II

(Non-legislative acts)

REGULATIONS

COUNCIL IMPLEMENTING REGULATION (EU) No 803/2011

of 4 August 2011

repealing the countervailing duty on imports of certain broad spectrum antibiotics originating in India and terminating the proceeding in respect of such imports, following review pursuant to Article 18(2) of Council Regulation (EC) No 597/2009

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community [1], (the basic Regulation), and in particular Article 18 thereof,

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

Whereas:

1. PROCEDURE

1.1. Measures in force

(1) In May 2005, following a combined expiry and interim review (the combined review), the Council, by Regulation (EC) No 713/2005 [2], imposed a definitive countervailing duty on imports of certain broad spectrum antibiotics, namely amoxicillin trihydrate, ampicillin trihydrate and cefalexin not put up in measured doses or in forms or packing for retail sale (the product concerned) currently falling within CN codes ex 2941 10 00 and ex 2941 90 00 originating in India. The measures took the form of an *ad valorem* duty ranging from 17,3 % to 32 %. The original measures had been imposed by Regulation (EC) No 2164/98 [3].

(2) Following a partial interim review, the Council, by Regulation (EC) No 1176/2008 [4], amended the countervailing duty rate applicable to one Indian exporter.

1.2. Request for an expiry review

(3) Following the publication of a notice of impending expiry [5] of the definitive measures in force, the Commission received a request for the initiation of an expiry review of Council Regulation (EC) No 713/2005 pursuant to Articles 18(2) of the basic Regulation, from two Union producers: DSM and Sandoz (the applicants), representing a major proportion, in this case more than 50 % of the total Union production of certain broad spectrum antibiotics.

(4) The request was based on the grounds that the expiry of the measures would be likely to lead to a continuation or recurrence of subsidisation and injury to the Union industry.

(5) Prior to the initiation of the expiry review, and in accordance with Articles 10(9) and 22(1) of the basic Regulation, the Commission notified the Government of India (the GOI) that it had received a properly documented review request. The GOI was invited for consultations with the aim of clarifying the situation as regards the contents of the request and arriving at a mutually agreed solution. The GOI responded only very late to this invitation and, therefore, no such consultations have taken place.

1.3. Initiation of an expiry review

(6) Having determined, after consulting the Advisory Committee, that sufficient evidence existed for the initiation of an expiry review, the Commission announced on 12 May 2010, by a notice published in the *Official Journal of the European Union* [6] (the Notice of initiation), the initiation of an expiry review pursuant to Article 18 of the basic Regulation.

[1] OJ L 188, 18.7.2009, p. 93.
[2] OJ L 121, 13.5.2005, p. 1.
[3] OJ L 273, 9.10.1998, p. 1.
[4] OJ L 319, 29.11.2008, p. 1.
[5] OJ C 21, 28.1.2010, p. 40.
[6] OJ C 123, 12.5.2010, p. 11.

1.4. **Investigation**

1.4.1. *Investigation period*

(7) The investigation of continuation or recurrence of subsidisation covered the period from 1 April 2009 to 31 March 2010 ('the review investigation period' or 'RIP'). The examination of the trends relevant for the assessment of the likelihood of a continuation or recurrence of injury covered the period from 1 January 2007 to the end of the review investigation period (the period considered).

1.4.2. *Parties concerned by the investigation*

(8) The Commission officially advised the applicants, other known Union producers, exporting producers, importers, up-stream suppliers, users known to be concerned, and the GOI of the initiation of the expiry review. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set out in the Notice of initiation.

(9) All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.

(10) In view of the apparent large number of exporting producers of the product concerned in India which were named in the request, it was considered appropriate, in accordance with Article 27 of the basic Regulation, to examine whether sampling should be used. In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, the above parties were requested, pursuant to Article 27 of the basic Regulation, to make themselves known within 15 days of the initiation of the review and to provide the Commission with the information requested in the Notice of initiation. Only three exporting producers came forward. Therefore, no sampling was applied.

(11) The Commission sent questionnaires to all parties known to be concerned and to those who made themselves known within the deadlines set in the Notice of initiation. Replies were received from three Union producers, three exporting producers and the GOI. None of the other producers replied to the questionnaire or supplied any information. None of the importers came forward during the sampling exercise and no other importers supplied the Commission with any information or made themselves known in the course of the investigation.

(12) One of the producers claimed that the assessment of the situation of the Union industry should also include data from another alleged Union producer. However, as it was found that this latter company was not a producer of the product under investigation, this claim was rejected.

(13) The Commission sought and verified all the information it deemed necessary for a determination of the likelihood of continuation or recurrence of subsidisation and resulting injury and of the Union interest. Verification visits were carried out at the premises of the following interested parties:

(a) *Union producers:*

— DSM Anti-Infectives B.V., Delft (The Netherlands), which also replied to the Commission's questionnaire on behalf of DSM Anti-Infectives Chemferm S.A., Santa Perpetua de Mogoda, (Spain). These two companies are hereafter jointly referred to as 'DSM',

— Deretil S.A. (formerly DSM Anti-Infectives Deretil S.A.), Almeria, Spain, referred to as 'Deretil', and

— Sandoz GmbH, Kundl (Austria), which also replied to the Commission's questionnaire on behalf of Sandoz Industrial Products S.A., Barcelona (Spain). Both companies are hereafter jointly referred to as 'Sandoz';

(b) *Exporting producers in India:*

— Lupin Limited, Mumbai,

— M/s Surya Pharmaceuticals Ltd, Chandigarh and Baddi, and

— Ranbaxy Laboratories Limited, Gurgaon;

(c) *Government of India (GOI):*

— Ministry of Commerce, New Delhi.

2. **PRODUCT CONCERNED AND LIKE PRODUCT**

(14) The product covered by this review is the same product as the one concerned by Council Regulation (EC) No 713/2005, namely amoxicillin trihydrate, ampicillin trihydrate and cefalexin not put up in measured doses or in forms or packing for retail sale currently falling within CN codes ex 2941 10 00 and ex 2941 90 00 originating in India (the product concerned).

(15) The investigation confirmed that, as in the previous review investigation, the product concerned and the products manufactured and sold by the exporting producers on the domestic market in India, as well as those manufactured and sold in the Union by the Union producers, have the same basic physical and technical characteristics as well as the same uses and are, therefore, considered to be like products within the meaning of Article 2(c) of the basic Regulation.

3. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF SUBSIDISATION

3.1. Introduction

(16) As mentioned in recital 11, three exporting producers came forward and completed a questionnaire reply. However, only two of these three exporting producers reported to have sales of the product concerned to the Union during the RIP.

(17) On the basis of the information contained in the review request and the replies to the Commission's questionnaire, the following schemes, which allegedly involve the granting of subsidies, were investigated:

Nationwide schemes:

(a) Advance Authorisation Scheme (AAS);

(b) Duty Entitlement Passbook Scheme (DEPBS);

(c) Export Promotion Capital Goods Scheme (EPCGS);

(d) Focus Market Scheme (FMS);

(e) Duty Free Import Authorisation (DFIA);

(f) Export Oriented Units (EOU)/Export Processing Zones (EPZ)/Special Economic Zones (SEZ);

(g) Export Credit Scheme (ECS); and

(h) Income Tax Exemption Scheme (ITES);

Regional schemes:

(i) Punjab Industrial Incentive Scheme; and

(j) Gujarat Industrial Incentive Scheme.

(18) The schemes (a) to (f) 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 Foreign Trade Policy (FTP) documents, which are issued by the Ministry of Commerce every 5 years and updated regularly. Two FTP documents are relevant to the RIP of this case, i.e. FTP 04-09 and FTP 09-14. The latter entered into force in August 2009. In addition, the GOI also sets out the procedures governing FTP 04-09 and FTP 09-14 in a 'Handbook of Procedures, Volume I' ('HOP I 04-09' and 'HOP I 09-14' respectively). The Handbook of Procedures is also updated on a regular basis.

(19) Scheme (g) 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.

(20) Scheme (h) is based on the Income Tax Act of 1961, which is amended by the yearly Finance Act.

(21) Scheme (i) is administered by the Government of Punjab and is based on the industrial policy and incentives code of the Government of Punjab.

(22) Scheme (j) is administered by the Government of Gujarat and is based on Gujarat's industrial incentive policy.

3.2. Advance Authorisation Scheme (AAS)

(a) *Legal basis*

(23) The detailed description of the scheme is contained in paragraphs 4.1.1 to 4.1.14 of FTP 04-09 and FTP 09-14 and paragraphs 4.1 to 4,30 A of HOP I 04-09 and HOP I 09-14.

(b) *Eligibility*

(24) The AAS consists of six sub-schemes, as described in more detail in recital 25. 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 FTP 04-09 and FTP 09-14, 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*

(25) 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. An import allowance and export obligation including the type of export product are specified in the advance authorisation;

(ii) annual requirement: such an andvance authorisation is not linked to a specific export product, but to a wider product group (e.g. chemical and allied products). The advance authorisation 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 who produces the intermediate product 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 FTP 04-09 and FTP 09-14. 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 SEZ;

(v) ARO: the advance authorisation 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 FTP 04-09 and FTP 09-14 (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 advance authorisation holder can approach a bank for opening an inland letter of credit in favour of an indigenous supplier. The advance 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 the forecast export benefits as set out in paragraph 8.3 of FTP 04-09 and FTP 09-14 (i.e. AAS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty).

(26) During the RIP, one of the two cooperating exporters obtained concessions under AAS. The subschemes that this company used was (i) physical exports. It is therefore not necessary to establish the countervailability of the remaining unused sub-schemes.

(27) 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 advance authorisation. Since the combined review, it has been extended to 36 months (24 months with two extensions of 6 months each).

(28) For verification purposes by the Indian authorities, an Advance Authorisation holder is legally obliged to maintain an actual consumption register (true and proper account) of duty free imported/domestically procured goods against each advance authorisation, as per prescribed format (paragraphs 4.26, 4.30 and Appendix 23 HOP I 04-09 and HOP I 09-14). 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.

(29) With regard to the use of AAS for physical exports during the RIP, both the import allowance and the export obligation are fixed in volume and value by the GOI and are documented on the advance authorisation. In addition, at the time of import and of export, the corresponding transactions are to be documented by government officials on the advance 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 issued by the GOI. Since the combined review, the SIONs have been revised downwards and during the RIP they were, for the main raw material input and depending on the product and route, 2,3 % to 16,1 % lower than during the combined review.

(30) In spite of this lowering of the SIONs, it was found that for one of the product types concerned, the actual consumption was still below the SIONs. Furthermore, it was found that, although mandatory, the company did not keep the consumption register referred to in recital 28 (Appendix 23), verifiable by an external accountant. In spite of the breach of this requirement, the company did avail the benefits under AAS which were moreover, in view of the found overestimation of the SIONs, in excess of the legal provisions therefore.

(d) *Disclosure comments*

(31) The GOI and one exporting producer submitted comments on AAS.

(32) The GOI claimed that AAS operates as a permitted drawback or substitution drawback system with a verification system in conformity with the provisions of Annexes I, II and III to the basic Regulation in place to monitor the nexus between duty free imported inputs and the resultant export products. The GOI further contended that, according to the basic Regulation, only the remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of exported products can be countervailed. With regard to a verification system, they insisted that an adequate verification system was in place. In this context they referred to a number of verification elements which were available to the GOI for such verification, including SIONs, quantity information on import and export documents and redemption verification after fulfilment of importation and exportation. The GOI also recalled that the scheme prescribes that, if there is any unutilised material, full duty is to be paid along with interest.

(33) The exporting producer which had used AAS for its Union sales had no comments on the findings as concerns description and practical implementation, as summarised under sections (a) to (c), but it contested a number of figures in the calculation of the subsidy amount. Whilst the calculation was checked and no corrections needed to be made, these issues were clarified to the company concerned.

(e) *Conclusion*

(34) The exemption from import duties is a subsidy within the meaning of Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation, i.e. a financial contribution of the GOI which conferred a benefit upon the investigated exporter.

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

(36) This expiry review has, therefore, confirmed that the main sub-scheme used in the present case cannot be considered as permissible duty drawback system or substitution drawback system within the meaning of Article 3(1)(a)(ii) of the basic Regulation. It does not conform to the rules laid down in Annexes I (item (i)), II (definition and rules for drawback) and III (definition and rules for substitution drawback) to the basic Regulation. Although a 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) does exist, the GOI did not effectively apply it. The SIONs themselves cannot be considered a verification system of actual consumption, since they have been found to be overgenerous and it was established that benefits received in excess are not reclaimed by the GOI. Indeed, an effective control done by the GOI based on a correctly kept actual consumption register did not take place. 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). Finally, it has been confirmed that, although mandatory by law, the involvement of chartered accountants in the verification process is, in practice, not guaranteed.

(37) AAS for physical exports is therefore countervailable.

(f) *Calculation of the subsidy amount*

(38) In the absence of permitted duty drawback system or substitution drawback system, the countervailable benefit is the remission of total import duties normally due upon importation of inputs. In this respect and as to the claim of the GOI in recital 32, it is noted that the basic Regulation does not only provide for the countervailing of an 'excess' remission of duties. According to Article 3(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 for countervailing 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 3(1)(a)(ii) of the basic Regulation it only has to establish sufficient evidence to refute the appropriateness of an alleged verification system.

(39) 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 sub-scheme used for the product concerned during the RIP (nominator). 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.

(40) The subsidy rate established in respect of this scheme during the RIP for the sole cooperating producer using it amounts to 12,3 %.

3.3. **Duty Entitlement Passbook Scheme (DEPBS)**

(a) *Legal Basis*

(41) The detailed description of the DEPBS is contained in paragraphs 4.3 of FTP 04-09 and FTP 09-14 as well as in Chapter 4 of HOP I 04-09 and HOP I 09-14.

(b) *Eligibility*

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

(c) *Practical implementation*

(43) 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 (see recital 29) and the customs duty incidence on the presumed import content, regardless of whether import duties have actually been paid or not. The DEPBS rates for the product concerned during the RIP of the current investigation were 8 % for amoxicillin trihydrate and 7 % for ampicillin trihydrate and cefalexin, and therefore in all cases higher than during the combined review.

(44) 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 was made. Therefore, there is no possibility for a retroactive amendment to the level of the benefit.

(45) It was found that in accordance with Indian accounting standards, DEPBS credits can be booked on an accrual basis as income in the commercial accounts, upon fulfilment of the export obligation. Such credits 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. DEPBS credits are freely transferable and valid for a period of 24 months from the date of issue.

(46) Applications for DEPBS credits are electronically filed and can cover an unlimited amount of export transactions. De facto, no strict deadlines to apply for DEPBS credits exist. The electronic system used to manage DEPBS does not automatically exclude export transactions exceeding the deadline submission periods mentioned in paragraph 4.47 of HOP I 04-09 and HOP I 09-14. Furthermore, as clearly provided in paragraph 9.3 of the HOP I 04-09 and HOP I 09-14, applications received after the expiry of submission deadlines can always be considered with the imposition of a minor penalty fee (i.e. 10 % of the entitlement).

(47) It was found that one cooperating Indian exporting producer used this scheme during the RIP.

(d) *Disclosure comments*

(48) The GOI submitted that 'benefit to the recipient' can be measured and the countervailability of the subsidy can be determined only when DEPBS licenses are sold in the market as they would only confer a benefit if and when they are sold on the market. In other words, DEPBS credits would not be countervailable when they are used for payment of customs duty on the imported goods which are used as inputs for the production of exported goods.

(e) *Conclusions on DEPBS*

(49) The DEPBS provides subsidies within the meaning of Article 3(1)(a)(ii) and Article 3(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 not only if a license is sold on the market, as was claimed by the GOI, but also if it is used for payment of customs duty on imported goods.

(50) Furthermore, the DEPBS is contingent in law upon export performance, and is therefore deemed to be specific and countervailable under Article 4(4), first subparagraph, point (a) of the basic Regulation.

(51) This scheme cannot be considered as permissible duty drawback system or substitution drawback system within the meaning of Article 3(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 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*

(52) In accordance with Articles 3(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 review investigation period. 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 forego the customs duties, which constitutes a financial contribution within the meaning of Article 3(1)(a)(ii) of the basic Regulation.

(53) In light of the above, it is considered appropriate to assess the benefit under the DEPBS as being the sum of the credits earned on all export transactions made under this scheme during the RIP.

(54) Where justified claims were made, fees necessarily incurred to obtain the subsidy were deducted from the credits so established to arrive at the subsidy amounts as numerator, pursuant to Article 7(1)(a) of the basic Regulation.

(55) In accordance with Article 7(2) of the basic Regulation these subsidy amounts have 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.

(56) Based on the above, the subsidy rate established in respect of this scheme for the cooperating exporting producer using it during the RIP amounts to 6,9 %.

3.4. **Export Promotion Capital Goods scheme (EPCGS)**

(a) *Legal basis*

(57) The detailed description of EPCGS is contained in Chapter 5 of FTP 04-09 and FTP 09-14 as well as in Chapter 5 of HOP I 04-09 and HOP I 09-14.

(b) *Eligibility*

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

(c) *Practical implementation*

(59) Under the condition of an export obligation, a company is allowed to import capital goods (new and 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. 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. Under FTP 09-14 the capital goods can be imported with 0 % duty rate under EPCGS but in such case the time period for fulfilment of the export obligation is shorter.

(60) The EPCGS licence holder can also source the capital goods indigenously. In such case, the indigenous manufacturer of capital goods may avail himself 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.

(61) It was found that both cooperating exporting producers used this scheme during the RIP.

(d) *Disclosure comments*

(62) Upon disclosure the GOI contested the countervailability of EPCGS. In particular, it claimed that EPCGS subsidies with regard to the purchase of capital goods where the

export obligation was already fulfilled before the RIP, should not anymore be treated as contingent upon export performance. One exporting producer which was found to have received EPCGS subsidies claimed that these subsidies should not have been taken into account as they would not have been used for purchasing capital goods used for the production of the product concerned.

(e) *Conclusion on EPCGS*

(63) The EPCGS provides subsidies within the meaning of Article 3(1)(a)(ii) and Article 3(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 exporter, because the duties saved upon importation improve the company's liquidity.

(64) The claim that EPCGS subsidies with regard to the purchase of capital goods where the export obligation was already fulfilled before the RIP would not anymore be contingent upon export performance has to be rejected. Indeed, it is not contested that EPCGS is contingent in law upon export performance, since such EPCGS licences cannot be obtained without a commitment to export. Therefore it is deemed to be specific and countervailable under Article 4(4), first subparagraph, point (a) of the basic Regulation. The moment in time where the export obligation would actually be fulfilled is irrelevant in that respect. As concerns the issue as to whether or not the capital goods are used for the production of the product concerned, according to Chapter 5.2 of FTP 09-14, the EPCGS allows imports of capital goods for pre production, production and post production (including complete knock-down (CKD)/semi knock-down (SKD) thereof as well as computer software systems). It is therefore clear that also goods not used for the production of the product concerned can benefit from EPCGS. In addition, it was established that the export obligation under EPCGS was fulfilled using exports of the product concerned. The claim is therefore rejected.

(65) EPCGS cannot be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 3(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.

(f) *Calculation of the subsidy amount*

(66) 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 the industry concerned. Interests were added to this amount in order to reflect the full value of the benefit over time. The commercial interest rate for local currency loans during the review investigation period in India was considered appropriate for this purpose.

(67) 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.

(68) The subsidy rate established in respect of this scheme for the cooperating exporting producers during the RIP amounts to 0,1 % — 0,5 %.

3.5. **Focus Market Scheme (FMS)**

(a) *Legal basis*

(69) The detailed description of FMS is contained in paragraphs 3.9.1 to 3.9.2.2 of FTP 04-09 and paragraphs 3.14.1 to 3.14.3 of FTP 09-14 and in paragraphs 3.20 to 3.20.3 of HOP I 04-09 and paragraphs 3.8 to 3.8.2 of HOP I 09-14.

(b) *Eligibility*

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

(c) *Practical implementation*

(71) Under this scheme exports of all products to countries notified under Appendix 37(C) of HOP I 04-09 and HOP I 09-14 are entitled to duty credit equivalent to 2,5 % of the FOB value of products exported under this scheme. Certain type of export activities are excluded from the scheme, e.g. exports of imported goods or transhipped goods, deemed exports, service exports and export turnover of units operating under special economic zones/export operating units. Also excluded from the scheme are certain types of products, e.g. diamonds, precious metals, ores, cereals, sugar and petroleum products.

(72) The duty credits under FMS are freely transferable and valid for a period of 24 months from the date of issue of the relevant credit entitlement certificate. They can be used for payment of custom duties on subsequent imports of any inputs or goods including capital goods.

(73) The credit entitlement certificate is issued from the port from which the exports have been made and after realisation of exports or shipment of goods. As long as the applicant provides to the authorities copies of all relevant export documentation (e.g. export order, invoices, shipping bills, bank realisation certificates), the GOI has no discretion over the granting of the duty credits.

(d) *Disclosure comments*

(74) After disclosure the GOI submitted that until the credit entitlement certificate is sold on the market, it would confer no benefit whatsoever to the recipient and, therefore, it would not be countervailable. It was claimed that FMS duty credits would not be countervailable when they are used for payment of customs duty on the imported goods which are used as inputs for the production of exported goods. The cooperating exporting producer which had availed benefits under FMS argued that the scheme is geographically related to other countries and, therefore, cannot be countervailed by the Union.

(e) *Conclusion on FMS*

(75) The FMS provides subsidies within the meaning of Article 3(1)(a)(ii) and Article 3(2) of the basic Regulation. A FMS duty 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, regardless as to whether the credit entitlement certificate is used for offsetting import duties or sold on the market, the FMS duty credit confers a benefit upon the exporter, because it improves its liquidity.

(76) Furthermore, FMS is contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 4(4), first subparagraph, point (a) of the basic Regulation. The fact that Union countries are not covered under FMS does not contradict either the practical implementations of the scheme nor the way the FMS benefit is used, as stated under recitals 72 to 74. Therefore, this claim had to be rejected.

(77) 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, point (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. 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 Annex I, point (i), and Annexes II and III to the basic Regulation. An exporter is eligible for FMS 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 FMS. Moreover, an exporter can use FMS duty credits in order to import capital goods although capital goods are not covered by the scope of permissible duty drawback systems, as set out in Annex I, point (i), to the basic Regulation, because they are not consumed in the production of the exported products.

(f) *Calculation of the subsidy amount*

(78) The amount of countervailable subsidies was calculated in terms of the benefit conferred on the recipient, which is found to exist during the RIP as booked by the cooperating exporting producer using the scheme on an accrual basis as income at the stage of export transaction. In accordance with Article 7(2) and 7(3) of the basic Regulation this subsidy amount (nominator) 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.

(79) The subsidy rate established with regard to this scheme during the RIP for the cooperating exporting producer using the scheme amounts to < 0,1 %.

3.6. **Duty Free Import Authorisation (DFIA)**

(80) In the course of the investigation it was found that the cooperating Indian producers did not obtain any benefits under DFIA during the RIP. It was therefore not necessary to further analyse this scheme in this investigation.

3.7. **Export Oriented Units (EOU)/Export Processing Zones (EPZ)/Special Economic Zones (SEZ)**

(81) In the course of the investigation it was found that the cooperating Indian producers did not obtain any benefits under EOU/EPZ/SEZ during the RIP. It was therefore not necessary to further analyse these schemes in this investigation.

3.8. **Export Credit Scheme (ECS)**

(a) *Legal basis*

(82) The details of the scheme are set by in Master Circular on Rupee/Foreign Currency Export Credit & Customer Services to Exporters DBOD No DIR.(Exp). BC 07/04.02.02/2009-10 of the RBI, which is addressed to all commercial banks in India.

(b) *Eligibility*

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

(c) *Practical implementation*

(84) 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.

(85) 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 set purely under market conditions. The difference in rates might decrease for companies with good credit ratings. In fact, high rating companies might be in a position to obtain export credits and cash credits at the same conditions.

(d) *Conclusion on ECS*

(86) The preferential interest rates of an ECS credit set by the RBI Master Circular mentioned in recital 85 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 3(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.

(87) 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 3(1)(a)(iv) of the basic Regulation. In this context, it should be noted that neither Article 3(1)(a)(iv) of the basic Regulation nor the 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 3(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 2(b) 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, within the meaning of the second indent of Article 3(1)(a)(iv) of the basic Regulation, 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 3(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 3(1)(a)(iv) of the basic Regulation. 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 4(4)(a) of the basic Regulation.

(e) *Calculation of the subsidy amount*

(88) 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 interest rate that would have been payable for ordinary commercial credits used by the sole cooperating exporting producer using the scheme. This subsidy amount (nominator) 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.

(89) The subsidy rate established with regard to this scheme for the RIP for the cooperating exporting producer using the scheme was negligible.

3.9. **Income Tax Exemption Scheme (ITES)**

(90) In the course of the investigation it was found that the cooperating Indian producers did not obtain any benefits under ITES during the RIP. It was therefore not necessary to further analyse this scheme in this investigation.

3.10. **Punjab Industrial Incentive Scheme**

(91) In the course of the investigation it was found that the cooperating Indian producers did not obtain any benefits under the Punjab Industrial Incentive Scheme during the RIP. It was therefore not necessary to further analyse this scheme in this investigation.

3.11. **Gujarat Industrial Incentive Scheme**

(92) In the course of the investigation it was found that the cooperating Indian producers did not obtain any benefits under the Gujarat Industrial Incentive Scheme during the RIP. It was therefore not necessary to further analyse this scheme in this investigation.

3.12. **Amount of countervailable subsidies**

(93) The amount of countervailable subsidies determined in accordance with the provisions of the basic Regulation, expressed *ad valorem*, for the investigated exporting producers range between 7,5 % and 12,4 %. These amounts of subsidisation exceed the *de minimis* threshold mentioned under Article 14(5) of the basic Regulation.

(94) It is therefore considered that, pursuant to Article 18 of the basic Regulation, subsidisation continued during the RIP.

3.13. **Conclusions on the likelihood of continuation or recurrence of subsidisation**

(95) In accordance with Article 18(2) of the basic Regulation, it was examined whether the expiry of the measures in force would be likely to lead to a continuation or recurrence of subsidisation.

(96) In this respect, it is recalled that only two known exporting producers of the product concerned cooperated. From the available Indian and Union statistical information the share of these exporters in the total Union sales of Indian exporting producers of the product concerned cannot be established. However, those statistical data would suggest that there are other producers which could sell the product concerned to the Union.

(97) It was established that during the RIP, the cooperating exporting producers continued to benefit from countervailable subsidisation by the Indian government. The subsidy schemes analysed above give recurring benefits and there are no indications that these programmes would be phased out or modified in the foreseeable future or that the cooperating exporting producers would stop obtaining benefits under these schemes.

(98) There is no information available which would indicate that the other exporting producers would not continue to benefit from the subsidy schemes analysed above. It is therefore concluded that the subsidisation at the country-wide level continued.

(99) In view of the findings described above it is concluded that subsidisation continued during the RIP and would be likely to continue in the future.

4. **UNION PRODUCTION**

(100) During the review investigation period, the like product was manufactured in the Union by the following Union producers: Sandoz, DSM, Deretil, ACS Dobfar SpA and Antibioticos S.A.. The applicants requested an expiry review of the anti-subsidy measures in force. All available information concerning Union producers, including information provided in the request and data collected from Union producers before and after the initiation of the review investigation, was used in order to establish the total Union production. On that basis, the estimated total Union production during the RIP was 7 093 tonnes.

(101) The Union producers accounting for the total Union production constitute the Union industry within the meaning of Article 9(1) of the basic Regulation and are hereafter referred to as the 'Union industry'. Since the like product produced by the three Union producers who submitted a questionnaire response during the RIP represented up to 95 % of the total Union production of the like product, these producers' data are considered to be representative of the entire Union industry.

5. **SITUATION ON THE UNION MARKET**

5.1. **Preliminary remark**

(102) To analyse the import volumes and price trends, the Eurostat import statistics for TARIC codes 2941 10 10 10, 2941 10 20 10 and 2941 90 00 30 for the years 2007 and 2008 and TARIC codes 2941 10 00 10 and 2941 90 00 30 for the year 2009 and onwards, as applicable during the period considered, were used.

(103) Taking into account the number of Union producers and the fact that one Union producer was producing the like product under a tolling agreement with another one, the information concerning the Union industry, where necessary, has been shown in indices or in ranges only, in order to protect confidentiality of data.

5.2. **Consumption in the Union market**

(104) The like product is sold by the Union industry to unrelated customers and sold/transferred to related companies for further downstream processing.

(105) Sales to unrelated entities were considered to form the 'free market'. Sales/transfers to related entities were considered as 'captive use'.

(106) In calculating the apparent Union consumption of the product concerned and the like product, the Commission added:

— the volume of total imports of the product under investigation into the Union as reported by Eurostat,

— the volume of sales of the like product in the Union produced by the Union industry,

— the volume of captive use of the like product by the Union industry, and

— the estimated sales of the like product in the Union by other known Union producers.

(107) It should be noted that, in order to avoid double-counting of sales volumes, the sales made under a tolling agreement between two Union producers were excluded from the above calculation.

(108) On the above basis, the Union consumption of the product concerned and the like product gradually increased by 28 % during the period considered:

Consumption (in tonnes)	2007	2008	2009	RIP
Product concerned and like product	6 601	7 021	7 783	8 423
Index	100	106	118	128

5.3. **Imports from India**

5.3.1. *Volume, market share and prices of imports from India*

Imports (in tonnes)	2007	2008	2009	RIP
Product concerned imports for free circulation	32,6	16,1	1,9	1,4
Index	100	49	6	4
Product concerned imports under inward processing regime	45,5	3,7	15,5	14,5
Index	100	8	34	32

(109) According to Eurostat data, the volume of imports of the product concerned from India for free circulation has decreased by 96 % during the period considered. A considerable drop by 51 percentage points has been observed in 2008 then followed by a further decrease by 43 percentage points in 2009 and two percentage points in the RIP.

(110) A slightly different trend could be observed for imports under inward processing regime which are free from countervailing and custom duties. After an initial fall in imports by 92 % between 2007 and 2008, imports increased in 2009 and remained relatively stable in the RIP.

Average import price (EUR/tonne)	2007	2008	2009	RIP
Product concerned imports for free circulation	25 863	28 934	34 758	19 200
Index	100	112	134	74
Product concerned imports under inward processing regime	35 616	37 443	30 894	30 044
Index	100	105	87	84

(111) The average import price of the product concerned from India for free circulation increased by 34 % between 2007 and 2009, then sharply dropped in the RIP, to reach a level 26 % lower than in 2007. Also prices of imports under inward processing regime followed a downward trend and decreased by 16 % over the period considered. The different price trends between the two import regimes can be explained by the different type of the product concerned that was mainly imported, i.e. cefalexin, which is comparatively more expensive than other types.

Market share of imports from India	2007	2008	2009	RIP
Product concerned, imports for free circulation	0,5 %	0,2 %	0,0 %	0,0 %
Index	100	46	5	3
Product concerned imports under inward processing regime	0,7 %	0,1 %	0,2 %	0,2 %
Index	100	8	29	25

(112) The market share of imports from India for free circulation or made under inward processing regime was very low over the period considered and decreased in both cases.

(113) One Union producer indicated that Indian imports, which were based on Eurostat data, had been wrongly estimated as Indian export statistics show higher export volumes than those stated by Eurostat. In this regard, it should be noted that it is the Commission's standard practice to use Eurostat as a basis for import statistics. It is further noted that Indian export statistics do not indicate the final destination of the exports and whether they will actually enter the Union. This claim had therefore to be rejected.

5.3.2. *Price undercutting*

(114) In view of the extremely low quantity of imports from India that entered the Union market for free circulation, no meaningful conclusion could be drawn in regard to price undercutting. In regard to the imports under the inward processing regime, the undercutting margin found was negative. However, these imports amounted to less than 10 tonnes and concerned only one product type (cefalexin), which is also the most expensive and less represented product type on the market. Therefore, it was concluded that the transaction data concerning imports under the inward processing regime were not representative for the purpose of a meaningful undercutting calculation and not suitable for further analysis.

(115) One Union producer indicated that a segregated analysis of the two categories of imports, i.e. for free circulation and under the inward processing regime, was not in line with the approach of the previous review proceeding and was also contrary to consistent Commission practice.

(116) In this regard, it should be noted that as concluded in recital 115, quantities imported either under the inward processing regime or for free circulation were not sufficient to allow meaningful conclusions to be drawn. Considering the low level of the aggregated volume, this conclusion equally applies to that volume.

5.4. **Imports from other third countries**

Third country imports	2007	2008	2009	RIP
Volume (tonnes)				
Singapore	1 557,7	1 448,2	2 030,5	2 425,3
Index	100	93	130	156
China	487,6	622,5	1 176,9	1 234,7
Index	100	128	241	253
Oman	373,4	438,5	301,7	287,9
Index	100	117	81	77
Other third countries	67,8	327,5	74,2	73,2
Index	100	483	109	108
Total	2 486,5	2 836,7	3 583,3	4 021,1
Index	100	114	144	162

(117) Imports of the product under review from countries other than India increased by 62 % during the period considered, with market share surging by more than 10 percentage points from 37,6 % to 47,7 %, which coincided with the increased consumption on the Union market. Among exporting countries, Singapore, China and Oman have been the major suppliers on the Union market.

Average import price per tonne (EUR)	2007	2008	2009	RIP
Singapore	44 218	36 590	27 007	22 485
Index	100	83	61	51
China	29 515	26 622	21 224	20 683
Index	100	90	72	70
Oman	29 875	27 665	23 440	22 597
Index	100	93	78	76
Other third countries	38 324	35 987	45 628	46 938
Index	100	94	119	122
Total	39 020	32 953	25 193	22 385
Index	100	84	65	57

(118) Average import prices from third countries have decreased significantly by 43 % over the period considered. Although the prices of the main exporting countries (Singapore, China and Oman) undercut the Union prices by around 20 % in the RIP on a product per product basis and the import volumes can be regarded as significant, such low priced imports did apparently not affect the profitability of the Union industry.

(119) One Union producer claimed that the analysis of the average import price trends should have taken account of the various product types. In this regard, it should be noted that, in line with standard practice, the analysis of, inter alia, price trends has to be made on the basis of the product concerned regardless of the share of each product type. It is further noted that, in this case, no conclusion was drawn from the trend in import prices from third countries over the period considered. The above claim therefore had to be rejected.

(120) All Union producers claimed that imports from, inter alia, China and Oman are mainly of amoxicillin trihydrate for veterinary use and this should have been taken into account in the analysis of the above prices. In this regard, it is noted that the product under review covers antibiotics for both human and veterinary consumption. Furthermore, the information provided in support of this allegation was not substantiated. Therefore, the above claim had to be rejected.

(121) One Union producer questioned the basis on which price comparisons for amoxicillin trihydrate and ampicillin trihydrate were made in the RIP given the fact that Eurostat data does not distinguish between these two product types. In this regard, as it was found that the Union industry's prices of these two product types were similar, it was not unreasonable to make an aggregate price comparison.

(122) As far as imports from Singapore are concerned, all Union producers claimed that they were made at transfer price between related parties. In these circumstances, to include these imports would distort the average prices from other third countries. It is noted that, if these imports were to be excluded from the price comparison, the above mentioned finding with regard to the undercutting margin would not change significantly and the conclusion that the low priced imports did not affect the profitability of the Union industry would remain valid.

5.5. **Economic situation of the Union industry**

(123) For the following economic indicators relating to the Union industry, it was found that a meaningful analysis and evaluation had to focus on the situation prevailing on the free market: sales volume and sales prices on the Union market, market share and profitability. Where possible and justified, these findings were subsequently compared with the data for the captive market, in order to provide a full picture of the situation of the Union industry.

(124) As regards other economic indicators, however, it was found on the basis of the investigation, that they could reasonably be examined only by referring to the whole activity. Indeed, production (for both the captive and the free market), capacity, capacity utilisation, inventories, investments, stocks, employment, productivity, wages, growth, ability to raise capital depend upon the whole activity, whether the production is captive or sold on the free market.

(125) Following comments received from one Union producer on the final disclosure of the facts and considerations on the basis of which it was proposed to terminate the proceeding, some of the economic indicators in the following recitals have been corrected. These changes were not of a nature to change the conclusion with regard to the situation of the Union industry.

5.5.1. *Production, capacity and capacity utilisation*

	2007	2008	2009	RIP
Index capacity	100	100	104	107
Index production	100	95	96	98
Index capacity utilisation	100	95	92	91

(126) The Union industry's production capacity was stable between 2007 and 2008 before increasing by 4 % from 2008 to 2009 and by a further 3 percentage points in the RIP.

(127) However, the production volume did not follow this increase due to unforeseen technical difficulties of one Union producer in 2008, when production volume dropped by 5 % and recovered gradually until the RIP.

(128) As a result of the increase in production capacity combined with a small fall in production, the capacity utilisation rate continually dropped in the period considered and reached a level in the RIP that was 9 % below that in 2007.

5.5.2. *Sales volume, sales price, market share*

5.5.2.1. Free market sales

Sales to unrelated parties in the Union	2007	2008	2009	RIP
Index volume	100	97	93	99
Index average sales price	100	121	104	104
Index market share	100	90	79	78

(129) The Union industry's sales volume to unrelated parties in the RIP was slightly below the level of 2007, dropping by 7 % in 2009 and then increasing by six percentage points during the RIP.

(130) The average sales price of the Union industry on the Union market increased by 4 % over the period considered. Prices first increased sharply by 21 % in 2008 before dropping by 17 percentage points in 2009 and remaining stable in the RIP.

(131) One Union producer claimed that the price impact of imports from India on the Union industry was not correctly assessed. In this regard, it is first of all noted that no undercutting was found as mentioned in recital 115. Additionally, as indicated in the preceding recital, Union industry prices increased by 4 % over the period considered. In these circumstances it is considered that imports from India did not have any negative effect on the situation of the Union industry.

(132) Decreasing sales on the Union market to unrelated parties were reflected in the development of the market share which dropped by 22 percentage points in the RIP compared to 2007.

5.5.2.2. Captive market

Captive market in the Union	2007	2008	2009	RIP
Index volume	100	115	122	128
Index average sales price of captive sales	100	100	111	110
Index market share	100	109	104	100

(133) While Union industry's sales volume to unrelated parties was decreasing despite increasing demand during the period considered, captive sales increased by 28 %.

(134) The market share of the captive market of the Union industry increased by 9 percentage points in 2008 before decreasing progressively to the 2007 level.

5.5.2.3. Market share of the Union industry/Growth

Sales to unrelated parties, captive sales and captive use	2007	2008	2009	RIP
Index volume	100	107	108	114
Index market share	100	100	92	90

(135) Market share of the Union industry as a whole was measured by adding free and captive market volumes in the Union. Although this volume increased over the period considered by 14 %, the market share of the Union industry decreased by 10 percentage points as market consumption increased by 28 % over the same period. This indicates that the Union industry did not benefit from the growth in consumption.

5.5.3. *Inventories*

Stocks	2007	2008	2009	RIP
Index volume	100	74	63	46

(136) The stock level dropped by 54 % from 2007 to the end of the RIP, which is mainly explained by the increased captive demand.

5.5.4. *Profitability*

5.5.4.1. Profitability on the free market

Profitability on the free market	2007	2008	2009	RIP
Index	100	447	218	253

(137) The profitability of Union industry's sales to unrelated parties on the Union market improved significantly by 153 percentage points during the RIP. This development can be explained by an average increase in prices of 2 % and a decrease in production cost. As compared to the profit margin achieved in the review investigation period of the last expiry investigation, the profit has increased by more than 400 percentage points.

(138) It should be noted that, with the exception of year 2007, Union industry profit level was above the target profit margin established in the previous expiry review investigation; i.e. 10 % (target profit), over the period considered.

(139) Two Union producers claimed that profitability had not been assessed properly as the profit achieved by related upstream suppliers were deducted from their costs. In this regard, it is consistent practice to deduct the profits achieved by related parties involved in the production of raw materials. In these circumstances, this argument had to be rejected.

5.5.4.2. Profitability of captive sales

Profitability of captive sales	2007	2008	2009	RIP
Index	100	55	153	151

(140) The profitability of Union industry's captive sales on the Union market improved by 51 % during the RIP. This development is largely explained by an average increase in prices of 10 %. However, since this price trend is based on transfer prices, no meaningful conclusion should be drawn from the above.

5.5.5. *Investments, return on investment, cash flow and the ability to raise capital*

	2007	2008	2009	RIP
Index investments	100	246	342	129
Index return on investment	100	233	52	62
Index cash flow	100	236	83	107

(141) Investments increased during the period considered. The investments related to increases in production capacity with the aim to deliver both the captive and the free markets.

(142) The investigation also showed that the return on investments, i.e. pre-tax net profit of the product expressed as a percentage of the net book value of fixed assets allocated to the product, decreased during the period considered.

(143) Cash flow increased by 7 % over the period considered as the decrease in profitability could be compensated by a decrease in inventory in the second half of the period considered.

5.5.6. *Employment, productivity and wages*

	2007	2008	2009	RIP
Index employment	100	106	111	109
Index productivity	100	89	87	89
Index wages	100	104	106	106

(144) Employment increased by 9 % during the period considered in line with the investments in production capacity, while average wages increased by only 6 %. Productivity decreased by 11 % overall following the unexpected technical difficulties faced by one Union producer.

5.5.7. *Magnitude of the amount of countervailable subsidies and recovery from past subsidisation*

(145) Given the volume of the subsidised imports from India, the impact of the actual amount of subsidisation cannot be considered to be significant.

(146) The situation of the Union industry improved significantly since the last review investigation and in the period considered. It can therefore be assessed that the Union industry managed to recover fully from past subsidisation.

5.6. **Conclusion on the economic situation of the Union industry**

(147) Between 2007 and the review investigation period, the volume of subsidised imports of the product concerned was negligible. With the exception of certain injury indicators such as market share, production volume and return on investment, most injury indicators including profitability (+ 153 %), sales price (+ 4 %), sales volume (+ 14 %), employment (+ 10 %) and investments (+ 29 %) developed positively during the period considered. The profit levels achieved in the Union market were, with the exception of year 2007, above the target profit margin established in the previous expiry review investigation; i.e. 10 %. The positive trend shown by the vast majority of indicators is mainly due to the reliability of the Union industry and the long standing customer relationship that it has developed over the past years, but also to the price level that it managed to achieve on the market.

(148) One Union producer claimed that the analysis of the price and profit trends should take account of the shortages in raw materials in 2007 and 2008. It was claimed that these shortages led to exceptional increases in prices and profits in 2008 and to a limited extent in 2009. In this regard, as can be seen in Tables 5.5.2.1 and 5.5.4.1, the exceptional price and profit levels only pertain to 2008. The profit levels achieved in 2009 and the RIP appear no longer to be affected by the raw material shortages. The conclusion in recital 139, that profits throughout the period considered were above the target profit, remain valid.

(149) Regarding captive sales, the option for the Union industry to sell part of its production on the captive market ensured high levels of capacity utilisation and enabled the Union industry to dilute fixed costs and to remain cost competitive.

(150) In conclusion, in view of the positive development of the indicators pertaining to the Union industry, it is considered that the Union industry did not suffer material injury during the period considered.

5.7. **Effect of subsidised imports**

(151) Given the low volumes of the product concerned that were imported in the Union over the period considered, the subsidised imports did not adversely affect the performance of the Union industry. Indeed, as stated above, it is considered that the industry did not suffer material injury during the period considered.

6. **LIKELIHOOD OF RECURRENCE OF INJURY**

(152) It is recalled that the Union industry did not suffer material injury during the period considered as most injury indicators showed positive trends over this period. In accordance with Article 18(2) of the basic Regulation, it was therefore examined whether the expiry of the measures in force would be likely to result in a recurrence of injury.

6.1. **Spare capacity in the country concerned**

(153) The investigation showed that the capacity utilisation of the three cooperating Indian producers had reached very high levels in the RIP. On that basis, spare capacities, which could be directed to the Union market in the absence of measures, would appear to be limited.

(154) After disclosure it was claimed by several Union producers that the spare capacities in India were high and that the capacity utilisation rate of the cooperating Indian exporting producers was not representative for the Indian sector as a whole. One Union producer even claimed that the spare capacities of seven leading Indian exporters would represent volumes largely above the Union free market consumption.

(155) In this respect it should first be underlined that the capacity utilisation rate of the three cooperating exporting producers was a weighted average calculation based on verified data and specifically relating to the product concerned. Moreover, the three cooperating exporting producers concerned were large producers and among the seven Indian exporters referred to, by the claimant, as 'leading'. On the contrary, the data presented by the Union producers on these seven Indian producers' spare capacity were mainly based on 'market knowledge' and, although this was specifically requested, they could not be substantiated by solid factual evidence. Therefore, that information had to be disregarded and it was confirmed that, based on the verified data on the file, Indian spare capacities appear to be limited.

6.2. **Export behaviour of the Indian exporting producers**

(156) On the basis of data from Indian official statistics, it was established that the prices of export sales to India's ten main export markets were around 20 % on average lower than the prices of the Union industry sales on the Union market in the RIP. These Indian export prices were in line with the prices of the other main players on the Union market as set out in recital 119. It was found that low priced imports during the period considered from these other countries did not have a negative effect on the performance of the Union industry. In these circumstances, it is considered that, should measures be allowed to lapse, Indian export prices would likely not be harmful to the Union industry as it is already facing competition from other exporting countries with the same pricing behaviour without suffering any material injury.

(157) Two Union producers also submitted that, if measures were to lapse, Indian producers would redirect exports currently sold on other markets to the Union on account of the attractiveness of the Union market in terms of prices. First of all it is noted that, if Indian producers were to re-direct their exports to the Union, they would enter in competition with other third countries that are already exporting significant quantities to the Union. Furthermore, as mentioned in recital 119, it has been concluded that imports from third countries, at prices similar to Indian export prices to other markets, have not affected the performance of the Union industry. On this basis, it is considered that if Indian export quantities to the Union increase at prices similar to those on other export markets, the Union industry would not suffer any material injury.

(158) Two Union producers also claimed that the fact that there were import bans in place in the US against certain antibiotic production plants in India would lead to the re-direction of additional quantities to the Union market. However, in this regard, the conclusions in the preceding recital on the possible re-direction of exports remain valid.

6.3. **Captive market**

(159) While the captive market accounted for 50 to 60 % of the free and captive markets of the Union industry in the period considered, consumption in the Union industry captive market increased by more than 20 % over the same period. Considering the characteristics and size of this market, it is believed that, should measures be allowed to lapse, the captive market would not be affected by the likely increase in Indian exports and would therefore continue to ensure high capacity utilisation rates and economies of scale for the Union industry.

6.4. **Conclusion on the likelihood of recurrence of injury**

(160) On the basis of the above, it was concluded that, should measures be allowed to lapse, subsidised imports from India are not likely to cause material injury to the Union industry as most injury indicators developed positively over the period considered in spite of significant and increasing imports from other countries that were priced similarly to Indian exports to other countries. It was therefore concluded that material injury was not likely to recur, should measures be allowed to lapse.

7. **UNION INTEREST**

(161) One Union producer claimed that a Union interest test analysis should have been carried out. In this regard, as it has been concluded that there is no likelihood of recurrence of injury, a Union interest test serves no purpose. In these circumstances, this claim was rejected.

8. **SPECIAL MONITORING**

(162) In view of the finding on the likelihood of continuation of subsidisation as mentioned in recital 100 and the impact it might have on future trade flows, the Commission will monitor the import volumes of the product concerned. Should there be a significant change in these quantities, the Commission will give consideration to what action, if any, is to be taken.

(163) The monitoring will be limited to a period of 2 years after the publication of this Regulation.

9. **TERMINATION**

(164) In the light of the results of this review investigation, it is considered appropriate to repeal the countervailing duty on imports of certain broad spectrum antibiotics originating in India.

(165) Interested parties were informed of the essential facts and considerations on the basis of which it was proposed to terminate the investigation and were given the opportunity to comment. The comments received were addressed under the relevant sections above and were not of a nature to change the above conclusions.

HAS ADOPTED THIS REGULATION:

Article 1

The expiry review of the countervailing measures applicable to imports of certain broad spectrum antibiotics, currently falling within CN codes ex 2941 10 00 and ex 2941 90 00 originating in India, initiated pursuant to Article 18(2) of Regulation (EC) No 597/2009, is hereby terminated and the measures in force on imports originating in India are repealed.

Article 2

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, 4 August 2011.

For the Council
The President
M. DOWGIELEWICZ