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COUNCIL REGULATION (EC) No 1628/2004

of 13 September 2004

imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain graphite electrode systems originating in India

(OJ L 295, 18.9.2004, p. 4)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Council Regulation (EC) No 1354/2008 of 18 December 2008	L 350	24	30.12.2008

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imposing a definitive countervailing duty and collecting definitively the provisional duty imposed 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 members of the European Community ([1]) (the basic Regulation), and in particular Article 15 thereof,

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

Whereas:

A. **PROVISIONAL MEASURES**

(1) On 19 May, the Commission, by Regulation (EC) No 1008/2004 ([2]) (the provisional Regulation), imposed a provisional countervailing duty on imports into the Community of certain graphite electrode systems originating in India.

B. **SUBSEQUENT PROCEDURE**

(2) Subsequent to the disclosure of the essential facts and considerations on the basis of which it was decided to impose provisional countervailing measures, several interested parties made written submissions making their views known on the provisional findings. The parties who so requested were granted an opportunity to be heard.

(3) The Commission continued to seek and verify all information it deemed necessary for the definitive findings.

(4) 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 countervailing duty on imports of certain graphite electrode systems originating in India and the definitive collection of the amounts secured by way of the provisional duty. They were also granted a period within which to make representations subsequent to the disclosure of the essential facts and considerations.

(5) The oral and written comments submitted by the interested parties were considered and, where appropriate, the findings have been modified accordingly.

C. **PRODUCT CONCERNED AND LIKE PRODUCT**

(6) Since no new comments were received regarding the product concerned and the like product, recitals 12 to 16 of the provisional Regulation are hereby confirmed.

D. **SUBSIDISATION**

1. **Duty entitlement passbook scheme (DEPB)**

(7) Following disclosure after the imposition of provisional measures and subsequent to final disclosure, a number of comments were received from the Government of India (the GOI) and from the

([1]) OJ L 288, 21.10.1997, p. 1. Regulation as last amended by Regulation (EC) No 461/2004 (OJ L 77, 13.3.2004, p. 12).

([2]) OJ L 183, 20.5.2004, p. 35.

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exporting producers. It was firstly claimed that the DEPB on post-export basis is a drawback scheme and, as a consequence, any benefit under the scheme should be restricted to any excess remission of import duties that may have been given. It was further claimed that the quantification of any benefit should be based on the date of receipt of the DEPB licences and not on the date of their utilisation or sale, as was taken by the Commission. Finally, it was claimed that the amount of benefit should be reduced as it was alleged that the DEPB rate for the product concerned was reduced from 19 to 11 % in February 2004, namely after the IP.

(8) In response to the first claim, it is noted in recital 33 of the provisional Regulation that 'the basic Regulation provides for an exception for, *inter alia*, drawback and substitution drawback schemes which 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)'.

(9) In this context, it must be noted that the GOI did not apply an effective 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). Additionally, the GOI did not carry out a post-export examination based on actual inputs involved to determine whether an excess payment occurred, although this would normally be required in the absence of an effectively applied verification system (Annex II(II)(5) and Annex III(II)(3) to the basic Regulation). Furthermore in recital 37 of the provisional Regulation it was considered that 'the DEPB on post-export basis cannot be considered as a permitted drawback or substitution drawback scheme (Annex III) under Article 2(1)(a)(ii) of the basic Regulation'. For these reasons, the conclusion in recital 38 of the provisional Regulation, that 'the countervailable benefit is the remission of total import duties normally due on all imports' is hereby confirmed.

(10) To be eligible for benefits under this scheme, a company must export goods. 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 DEPB scheme. In order for the goods to be exported, the Indian customs authorities issue, in advance of the goods being exported, an export shipping bill which shows, *inter alia*, the amount of DEPB credit which is to be granted for that export transaction. At this point in time of export, the company 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 DEPB credit. It was also verified that any change to the DEPB rates between the actual export and the issuance of a DEPB licence will not affect the level of benefit granted. The relevant DEPB rate is that which applied at the time the export declaration is made. Therefore, there is no possibility for a retroactive amendment to the level of the benefit. Accordingly, the moment the export transaction is made, the GOI is liable to forego the customs duties, which constitutes a financial contribution within the meaning of Article 2(1)(a)(i) of the basic Regulation.

(11) Article 1(1) of the basic Regulation provides that a 'countervailing duty may be imposed for the purpose of offsetting any subsidy granted […] whose release for free circulation in the Community causes injury'. The rationale for imposing such a duty is that the prices of the imported goods are lower as a result of having received subsidies and that such lower prices cause injury. In this case, when exporters of graphite electrode systems are negotiating prices for an export sale, they are aware

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that that sale benefits from a subsidy under the DEPB scheme. By virtue of the fact that the exporters are aware that they will receive such subsidy, and indeed benefits under other schemes, these companies are already in a competitively more advantageous position at the point in time when they are negotiating prices, that is to say they can reflect the subsidies through offering lower prices.

(12) The Indian accounting standards provide for booking credits, such as those received under the DEPB scheme, on an accrual basis as income, once (i) such benefits have been earned; and (ii) it is reasonably certain that the ultimate collection of the proceeds of the export transaction will be made. What is relevant here is the point at which 'benefits have been earned'. As stated in recital 10 above, 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 and it has no discretion as to the amount of the subsidy. Also, as stated above in the same recital, any change to the DEPB rates between the actual export and the issuance of a DEPB licence has no retroactive effect on the level of benefit granted. Finally, as stated in recital 11 above, the prices of export transactions are considered to reflect the subsidies (that is to say through lower prices) from which they can benefit. In these circumstances, it is considered that benefits are earned when the export transaction is made. On this basis, companies can, in line with Indian accounting standards, book the DEPB credit as income at the stage of export transaction.

(13) In accordance with Articles 2(2) and 5 of the basic Regulation, the amount of countervailable subsidies shall be calculated in terms of the benefit conferred on the recipient, which is found to exist during the investigation period. In light of the above, it is considered appropriate to assess the benefit under this scheme as being the sum of the credits earned on all export transactions made under this scheme during the investigation period. This differs from the approach followed in the provisional Regulation where the sum of the credits utilised was assessed. In accordance with Article 7(1)(a) of the basic Regulation, fees necessarily incurred to obtain the subsidy were deducted.

(14) In respect of the final argument relating to the alleged reduction of the DEPB rate, it is accepted that *prima facie* evidence has been submitted to show that the DEPB rate for the product concerned was reduced to 11 % with effect from 9 February 2004. However, as the amount of benefit is assessed on the basis of the amount of benefit earned on all export transactions made during the IP, the reduction in the DEPB rate after this period will have no effect on the level of subsidy determined.

(15) On the basis of these changes, the benefit under this scheme for the two cooperating companies was revised to 16,6 and 14,4 % respectively.

2. **Export promotion capital goods scheme (EPCGS)**

(16) In the absence of any comments from interested parties, the conclusions outlined in recitals 56 to 58 of the provisional Regulation, are hereby confirmed.

3. **Advance licence scheme (ALS)**

(17) At the provisional stage, one exporting producer in India was deemed to have received a countervailable benefit under this scheme. The representatives of this exporter claimed both that (i) the scheme was not countervailable; and (ii) in any case, any benefit received was only granted to a business unit of the company which did not manufacture the product concerned and

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which had been sold off by the company subsequent to the IP. Accordingly, it was claimed that no benefit under the ALS should be attributed to the exporter.

(18) In respect of the first claim, no new evidence was provided to show that the ALS was not a countervailable export subsidy. In this context, it is recalled that the GOI did not apply an effective 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). Additionally, the GOI did not carry out a post-export examination based on actual inputs involved to determine whether an excess payment occurred, although this would normally be required in the absence of an effectively applied verification system (Annex II(II)(5) and Annex III(II)(3) to the basic Regulation). For these reasons, the conclusions in recitals 64 to 70 of the provisional Regulation are hereby confirmed.

(19) In respect of the second claim, it was found that during the IP the exporter concerned had benefited from the scheme and had, as a result, received a countervailable benefit. Furthermore, the fact that the business unit producing this product was sold subsequent to the IP, is not relevant for determining whether the company benefited of a subsidy during the IP. In addition, it is not considered to be relevant when assessing the level of the subsidisation of the company as a whole, whether the subsidy scheme was targeted at a unit of the company that did not itself produce the product concerned. Indeed, it is the company as a whole which is examined, and thus any benefit to one of the units is considered to represent a benefit for the company as a whole. To that end, it is confirmed that during the IP, the business unit which benefited from the ALS scheme and the business units which manufactured the product concerned, formed one legal economic entity. Therefore, the conclusion outlined in recital 71 of the provisional Regulation is hereby confirmed.

4. **Export processing zones (EPZ)/export orientated unit (EOU)**

(20) In the absence of any comments from interested parties, the conclusion outlined in recital 72 of the provisional Regulation, is hereby confirmed.

5. **Income tax exemption (ITE)**

(21) In the absence of any comments from interested parties, the conclusion outlined in recital 74 of the provisional Regulation, is hereby confirmed.

6. **Amount of countervailable subsidies**

(22) In light of the conclusions outlined above, the amount of countervailable subsidies is definitively confirmed, as follows:

Type of subsidy	DEPB	EPCGS	ALS	EPZ/EOU	ITE	TOTAL
Graphite India Limited (GIL)	16,6 %	0,1 %				16,7 %
Hindustan Electro Graphite (HEG) Limited	14,4 %	0,3 %	0,2 %			14,9 %
All others						16,7 %

E. **COMMUNITY INDUSTRY**

(23) In the absence of any substantially new information or argument in this particular respect, recitals 76 to 79 of the provisional Regulation are hereby confirmed.

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F. **INJURY**

(24) Following the provisional disclosure, the Indian exporters pointed to the divergence in the undercutting margin of one particular type of the product concerned, as compared with the undercutting margins of similar types. The claim was properly examined and it was found that the discrepancy was due to a mistake in the reporting of a number of credit notes and discounts of one particular Community producer. The claim was therefore accepted and the undercutting margin of this particular type and, where applicable, of other types were corrected accordingly.

(25) It was further found that a number of sale transactions of the Community industry used for the undercutting calculations were double-counted. In view of this, the double-counted transactions had to be eliminated and the undercutting calculations had to be modified accordingly. However, this double-counting had not taken place when establishing the figures used for assessing the injury indicators. Therefore, there was no need to modify the injury indicators.

(26) As a result, the comparison showed that during the IP the prices of the product concerned originating in India and sold in the Community undercut the Community industry's prices by between 3 and 11 %.

(27) In the absence of any substantially new information or argument in this particular respect, recitals 80 to 116 of the provisional Regulation are hereby confirmed, with the exception of recital 86 (see recitals 24 to 26 above).

G. **CAUSATION**

1. **Return to normal competition conditions after the dismantling of the cartel**

(28) The Indian exporters reiterated their argument that the establishment of a causal link between the subsidised imports and the injury suffered by the Community industry is based on data which would be unreliable because of the existence of a cartel up until the beginning of 1998. However, the Indian exporters did not provide any new information within the deadline set for submitting comments in this particular respect.

(29) In the absence of any substantially new information or argument, recitals 117 to 137 of the provisional Regulation are hereby confirmed.

H. **COMMUNITY INTEREST**

(30) An association representing users and a user company reiterated their main concern that, by excluding Indian suppliers from the Community market, the imposition of any measure would reduce overall competition on the Community market for this particular product and inevitably lead to an increase in prices. However, as assessed under recital 147 of the provisional Regulation, the impact of any increase in the price of the like product for final customers is likely to be minimal. It is further recalled that the purpose of any countervailing measure is by no means to stop access into the Community of products from India, but rather to restore a level playing field that had been distorted by unfair trade practices. Finally, it is considered that the level of the measures is not such as to exclude the Indian producers from the Community market.

(31) In the absence of any substantially new information or argument in this particular respect, recitals 138 to 151 of the provisional Regulation are hereby confirmed.

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I. **INJURY ELIMINATION LEVEL**

(32) Further to disclosure of provisional findings, several interested parties claimed that the profit level of 9,4 % deemed to represent the financial situation of the Community industry in the absence of injurious subsidisation from India was too high. It was alleged that the normal practice was to set a 5 % profit ratio for commodity goods sectors such as steel, textiles and base chemicals. The same parties further claimed that the methodology used to arrive at this figure should be fully disclosed.

(33) As explained under recital 154 of the provisional Regulation, the profit of 9,4 % was the result of a reasoned assessment established on the basis of a number of elements, amongst which (i) the profit achieved by the Community industry in 1999, when the market share of the dumped imports was at its lowest; (ii) the market conditions at that time; and (iii) the output drawn from a database on company accounts. As regards this database, it consists of company accounts data, which are first collected by national central banks of the largest industrialised countries, i.e. most of the Member States of the European Union, the United States of America and Japan, and then aggregated, by sectors, by the European Committee of Central Balance Sheet Data Offices and the European Commission. The database has been updated between provisional and definitive determination. An analysis of the updated data referring to the EU Member States, plus the United States of America and Japan shows that the average profit before extraordinary items for companies belonging to the nearest available business sector was of 7,5 % in 2002, which is the last year available in the database.

(34) However, it is further considered that, when setting the profit that could have been achieved in the absence of subsidisation, due consideration has to be paid to all qualitative and quantitative elements relevant for this purpose. In particular, as this has been done under recital 154 of the provisional Regulation, a proper examination was made of Community industry's profit levels when the market share of subsidised imports was at its lowest (namely 1999), and of any other causes and circumstances that might affect the representativity of the latter period. Finally, it is noted that the product concerned is used in demanding applications and has to strictly match certain parameters, notably in terms of electrical resistance. This entails both a highly capital intensive manufacturing process and a not negligible amount of research and development costs. The fact that only a limited number of producers in the world master this technology is a further indication that this product can certainly not be considered as a basic commodity.

(35) Taking all these circumstances and elements into account, it is definitively concluded that the profit margin that can reasonably be deemed to represent the financial situation of the Community industry in the absence of injurious subsidisation from India should be set at 8 % for the purpose of the calculation of the injury margin.

(36) As a consequence of the above and of the finding regarding undercutting (see recitals 24 to 26), the injury margins were revised as follows.

Graphite India Limited (GIL)	15,7 %
Hindustan Electro Graphite (HEG) Limited	7,0 %

J. **DEFINITIVE MEASURES**

(37) In view of the conclusions reached with regard to subsidisation, injury, causation and Community interest, it is considered that a definitive countervailing duty should be imposed in order to

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prevent further injury being caused to the Community industry by the subsidised imports. The definitive measures should be imposed at the level of the subsidy margin found, but should not be higher than the injury margin calculated above in accordance with Article 15(1) of the basic Regulation. Given that the level of the overall cooperation for India was high, the residual subsidy margin for all other companies was set at the level for the company with the highest individual margin, that is to say 16,7 %.

K. DEFINITIVE COLLECTION OF THE PROVISIONAL DUTY

(38) In view of the magnitude of the subsidy margins found for the exporting producers in India and given the level of the injury caused to the Community industry, it is considered necessary that the amounts secured by way of provisional countervailing duty imposed by the provisional Regulation should be definitively collected to the extent of the amount of definitive duties imposed. As the definitive countervailing duty for Graphite India Limited (GIL) is higher than the provisional countervailing duty, the amounts secured by way of provisional countervailing duty imposed by the provisional Regulation shall be definitively collected. Conversely, as the definitive countervailing duty for Hindustan Electro Graphite (HEG) Limited is lower than the provisional countervailing duty, amounts provisionally secured in excess of the definitive rate of countervailing duties shall be released.

(39) The individual 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 country-wide duty applicable to 'all others') are thus exclusively applicable to imports of products originating in the country concerned 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 others'.

(40) Any claim requesting the application of these individual countervailing duty rates (for example, 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, domestic sales and export sales associated with for example that name change or that change in the production and sales entities. If appropriate, the Regulation will accordingly be amended by updating the list of companies benefiting from individual duties.

L. UNDERTAKINGS

(41) During the course of the investigation, the two exporting producers in India, Graphite India Limited and Hindustan Electro Graphite Limited offered price undertakings in accordance with Article 13(1) of the basic Regulation. However, significant differences were observed between the investigation period and the present time for raw material costs, this being due to the general volatility of this particular market. It follows that if undertakings were accepted in this case, on the basis of minimum import prices established solely on the data collected relating to the investigation period, as currently offered, this would have negative consequences on the effectiveness of the said undertakings in removing injurious subsidisation. In

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addition, one of the exporting producers concerned, subsequent to its undertaking offer, acquired a graphite electrode production company situated in the Community which raises the risk of circumvention of its undertaking offer. In view of both of these developments it was not possible to finalise workable, and therefore acceptable, undertakings within the time limits of the present investigation,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive countervailing duty is hereby imposed 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 (TARIC code 8545 11 00 10) and nipples used for such electrodes, falling within CN code ex 8545 90 90 (TARIC code 8545 90 90 10) whether imported together or separately originating in India.

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2. 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

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

Article 2

The amounts secured by way of provisional countervailing duties pursuant to the provisional Regulation 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 (TARIC code 8545 11 00 10) and nipples used for such electrodes, falling within CN code ex 8545 90 90 (TARIC code 8545 90 90 10) whether imported together or separately originating in India shall be definitively collected as follows.

The amounts secured in excess of the definitive rate of countervailing duties shall be released. Where the definitive duties are higher than the provisional duties, only the amounts secured at the level of the provisional duties shall be definitively collected.

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.