 52.
([6]) OJ L 53, 27.2.2008, p. 50.
([7]) OJ L 83, 26.3.2008, p. 5.
([8]) OJ C 303, 14.12.2007, p. 1.

(b) are or have been transmitted or made available by Member States to authorities or to information systems established on the basis of Title VI of the Treaty on European Union; or

(c) are or have been transmitted or made available to the competent authorities of the Member States by authorities or information systems established on the basis of the Treaty on European Union or the Treaty establishing the European Community.

3. This Framework Decision shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means, of personal data which form part of a filing system or are intended to form part of a filing system.

4. This Framework Decision is without prejudice to essential national security interests and specific intelligence activities in the field of national security.

5. This Framework Decision shall not preclude Member States from providing, for the protection of personal data collected or processed at national level, higher safeguards than those established in this Framework Decision.

*Article 2*

**Definitions**

For the purposes of this Framework Decision:

(a) 'personal data' mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) 'processing of personal data' and 'processing' mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

(c) 'blocking' means the marking of stored personal data with the aim of limiting their processing in future;

(d) 'personal data filing system' and 'filing system' mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;

(e) 'processor' means any body which processes personal data on behalf of the controller;

(f) 'recipient' means any body to which data are disclosed;

(g) 'the data subject's consent' means any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed;

(h) 'competent authorities' mean agencies or bodies established by legal acts adopted by the Council pursuant to Title VI of the Treaty on European Union, as well as police, customs, judicial and other competent authorities of the Member States that are authorised by national law to process personal data within the scope of this Framework Decision;

(i) 'controller' means the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data;

(j) 'referencing' means the marking of stored personal data without the aim of limiting their processing in future;

(k) 'to make anonymous' means to modify personal data in such a way that details of personal or material circumstances can no longer or only with disproportionate investment of time, cost and labour be attributed to an identified or identifiable natural person.

*Article 3*

**Principles of lawfulness, proportionality and purpose**

1. Personal data may be collected by the competent authorities only for specified, explicit and legitimate purposes in the framework of their tasks and may be processed only for the same purpose for which data were collected. Processing of the data shall be lawful and adequate, relevant and not excessive in relation to the purposes for which they are collected.

2. Further processing for another purpose shall be permitted in so far as:

(a) it is not incompatible with the purposes for which the data were collected;

(b) the competent authorities are authorised to process such data for such other purpose in accordance with the applicable legal provisions; and

(c) processing is necessary and proportionate to that other purpose.

The competent authorities may also further process the transmitted personal data for historical, statistical or scientific purposes, provided that Member States provide appropriate safeguards, such as making the data anonymous.

*Article 4*

**Rectification, erasure and blocking**

1. Personal data shall be rectified if inaccurate and, where this is possible and necessary, completed or updated.

2. Personal data shall be erased or made anonymous when they are no longer required for the purposes for which they were lawfully collected or are lawfully further processed. Archiving of those data in a separate data set for an appropriate period in accordance with national law shall not be affected by this provision.

3. Personal data shall be blocked instead of erased if there are reasonable grounds to believe that erasure could affect the legitimate interests of the data subject. Blocked data shall be processed only for the purpose which prevented their erasure.

4. When the personal data are contained in a judicial decision or record related to the issuance of a judicial decision, the rectification, erasure or blocking shall be carried out in accordance with national rules on judicial proceedings.

*Article 5*

**Establishment of time limits for erasure and review**

Appropriate time limits shall be established for the erasure of personal data or for a periodic review of the need for the storage of the data. Procedural measures shall ensure that these time limits are observed.

*Article 6*

**Processing of special categories of data**

The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership and the processing of data concerning health or sex life shall be permitted only when this is strictly necessary and when the national law provides adequate safeguards.

*Article 7*

**Automated individual decisions**

A decision which produces an adverse legal effect for the data subject or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to the data subject shall be permitted only if authorised by a law which also lays down measures to safeguard the data subject's legitimate interests.

*Article 8*

**Verification of quality of data that are transmitted or made available**

1. The competent authorities shall take all reasonable steps to provide that personal data which are inaccurate, incomplete or no longer up to date are not transmitted or made available. To that end, the competent authorities shall, as far as practicable, verify the quality of personal data before they are transmitted or made available. As far as possible, in all transmissions of data, available information shall be added which enables the receiving Member State to assess the degree of accuracy, completeness, up-to-dateness and reliability. If personal data were transmitted without request the receiving authority shall verify without delay whether these data are necessary for the purpose for which they were transmitted.

2. If it emerges that incorrect data have been transmitted or data have been unlawfully transmitted, the recipient must be notified without delay. The data must be rectified, erased, or blocked without delay in accordance with Article 4.

*Article 9*

**Time limits**

1. Upon transmission or making available of the data, the transmitting authority may in line with the national law and in accordance with Articles 4 and 5, indicate the time limits for the retention of data, upon the expiry of which the recipient must erase or block the data or review whether or not they are still needed. This obligation shall not apply if, at the time of the expiry of these time limits, the data are required for a current investigation, prosecution of criminal offences or enforcement of criminal penalties.

2. Where the transmitting authority has not indicated a time limit in accordance with paragraph 1, the time limits referred to in Articles 4 and 5 for the retention of data provided for under the national law of the receiving Member State shall apply.

*Article 10*

**Logging and documentation**

1. All transmissions of personal data are to be logged or documented for the purposes of verification of the lawfulness of the data processing, self-monitoring and ensuring proper data integrity and security.

2. Logs or documentation prepared under paragraph 1 shall be communicated on request to the competent supervisory authority for the control of data protection. The competent supervisory authority shall use this information only for the control of data protection and for ensuring proper data processing as well as data integrity and security.

*Article 11*

**Processing of personal data received from or made available by another Member State**

Personal data received from or made available by the competent authority of another Member State may, in accordance with the requirements of Article 3(2), be further processed only for the following purposes other than those for which they were transmitted or made available:

(a) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties other than those for which they were transmitted or made available;

(b) other judicial and administrative proceedings directly related to the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties;

(c) the prevention of an immediate and serious threat to public security; or

(d) any other purpose only with the prior consent of the transmitting Member State or with the consent of the data subject, given in accordance with national law.

The competent authorities may also further process the transmitted personal data for historical, statistical or scientific purposes, provided that Member States provide appropriate safeguards, such as, for example, making the data anonymous.

*Article 12*

**Compliance with national processing restrictions**

1. Where, under the law of the transmitting Member State, specific processing restrictions apply in specific circumstances to data exchanges between competent authorities within that Member State, the transmitting authority shall inform the recipient of such restrictions. The recipient shall ensure that these processing restrictions are met.

2. When applying paragraph 1, Member States shall not apply restrictions regarding data transmissions to other Member States or to agencies or bodies established pursuant to Title VI of the Treaty on European Union other than those applicable to similar national data transmissions.

*Article 13*

**Transfer to competent authorities in third States or to international bodies**

1. Member States shall provide that personal data transmitted or made available by the competent authority of another Member State may be transferred to third States or international bodies, only if:

(a) it is necessary for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties;

(b) the receiving authority in the third State or receiving international body is responsible for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties;

(c) the Member State from which the data were obtained has given its consent to transfer in compliance with its national law; and

(d) the third State or international body concerned ensures an adequate level of protection for the intended data processing.

2. Transfer without prior consent in accordance with paragraph 1(c) shall be permitted only if transfer of the data is essential for the prevention of an immediate and serious threat to public security of a Member State or a third State or to essential interests of a Member State and the prior consent cannot be obtained in good time. The authority responsible for giving consent shall be informed without delay.

3. By way of derogation from paragraph 1(d), personal data may be transferred if:

(a) the national law of the Member State transferring the data so provides because of:

(i) legitimate specific interests of the data subject; or

(ii) legitimate prevailing interests, especially important public interests; or

(b) the third State or receiving international body provides safeguards which are deemed adequate by the Member State concerned according to its national law.

4. The adequacy of the level of protection referred to in paragraph 1(d) shall be assessed in the light of all the circumstances surrounding a data transfer operation or a set of data transfer operations. Particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the State of origin and the State or international body of final destination of the data, the rules of law, both general and sectoral, in force in the third State or international body in question and the professional rules and security measures which apply.

*Article 14*

**Transmission to private parties in Member States**

1. Member States shall provide that personal data received from or made available by the competent authority of another Member State may be transmitted to private parties only if:

(a) the competent authority of the Member State from which the data were obtained has consented to transmission in compliance with its national law;

(b) no legitimate specific interests of the data subject prevent transmission; and

(c) in particular cases transfer is essential for the competent authority transmitting the data to a private party for:

(i) the performance of a task lawfully assigned to it;

(ii) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties;

(iii) the prevention of an immediate and serious threat to public security; or

(iv) the prevention of serious harm to the rights of individuals.

2. The competent authority transmitting the data to a private party shall inform the latter of the purposes for which the data may exclusively be used.

*Article 15*

**Information on request of the competent authority**

The recipient shall, on request, inform the competent authority which transmitted or made available the personal data about their processing.

*Article 16*

**Information for the data subject**

1. Member States shall ensure that the data subject is informed regarding the collection or processing of personal data by their competent authorities, in accordance with national law.

2. When personal data have been transmitted or made available between Member States, each Member State may, in accordance with the provisions of its national law referred to in paragraph 1, ask that the other Member State does not inform the data subject. In such case the latter Member State shall not inform the data subject without the prior consent of the other Member State.

*Article 17*

**Right of access**

1. Every data subject shall have the right to obtain, following requests made at reasonable intervals, without constraint and without excessive delay or expense:

(a) at least a confirmation from the controller or from the national supervisory authority as to whether or not data relating to him have been transmitted or made available and information on the recipients or categories of recipients to whom the data have been disclosed and communication of the data undergoing processing; or

(b) at least a confirmation from the national supervisory authority that all necessary verifications have taken place.

2. The Member States may adopt legislative measures restricting access to information pursuant to paragraph 1(a), where such a restriction, with due regard for the legitimate interests of the person concerned, constitutes a necessary and proportional measure:

(a) to avoid obstructing official or legal inquiries, investigations or procedures;

(b) to avoid prejudicing the prevention, detection, investigation and prosecution of criminal offences or for the execution of criminal penalties;

(c) to protect public security;

(d) to protect national security;

(e) to protect the data subject or the rights and freedoms of others.

3. Any refusal or restriction of access shall be set out in writing to the data subject. At the same time, the factual or legal reasons on which the decision is based shall also be communicated to him. The latter communication may be omitted where a reason under paragraph 2(a) to (e) exists. In all of these cases the data subject shall be advised that he may appeal to the competent national supervisory authority, a judicial authority or to a court.

*Article 18*

**Right to rectification, erasure or blocking**

1. The data subject shall have the right to expect the controller to fulfil its duties in accordance with Articles 4, 8 and 9 concerning the rectification, erasure or blocking of personal data which arise from this Framework Decision. Member States shall lay down whether the data subject may assert this right directly against the controller or through the intermediary of the competent national supervisory authority. If the controller refuses rectification, erasure or blocking, the refusal must be communicated in writing to the data subject who must be informed of the possibilities provided for in national law for lodging a complaint or seeking judicial remedy. Upon examination of the complaint or judicial remedy, the data subject shall be informed whether the controller acted properly or not. Member States may also provide that the data subject shall be informed by the competent national supervisory authority that a review has taken place.

2. If the accuracy of an item of personal data is contested by the data subject and its accuracy or inaccuracy cannot be ascertained, referencing of that item of data may take place.

*Article 19*

**Right to compensation**

1. Any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Framework Decision shall be entitled to receive compensation for the damage suffered from the controller or other authority competent under national law.

2. Where a competent authority of a Member State has transmitted personal data, the recipient cannot, in the context of its liability vis-à-vis the injured party in accordance with national law, cite in its defence that the data transmitted were inaccurate. If the recipient pays compensation for damage caused by the use of incorrectly transmitted data, the transmitting competent authority shall refund to the recipient the amount paid in damages, taking into account any fault that may lie with the recipient.

*Article 20*

**Judicial remedies**

Without prejudice to any administrative remedy for which provision may be made prior to referral to the judicial authority, the data subject shall have the right to a judicial remedy for any breach of the rights guaranteed to him by the applicable national law.

*Article 21*

**Confidentiality of processing**

1. Any person who has access to personal data which fall within the scope of this Framework Decision may process such data only if that person is a member of, or acts on instructions of, the competent authority, unless he is required to do so by law.

2. Persons working for a competent authority of a Member State shall be bound by all the data protection rules which apply to the competent authority in question.

*Article 22*

**Security of processing**

1. Member States shall provide that the competent authorities must implement appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, in particular where the processing involves the transmission over a network or the making available by granting direct automated access, and against all other unlawful forms of processing, taking into account in particular the risks represented by the processing and the nature of the data to be protected. Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.

2. In respect of automated data processing each Member State shall implement measures designed to:

(a) deny unauthorised persons access to data-processing equipment used for processing personal data (equipment access control);

(b) prevent the unauthorised reading, copying, modification or removal of data media (data media control);

(c) prevent the unauthorised input of data and the unauthorised inspection, modification or deletion of stored personal data (storage control);

(d) prevent the use of automated data-processing systems by unauthorised persons using data communication equipment (user control);

(e) ensure that persons authorised to use an automated data-processing system only have access to the data covered by their access authorisation (data access control);

(f) ensure that it is possible to verify and establish to which bodies personal data have been or may be transmitted or made available using data communication equipment (communication control);

(g) ensure that it is subsequently possible to verify and establish which personal data have been input into automated data-processing systems and when and by whom the data were input (input control);

(h) prevent the unauthorised reading, copying, modification or deletion of personal data during transfers of personal data or during transportation of data media (transport control);

(i) ensure that installed systems may, in case of interruption, be restored (recovery);

(j) ensure that the functions of the system perform, that the appearance of faults in the functions is reported (reliability) and that stored data cannot be corrupted by means of a malfunctioning of the system (integrity).

3. Member States shall provide that processors may be designated only if they guarantee that they observe the requisite technical and organisational measures under paragraph 1 and comply with the instructions under Article 21. The competent authority shall monitor the processor in those respects.

4. Personal data may be processed by a processor only on the basis of a legal act or a written contract.

*Article 23*

**Prior consultation**

Member States shall ensure that the competent national supervisory authorities are consulted prior to the processing of personal data which will form part of a new filing system to be created where:

(a) special categories of data referred to in Article 6 are to be processed; or

(b) the type of processing, in particular using new technologies, mechanism or procedures, holds otherwise specific risks for the fundamental rights and freedoms, and in particular the privacy, of the data subject.

*Article 24*

**Penalties**

Member States shall adopt suitable measures to ensure the full implementation of the provisions of this Framework Decision and shall in particular lay down effective, proportionate and dissuasive penalties to be imposed in case of infringements of the provisions adopted pursuant to this Framework Decision.

*Article 25*

**National supervisory authorities**

1. Each Member State shall provide that one or more public authorities are responsible for advising and monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Framework Decision. These authorities shall act with complete independence in exercising the functions entrusted to them.

2. Each authority shall in particular be endowed with:

(a) investigative powers, such as powers of access to data forming the subject matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties;

(b) effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions;

(c) the power to engage in legal proceedings where the national provisions adopted pursuant to this Framework Decision have been infringed or to bring this infringement to the attention of the judicial authorities. Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

3. Each supervisory authority shall hear claims lodged by any person concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

4. Member States shall provide that the members and staff of the supervisory authority are bound by the data protection provisions applicable to the competent authority in question and, even after their employment has ended, are to be subject to a duty of professional secrecy with regard to confidential information to which they have access.

*Article 26*

**Relationship to agreements with third States**

This Framework Decision is without prejudice to any obligations and commitments incumbent upon Member States or upon the Union by virtue of bilateral and/or multilateral agreements with third States existing at the time of adoption of this Framework Decision.

In the application of these agreements, the transfer to a third State of personal data obtained from another Member State, shall be carried out while respecting Article 13(1)(c) or (2), as appropriate.

*Article 27*

**Evaluation**

1. Member States shall report to the Commission by 27 November 2013 on the national measures they have taken to ensure full compliance with this Framework Decision, and particularly with regard to those provisions that already have to be complied with when data is collected. The Commission shall examine in particular the implications of those provisions for the scope of this Framework Decision as laid down in Article 1(2).

2. The Commission shall report to the European Parliament and the Council within one year on the outcome of the evaluation referred to in paragraph 1, and shall accompany its report with any appropriate proposals for amendments to this Framework Decision.

*Article 28*

**Relationship to previously adopted acts of the Union**

Where in acts, adopted under Title VI of the Treaty on European Union prior to the date of entry into force of this Framework Decision and regulating the exchange of personal data between Member States or the access of designated authorities of Member States to information systems established pursuant to the Treaty establishing the European Community, specific conditions have been introduced as to the use of such data by the receiving Member State, these conditions shall take precedence over the provisions of this Framework Decision on the use of data received from or made available by another Member State.

*Article 29*

**Implementation**

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision before 27 November 2010.

2. By the same date Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision, as well as information on the supervisory authorities referred to in Article 25. On the basis of a report established using this information by the Commission, the Council shall, before 27 November 2011, assess the extent to which Member States have complied with the provisions of this Framework Decision.

*Article 30*

**Entry into force**

This Framework Decision shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Done at Brussels, 27 November 2008.

*For the Council*

*The President*

M. ALLIOT-MARIE

# COUNCIL FRAMEWORK DECISION 2008/978/JHA

## of 18 December 2008

## on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31 and Article 34(2)(b) thereof,

Having regard to the proposal of the Commission,

Having regard to the opinion of the European Parliament [1],

Whereas:

(1) The European Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union.

(2) On 29 November 2000 the Council, in accordance with the Tampere Conclusions, adopted a programme of measures to implement the principle of mutual recognition in criminal matters [2]. This Framework Decision is necessary to complete measures 5 and 6 of that programme, which deal with the mutual recognition of orders to obtain evidence.

(3) Point 3.3.1 of the Hague Programme [3], included in the Conclusions of the European Council of 4 and 5 November 2004, emphasises the importance of the completion of the comprehensive programme of measures to implement the principle of mutual recognition in criminal matters and highlights the introduction of the European evidence warrant (EEW) as a matter of priority.

(4) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [4] was the first concrete measure in the field of criminal law implementing the principle of mutual recognition.

(5) Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property and evidence [5] addresses the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, this deals only with part of the spectrum of judicial cooperation in criminal matters with respect to evidence, and subsequent transfer of the evidence is left to mutual assistance procedures.

(6) It is therefore necessary further to improve judicial cooperation by applying the principle of mutual recognition to a judicial decision, in the form of an EEW, for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

(7) The EEW may be used to obtain any objects, documents and data for use in proceedings in criminal matters for which it may be issued. This may include for example objects, documents or data from a third party, from a search of premises including the private premises of the suspect, historical data on the use of any services including financial transactions, historical records of statements, interviews and hearings, and other records, including the results of special investigative techniques.

(8) The principle of mutual recognition is based on a high level of confidence between Member States. In order to promote this confidence, this Framework Decision should contain important safeguards to protect fundamental rights. The EEW should therefore be issued only by judges, courts, investigating magistrates, public prosecutors and certain other judicial authorities as defined by Member States in accordance with this Framework Decision.

(9) This Framework Decision is adopted under Article 31 of the Treaty and therefore concerns judicial cooperation within the context of that provision, aiming to assist the collection of evidence for proceedings as defined in Article 5 of this Framework Decision. Although authorities other than judges, courts, investigating magistrates and public prosecutors may have a role in the collection of such evidence in accordance with Article 2(c)(ii), this Framework Decision does not cover police, customs, border and administrative cooperation which are regulated by other provisions of the Treaties.

[1] OJ C 103 E, 29.4.2004, p. 452.
[2] OJ C 12, 15.1.2001, p. 10.
[3] OJ C 53, 3.3.2005, p. 1.
[4] OJ L 190, 18.7.2002, p. 1.
[5] OJ L 196, 2.8.2003, p. 45.

(10) The definition of the term 'search or seizure' should not be invoked for the application of any other instrument applicable between Member States, in particular the Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April 1959, and the instruments which supplement it.

(11) An EEW should be issued only where obtaining the objects, documents or data sought is necessary and proportionate for the purpose of the criminal or other proceedings concerned. In addition, an EEW should be issued only where the object, documents or data concerned could be obtained under the national law of the issuing State in a comparable case. The responsibility for ensuring compliance with these conditions should lie with the issuing authority. The grounds for non-recognition or non-execution should therefore not cover these matters.

(12) The executing authority should use the least intrusive means to obtain the objects, documents or data sought.

(13) The executing authority should be obliged to execute the EEW for electronic data not located in the executing State only to the extent possible under its law.

(14) It should be possible, if the national law of the issuing State so provides in transposing Article 12, for the issuing authority to ask the executing authority to follow specified formalities and procedures in respect of legal or administrative processes which might assist in making the evidence sought admissible in the issuing State, for example the official stamping of a document, the presence of a representative from the issuing State, or the recording of times and dates to create a chain of evidence. Such formalities and procedures should not encompass coercive measures.

(15) The execution of an EEW should, to the widest extent possible, and without prejudice to fundamental guarantees under national law, be carried out in accordance with the formalities and procedures expressly indicated by the issuing State.

(16) To ensure the effectiveness of judicial cooperation in criminal matters, the possibility of refusing to recognise or execute the EEW, as well as the grounds for postponing its execution, should be limited. In particular, refusal to execute the EEW on the grounds that the act on which it is based does not constitute an offence under the national law of the executing State (dual criminality) should not be possible for certain categories of offences.

(17) It should be possible to refuse an EEW where its recognition or execution in the executing State would involve breaching an immunity or privilege in that State. There is no common definition of what constitutes an immunity or privilege in the European Union and the precise definition of these terms is therefore left to national law, which may include protections which apply to medical and legal professions, but should not be interpreted in a way which would run counter to the obligation to abolish certain grounds for refusal in Article 7 of the Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [1].

(18) It should be possible to refuse to recognise or execute an EEW to the extent that execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities. However, it is accepted that such ground for non-recognition or non-execution would be applied only where, and to the extent that, the objects, documents or data would not be used for those reasons as evidence in a similar domestic case.

(19) The specific provisions in Article 13(3) in relation to Article 13(1)(f)(i) do not prejudice how and the extent to which the other grounds for refusal in Article 13(1) are implemented.

(20) Time limits are necessary to ensure quick, effective and consistent cooperation on obtaining objects, documents or data for use in proceedings in criminal matters throughout the European Union.

(21) Each Member State has in its law legal remedies available against the substantive reasons underlying decisions for obtaining evidence, including whether the decision is necessary and proportionate, although those remedies may differ between Member States and may apply at different stages of proceedings.

(22) It is necessary to establish a mechanism to assess the effectiveness of this Framework Decision.

[1] OJ C 326, 21.11.2001, p. 1.

(23) Since the objective of this Framework Decision, namely to replace the system of mutual assistance in criminal matters for obtaining objects, documents or data between Member States cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and set out in Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.

(24) The personal data processed in the context of the implementation of this Framework Decision will be protected in accordance with the relevant instruments including the principles of the Council of Europe Convention of 28 January 1981 for the protection of individuals with regard to the automatic processing of personal data, as well as by the additional protection afforded by this Framework Decision in line with Article 23 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 ([1]).

(25) The EEW should coexist with existing mutual assistance procedures, but such coexistence should be considered transitional until, in accordance with the Hague Programme, the types of evidence-gathering excluded from the scope of this Framework Decision are also the subject of a mutual recognition instrument, the adoption of which would provide a complete mutual recognition regime to replace mutual assistance procedures.

(26) Member States are encouraged to draw up, for themselves and in the interest of the European Union, tables which as far as possible show the correlation between the provisions of this Framework Decision and the national implementation measures and to communicate this to the Commission together with the text of the national law implementing this Framework Decision.

(27) This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to execute an EEW when there are reasons to believe, on the basis of objective elements, that the EEW has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons.

([1]) OJ C 197, 12.7.2000, p. 1.

(28) This Framework Decision does not prevent any Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

(29) This Framework Decision does not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security in accordance with Article 33 of the Treaty,

HAS ADOPTED THIS FRAMEWORK DECISION:

TITLE I

## THE EUROPEAN EVIDENCE WARRANT (EEW)

*Article 1*

### Definition of the EEW and obligation to execute it

1. The EEW shall be a judicial decision issued by a competent authority of a Member State with a view to obtaining objects, documents and data from another Member State for use in proceedings referred to in Article 5.

2. Member States shall execute any EEW on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.

*Article 2*

### Definitions

For the purposes of this Framework Decision:

(a) 'issuing State' shall mean the Member State in which the EEW has been issued;

(b) 'executing State' shall mean the Member State in whose territory the objects, documents or data are located or, in the case of electronic data, directly accessible under the law of the executing State;

(c) 'issuing authority' shall mean:

(i) a judge, a court, an investigating magistrate, a public prosecutor; or

(ii) any other judicial authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the obtaining of evidence in cross-border cases in accordance with national law;

(d) 'executing authority' shall mean an authority having competence under the national law which implements this Framework Decision to recognise or execute an EEW in accordance with this Framework Decision;

(e) 'search or seizure' shall include any measures under criminal procedure as a result of which a legal or natural person is required, under legal compulsion, to provide or participate in providing objects, documents or data and which, if not complied with, may be enforceable without the consent of such a person or it may result in a sanction.

*Article 3*

**Designation of competent authorities**

1. Each Member State shall inform the General Secretariat of the Council which authority or authorities, under its national law, are competent pursuant to Article 2(c) and (d) when that Member State is the issuing State or the executing State.

2. Member States wishing to make use of the possibility to designate a central authority or authorities in accordance with Article 8(2) shall communicate to the General Secretariat of the Council information relating to the designated central authority(ies). These indications shall be binding upon the authorities of the issuing State.

3. The General Secretariat of the Council shall make the information received available to all Member States and the Commission.

*Article 4*

**Scope of the EEW**

1. Without prejudice to paragraph 2 of this Article, the EEW may be issued under the conditions referred to in Article 7 with a view to obtaining in the executing State objects, documents or data needed in the issuing State for the purpose of proceedings referred to in Article 5. The EEW shall cover the objects, documents and data specified therein.

2. The EEW shall not be issued for the purpose of requiring the executing authority to:

(a) conduct interviews, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other party;

(b) carry out bodily examinations or obtain bodily material or biometric data directly from the body of any person, including DNA samples or fingerprints;

(c) obtain information in real time such as through the interception of communications, covert surveillance or monitoring of bank accounts;

(d) conduct analysis of existing objects, documents or data; and

(e) obtain communications data retained by providers of a publicly available electronic communications service or a public communications network.

3. Exchange of information on criminal convictions extracted from the criminal record shall be carried out in accordance with Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record [1] and other relevant instruments.

4. The EEW may be issued with a view to obtaining objects, documents or data falling within paragraph 2, where the objects, documents or data are already in the possession of the executing authority before the EEW is issued.

5. Notwithstanding paragraph 1, the EEW shall, if so indicated by the issuing authority, also cover any other object, document or data, which the executing authority discovers during the execution of the EEW and without further enquiries considers to be relevant to the proceedings for the purpose of which the EEW was issued.

6. Notwithstanding paragraph 2, the EEW may, if requested by the issuing authority, also cover taking statements from persons present during the execution of the EEW and directly related to the subject of the EEW. The relevant rules of the executing State applicable to national cases shall also be applicable in respect of the taking of such statements.

*Article 5*

**Type of proceedings for which the EEW may be issued**

The EEW may be issued:

(a) with respect to criminal proceedings brought by, or to be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State;

[1] OJ L 322, 9.12.2005, p. 33.

(b) in proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters;

(c) in proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to further proceedings before a court having jurisdiction in particular in criminal matters; and

(d) in connection with proceedings referred to in points (a), (b) and (c) which relate to offences or infringements for which a legal person may be held liable or punished in the issuing State.

*Article 6*

**Content and form of the EEW**

1. The EEW set out in the form provided for in the Annex shall be completed, signed, and its contents certified as accurate, by the issuing authority.

2. The EEW shall be written in, or translated by the issuing State into, the official language or one of the official languages of the executing State.

Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept EEWs or a translation of an EEW in one or more other official languages of the institutions of the Union.

TITLE II

**PROCEDURES AND SAFEGUARDS FOR THE ISSUING STATE**

*Article 7*

**Conditions for issuing the EEW**

Each Member State shall take the necessary measures to ensure that the EEW is issued only when the issuing authority is satisfied that the following conditions have been met:

(a) obtaining the objects, documents or data sought is necessary and proportionate for the purpose of proceedings referred to in Article 5;

(b) the objects, documents or data can be obtained under the law of the issuing State in a comparable case if they were available on the territory of the issuing State, even though different procedural measures might be used.

These conditions shall be assessed only in the issuing State in each case.

*Article 8*

**Transmission of the EEW**

1. The EEW may be transmitted to the competent authority of a Member State in which the competent authority of the issuing State has reasonable grounds to believe that relevant objects, documents or data are located or, in the case of electronic data, directly accessible under the law of the executing State. It shall be transmitted without delay from the issuing authority to the executing authority by any means capable of producing a written record under conditions allowing the executing State to establish authenticity. All further official communications shall be made directly between the issuing authority and the executing authority.

2. Each Member State may designate a central authority or, when its legal system so provides, more than one central authority to assist the competent authorities. A Member State may, if necessary as a result of the organisation of its internal judicial system, make its central authority(ies) responsible for the administrative transmission and reception of the EEW as well as for other official correspondence relating thereto.

3. If the issuing authority so wishes, transmission may be effected via the secure telecommunications system of the European Judicial Network.

4. If the executing authority is unknown, the issuing authority shall make all necessary inquiries, including via the European Judicial Network contact points, in order to obtain the information from the executing State.

5. When the authority in the executing State which receives the EEW has no jurisdiction to recognise it and to take the necessary measures for its execution, it shall, *ex officio*, transmit the EEW to the executing authority and so inform the issuing authority.

6. All difficulties concerning the transmission or the authenticity of any document needed for the execution of the EEW shall be dealt with by direct contacts between the issuing and executing authorities involved, or, where appropriate, with the involvement of the central authorities of the Member States.

*Article 9*

**EEW related to an earlier EEW or a freezing order**

1. Where the issuing authority issues an EEW which supplements an earlier EEW or which is a follow-up to a freezing order transmitted under Framework Decision 2003/577/JHA, it shall indicate this fact in the EEW in accordance with the form provided for in the Annex.

2. Where, in accordance with the provisions in force, the issuing authority participates in the execution of the EEW in the executing State, it may without prejudice to declarations made under Article 3(2) address an EEW which supplements the earlier EEW directly to the competent executing authority while present in that State.

*Article 10*

**Conditions for the use of personal data**

1. Personal data obtained under this Framework Decision may be used by the issuing State for the purpose of:

(a) proceedings for which the EEW may be issued;

(b) other judicial and administrative proceedings directly related to the proceedings referred to under point (a);

(c) preventing an immediate and serious threat to public security.

For any purpose other than those set out in points (a), (b) and (c), personal data obtained under this Framework Decision may be used only with the prior consent of the executing State, unless the issuing State has obtained the consent of the data subject.

2. In the circumstances of the particular case, the executing State may require the Member State to which the personal data have been transferred to give information on the use made of the data.

3. This Article shall not apply to personal data obtained by a Member State under this Framework Decision and originating from that Member State.

TITLE III

**PROCEDURES AND SAFEGUARDS FOR THE EXECUTING STATE**

*Article 11*

**Recognition and execution**

1. The executing authority shall recognise an EEW, transmitted in accordance with Article 8, without any further formality being required and shall forthwith take the necessary measures for its execution in the same way as an authority of the executing State would obtain the objects, documents or data, unless that authority decides to invoke one of the grounds for non-recognition or non-execution provided for in Article 13 or one of the grounds for postponement provided for in Article 16.

2. The executing State shall be responsible for choosing the measures which under its national law will ensure the provision of the objects, documents or data sought by an EEW and for deciding whether it is necessary to use coercive measures to provide that assistance. Any measures rendered necessary by the EEW shall be taken in accordance with the applicable procedural rules of the executing State.

3. Each Member State shall ensure:

(i) that any measures which would be available in a similar domestic case in the executing State are also available for the purpose of the execution of the EEW;

and

(ii) that measures, including search or seizure, are available for the purpose of the execution of the EEW where it is related to any of the offences as set out in Article 14(2).

4. If the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and the EEW has not been validated by one of those authorities in the issuing State, the executing authority may, in the specific case, decide that no search or seizure may be carried out for the purpose of the execution of the EEW. Before so deciding, the executing authority shall consult the competent authority of the issuing State.

5. A Member State may, at the time of adoption of this Framework Decision, make a declaration or subsequent notification to the General Secretariat of the Council requiring such validation in all cases where the issuing authority is not a judge, a court, an investigating magistrate or a public prosecutor and where the measures necessary to execute the EEW would have to be ordered or supervised by a judge, a court, an investigating magistrate or a public prosecutor under the law of the executing State in a similar domestic case.

*Article 12*

**Formalities to be followed in the executing State**

The executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Framework Decision and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. This Article shall not create an obligation to take coercive measures.

*Article 13*

**Grounds for non-recognition or non-execution**

1. Recognition or execution of the EEW may be refused in the executing State:

(a) if its execution would infringe the *ne bis in idem* principle;

(b) if, in cases referred to in Article 14(3), the EEW relates to acts which would not constitute an offence under the law of the executing State;

(c) if it is not possible to execute the EEW by any of the measures available to the executing authority in the specific case in accordance with Article 11(3);

(d) if there is an immunity or privilege under the law of the executing State which makes it impossible to execute the EEW;

(e) if, in one of the cases referred to in Article 11(4) or (5), the EEW has not been validated;

(f) if the EEW relates to criminal offences which:

(i) under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory; or

(ii) were committed outside the territory of the issuing State, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory;

(g) if, in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities; or

(h) if the form provided for in the Annex is incomplete or manifestly incorrect and has not been completed or corrected within a reasonable deadline set by the executing authority.

2. The decision to refuse the execution or recognition of the EEW pursuant to paragraph 1 shall be taken by a judge, court, investigating magistrate or public prosecutor in the executing State. Where the EEW has been issued by a judicial authority referred to in Article 2(c)(ii), and the EEW has not been validated by a judge, court, investigating magistrate or public prosecutor in the issuing State, the decision may also be taken by any other judicial authority competent under the law of the executing State if provided for under that law.

3. Any decision under paragraph 1(f)(i) in relation to offences committed partly within the territory of the executing State, or in a place equivalent to its territory, shall be taken by the competent authorities referred to in paragraph 2 in exceptional circumstances and on a case-by-case basis, having regard to the specific circumstances of the case, and in particular to whether a major or essential part of the conduct in question has taken place in the issuing State, whether the EEW relates to an act which is not a criminal offence under the law of the executing State and whether it would be necessary to carry out a search and seizure for the execution of the EEW.

4. Where a competent authority considers using the ground for refusal under paragraph 1(f)(i), it shall consult Eurojust before taking the decision.

Where a competent authority is not in agreement with Eurojust's opinion, Member States shall ensure that it give the reasons for its decision and that the Council be informed.

5. In cases referred to in paragraph 1(a), (g) and (h), before deciding not to recognise or not to execute an EEW, either totally or in part, the competent authority in the executing State shall consult the competent authority in the issuing State, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay.

*Article 14*

**Double criminality**

1. The recognition or execution of the EEW shall not be subject to verification of double criminality unless it is necessary to carry out a search or seizure.

2. If it is necessary to carry out a search or seizure for the execution of the EEW, the following offences, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of that State, shall not be subject to verification of double criminality under any circumstances:

— participation in a criminal organisation,

— terrorism,

— trafficking in human beings,

— sexual exploitation of children and child pornography,

— illicit trafficking in narcotic drugs and psychotropic substances,

— illicit trafficking in weapons, munitions and explosives,

— corruption,

— fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests ([1]),

— laundering of the proceeds of crime,

— counterfeiting currency, including of the euro,

— computer-related crime,

— environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,

— facilitation of unauthorised entry and residence,

— murder, grievous bodily injury,

— illicit trade in human organs and tissue,

— kidnapping, illegal restraint and hostage-taking,

— racism and xenophobia,

— organised or armed robbery,

— illicit trafficking in cultural goods, including antiques and works of art,

— swindling,

— racketeering and extortion,

— counterfeiting and piracy of products,

— forgery of administrative documents and trafficking therein,

— forgery of means of payment,

— illicit trafficking in hormonal substances and other growth promoters,

— illicit trafficking in nuclear or radioactive materials,

— trafficking in stolen vehicles,

— rape,

— arson,

— crimes within the jurisdiction of the International Criminal Court,

— unlawful seizure of aircraft/ships,

— sabotage.

3. If the EEW is not related to any of the offences set out in paragraph 2 and its execution would require a search or seizure, recognition or execution of the EEW may be subject to the condition of double criminality.

In relation to offences in connection with taxes or duties, customs and exchange, recognition or execution may not be opposed on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.

4. The condition of double criminality set out in paragraph 3 shall be further examined by the Council by 19 January 2014 in the light of any information transmitted to the Council.

5. The Council may decide, acting unanimously, after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty, to add other categories of offences to the list contained in paragraph 2.

*Article 15*

**Deadlines for recognition, execution and transfer**

1. Each Member State shall take the necessary measures to ensure compliance with the deadlines provided for in this Article. Where the issuing authority has indicated in the EEW that, due to procedural deadlines or other particularly urgent circumstances, a shorter deadline is necessary, the executing authority shall take as full account as possible of this requirement.

2. Any decision to refuse recognition or execution shall be taken as soon as possible and, without prejudice to paragraph 4, no later than 30 days after the receipt of the EEW by the competent executing authority.

3. Unless either grounds for postponement under Article 16 exist or the executing authority has the objects, documents or data sought already in its possession, the executing authority shall take possession of the objects, documents or data without delay and, without prejudice to paragraph 4, no later than 60 days after the receipt of the EEW by the competent executing authority.

([1]) OJ C 316, 27.11.1995, p. 49.

4. When it is not practicable in a specific case for the competent executing authority to meet the deadline set out in paragraphs 2 or 3 respectively, it shall without delay inform the competent authority of the issuing State by any means, giving the reasons for the delay and the estimated time needed for the action to be taken.

5. Unless a legal remedy is pending in accordance with Article 18 or grounds for postponement under Article 16 exist, the executing State shall without undue delay transfer the objects, documents or data obtained under the EEW to the issuing State.

6. When transferring the objects, documents or data obtained, the executing authority shall indicate whether it requires them to be returned to the executing State as soon as they are no longer required by the issuing State.

*Article 16*

**Grounds for postponement of recognition or execution**

1. The recognition of the EEW may be postponed in the executing State where:

(a) the form provided for in the Annex is incomplete or manifestly incorrect, until such time as the form has been completed or corrected; or

(b) in one of the cases referred to in Article 11(4) or (5), the EEW has not been validated, until such time as the validation has been given.

2. The execution of the EEW may be postponed in the executing State where:

(a) its execution might prejudice an ongoing criminal investigation or prosecution, until such time as the executing State deems reasonable; or

(b) the objects, documents or data concerned are already being used in other proceedings until such time as they are no longer required for this purpose.

3. The decision to postpone recognition or execution of the EEW pursuant to paragraphs 1 or 2 shall be taken by a judge, court, investigating magistrate or public prosecutor in the executing State. Where the EEW has been issued by a judicial authority referred to in Article 2(c)(ii), and the EEW has not been validated by a judge, court, investigating magistrate or public prosecutor in the issuing State, the decision may also be taken by any other judicial authority competent under the law of the executing State if provided for under that law.

4. As soon as the ground for postponement has ceased to exist, the executing authority shall forthwith take the necessary measures for the execution of the EEW and inform the relevant competent authority in the issuing State thereof by any means capable of producing a written record.

*Article 17*

**Obligation to inform**

The executing authority shall inform the issuing authority:

1. immediately by any means:

   (a) if the executing authority, in the course of the execution of the EEW, considers without further enquiries that it may be appropriate to undertake investigative measures not initially foreseen, or which could not be specified when the EEW was issued, in order to enable the issuing authority to take further action in the specific case;

   (b) if the competent authority of the executing State establishes that the EEW was not executed in a manner consistent with the law of the executing State;

   (c) if the executing authority establishes that, in the specific case, it cannot comply with formalities and procedures expressly indicated by the issuing authority in accordance with Article 12.

   Upon request by the issuing authority, the information shall be confirmed without delay by any means capable of producing a written record;

2. without delay by any means capable of producing a written record:

   (a) of the transmission of the EEW to the competent authority responsible for its execution, in accordance with Article 8(5);

(b) of any decision taken in accordance with Article 15(2) to refuse recognition or execution of the EEW, together with the reasons for the decision;

(c) of the postponement of the execution or recognition of the EEW, the underlying reasons and, if possible, the expected duration of the postponement;

(d) of the impossibility to execute the EEW because the objects, documents or data have disappeared, been destroyed or cannot be found in the location indicated in the EEW or because the location of the objects, documents or data has not been indicated in a sufficiently precise manner, even after consultation with the competent authority of the issuing State.

*Article 18*

**Legal remedies**

1. Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies against the recognition and execution of an EEW pursuant to Article 11, in order to preserve their legitimate interests. Member States may limit the legal remedies provided for in this paragraph to cases in which the EEW is executed using coercive measures. The action shall be brought before a court in the executing State in accordance with the law of that State.

2. The substantive reasons for issuing the EEW, including whether the conditions established in Article 7 have been met, may be challenged only in an action brought before a court in the issuing State. The issuing State shall ensure the applicability of legal remedies which are available in a comparable domestic case.

3. Member States shall ensure that any time limits for bringing an action mentioned in paragraphs 1 and 2 are applied in a way that guarantees the possibility of an effective legal remedy for interested parties.

4. If the action is brought in the executing State, the judicial authority of the issuing State shall be informed thereof and of the grounds of the action, so that it can submit the arguments that it deems necessary. It shall be informed of the outcome of the action.

5. The issuing and executing authorities shall take the necessary measures to facilitate the exercise of the right to bring actions mentioned in paragraphs 1 and 2, in particular by providing interested parties with relevant and adequate information.

6. The executing State may suspend the transfer of objects, documents and data pending the outcome of a legal remedy.

*Article 19*

**Reimbursement**

1. Without prejudice to Article 18(2), where the executing State under its law is responsible for injury caused to one of the parties mentioned in Article 18 by the execution of an EEW transmitted to it pursuant to Article 8, the issuing State shall reimburse to the executing State any sums paid in damages by virtue of that responsibility to the said party except if, and to the extent that, the injury or any part of it is due to the conduct of the executing State.

2. Paragraph 1 shall be without prejudice to the national law of the Member States on claims by natural or legal persons for compensation of damage.

TITLE IV

**FINAL PROVISIONS**

*Article 20*

**Monitoring the effectiveness of this Framework Decision**

1. A Member State which has experienced repeated problems which it had not been possible to solve by consultation on the part of another Member State in the execution of EEWs shall inform the Council in order to assist in its evaluation of the implementation of this Framework Decision at Member State level.

2. The Council shall conduct a review, in particular, of the practical application of the provisions of this Framework Decision by Member States.

*Article 21*

**Relation to other legal instruments**

1. Subject to paragraph 2 and without prejudice to the application of existing legal instruments in relations between Member States and third countries, this Framework Decision shall coexist with existing legal instruments in relations between the Member States in so far as these instruments concern mutual assistance requests for evidence falling within the scope of this Framework Decision.

2. Without prejudice to paragraphs 3 and 4, issuing authorities shall rely on the EEW when all of the objects, documents or data required from the executing State fall within the scope of this Framework Decision.

3. Issuing authorities may use mutual legal assistance to obtain objects, documents or data falling within the scope of this Framework Decision if they form part of a wider request for assistance or if the issuing authority considers in the specific case that this would facilitate cooperation with the executing State.

4. Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for obtaining evidence falling within the scope of this Framework Decision.

5. The agreements and arrangements referred to in paragraph 4 may in no case affect relations with Member States which are not parties to them.

6. Member States shall notify the Council and the Commission of any new agreement or arrangement referred to in paragraph 4, within three months of signing it.

*Article 22*

**Transitional arrangements**

Mutual assistance requests received before 19 January 2011 shall continue to be governed by existing instruments relating to mutual assistance in criminal matters.

*Article 23*

**Implementation**

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 19 January 2011.

2. By 19 January 2011, Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision.

3. Any Member State that intends to transpose the ground for refusal set out in Article 13(1)(f) into its national law shall notify the Secretary-General of the Council thereof upon adoption of this Framework Decision by making a declaration.

4. Germany may by a declaration reserve its right to make the execution of an EEW subject to verification of double criminality in cases referred to in Article 14(2) relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion or swindling if it is necessary to carry out a search or seizure for the execution of the EEW, except where the issuing authority has declared that the offence concerned under the law of the issuing State falls within the scope of criteria indicated in the declaration.

Should Germany wish to make use of this paragraph, it shall notify a declaration to that effect to the Secretary-General of the Council upon the adoption of this Framework Decision. The declaration shall be published in the *Official Journal of the European Union*.

5. The Commission shall, by 19 January 2012, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Framework Decision, accompanied, if necessary, by legislative proposals.

6. The General Secretariat of the Council shall notify Member States, the Commission and Eurojust of the declarations made pursuant to Articles 6 and 11 and to this Article.

*Article 24*

**Review**

1. Each Member State shall each year before 1 May inform the Council and the Commission of any difficulties encountered by it during the previous calendar year concerning the execution of EEWs in relation to Article 13(1).

2. At the beginning of every calendar year, Germany shall inform the Council and the Commission of the number of cases in which the ground for non-recognition or non-execution referred to in Article 23(4) was applied in the previous year.

3. No later than 19 January 2014, the Commission shall establish a report on the basis of the information received in accordance with paragraphs 1 and 2, accompanied by any initiatives it may deem appropriate. On the basis of the report the Council shall review this Framework Decision with a view to considering whether the following provisions should be repealed or modified:

— Article 13(1) and (3), and

— Article 23(4).

*Article 25*

**Entry into force**

This Framework Decision shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Done at Brussels, 18 December 2008.

*For the Council*
*The President*
M. BARNIER

*ANNEX*

**EUROPEAN EVIDENCE WARRANT (EEW)** [1]

This EEW has been issued by a competent judicial authority. I request that the objects, documents or data specified below be obtained and transferred.

**(A)**

Issuing State: .....

Executing State: .....

**(B)**

The judicial authority is satisfied that:

(i) ☐ obtaining the objects, documents or data sought by this EEW is necessary and proportionate for the purpose of the proceedings specified below;

(ii) ☐ it would be possible to obtain these objects, documents or data under the law of the issuing State in a comparable domestic case if they were available on the territory of the issuing State, even though different procedural measures might be used.

**(C) THE JUDICIAL AUTHORITY WHICH ISSUED THE EEW**

Official name:

.....

Name of its representative:

.....

Post held (title/grade):

.....

Tick the type of judicial authority which issued the warrant:

☐ (a) judge or court

☐ (b) investigating magistrate

☐ (c) public prosecutor

☐ (d) any other judicial authority as defined by the issuing State and, in the specific case, acting in their capacity as an investigating authority in criminal proceedings with competence to order the obtaining of evidence in cross-border cases in accordance with national law

☐ This EEW has been validated by a judge or court, investigating magistrate or a public prosecutor (see Sections D and O).

File reference:

.....

Address:

.....

.....

Tel. No: (country code) (area/city code)

.....

Fax No: (country code) (area/city code)

.....

E-mail: .....

Languages in which it is possible to communicate with the issuing authority: .....

Contact details of the person(s) to contact if additional information on the execution of this EEW is necessary or to make necessary practical arrangements for the transfer of objects, documents or data (if applicable):

.....

[1] This EEW must be written in, or translated into, one of the official languages of the executing State or any other language accepted by that State.

**(D) THE JUDICIAL AUTHORITY VALIDATING THE EEW (WHERE APPLICABLE)**

If point (d) in Section C has been ticked and this EEW is validated, tick the type of judicial authority which has validated this EEW:

☐ (a) judge or court

☐ (b) investigating magistrate

☐ (c) public prosecutor

Official name of the validating authority:

.....

Name of its representative:

.....

Post held (title/grade):

.....

File reference:

.....

Address:

.....

.....

Tel. No: (country code) (area/city code) .....

Fax No: (country code) (area/city code) .....

E-mail: .....

**(E) WHERE A CENTRAL AUTHORITY HAS BEEN MADE RESPONSIBLE FOR THE ADMINISTRATIVE TRANSMISSION AND RECEPTION OF EEWS AND, IF APPLICABLE, FOR OTHER OFFICIAL CORRESPONDENCE RELATING THERETO**

Name of the central authority: .....

.....

Contact person, if applicable (title/grade and name): .....

.....

Address: .....

.....

File reference: .....

Tel. No: (country code) (area/city code) .....

Fax No: (country code) (area/city code) .....

E-mail: .....

**(F) THE AUTHORITY OR AUTHORITIES WHICH MAY BE CONTACTED (IN THE CASE WHERE SECTION D AND/OR E HAVE BEEN COMPLETED)**

☐ Authority under Section C

Can be contacted for questions concerning .....

☐ Authority under Section D

Can be contacted for questions concerning .....

☐ Authority under Section E

Can be contacted for questions concerning .....

**(G) RELATION TO POSSIBLE EARLIER EEW OR FREEZING ORDER**

If applicable, indicate if this EEW supplements an earlier EEW or is a follow-up to a freezing order and, if so, provide information relevant to identify the earlier EEW or freezing order (the date of issue of such EEW or order, the authority to which it was transmitted and, if available, the date of transmission of the EEW or order and reference numbers given by the issuing and executing authorities).

.....

.....

.....

.....

**(H) TYPE OF PROCEEDINGS FOR WHICH THE EEW WAS ISSUED**

Tick the type of proceedings for which the EEW was issued:

☐ (a) with respect to criminal proceedings brought by, or to be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State; or

☐ (b) proceedings brought by administrative authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters; or

☐ (c) proceedings brought by judicial authorities in respect of acts which are punishable under the national law of the issuing State by virtue of being infringements of the rules of law, and where the decision may give rise to further proceedings before a court having jurisdiction in particular in criminal matters.

**(I) REASON FOR ISSUING THE EEW**

**1. Summary of facts and description of circumstances in which the offence(s) underlying the EEW has (have) been committed, including time and place, as known to the issuing authority:**

.....

.....

.....

.....

Nature and legal classification of the offence(s) resulting in the EEW and the applicable statutory provision/code:

.....

.....

.....

.....

.....

**2. If applicable, tick one or more of the following offences punishable in the issuing State by a custodial sentence or a detention order of a maximum of at least three years as defined by the laws of the issuing State:**

☐ participation in a criminal organisation;

☐ terrorism ([1]);

☐ trafficking in human beings;

☐ sexual exploitation of children and child pornography;

☐ illicit trafficking in narcotic drugs and psychotropic substances;

☐ illicit trafficking in weapons, munitions and explosives;

☐ corruption;

☐ fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests;

☐ laundering of the proceeds of crime;

☐ counterfeiting currency, including of the euro;

☐ computer-related crime ([1]);

☐ environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;

☐ facilitation of unauthorised entry and residence;

☐ murder, grievous bodily injury;

☐ illicit trade in human organs and tissue;

☐ kidnapping, illegal restraint and hostage-taking;

☐ racism and xenophobia ([1]);

☐ organised or armed robbery;

☐ illicit trafficking in cultural goods, including antiques and works of art;

☐ swindling ([1]);

☐ racketeering and extortion ([1]);

☐ counterfeiting and piracy of products;

☐ forgery of administrative documents and trafficking therein;

☐ forgery of means of payment;

☐ illicit trafficking in hormonal substances and other growth promoters;

☐ illicit trafficking in nuclear or radioactive materials;

☐ trafficking in stolen vehicles;

☐ rape;

☐ arson;

☐ crimes within the jurisdiction of the International Criminal Court;

☐ unlawful seizure of aircraft/ships;

☐ sabotage ([1]);

([1]) Where the EEW is addressed to Germany, and according to the declaration made by Germany in accordance with Article 23(4) of the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, the issuing authority may additionally complete Box No 1 to confirm that the offence(s) fall(s) within the scope of criteria indicated by Germany for this type of offence.

**3. Full descriptions of the offence(s) not covered by point 2 for which the EEW was issued:**

.....

.....

.....

.....

.....

**(J) IDENTITY OF THE PERSONS CONCERNED**

Information regarding the identity of the (i) natural or (ii) legal person(s) against whom the proceedings are/may be taking place:

(i) In the case of natural person(s)

Name: .....

Forename(s): .....

Maiden name, if applicable: .....

Aliases, if applicable: .....

Sex: .....

Nationality: .....

Identity number or social security number (when possible): .....

Date of birth: .....

Place of birth: .....

Residence and/or known address; if address not known, state the last known address:

.....

Language(s) which the person understands (if known): .....

(ii) In the case of legal person(s)

Name: .....

Form of legal person: .....

Shortened name, commonly used name or trading name, if applicable:

.....

Registered seat (if available): .....

Registration number (if available): .....

Address of the legal person:

.....

**(K) OBJECTS, DOCUMENTS OR DATA SOUGHT BY THE EEW**

**1. Description of what is sought by the EEW (tick and complete the appropriate boxes):**

☐ Objects (further details below):

.....

.....

.....

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☐ Documents (further details below):

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.....

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☐ Data (further details below):

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**2. Location of objects, documents or data (if not known, the last known location):** .....

.....

.....

.....

**3. If other than the person referred to in Section J (i) or (ii), information regarding the identity of the (i) natural or (ii) legal person(s) believed to hold the objects, documents or data:**

(i) In the case of natural person(s):

Name: .....

Forename(s): .....

Maiden name, if applicable: .....

Aliases, if applicable: .....

Sex: .....

Nationality: .....

Identity number or social security number (when possible): .....

Date of birth: .....

Place of birth: .....

Residence and/or known address; if address not known, state the last known address:

.....

Language(s) which the person understands (if known):

.....

(ii) In the case of legal person(s):

Name: .....

Form of legal person: .....

Shortened name, commonly used name or trading name, if applicable:

.....

Registered seat (if available): .....

Registration number (if available): .....

Address of the legal person:

.....

Other address(es) where business is conducted:

.....

**(L) EXECUTION OF THE EEW**

**1. Deadlines for execution of the EEW are laid down in Council Framework Decision 2008/978/JHA ([1]). However, if the request is particularly urgent, please indicate any earlier deadline and the reason for this by ticking the relevant box:**

Earlier deadline: ..... (dd/mm/yyyy)

Reasons:

[ ] procedural deadlines

[ ] other particularly urgent circumstances (please specify): .....

**2. Tick and complete, if applicable**

☐ It is requested that the executing authority comply with the following formalities and procedures ([2])

.....

.....

.....

.....

☐ The EEW also covers any object, document or data which the executing authority discovers during the execution of this EEW and without further enquiries considers to be relevant to the proceedings for the purpose of which this EEW was issued.

☐ It is requested that the executing authority take statements from persons present during the execution of this EEW and directly related to the subject of this EEW.

**(M) LEGAL REMEDIES**

**1. Description of the legal remedies for interested parties, including bona fide third parties, available in the issuing State, including necessary steps to take:**

.....

.....

.....

.....

**2. Court before which the action may be taken:**

.....

.....

**3. Information as to those for whom the action is available:**

.....

.....

**4. Time limit for submission of the action:**

.....

.....

**5. Authority in the issuing State which can supply further information on procedures for seeking legal remedies in the issuing State and on whether legal assistance and interpretation and translation is available:**

Name: .....

Contact person (if applicable): .....

Address: .....

Tel. No: (country code) (area/city code) .....

Fax No: (country code) (area/city code) .....

E-mail: .....

([1]) OJ L 350, 30.12.2008, p. 72.

([2]) It is assumed that the executing authority will comply with the formalities and procedures indicated by the issuing authority unless they are contrary to the fundamental principles of the law of the executing State. However, this does not create any obligation to take coercive measures.

**(N) FINAL PROVISIONS AND SIGNATURE**

**1. Optional information to be given only in relation to Germany:**

☐ It is declared that the offence(s) concerned under the law of the issuing State fall(s) within the scope of criteria indicated by Germany in the declaration [1] made in accordance with Article 23(4) of Framework Decision 2008/978/JHA.

**2. Other information relevant to the case, if any:**

.....

.....

**3. Requested means of transfer of the objects, documents or data:**

☐ by e-mail

☐ by fax

☐ in the original by post

☐ by other means (please specify):

.....

**4. Signature of the issuing authority and/or its representative certifying the content of the EEW as accurate:**

.....

Name: .....

Post held (title/grade): .....

Date: .....

Official stamp (if available):

**(O) IF SECTION (D) IS COMPLETED, SIGNATURE AND DETAILS OF THE VALIDATING AUTHORITY**

.....

Name: .....

Post held (title/grade):

.....

Date:

.....

Official stamp (if available):

[1] OJ L 350, 30.12.2008, p. 72.

## DECLARATION OF THE FEDERAL REPUBLIC OF GERMANY

Where the execution of a European Evidence Warrant under Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [1] requires search or seizure, the Federal Republic of Germany reserves the right under Article 23(4) of that Framework Decision to make execution subject to verification of double criminality in the case of the offences relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling listed in Article 14(2) of that Framework Decision, unless the issuing authority has stated that the offence in question meets the following criteria under the law of the issuing State:

**Terrorism:**

— An act which constitutes an offence within the meaning of and as defined in the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005, the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 or within the meaning of one of the treaties listed in the annex thereto, or

— an act to be criminalised under the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2], or

— an act to be prohibited under United Nations Security Council Resolution 1624 (2005) of 14 September 2005.

**Computer-related crime:**

Offences as defined in the Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems [3], or in Title 1 of Section I of the European Convention on Cybercrime of 23 November 2001.

**Racism and xenophobia:**

Offences as defined in the Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia [4].

**Sabotage:**

Acts unlawfully and intentionally causing large-scale damage to a government facility, another public facility, a public transport system or other infrastructure which entails or is likely to entail considerable economic loss.

**Racketeering and extortion:**

Demanding by threats, use of force or by any other form of intimidation goods, promises, revenues or the signing of any document containing or resulting in an obligation, alienation or discharge.

**Swindling:**

Using false names or claiming a false position or using fraudulent means to abuse people's trust or good faith with the aim of appropriating something belonging to another person.

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[1] OJ L 350, 30.12.2008, p. 72.
[2] OJ L 164, 22.6.2002, p. 3.
[3] OJ L 69, 16.3.2005, p. 67.
[4] OJ L 185, 24.7.1996, p. 5.

**NOTE TO THE READER**

The institutions have decided no longer to quote in their texts the last amendment to cited acts.

Unless otherwise indicated, references to acts in the texts published here are to the version of those acts currently in force.