COMMISSION REGULATION (EEC) No 920/93

of 15 April 1993

imposing a provisional anti-dumping duty on imports of certain magnetic disks (3,5″ microdisks) originating in Japan, Taiwan and the People's Republic of China

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community [1], and in particular Article 11 thereof,

After consultations within the Advisory Committee as provided for under the above Regulation,

Whereas :

A. PROCEDURE

(1) In July 1991 the Commission announced, by a notice published in the *Official Journal of the European Communities* [2], the initiation of an anti-dumping proceeding concerning imports into the Community of certain magnetic disks (3,5″ microdisks) originating in Japan, Taiwan and the People's Republic of China, and commenced an investigation.

The proceeding was initiated as a result of a complaint lodged by the Committee of European Diskette Manufacturers (Diskma) on behalf of producers whose collective output of 3,5″ microdisks was alleged to represent a major proportion of the Community production of these microdisks.

The complaint contained evidence of dumping of this product originating in the countries indicated above, and of material injury resulting therefrom ; this evidence was considered sufficient to justify opening a proceeding.

(2) The Commission officially advised the producers, exporters and importers known to be concerned, the representatives of the exporting countries, and the complainants, and gave the parties directly concerned the opportunity to make their views known in writing and to request a hearing.

A number of producers in the countries concerned, some importers in the Community related to producers in Japan, certain exporters in Hong Kong of 3,5″ microdisks said to originate in the People's Republic of China and some non-complainant Community producers made their views known in writing. All parties who so requested were granted a hearing.

(3) The Commission sent questionnaires to parties known to be concerned and received detailed information from the complainant Community producers, certain producers in Taiwan and the People's Republic of China and certain exporters in Hong Kong of 3,5″ microdisks said to originate in the People's Republic of China. Information received from all but one Japanese producer was incomplete.

(4) The Commission carried out investigations at the premises of the following firms :

(a) **Complainant Community producers**

Belgium :

— Sentinel Computer Products Europe, NV, Wellen ;

France :

— RPS, Rhône Poulenc Systems, Noisy Le Grand ;

Germany :

— Boeder AG, Flörsheim am Main ;

Italy :

— Balteadisk SpA, Arnad ;

(b) **Japanese producers**

— Hitachi - Maxell Ltd, Tokyo,

— Memorex Telex Japan Ltd, Tokyo,

— Memorex Copal Corporation Ltd, Fukushima ;

(c) **Taiwanese producers**

— CIS Technology Inc., Hsin-Chu,

— Megamedia Corporation, Taipei ;

[1] OJ No L 209, 2. 8. 1988, p. 1.
[2] OJ No C 174, 5. 7. 1991, p. 16.

(d) **Hong Kong exporters of 3,5" microdisks originating in the People's Republic of China**

— Hanny Magnetics Ltd,

— Lambda Magnetic Ltd,

— Prime Standard Ltd;

(e) **Importers and reselling companies in the Community related to Japanese producers**

France:

— Memorex Computer Supplies;

Germany:

— Maxell Europe GmbH,

— Memorex Computer Supplies,

— Sony Deutschland GmbH,

— TDK Electronics Europe GmbH;

Netherlands:

— Memorex Telex Distribution;

UK:

— Maxell UK Ltd,

— Memorex Computer Supplies,

— Sony UK Ltd,

— TDK UK Ltd.

(5) The investigation of dumping covered the period from 1 April 1990 to 31 March 1991 (the investigation period).

(6) This investigation has exceeded the normal time period of one year because of the volume and complexity of the data gathered and examined.

B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

(i) Description of the product concerned

(7) The product covered by the complaint and for which the proceeding was opened is 3,5" microdisks, used to record and store encoded digital computer information (CN code ex 8523 20 90).

(8) The microdisks concerned are available in various types, depending on their storage capacity and on the way in which they are marketed. However, no significant differences in the basic physical characteristics and technology of the various types exist. Furthermore, these types show a high degree of interchangeability.

(9) One Japanese producer requested that 3,5" microdisks with a storage capacity of four megabytes and above should be excluded from the scope of the proceeding. In support of its request, the producer in question argued that four megabyte and higher capacity 3,5" microdisks differ from lower capacity 3,5" microdisks in physical and technical characteristics as well as in end use.

These arguments are, however, not convincing since, despite some alleged differences in the technology used for the manufacture of both four megabyte and higher capacity 3,5" microdisks and other 3,5" microdisks, their basic physical characteristics and end uses are essentially the same, and all 3,5" microdisks are, to a large extent, interchangeable.

(10) In these circumstances, all 3,5" microdisks should be considered as one product for the purpose of this proceeding.

(ii) Like product

(11) The investigation showed that the various types of microdisks concerned sold on the domestic markets of Japan and Taiwan were alike to those exported from these two countries, and the People's Republic of China to the Community.

(12) Likewise, the various types of microdisks manufactured in the Community and those exported to the Community from the three countries in question use the same basic technology and are alike in their essential physical characteristics and in their end uses. They have, therefore, to be considered as a like product in accordance with Article 2 (12) of Regulation (EEC) No 2423/88.

C. INDIVIDUAL TREATMENT OF CHINESE EXPORTERS

(13) All producers in the People's Republic of China who replied fully to the Commission's questionnaire, and exported the product concerned to the Community during the investigation period, claimed to be foreign investment companies, either with the status of joint venture, or with a majority shareholding by a foreign investor, and consequently, claimed to operate in an environment very similar to that of market economy companies.

These producers, therefore, requested that the Commission make individual company findings for each of them. In support of this request, some of the producers concerned submitted documentation of their status.

In this respect, it is considered that, with regard to exports from a non-market economy country, individual treatment must remain a strict exception, to be applied solely in cases where the producer concerned has provided evidence that it is free to establish export prices without the influence of the State authorities. Indeed, individual determinations are inappropriate since the State, through its

control, could modify the pattern of production and trade, so as to take advantage of the lowest determination and thus undermine the effectiveness of any measures. The sole fact that a company has the status of joint venture, or a majority shareholding by a foreign investor, is thus not sufficient to justify an individual determination for companies operating in the People's Republic of China. On the basis of the information submitted by all but one of the companies concerned, it was found that either the Chinese State authorities held majority shareholdings or that the absence of State influence on the business decisions of these companies had not been demonstrated.

(14) For one company, however, which was fully owned by a foreign investor, it was found, on the basis of its Articles of Association and other relevant documents concerning the establishment and functioning of the company that, in addition to being profit orientated with the freedom to transfer profits outside the People's Republic of China, it was totally independent in the administration of its business and in the setting of export prices.

D. DUMPING

(i) Normal value

For all the exporting countries concerned, normal values were provisionally established for each type of the product concerned exported to the Community during the investigation period.

(a) *Japan*

(15) Only one Japanese producer submitted information on its domestic selling prices and costs of production. Whilst it proved possible in the on-the-sport investigation to verify the costs of production provided by this producer, the data in respect of domestic sales made available to the Commission were incomplete, and did not allow a satisfactory verification of domestic selling prices.

(16) Normal value for this Japanese producer was, therefore, established on the basis of the facts available in accordance with Article 7 (7) (b) of Regulation (EEC) No 2423/88. In this respect, the most reasonable basis was considered to be the cost of production of the producer concerned plus a reasonable profit margin. In accordance with Article 2 (3) (b) (ii) of Regulation (EEC) No 2423/88, the selling, general and administrative expenses to be added to the manufacturing costs were calculated by reference to the domestic sales made by the producer concerned in the same business sector, since no identifiable profitable domestic sales of the like product could be established, either for the producer concerned or other producers in Japan. As to the profit margin used, in the absence of information with regard to domestic sales made in the same business sector by either the producer concerned or other producers in Japan, the Commission has based its provisional determination on a margin of 15 % profit as alleged by the complainant with regard to sales of the like product on the Japanese domestic market, which is considered to be a reasonable level for this type of product on the Japanese market.

(17) In the complete absence of information from the other Japanese producers concerned, the normal values thus established were considered the best and most reasonable basis for the determination of normal value for these producers, in accordance with the said Article 7 (7) (b).

(b) *Taiwan*

(18) For one of the two Taiwanese producers who responded to the Commission's questionnaire, normal value was established, in accordance with Article 2 (3) and (4) of Regulation (EEC) No 2423/88, on the basis of the price actually paid in the ordinary course of trade for domestic sales of the like product, which were made in sufficient quantities to permit a proper comparison.

(19) As to the other Taiwanese producer, it was found that the volume of its domestic sales of the like product represented less than 5 % of its exports to the Community of the product concerned. In accordance with normal practice confirmed by the case-law of the Court of Justice of the European Communities, domestic sales of this producer were thus considered to have been made in insufficient quantities to permit a proper comparison. Normal value had, therefore, to be constructed in accordance with Article 2 (3) (b) (ii) of Regulation (EEC) No 2423/88 on the basis of the manufacturing costs of the producer concerned and, in the absence of suitable data on expenses and profits of the producer concerned on the domestic market because of the insufficient quantities sold in that market, an amount for selling, general and administrative expenses and profit, calculated by reference to the expenses incurred and the profit realized by the other Taiwanese producer on sales of the like product on its domestic market.

(c) *People's Republic of China*

(20) Since the People's Republic of China is a non-market economy country, normal value was based on data obtained in a market economy. To this effect, the complainant suggested that normal value be determined on the basis of domestic selling prices of the like product in Taiwan, i.e. an analogue market economy, as provided for in Article 2 (5) of Regulation (EEC) No 2423/88.

(21) One Chinese producer argued to the contrary that normal value should be based on the prices at which the like product manufactured by this producer was sold to the USA, where most of its products were sold. Alternatively, this producer proposed that, as nearly all components used to manufacture the product concerned were sourced from related companies in market economy countries, i.e. USA and Hong Kong, normal value should be constructed by taking account of these costs as incurred by the Chinese producer concerned, the remaining costs being established on the basis of the analogue market economy.

(22) In this respect, Article 2 (5) of Regulation (EEC) No 2423/88 sets out the criteria for the establishment of normal value, and neither prices to other countries, nor costs incurred by the producer concerned, meet these criteria. Accordingly, the arguments of this producer cannot be accepted.

(23) As regards the selection of a market economy country, Taiwan is considered to be an appropriate and not unreasonable market, where a number of producers compete for sales of the product concerned. It is similar to the People's Republic of China in its dependence on the supply of certain components used in the manufacturing process. In addition, the production volume of the product concerned by the two Taiwanese companies investigated was representative when compared with the volume of exports from the People's Republic of China to the Community. Therefore, the Commission has established normal value for the People's Republic of China on the basis of the weighted average normal value determined for the two Taiwanese producers concerned.

(ii) **Export price**

(a) *General*

(24) For one producer in Taiwan and the producers concerned in the People's Republic of China, practically all exports to the Community in the investigation period were considered. For the other producer in Taiwan, exports to the Community in the investigation period of 'fall-out' microdisks, i.e. production rejects, were excluded from the establishment of the export price. In agreement with the producers concerned in Japan, the export transactions taken into account during the investigation period, covered more than 75 % of their total exports to the Community in the same period.

(b) *Japan*

(25) Since almost all export sales by the Japanese producers concerned were made to related importers in the Community, export prices for these sales were constructed, in accordance with Article 2 (8) (b) of Regulation (EEC) No 2423/88, on the basis of the price at which the imported product was first resold to an independent buyer in the Community. In constructing these export prices, allowances were made for all costs incurred between importation and resale and for a profit margin of 5 %, which is provisionally considered to be reasonable on the basis of those profits made by independent importers in the electronics sector.

(26) One of the Japanese producers concerned refused to submit information with regard to the costs incurred between importation and resale in respect of its central distribution centre in the Community. Consequently, these costs were established on the basis of the facts available, in accordance with Article 7 (7) (b) of Regulation (EEC) No 2423/88. For this producer, the costs incurred by another Japanese producer, with a similar distribution structure in the Community, were considered to be the most reasonable basis for determining the costs in question.

The same Japanese producer also refused to supply information with regard to the prices charged by its related importer in the Community to two large independent customers, on the grounds that the sales to other customers, already reported, represented more than 80 % of the total exports to the Community by this producer. However, since these two customers each represented about 5 % of the total sales in the Community of the producer concerned, it was considered that the prices charged to these two customers were not necessarily in line with the average prices charged to other customers in the Community. In these circumstances, and in accordance with the said Article 7 (7) (b), the Commission has considered selling

prices to these two customers to be at the level of the lowest prices found to have been charged in the Community by this producer for the product concerned, and constructed the corresponding export prices as outlined in recital 23. Any other approach would have constituted a bonus for non-cooperation.

Furthermore, the Japanese producer concerned was the only one found to have made export sales directly to an independent buyer in the Community. Export prices for these sales were established on the prices actually paid for the product concerned sold for export to the Community, in accordance with Article 2 (8) (a) of Regulation (EEC) No 2423/88.

(c) *Taiwan*

(27) Export prices for the two Taiwanese producers concerned were determined, for the purpose of the provisional findings, on the basis of the prices actually paid for the product sold for export to the Community, in accordance with Article 2 (8) (a) of Regulation (EEC) No 2423/88.

(d) *People's Republic of China*

(28) All but one of the Chinese producers made all their sales to the Community through Hong Kong. In these circumstances, where exports were made directly to the Community or through Hong Kong by the producer itself, export prices were determined on the basis of the prices actually paid for the product sold for export to the Community.

Where exports were made through related companies in Hong Kong to independent buyers in the Community, export prices were determined on the basis of the export price to the Community from the company in Hong Kong.

Where exports were made to related importers in the Community, export prices were constructed on the basis of the price at which the imported product was first resold to an independent buyer in the Community. In constructing the export price, allowances were made for all costs incurred by the related importer between importation and resale. Allowance was also made for a profit margin of 5 %, which is provisionally considered to be reasonable on the basis of those profits made by independent importers in the electronics sector.

(iii) **Comparison**

(29) The normal value, by product type, was compared with the export price for the corresponding type, transaction by transaction, at the same level of trade, and on an ex-works basis. For the purposes of a fair comparison, adjustments were made in accordance with Article 2 (9) and (10) of Regulation (EEC) No 2423/88 in respect of differences affecting price comparability, such as differences in physical characteristics and in selling expenses for which satisfactory evidence was submitted.

(30) As regards physical characteristics, normal value for one of the two producers in Taiwan was adjusted to take account of the lower degree of certification, i.e. the testing of the performance of the diskette which influences its market value, of some exports of the product concerned to the Community, when compared to the like product sold on the domestic market.

(31) One Chinese producer claimed that normal value should be adjusted to take account of the fact that its exports to the Community in the investigation period consisted only of uncertified 3,5" micro-disks. The Commission considered this claim to be substantiated, and an appropriate allowance was granted.

(32) As to the allowances in respect of selling expenses, adjustments were made, as appropriate, to both normal value and export price in respect of transport, insurance, handling, packing, payment terms, salesmen's salaries and commissions.

(33) One Taiwanese producer and one Japanese producer claimed adjustments to normal value in respect of after sales technical assistance expenses incurred in domestic sales of the like product. However, no satisfactory evidence was supplied by either producer on the exact nature and amount of the expenses concerned, and the claim was therefore rejected.

(iv) **Dumping margins**

(34) The comparison showed the existence of dumping, the dumping margins being equal to the amount by which the normal value, as established, exceeds the price for export to the Community.

(35) For the reasons stated in recital 13, a general dumping margin has been established for all the Chinese producers concerned, with the exception of the one wholly foreign-owned company mentioned in recital 14.

(36) The weighted average dumping margins for each producer, expressed as a percentage of the free-at-Community-frontier price are as follows:

Japan

— Memorex:	41,3 %,
— TDK:	41,6 %,
— Hitachi-Maxell:	37,3 %,
— Sony:	60,1 %;

Taiwan

— Megamedia:	33,5 %,
— CIS Technology:	20,4 %;

People's Republic of China

— General Dumping Margin:	41,5 %,
— Hanny Zhuhai:	35,6 %.

(37) For those producers in Japan and Taiwan which neither replied to the Commission's questionnaire nor otherwise made themselves known, the dumping margin was determined on the basis of the facts available in accordance with Article 7 (7) (b) of Regulation (EEC) No 2423/88. In this respect, it was considered that, in the light of the proportion of total imports into the Community covered by the companies in each of these countries which had cooperated in the investigation, the findings made with regard to these companies provided the most appropriate basis for the determination of the dumping margin.

Indeed, the Commission considered that it would have provided a bonus for non-cooperation, and may lead to circumvention of anti-dumping measures, should any of the producers concerned be deemed to have dumped at levels lower than the highest found for any producer or group of producers in the exporting country concerned which had cooperated.

It is, therefore, considered appropriate to use, for the producers concerned, the highest dumping margin found in the respective country.

(38) One Japanese exporter who replied to the Commission's questionnaire stated it did not produce or sell domestically the product concerned. The Commission found that the purchases of the product concerned by this trader from Japanese producers were sales for export by these producers and should form part of the calculation of their dumping margins. However, as the latter did not make themselves known to the Commission, by requesting and completing the questionnaire established for that purpose, no individual calculation of dumping was possible.

E. COMMUNITY INDUSTRY

(39) In examining whether the complainants constitute a major proportion of the total Community production of the like product, the Commission requested the cooperation of all non-complainant producers in the Community known to be concerned, and took into account the information submitted by those that agreed to cooperate.

The Commission also had to take account of the fact that some of producers in the Community are related to the producers in the exporting countries concerned, and that others, without such relationships, imported the dumped product themselves. The Commission had, therefore, to decide whether these groups of producers should be excluded from the term Community industry, according to the first indent of Article 4 (5) of Regulation (EEC) No 2423/88.

(40) In this respect, the constant practice of the Community institutions has been that the exclusion of such producers in the Community must be decided on a case-by-case basis, on reasonable and equitable grounds, and by taking into consideration all the legal and economic aspects involved. These institutions have, on several occasions, concluded that an exclusion is justified where the producers in the Community either participated in the dumping practices, are shielded from their effects, or where they benefit unduly from them.

(41) In the present case, the investigation has shown that some producers in the Community, which have corporate links with the producers in Japan, sell both their Community-produced 3,5" microdisks and the dumped 3,5" microdisks imported from their parent companies in Japan through the same corporate sales channels in the Community.

In addition, the prices of the Community-produced product are aligned to those of that imported from Japan, since the price behaviour on the Community market for all microdisks, whether produced in Japan or in the Community, is controlled by the Japanese parent company.

(42) In these circumstances, the Commission concludes, for the purposes of its provisional findings, that these producers participate in the dumping practices of the Japanese parent companies and, through a policy of transfer prices, are not only shielded from the effects of the dumping but even benefit from it.

Furthermore, the transfer prices at which these producers import the product concerned, and its components, from related producers in Japan would distort the economic assessment of the Community industry, should these producers be included in the definition of this industry.

It is, therefore, concluded that the producers concerned have to be excluded from the term 'Community industry', in accordance with Article 4 (5) of Regulation (EEC) No 2423/88.

(43) Some of the complainant producers imported the product under investigation from producers for which dumping was found. The Commission considers that these importing producers are not participating in the dumping practices, since independent importers are not involved in dumping. Moreover, the level of imports in the investigation period by all but one of these producers did not, on an individual basis, exceed 7 % of their total sales in the Community in the same period. Such a low level of imports cannot, therefore, have shielded the producers concerned from the effects of dumping nor have substantially benefited them. Indeed, the small advantages which these producers may have obtained from these imports are by far offset by the disadvantages from the dumping.

(44) During the investigation period, one complainant Community producer imported 3,5" microdisks found to be originating in the countries concerned in quantities which can be considered substantial, in so far as they amounted to nearly one-third of the total sales by this producer in the Community. It was found that the Community producer in question was already a well-established and efficient manufacturer of the previous 5,25" diskette format, with an extensive customer base, and that its decision to import was made in order to maintain this base with regard to the new 3,5" diskette format, while its own production of this format was insufficient. Due to the threat arising from the low prices of the dumped imports of the new format, this producer had no other reasonable choice than to cover its sales programme, for an intermediate period and to the required extent, with imported products. These imports have, therefore, to be considered as necessary to defend a competitive position and a reasonable market share with regard to the new format. This act of self defence cannot be considered as undue benefit from the dumping.

(45) One Japanese exporter argued that two of the complainant producers should be excluded from the term 'Community industry' on the grounds that the degree of State ownership or control of these companies was such that they were not exposed to the normal market forces operating in a market economy. In this respect, the Commission notes that capital holding by the State is irrelevant to the definition of the Community industry.

(46) In the light of the above circumstances, it is provisionally considered that there are no reasons for the exclusion of any of the complainant producers from the definition of the Community industry.

(47) On the basis of the above considerations, the share of the total Community production of the product concerned held by the complainant producers during the investigation period amounted to approximately 77 %.

F. INJURY

(i) Cumulation of the effects of the dumped imports

(48) In establishing the impact of the dumped imports on the Community industry, the Commission has considered the effect of all dumped imports from the countries concerned by the investigation. In analysing whether cumulation of these imports is appropriate, the Commission has considered the comparability of the product imported from the countries concerned in terms of the following criteria : similarity in physical characteristics, interchangeability of end uses, significance of the volumes imported, simultaneous competition in the Community with each other and with the like product manufactured by the Community industry, and similarity of channels of distribution and price behaviour in the Community market of the producers in each country.

(49) Some of the producers concerned in Japan claimed, for the purpose of the injury assessment, that imports of 3,5″ microdisks from this country should not be cumulated with imports from Taiwan and the People's Republic of China, as the effects of the Japanese product on the Community market were wholly different in terms of product quality, import volume, pricing and market strategy. These Japanese producers argued that their exports to the Community consist almost exclusively of 3,5″ microdisks addressed to the high-quality, high-priced, branded segment of the market, and that they, therefore, do not compete with low quality imports from Taiwan and the People's Republic of China, which are concentrated in the low-priced segments, where only the Community industry is active. It is also argued that imports of the product concerned from Japan have rapidly declined, whereas imports from the other two exporting countries concerned have increased significantly.

(50) The Commission found that imports during the investigation period of the product concerned originating in Japan were by no means concentrated in the branded segment, but concerned, in substantial quantities, the various types of 3,5″ microdisks available in the Community market, i.e. branded and unbranded diskettes in the two main storage capacities.

As to the volume of the dumped imports from Japan, it increased from 64,5 million units in 1988 to 116,6 million units in 1990, peaking at 131,5 million units in 1989. It showed a certain further decline to 103,6 million units during the investigation period. This evolution has to be seen in the light of a switch by the Japanese producers concerned to production in the Community and in other third countries. Notwithstanding this decline, the volume of dumped imports from Japan remains at a high level and is nearly twice the volume of dumped imports from the other two countries concerned taken together. The arguments of the Japanese producers have, therefore, to be rejected.

(51) After examination of the facts, it was found that the 3,5″ microdisks imported from each of the countries concerned are, on a type-by-type basis, alike in all respects, interchangeable and marketed in the Community within a comparable period and under similar commercial policies. These imports compete with each other and with the like product manufactured by the Community industry. It was also found that there was no clear distinction in the price behaviour in the Community of the producers in each of the countries concerned. In addition, the volume of the dumped imports from each of these countries could, in no instance, be considered negligible.

(52) In these circumstances and in accordance with the standard practice of the Community institutions, it is considered that there are sufficient grounds to cumulate the imports from all the countries concerned.

(ii) Volume and market share of the dumped imports

(53) Since the CN code under which 3,5″ microdisks fall also covers other magnetic disks and unrecorded media components thereof, no precise figures concerning total imports and total consumption of the product concerned were available. However, the information obtained during the investigation does not put in question the estimates made by the complainant with regard to the proportion of 3,5″ microdisks in total imports from the countries concerned under the said CN code which, in addition, have not been contested by the other parties to the proceeding. Thus, these estimates, together wih further data obtained during the investigation, allowed the Commission to reasonably assess the Community consumption of the product concerned.

On this basis, the volume of the dumped imports into the Community of the product concerned originating in the exporting countries subject of the proceeding, were 74 million units in 1988, 142 million units in 1989, and 156 million units in 1990 and during the investigation period, i.e. an increase of more than 110 % since 1988.

(54) The development of these imports, assessed in the light of the apparent Community consumption, led to a combined market share of the Community market held by the exporting countries concerned which was 37,2 % in 1988, peaked at 43,3 % in 1989 and was 33,8 % during the investigation period. This decline in market share is exclusively due to a fall in imports of the product concerned originating in Japan which, since 1989, appear to have been progressively replaced by production of the Japanese companies concerned in other third countries and in the Community.

(iii) Prices of dumped imports

(55) Prices of the imported product from the countries concerned have undergone a rapid decline since

1988. In many cases, these prices have decreased by more than 75 %, which appears to be much greater than could be reasonably expected from economies of scale and the learning-curve effect of this industry.

These prices were, during the investigation period, significantly below the prices practised by the Community industry. Price undercutting was established, for each of the producers in the exporting countries concerned investigated, by comparing their prices for sales to the first independent customer in the Community with the weighted average prices of the Community industry. In general, the comparison was made for the markets of the United Kingdom, Germany, France and Italy, which together represent most of the Community market for the product concerned, and to which are addressed more than 75 % of the dumped imports in question.

This comparison was made on a per-product-type basis for each of the types imported which were considered for the dumping determination. To ensure price comparability, adjustments were made with regard to differences in physical characteristics between the product concerned exported to the Community from Taiwan and the People's Republic of China, and the product manufactured in the Community. These adjustments were those outlined in recitals 30 and 31. Adjustments were also made in respect of customs duty and the importer's profit margin mentioned in recitals 25 and 28 to the extent it was applicable.

The results of the comparison showed margins of undercutting for practically all the producers investigated. The weighted average undercutting ranged from 0,5 to 16,6 % for Japan, from 13,6 to 20,4 % for Taiwan, and from 22,02 to 34,4 % for the People's Republic of China.

(iv) Situation of the Community industry

(a) *Production and capacity utilization*

(56) The volume of production of the product concerned by the Community industry increased from 37 million units in 1989, the first full year in which production by all the complainant producers became operational, to 55 million units in 1990, and to 59 million units in the investigation period. This absolute increase in production has, however, to be assessed in the light of the recent establishment of the Community industry, and the growth in demand for the product concerned in the Community, with the total Community market increasing from 170 million units in 1988, 294 million units in 1989, and 398 million units in 1990 to 425 million units in the investigation period. Thus, the production volume of the Community industry is below the level that could have been attained, and, in the opinion of the Commission, would have been obtained in the absence of the imports concerned. The Community industry, therefore, suffered suppression of production.

(57) This production suppression may also be observed with regard to capacity utilization rates which, during the investigation period, were still, on average, at a low level of 63 %, and even below 50 % for some of the complainant Community producers. These rates are thus far from a reasonable level of capacity utilization which would have enabled the Community industry to benefit fully from economies of scale.

(b) *Sales, stocks and market share*

(58) The volume of sales in the Community of the product concerned by the Community industry was in line with that of production and, therefore, equally suppressed. Consequently, year-end stock levels did not reveal a real trend. This development in sales volume, compared to that of the apparent Community consumption, shows a market share which has stagnated at around 12 % since 1989, notwithstanding the start-up phase of the Community industry, when market share could have been expected to grow at a much faster pace.

(c) *Prices*

(59) Complainant Community producers reduced their prices to levels which, in general, did not allow a reasonable profit to be made and, in some cases, did not cover the cost of production. It was found that these price reductions amounted to more than 30 % since 1989, in an attempt by the Community industry to achieve reasonable levels of capacity utilization and market share. In addition, it was found that this decline in prices, which became much more acute in the second half of the investigation period, exceeded the reduction in the cost of production achieved by all the complainant Community producers.

(d) *Profitability*

(60) The development in prices and cost of production, an the under-utilization of capacity, resulted in losses being incurred from 1989 by the majority of the Community producers concerned. Furthermore, in some cases, return on sales was clearly insufficient to recover the high investments already made, and to afford those necessary to ensure a presence in this fast-paced, high-technology industry. Since 1989, losses on turnover in the Community incurred by the Community industry amounted, on average, to more than 3 % on an annual basis.

(e) *Investments*

(61) The Community producers concerned which, in some cases, were efficient manufacturers of generations of diskettes prior to 3,5" microdisks, financed high investments in the period from 1987 to 1989 in order to develop the production of the product concerned.

Since 1989, practically all the complainant Community producers have been forced to reduce seriously their investments pending the re-establishment of a fair competitive situation in the Community market.

(v) **Conclusions on injury**

(62) In assessing the situation of the Community industry, account has to be taken of the fact that it is still at an early stage of development and is, therefore, dependent on continued sales growth and further capital investment. This investment is also a requirement of such a fast-paced industry where microdisks with increasing storage capacity are likely to enter the market in the near future. Thus, an essential condition for the Community industry to keep pace with the investment flow required is the achievement of adequate levels of production, sales and prices yielding an appropriate profitability.

Although economic indicators such as production and sales increased, as could normally be expected for new entrants in a growing market, these are still far from allowing this industry to achieve reasonable levels of capacity utilization and market share and to benefit from economies of scale. Moreover, the acute price erosion and the consequent precarious financial situation of the complainant Community producers prevent them from keeping pace with the investment requirements in this industry. This downgrading of investments has occurred at a crucial stage in the development of the Community industry, when it was about to become firmly established. This situation has impeded its growth, adversely affecting its viability.

In these circumstances, it is concluded that the Community industry is suffering material injury, specially demonstrated by the difference between the present situation, characterized by sales suppression, price depression and resulting lack of profitability, and a situation in which, in the absence of dumping, reasonable levels of capacity utilization, market share and profits could have been achieved.

G. CAUSATION OF INJURY

(63) The Commission examined whether the material injury suffered by the Community industry had been caused by the dumped imports and whether other factors might have caused or contributed to that injury.

(i) **Effect of dumped imports**

(64) In its examination, the Commission found that the increasing volume and high market share of the dumped imports from the three countries concerned by the proceeding coincided in time with the precarious financial situation of the Community industry. Due to dumping, the imported product was sold at very low prices on the Community market. The transparency and price elasticity of this market stem from the fact that competition occurs, to a great extent, at the level of a highly professionalized category of customer, extremely sensitive to price changes. As a result, the Community industry was forced to reduce its prices in an attempt to achieve a reasonable capacity utilization and market share. This depression of prices led, in turn, to a general lack of profitability specifically demonstrated by the financial losses incurred since 1989.

(ii) **Effects of other factors**

(65) The Commission examined whether factors other than the dumped imports might have caused, or contributed to, the injury suffered by the Community industry. The Commission, in particular, examined the evolution and impact of imports from third countries not covered by this proceeding, and the trend of the apparent consumption in the Community market.

(66) Imports from third countries not included in the proceeding have been increasing since 1988 at a lower rate than Community consumption and, as a result, their estimated market share decreased from 44,7 % in 1988 to 37,9 % during the investigation period. Nearly 90 % of these imports originated in the USA, Hong Kong and the Republic of Korea.

The Commission has received a further complaint from Diskma alleging dumping and injury resulting therefrom with regard to imports of the product concerned originating in Hong Kong and the Republic of Korea, and has commenced an investigation (1).

As regards imports from the USA, it has to be noted that their market share has remained relatively stable since 1989. As to the level of prices of these imports, no conclusions can be drawn from the information made available to the Commission during its investigation.

Some of the producers concerned in Japan and the People's Republic of China argued that the non-inclusion of imports from the USA and Hong Kong in the proceeding would distort the assessment of injury.

However, even if it was admitted that imports from third countries other than those covered by this proceeding had caused some injury to the Community industry, this would not alter the fact that the injury caused by the dumped imports concerned, taken in isolation, is material.

(67) With regard to changes in consumption, the Commission found that apparent consumption of the product concerned in the Community increased during the investigation period by 150 % when compared to consumption in 1988. Injury suffered by the Community industry cannot, therefore, be attributed to a contraction in demand for the product concerned in the Community.

(68) The Commission examined the impact on the assessment of injury of the production of the product concerned by affiliates of Japanese producers established in the Community. In this respect it was found that the market share held by this production increased from 9,5 % in 1988 to only 10,7 % in the investigation period. Indeed, to the extent that the prices of the product concerned manufactured by these affiliates in the Community are similar to the prices for the imported product resold by them, this production in the Community might have had some adverse impact on the situation of the Community industry. However any negative impact has been limited, and cannot explain the material injury suffered by the Community industry.

(69) Some producers in the three countries concerned submitted that the injury allegedly suffered by the Community industry was, to a certain extent, self-inflicted on various grounds and, as such, should not be attributed to the dumped imports.

(70) It is first argued that imports of the product concerned made by some of the complainant Community producers caused injury to the importing producers themselves and to other complainant Community producers.

As already outlined in recital 43, only one complainant producer imported substantial quantities of the 3,5" microdisks found to be originating in the countries concerned. This producer did so in order to defend its competitive position in the Community and to maintain its market share and, therefore, did not inflict injury on itself. Furthermore, it was found that the prices at which the imported product was resold by this producer in the Community were not only the same as the prices of its own-produced like product, but also not very different from the prices charged by the other complainant Community producers.

(71) Secondly, it is alleged that the complainant Community industry had misjudged market growth and had invested in production capacity at too late a stage in the product cycle. When this capacity came on-stream, it proved to be excessive, given actual market development and the well-established position of other suppliers on the Community market.

In this respect, it should be noted that the Community industry increased its production capacity by 23 % when comparing that existing in the investigation perod with that in 1989, the first full year in which production by all the complainant producers became operational. In the same period, apparent consumption in the Community for the product concerned increased by 44 %. This does not show any misjudgement of market growth by the Community industry. Furthermore, the existence of well-established suppliers of the

(1) OJ No C 239, 18. 9. 1992, p. 4.

product concerned on the Community market should not prevent recently established efficient producers of 3,5" microdisks participating in the Community market under fair competitive conditions, as was the case with regard to previous formats of diskettes.

(72) A third argument is that the absence of marketing support in the commercialization of the product concerned by the Community industry has forced the latter to concentrate on the low-priced, unbranded segment of the market, thus explaining its alleged precarious financial situation. It was found, however, that sales of the product concerned by the Community industry were evenly distributed between the branded and unbranded segments of the Community market and, therefore, the concentration alleged was far from being confirmed. Furthermore, the pressure on prices exerted by the dumped imports concerned, and the resulting lack of profitability, obliged the Community industry not only to downgrade its investment in equipment, but also to limit marketing expenditure.

(73) Finally, producers in Japan questioned the technological experience and viability of the Community industry, since it is alleged to be still significantly behind well-established producers in Japan with regard to the sophistication of the manufacturing process and the quality of its products. In respect of these contentions, the investigation has shown that the Community industry is able to compete in terms of technology, processing ability and prices, provided the competition is fair and not distorted by dumping. Furthermore, it was found that the cost of production of the product concerned by the complainant Community producers with the highest capacity utilization were, during the investigation period, lower than that verified in Japan.

(74) In these circumstances, the Commission has concluded that, for the purposes of its provisional findings, notwithstanding the possible existence of other causes of some injury, the dumped imports originating in Japan, Taiwan and the People's Republic of China, because of their low prices, their strong presence in the Community market and the resulting lack of profitability of the Community industry, have, taken in isolation, caused material injury to this industry.

H. COMMUNITY INTEREST

(75) In assessing the Community interest, the Commission has to take account of two basic elements. The first is that to stop distortions of competition arising from unfair commercial practices, and thus re-establish open and fair competition on the Community market, is the very purpose of anti-dumping measures and is fundamentally in the general Community interest, as stated in Article 3 (f) of the Treaty. The second is that, in the particular circumstances of the present proceeding, failure to take provisional measures would aggravate the already precarious situation of the Community industry, especially noticeable from the lack of profitability and the resulting downgrading of investments, which adversely affect its viability. Should this industry be forced to cease production, the Community would be rendered almost entirely dependent on third countries in a sector of growing technological importance. Moreover, this could entail serious consequences for the Community manufacturers of components for 3,5" microdisks.

(76) In this context, the following arguments were put forward by some parties to the proceeding:

(i) an increase in the price of the imported 3,5" microdisks, as a result of the adoption of anti-dumping measures, would be detrimental to the interests of duplicators and consumers in the Community;

(ii) the adoption of such measures would, by excluding the third-country suppliers concerned from the Community market, lead to a decrease in the diversity and quality of supply, and would result in demand exceeding supply, since Community-based manufacturers are not yet able to satisfy fully the expected demand.

(77) As to the interests of duplicators and consumers of the product concerned in the Community, their short-term price advantages have to be seen against the background of the longer-term effect of not restoring fair competition. Indeed, to refrain from taking action would seriously threaten the viability of the Community industry, the disappearance of which would, in fact, reduce supply and competition, to the detriment of duplicators and consumers.

(78) The Commission also notes that there is no indication that the re-establishment of open and fair market conditions will prevent producers in third countries from competing in the Community market or, consequently, reduce quality and diversity of supply.

While is is true that production in the Community is, at present, insufficient to meet demand for the product concerned, anti-dumping measures would merely remove the distortion of competition arising from dumping and are not, therefore, an obstacle to satisfying the gap in demand with supplies from third countries at fair prices. Indeed, where the level of the anti-dumping measures is equal to the dumping margin, but lower than the amount required to remove fully the injury, it is only the unfair element of the exporters' price advantage which will be eliminated. In such a situation, the exporters can fully compete on the basis of their true comparative advantage. In the other instance, where the price increase necessary to remove the injury is lower than the dumping margin, the rise in the price of the imported product is limited to a level which reflects a fair competitive Community market situation permitting the Community industry to sell at economic prices. In neither instance, therefore, will exporters experience diminished access to the Community market.

(79) After consideration of the general and specific interests involved, it is provisionally concluded that the adoption of measures in the present case will re-establish fair competition by eliminating the injurious effects of dumping practices, afford the Community industry the opportunity of maintaining and developing this essential technology, and thus offer certain safeguards to the component supply industry in the Community.

(80) The Commission finds, therefore, that it is in the Community interest to adopt anti-dumping measures, in the form of provisional duties, in order to prevent further injury being caused by the dumped imports concerned during the proceeding.

I. DUTY

(81) For the purpose of establishing the level of the provisional duty, the Commission took account of the dumping margins found and of the amount of duty necessary to eliminate the injury sustained by the Community industry.

(82) Since the injury consists principally of price undercutting, price depression and suppression of capacity utilization and market share and, as a consequence, lack of profitability or losses, the removal of such injury requires that the industry should be put in the position where prices can be increased to profitable levels without loss of sales volume. In order to achieve this, the prices of the imports concerned originating in Japan, Taiwan and the People's Republic of China should be increased accordingly.

For calculating the necessary price increase, the Commission considered that the actual prices of these imports had to be compared to selling prices that reflect the costs of production of the complainant Community producers plus a reasonable amount of profit.

To this end, the Commission has used the costs of production of the two complainant producers with the highest production volume and rate of capacity utilization, which is higher than the actual average rate of the Community industry. As to the amount of profit, account was taken of the fact that the Community industry, being at an early stage of development, could not expect to achieve profit levels in line with those realized by already well-established producers in the third countries concerned. In these circumstances, a profit margin of 10 % on turnover was considered to provide the minimum amount of profit required to ensure the viability of the Community industry.

The actual weighted average selling prices charged during the investigation period by the Community industry were increased for each product type, where appropriate, in order to achieve the overall minimum amount of profit required. The resultant prices thus established were compared with the prices of the dumped imports used to establish undercutting as outlined in recital 55.

The differences between these two prices expressed on a weighted average basis and as a percentage of the free-at-Community-frontier price, were above the dumping margins found for all the producers concerned in Taiwan and the People's Republic of China, and ranged from 5,2 % up to 40,9 % for producers in Japan.

(83) Where the margins of dumping found, in respect of a particular exporting producer, were below the corresponding increases in export prices necessary

to remove the injury, as calculated above, the provisional duties imposed should be limited to the dumping margins established.

(84) For the reasons given in recitals 13 and 14 above, a single duty should be established for all producers in the People's Republic of China, with the exception of one company for which an individual duty should be determined.

(85) In establishing the level of provisional duty for producers in each of the countries concerned who neither replied to the Commission's questionnaire nor otherwise made themselves known, the Commission considers it appropriate, for the reasons concerning the dumping margins outlined in recital 37, to use the findings of the investigation as a basis and to apply the highest level of duty determined for a producer in the same country.

J. FINAL PROVISION

(86) In the interest of sound administration, a period should be fixed within which the parties concerned may make their views known and request a hearing. Furthermore, it should be stated that all findings made for the purpose of this Regulation are provisional and may have to be reconsidered for the purpose of any definitive duty which the Commission may propose,

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on imports of 3,5" microdisks used to record and store encoded digital computer inormation falling within CN code ex 8523 20 90 (Taric code: 8523 20 90 * 10), and originating in Japan, Taiwan and the People's Republic of China.

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

Country	Products manufactured by	Rate of duty (%)	Taric additional code
Japan	Memorex Telex Japan Ltd	5,2	8705
	Hitachi-Maxell	23,4	8706
	TDK	27,8	8707
	Other companies	40,9	8708
Taiwan	CIS Technology	20,4	8709
	Other companies	33,5	8710
People's Republic of China	Hanny Magnetics	35,6	8711
	Other companies	41,5	8712

3. The provisions in force concerning customs duties shall apply.

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

Article 2

Without prejudice to Article 7 (4) (b) of Regulation (EEC) No 2823/88, the parties concerned may make known their views in writing and apply to be heard orally by the Commission within one month of the date of entry into force of this Regulation.

Article 3

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*. Subject to Articles 11, 12 and 13 of Regulation (EEC) No 2823/88, Article 1 of this Regulation shall apply for a period of four months, unless the Council adopts definitive measures before the expiry of that period.

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

Done at Brussels, 15 April 1993.

For the Commission

Leon BRITTAN

Member of the Commission