COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL REGULATION (EEC)

imposing a definitive anti-dumping duty

on imports of certain magnetic disks (3.5" microdisks)

originating in Japan, Taiwan and the People's Republic of China,

and collecting definitively the provisional duty imposed

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. The Commission, by Regulation (EEC) No 920/93[1] of 15 April 1993 imposed a provisional duty on imports of certain magnetic disks (3.5" microdisks) originating in Japan, Taiwan and the People's Republic of China. The Council, by Regulation (EEC) No 2206/93[2] of 5 August 1993 extended this duty for a period not exceeding two months.

2. Following the adoption of the provisional measures, the interested parties, who so requested, were heard by the Commission and made written submissions. Upon request, parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive duties and the definitive collection of amounts secured by way of a provisional duty. They were also granted a period within which to make representations subsequent to the disclosure.

3. The oral and written comments submitted by the parties were considered and, where appropriate, the Commission's findings were modified to take account of them.

4. The facts, as finally established, show dumping for almost all the exporters concerned as well as injury to the Community industry caused thereby, especially demonstrated by sales suppression, price depression and a resulting lack of profitability.

5. In these circumstances, the Commission considers that it is in the Community interest to adopt definitive measures intended to eliminate the injurious effect of the dumped imports concerned. Consequently, in accordance with Article 12 of Council Regulation (EEC) No 2423/88[3], the Commission, after consultation within the Advisory Committee, proposes the imposition of definitive anti-dumping duties on imports of certain magnetic disks (3.5" microdisks) originating in Japan, Taiwan and the People's Republic of China.

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(1) OJ No L 95, 21.4.1993, p. 5.
(2) OJ No L 196, 5.8.1993, p. 47.
(3) OJ No L 209, 2.8.1988, p. 1.

6. In view of the dumping margins established, and the seriousness of the injury caused to the Community industry, it is also proposed that the amounts secured by way of provisional anti-dumping duty be definitively collected to the extent of the amount of the duty definitively imposed.

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and collecting definitively the provisional duty imposed

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community[1], and in particular Article 12 thereof,

Having regard to the proposal submitted by the Commission after consultation within the Advisory Committee as provided for under the above Regulation,

Whereas:

A. PROVISIONAL MEASURES

(1) The Commission, by Regulation (EEC) No 920/93[2] (hereinafter "the provisional Regulation"), imposed a provisional anti-dumping duty on imports into the Community of certain magnetic disks (hereinafter referred to as 3.5" microdisks) originating in Japan, Taiwan and the People's Republic of China (hereinafter "China"), and falling within CN Code ex 85 23 20 90. The duty was extended for a maximum period of two months by Council Regulation (EEC) No 2206/93[3].

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(1) OJ No L 209, 2.8.1988, p. 1.
(2) OJ No L 95, 21.4.1993, p. 5.
(3) OJ No L 196, 5.8.1993, p. 47.

B. SUBSEQUENT PROCEDURE

(2) Subsequent to the imposition of the provisional anti-dumping duty, the interested parties who so requested were granted an opportunity to be heard by the Commission. Certain of those parties also presented written submissions making known their views on the findings.

(3) Two importers which had not cooperated in the investigation made written representations to the Commission following the introduction of the provisional anti-dumping duty. One of them requested and was granted a hearing.

(4) Upon request, parties were informed in writing of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive duties and the definitive collection of amounts secured by way of provisional duty. They were also granted a reasonable period within which to make representations subsequent to the disclosure.

(5) The oral and written comments presented by the parties were considered, and, where appropriate, the Commission's findings were modified to take account of them.

(6) Because of the volume and complexity of the data examined, the investigation could not be concluded within the time limit provided for in Article 7(9)(a) of Regulation (EEC) No 2423/88 (hereinafter referred to as "the Basic Regulation").

C. PRODUCT UNDER CONSIDERATION/LIKE PRODUCT

(7) As no new arguments have been presented regarding the product under consideration and the like product, the Council adopts the findings of the Commission as set out in recitals (7) to (12) of the provisional Regulation.

D. INDIVIDUAL TREATMENT OF CHINESE EXPORTERS

(8) Several producers in China reiterated their request that the Commission make individual company findings for each of them, without, however, presenting any evidence additional to that submitted prior to the provisional findings and referred to at recital (13) of the provisional Regulation.

The Commission recalls, in this respect, that individual treatment is not a requirement of the Basic Regulation. Indeed, the grant of individual treatment to some of those producers may affect or even distort the outcome of the calculation of the country-wide anti-dumping duty. In addition, it is in practice extremely difficult to establish in the case of a country such as China whether a company really enjoys, both in point of law and in fact, independence from the State and in particular whether a company has permanent independence where it appears to enjoy independence at a given point in time.

Finally, since the grant of individual treatment may cause inappropriate levels of duty to be imposed and gives rise to an opportunity for the State to circumvent anti-dumping measures by channelling through the exporter with the lowest duty, the Commission has come to the conclusion that departures from the general rule, whereby a single anti-dumping duty is established for State-trading countries, should only be made where the Commission is completely satisfied that the effectiveness of the measures is not undermined.

In the provisional Regulation, the facts established for Hanny Magnetics (Zuhai) Ltd. during the Commission's investigation demonstrated that this company is free of government intrusion in the conduct of its business, and individual treatment was granted. In the light of the principles of legitimate expectations and legal certainty the Commission considers that the individual treatment granted to this company should be maintained. Furthermore, given the small difference found in the dumping margin for this producer and that applicable to the other producers, the risk of circumvention is minimal.

The findings at the said recital (13) are thus maintained.

(9) The Council confirms the Commission's findings.

E. DUMPING

1. Normal value

(10) For the purpose of the definitive findings, normal value was, in general, established on the basis of the same methods as those used in the provisional determination of dumping, after taking into consideration new facts and arguments presented by the parties.

(11) Following publication of the provisional Regulation, one Taiwanese producer claimed that the normal value established should have been based on the prices of all sales of the like product on the domestic market, including sales made at a loss.

As stated in recital (18) of the provisional Regulation, normal value in Taiwan for this producer was established in accordance with Article 2(3)(a) and (4) of the Basic Regulation, on the basis of the price actually paid in the ordinary course of trade for domestic sales of the like product which were made in sufficient quantities to permit a proper comparison.

However, it was found that the majority of its domestic sales of one product type were made at a substantial loss. The Commission had, therefore, to exclude from the determination of normal value the sales of this product type, the prices of which did not permit recovery, in the normal course of trade in the investigation period, of all costs reasonably allocated.

As regards the other product type, the producer in question was able to show that its prices for sales of this product were sufficiently profitable to be considered to have been made in the ordinary course of trade over the investigation period. Accordingly, normal value for this type was established by reference to those prices.

(12) The producer in China referred to in recital (21) of the provisional Regulation argued that the normal value established on the basis of an analogue third market economy, namely Taiwan, should be adjusted to reflect the lower manufacturing cost structure in China.

The Commission cannot accept this argument. To make allowances for alleged differences in cost structures in a State-trading country would involve relying on that country's costs of production, in particular its labour, utility and transport costs, property charges, and other inputs, which are not determined by market forces and would, therefore, not permit a proper comparison.

(13) The Council confirms these findings and those set out at recitals (15) to (23) of the provisional Regulation concerning normal value.

2. Export price

(14) One Taiwanese producer claimed that, in its calculation of export prices, the Commission, for reasons of equity, should have excluded export sales made to complainant Community producers.

The Commission could not, however, accept any such exclusion, as the sales in question satisfied the provisions of Article 2(8)(a) of the Basic Regulation regarding the determination of export prices. Indeed, not only is such an exclusion not provided for by the Basic Regulation, but the reliability of these prices is unaffected, in the present case, by the status of the customer involved.

The related problem of self-inflicted injury is addressed in recital (28) below.

(15) The Council confirms this view and the findings on the export price set out in recitals (24) to (28) of the provisional Regulation.

3. Comparison

(16) The Chinese producer referred to in recital (31) of the provisional Regulation claimed that the adjustment made to normal value to take account of differences in physical characteristics of the uncertified diskettes sold for export did not reflect the full value of these differences.

The Commission has examined this question. It has noted that the purchaser runs a certain risk in purchasing uncertified diskettes, and consequently, an adjustment should be made to reflect the differences in physical characteristics. However, this producer was unable to provide new evidence substantiating the additional claim. In those circumstances, the Commission considers that the adjustment provisionally made reflected fully the differences established in physical characteristics. Consequently, the claim for an additional adjustment was rejected.

(17) Several other Chinese producers and one Taiwanese producer claimed that, in the comparison of normal value on the Taiwanese market with export price, no adjustment had been made to reflect the differences in direct selling expenses for sales to OEM customers on the export market and for sales to non-OEM customers on the domestic market. In its examination of the situation of the Taiwanese producer which made domestic sales in sufficient quantities to permit a proper comparison, the Commission found no indication that there was any difference in selling expenses incurred and profit realized in different channels of sale. No adjustment in this respect, therefore, could be made.

4. Dumping margins

(18) On the basis of the modifications made to the calculations of normal value and export price, the definitive dumping margins calculated by the Commission, expressed as a percentage of the CIF value, established in accordance with the provisions of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes[4], as last amended by Regulation (EEC) No 4046/89[5], for each of the companies concerned, are as follows:

Japan	Memorex Telex Japan Ltd.	49%	China	Hanny Magnetics	
	Hitachi-Maxell Ltd.	32.8%		(Zuhai) Ltd.	35.6%
	TDK Ltd.	44.8%		Other companies	39.4%
	Sony Ltd.	60.1%			
Taiwan	CIS Technology Ltd.	19.8%			
	Megamedia Ltd.	32.7%			

(19) As far as non-cooperating producers are concerned, no comments on the conclusions reached by the Commission in recital (37) of the provisional Regulation were received. In those circumstances, the Council confirms these findings and the dumping margin for non-cooperating producers is set at the level of the highest dumping margins for each country.

F. **COMMUNITY INDUSTRY**

(20) Producers in Japan and China challenged the Commission's finding in recitals (39) to (47) of the provisional Regulation that the five complainant producers represented a major proportion of Community production of 3.5" microdisks, and could therefore be considered to be the Community industry under Article 4(5) of the Basic Regulation. They argued, in particular, that the output of the producers in the Community found to be related to the producers in the countries subject to the proceeding should have been

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(4) OJ No L 134, 31.5.1980, p. 1.
(5) OJ No L 388, 30.12.1989, p. 24.

included in total Community production when calculating whether the output of the five complainant producers constituted a major proportion of total Community production of the product in question.

In this context, the Commission recalls that it is the consistent practice of the Community institutions to accept that total Community production can only be considered to mean the output of those Community producers which are not excluded for the reasons given in first indent of the said Article 4(5). The output of producers which are excluded from the definition of "Community industry" because of their relationship to exporters should, therefore, be excluded a fortiori from total Community production, when determining whether the Community industry represents a major proportion of such production.

The rationale of Article 4(5) of the Basic Regulation is indeed that, for the determination of injury, it should not be open to producers found to be related to exporters to seek relief from unfair trading practices, since they may, through this relationship, have participated in or benefited from injurious dumping. It is only by excluding such producers, where appropriate, that the Community institutions can obtain an undistorted and objective view of the effects of the dumped imports. If this was not the case, then, in addition to contributing to the injury, producers related to exporters or otherwise benefiting from dumping would be in a position to hinder - or even block - the attempts of complainant Community producers to seek legitimate relief against the injury caused by dumped imports.

The Commission, therefore, maintains its findings at recitals (39) to (47) of the provisional Regulation, that producers in the Community related to producers in Japan should be excluded from "the Community industry" and that, on this basis, production of 3.5" microdisks by the complainant producers represented around 77% of total Community production during the investigation period.

(21) The Council confirms these findings.

G. INJURY

1. Cumulation of the effects of the dumped imports

(22) Some Japanese producers contested the Commission's findings on cumulation at recitals (50) to (52) of the provisional Regulation. However, no new arguments or facts were presented. The Council confirms the aforementioned Commission findings.

2. Prices of dumped imports

(23) One Japanese producer and producers in China queried the basis for the Commission's statement at recital (55) of the provisional Regulation that the prices of imported 3.5" microdisks had undergone, in many cases, a decrease of more than 75% between 1988 and the investigation period.

The Commission has reviewed the information available to it in respect of export price trends since 1988. Prices declined substantially, varying by company and by product type, by between 23% and 79%.

Furthermore, by comparing the prices realized at the beginning and at the end of the investigation period, price declines of 13% on average for unbranded 3.5" microdisks and 31% for branded 3.5" microdisks were found over this period.

(24) One Japanese producer claimed that in establishing price undercutting, the Commission should have taken account of the fact that its sales to an exclusive distributor on the French market by its German subsidiary were made at a different level of trade to that of the relevant Community industry sales.

Following the claim from the Japanese producer concerned, the Commission reviewed the undercutting calculations for this producer.

The producer provided no evidence, however, to show that the tasks or activities of the distributor in France were any different from those of other distributors in the Community. In those circumstances, the Commission has, for this producer, established prices to distributors and compared them with prices for sales to distributors by the Community industry. In addition, prices to other categories of customer were compared at the same level.

The result of the revised comparison of prices reveals an undercutting margin still within the range mentioned in recital (55) of the provisional Regulation.

(25) The Council confirms these findings, and those in recital (55) of the provisional Regulation.

3. Situation of the Community industry

(26) As no new arguments or information were put forward, the Council confirms the Commission's findings as set out in recitals (56) to (61) of the provisional Regulation on the situation of the Community industry, and those relating to injury at recital (62).

H. CAUSATION

(27) Two Japanese producers, on the grounds that the market share held by imports from Japan had fallen considerably over the period concerned, disputed the Commission's conclusion contained in recital (66) of the provisional Regulation, that the effects of imports from third countries not covered by the proceeding did not alter the fact that the dumped imports from Japan, Taiwan and China, taken in isolation, caused material injury to the Community industry. Those producers therefore requested that the effect of imports from Japan should not be examined cumulatively with those from the other countries concerned.

The Commission recalls that it has been the consistent practice of the Community institutions, upheld by the Court of Justice of the European Communities, to examine the effect of the dumped imports as a whole, except where the level of dumped imports from a given country is negligible or otherwise does not contribute to injury.

The Commission, in recital (54) of the provisional Regulation, acknowledged that imports into the Community of 3.5" microdisks from Japan had fallen between 1988 and the investigation period.

However, at 22%, their market share remained substantial, and was almost double that of the Community industry.

Furthermore, the dumped imports from the three countries concerned, viewed cumulatively, attained a market share of 33.8% in the investigation period. That, together with the substantial price depression arising from the price undercutting by those dumped imports, could not have failed to have a marked negative effect on the situation of the Community industry, which had only recently been established.

The Commission, therefore, maintains the findings at the said recital (66).

(28) Two Japanese producers questioned the Commission's recognition of under-utilization of capacity as an indicator of material injury at recital (57) of the provisional Regulation, when complainant Community producers were, at the same time, importing sometimes substantial quantities of the product concerned from the countries covered by the proceeding. Hence the Community industry was inflicting injury upon itself.

As pointed out in recital (43) of the provisional Regulation, imports of 3.5" microdisks by all but one of the Community producers represented only a small proportion of their sales in the investigation period. Therefore, the arguments presented by the Japanese are not supported by the facts.

It should be noted that the complainant producer which had a substantial level of imports also had a high capacity-utilization rate. No contradiction thus exists between the Commission's recognition of general capacity under-utilization and imports of 3.5" microdisks. The imports were a consequence of the fact that, due to the effects of low-priced imports from the countries concerned, the producer in question had been unable to generate the investment funds needed to develop a production capacity sufficient to meet demand in the Community. At the time, that producer had no other reasonable choice but to act in self-defense, and did not therefore inflict injury on itself.

(29) The Council confirms the Commission's findings regarding causality and the injury attributable to other factors, and those contained in recitals (64) to (74) of the provisional Regulation.

I. COMMUNITY INTEREST

(30) Two Japanese producers argued that the imposition of duties at a time of shortage of supply on the Community market, with the Community industry unable to meet demand, would only serve to raise costs and prices, to the detriment of software firms and consumers.

In recital (78) of the provisional Regulation, the Commission recognized that production by the Community industry is currently insufficient to meet the surge in demand that has recently occurred in the Community market. Nevertheless, the Community industry, in an appropriate response to this development, has since the end of the investigation period acted to increase production capacity and, given the respite afforded by anti-dumping duties from the pricing pressures caused by unfairly traded imports, can be expected to continue to invest in this sector. Moreover, new Community producers, in a further response to the market, have set up production facilities in the Community. The Commission considers it essential that the complainant Community industry and these new independent Community producers be given the opportunity to attain, in conditions of fair trade undistorted by dumping, the levels of profitability needed for economic viability. The Commission therefore maintains its findings on Community interest as set out in recitals (75) to (80) of the provisional Regulation.

(31) One importer argued that the imposition of a definitive anti-dumping duty would only increase costs to users, without in any way helping the Community industry, as producers and exporters in countries not subject to the duty would take advantage of the higher prices engendered to increase market shares at prices below those needed by the Community industry.

The Commission notes, however, that the purpose of the present proceeding is to address problems arising from the dumped imports from the countries concerned. It is not the purpose of anti-dumping measures to protect the Community industry from the normal operation of fair competition in circumstances in which there should be unhindered market access.

(32) As no other arguments were presented, the Council confirms these conclusions and those set out in recitals (75) to (85) of the provisional Regulation.

J. DUTY

(33) In the provisional determination, the Commission established the amount of duty necessary to remove the injury on the basis of full costs of production plus a 10% return on sales. The complainant argued that the use of a profit margin of 10% is insufficient to meet the needs of the Community industry for investment to increase production capacity, marketing expenditure, and research and development of new products, and that the Commission should use a profit margin of between 12% and 16% of turnover to calculate the increase in prices necessary to remove the injury.

(34) The Commission maintains its argument that, in respect of the relevant costs in the period covered by the investigation, it would have been unrealistic to expect profit margins for the Community industry above the 10% considered to be the minimum required to ensure the viability of that industry.

(35) One Japanese producer argued that, because of its calculation of the duty required to remove injury, the Commission had attributed to the producers in the countries concerned not only that part of any injury suffered by the Community industry caused by imports from those countries but also the injury caused by other factors, notably by imports from countries not subject to the proceeding.

The Commission rejects the contention.

In its overall assessment of the situation, the Commission examined all potential causes of injury, to ensure that factors other than imports from Japan, Taiwan and China were not in fact responsible for the injury suffered by the Community industry. This examination covered, as is pointed out in recital (66) of the provisional Regulation, imports from third countries not included in the proceeding, and it was found that, even if some of the injury could have been attributed to those imports, this did not alter the fact that the injury caused by the dumped imports from the countries subject to the proceeding was, taken in isolation, material.

Furthermore, in line with consistent Community practice, the Commission has acted to remove the injury established by imposing duties only up to the limit of the dumping margins or the margins of underselling individually determined for producers found to be dumping. It is clear, therefore, that by adopting this approach, the Commission does not remove more injury than that caused by each exporter by its dumped imports, and does not, therefore, attribute to the dumped imports any element of injury that may have been caused by other factors.

(36) The difference between the prices for the Community industry, established in accordance with the method outlined in recital (81) of the provisional Regulation, and the prices of the dumped imports used to establish undercutting, as outlined in recital (55) of the provisional Regulation, as adjusted by recital (27) of this Regulation, expressed on a weighted average basis and as a percentage of the free-at-Community-frontier price, established in accordance with the provisions of Regulation (EEC) No 1224/80, were above the dumping margins found for all the producers in Taiwan and China, and ranged from 6.1% to 40.9% for producers in Japan.

As far as non-cooperating producers are concerned, the Commission considers that the result of its investigation forms the most appropriate basis for the establishment of the level of duty, and thus concludes that the highest level of duty determined for a producer in the same country should be applied to the non-cooperating producers.

(37) The Council confirms the above findings of the Commission and the determination of the duty to be applied, as described in recitals (81) to (85) of the provisional Regulation.

K. UNDERTAKINGS

(38) Several producers have suggested offering undertakings, and have been informed that the Commission is unable to accept undertakings in this case. The Commission considers that the degree of non-cooperation in the proceeding, the rapidity of technological change in the product, and the volatility of prices, would render the observance of undertakings exceedingly difficult to monitor. In addition, the high level of mobility of the production facilities in the industry would be unlikely to contribute to the restoration of fair competitive conditions in the market.

(39) Given the above, the Council concludes that measures should be imposed in the form of definitive anti-dumping duties.

L. COLLECTION OF THE PROVISIONAL DUTIES

(40) In view of the dumping margins established, the injury caused to the Community industry, and the latter's precarious financial situation, the Council considers it necessary that the amounts secured by way of provisional anti-dumping duty for all companies should be collected definitively. Where the provisional duty exceeds the duty rate definitively imposed, the amount collected should not exceed that of the definitive anti-dumping duty,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of 3.5" microdisks used to record and store encoded digital computer information falling within CN Code ex 8523 20 90 (Taric Code 8523 20 90*10), and originating in Japan, Taiwan and the People's Republic of China.

2. The rate of duty applicable to the net free-at-Community-frontier price, not cleared through customs, shall be as follows:

(a) 40.9% in respect of the products specified in paragraph 1 originating in Japan (Taric additional code: 8708), with the exception of imports which are manufactured and sold for export to the Community by the following companies, which shall be subject to the rates of duty mentioned hereunder:

- Memorex Telex Japan Ltd.: 6.1% (Taric additional code : 8705)
- Hitachi-Maxell : 20.6% (Taric additional code : 8706)
- TDK: 26.7% (Taric additional code : 8707)

(b) 32.7% in respect of the products specified in paragraph 1 originating in Taiwan (Taric additional code: 8710), with the exception of imports which are manufactured and sold for export to the Community by the following company, which shall be subject to the rate of duty mentioned hereunder:

- CIS Technology: 19.8% (Taric additional code: 8709)

(c) 39.4% in respect of the products specified at paragraph 1 originating in China (Taric additional code: 8712), with the exception of imports which are manufactured and sold for export by the following company, which shall be subject to the rate of duty mentioned hereunder:

- Hanny Magnetics: 35.6% (Taric additional code: 8711)

3. The provisions in force concerning customs duties shall apply to the said duty.

Article 2

1. The amounts secured by way of the provisional anti-dumping duty under Regulation (EEC) No 920/93 in respect of 3.5" microdisks shall be definitively collected. Where the provisional duty exceeds the duty rate definitively imposed, the amount collected should not exceed that of the definitive duty.

2. Amounts secured in excess of the definitive rate of duty shall be released.

Article 3

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

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

Done at Brussels,

For the Council
The President

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