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## **NON-CONFIDENTIAL**

Brussels, 9 June 2015

Dear Sir/Madam,

In view of the additional submissions filed by SPC Ardmona ("SPCA") and recently published in the Electronic Public Record, Feger di Gerardo Ferraioli S.p.A. and La Doria S.p.A. (respectively "Feger" and "La Doria") would like to submit the following comments with respect to the alleged "market situation" in Italy.

- In its submission dated 4 March 2015, SPCA provides a list of press articles relating to allegedly illegal labour and pollution in the Italian tomato industry which would impact the normal value of the finished product manufactured by Feger and La Doria, by reducing their costs of production. Feger and La Doria firmly oppose such speculations - unsupported by any factual evidence - which are simply unacceptable. SPCA's attempt to demonstrate the existence of a "market situation" in the Italian market for preserved tomatoes by means of the above-mentioned articles is ridiculous, besides being unfair.
- In its submission dated 17 March and 23 March 2015, SPCA submits further comments regarding the impact of the SPS on the "market situation" in Italy. In this respect, the following should be noted.

- As repeatedly clarified, the question of whether the SPS constitutes a subsidy to tomato growers should be addressed within the framework of a countervailing investigation, and *not* in the framework of anti-dumping proceedings. Tackling this issue in the ongoing investigation is contrary to WTO rules, which indicate that “*no specific action against a subsidy of another Member can be taken except in accordance with the provision of GATT 1994, as interpreted by this Agreement*” (Article 32.1 of the Agreement on Subsidies and Countervailing Measures. The purpose of the analysis (*i.e.* whether it is conducted for the sake of an anti-dumping investigation) is irrelevant in that regard.
- In any case, should the Anti-Dumping Commission (“ADC”) address such a question within the framework of the ongoing investigation, *quod non*, it is recalled that the SPS is fully WTO compatible since it is neither specific, nor a coupled income support to tomato growers. Again, the SPS has no trade distorting effects or effects on the production, and is a “green-box” measure in term of paragraph 1 of Annex 2 of the Agreement on Agriculture. In that regard, it is to be observed that SPCA’s comments suggest a lack of understanding of the WTO Agreement on Agriculture.
  - First, in para. 5-11 of its submission of 23 March 2015, SPCA alleges that “*the base period used for the SPS is based on a reference period of 2004-2006 [...] [which] is clearly beyond the ‘base period’ in subparagraph (b) of Paragraph 6 of Annex 2 of the Agreement on Agriculture*”. However, the period referred to by SPCA (1986-1988) is the base period indicated in Annex 5 of the Agreement on Agriculture (for the purpose of the application of paragraph 2 of Article 4 of the Agreement), and therefore does not concern at all the green-box measures pursuant to paragraph 6 of Annex 2 of the Agreement on Agriculture.<sup>1</sup> Therefore, the “base period” mentioned in paragraph 6(b) of Annex 2 of the Agreement on Agriculture is

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<sup>1</sup> This is further confirmed by the WTO website, which explains that “[t]he Agreement on Agriculture sets out a number of general and measure-specific criteria which, when met, allow measures to be placed in the Green Box (Annex 2). These measures are **exempt from reduction commitments and, indeed, can even be increased without any financial limitation under the WTO** [...] The Green Box also provides for the use of direct payments to producers which are not linked to production decisions, *i.e.* although the farmer receives a payment from the government, this payment does not influence the type or volume of agricultural production (“decoupling”). The conditions preclude any linkage between the amount of such payments, on the one hand, and production, prices or factors of production in any year after a fixed base period. In addition, no production shall be required in order to receive such payments”. See [www.wto.org/english/tratop\\_e/agric\\_e/ag\\_intro03\\_domestic\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/ag_intro03_domestic_e.htm)

not the period 1986-1988 but, rather, the “*defined and fixed base period*” referred to in paragraph 6(a). It follows that the base period for the purpose of the “green box measures” must only be “defined and fixed”, since no other requirement is set by Annex 2 of the Agreement on Agriculture. In light of the foregoing, it must be concluded that SPCA’s reading of paragraph 6(b) of Annex 2 of the Agreement on Agriculture is not correct.

- Second, it must be observed that in *United States – Subsidies on Upland Cotton* (quoted by SPCA at para. 7 of its submission dated 23 March 2015), the Appellate Body made clear that “[p]aragraph 6, entitled, “[d]ecoupled income support” applies to one type of “direct payment” to producers that may benefit from exemption from reduction commitments and protection under the peace clause. Paragraph 6(a) sets forth that eligibility for payments under a decoupled income support program must be determined by reference to certain “clearly-defined criteria” in a “defined and fixed base period”. Paragraph 6(b) requires the severing of any link between the amount of payments under such a program and the type or volume of production undertaken by recipients of payments under that program in any year after the base period. Paragraphs 6(c) and 6(d) serve to require that payments are also decoupled from prices and factors of production employed after the base period. Paragraph 6(e) makes it clear that “[n]o production shall be required in order to receive ... payments” under a decoupled income support program.”<sup>2</sup> It has been demonstrated at length that the SPS does meet all of the above criteria. In paras. 7-8 of its submission, SPCA merely quotes an argument of Australia and a finding of the Appellate Body, without further explaining the type of subsidies at hand in *US – Subsidies on Upland Cotton* and the alleged similarities with the SPS. This is not a coincidence, since the subsidies at hand in the WTO case under discussion have nothing in common with the SPS.
- Third, SPCA considers that “[...] it should also be noted that there is a strong indication that the provisions of subparagraph (d) are also not met. The exporters describe on page 5 that the direct payment is based on ‘... the hectares of land owned...’ As land is a factor of production the conditions in

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<sup>2</sup> Appellate Body Report, *United States – Subsidies on Upland Cotton*, para. 321.

*subparagraph (d) are not met*". Paragraph 6 (d) reads as follows "(d) *The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.*" While it is correct that the direct payments are calculated, *inter alia*, on the basis of the hectares of land owned, it is not correct to say that the calculation refers to a factor of production under the meaning of paragraph 6(d). Under the SPS, the hectares owned do not confer any right if they are not accompanied by a sufficient number of "entitlements". Each entitlement is issued on the basis of the amount of payments received by each hectare which qualified for the support in the base period (2004-2006). It follows that the hectares owned in "any year after the base period" are not used for the determination of the amount of the payments. Therefore, SPCA's interpretation is not correct.

- As repeatedly clarified, the amount of the coupled payments received by the Italian tomatoes growers before the investigation period (see para. 14-15 of SPCA's submission of 23 March 2015) is totally irrelevant for the purpose of the present investigation. The Complainant itself acknowledged that in the investigation period the payments received by the Italian growers under the SPS were 100% decoupled from production. The fact that the value of each single entitlement under the SPS is based on historical payments received during the base period (2004-2006) is irrelevant, given that such entitlements are no longer attached to the land and can be traded. The statement at para. 18 of SPCA's submission of 23 March that "*decoupling when it is based on historical production is not in itself a definition of decoupling*" is simply meaningless.
- SPCA further claims that, if the SPS was withdrawn, the tomato growers' income could decrease by 50% (see para. 15 of SPCA's submission of 23 March). Even assuming SPCA's calculation - which is based on outdated information - to be correct, *quod non*, this is totally irrelevant. As repeatedly clarified, what matters for the purpose of the "market situation" assessment is whether the SPS has materially affected the domestic sales prices of the product under investigation.
- According to SPCA "*farmers are only able to make "profits" because of the SPS. In the absence of the SPS the farmers would not make the same profits as without it*" (see para. 20 of SPCA's submission of 23 March). SPCA claims that, in the absence of SPS "*the average price would have to increase by the amount that the tomato grower*

*gets as income/price support from the SPS*” (see para. 7 of SPCA’s submission of 17 March). However, this is a simple allegation unsupported by any evidence. As a matter of fact, SPCA has not been able to demonstrate that, in the absence of the SPS, the price for raw tomatoes in the Italian market during the investigation period would have been higher. Moreover, SPCA has not been able to quantify the alleged price distortion in the investigation period. On the contrary, Feger and La Doria have provided arguments and evidence showing that the SPS does not have distorting effects on production and therefore on prices, since growers receive the support irrespective of whether they produce tomatoes. This is clearly demonstrated by the fact that prices for raw tomatoes for processing in Italy are amongst the highest in the world. In this respect, it is recalled that when the ADC addressed this very specific issue, 15 months ago and under the exact same legal framework, it concluded that “[...] *The Commission found that the price of fresh tomato paid by Italian processors was either similar or higher than the benchmark price of fresh tomato available in Australia*”. Furthermore, the ADC indicated that “[...] the evidence indicates that any payments provided directly to tomato growers in Italy are benefitting the growers in isolation and are not transferred to processors in the form of lower prices”<sup>3</sup>. Feger and La Doria fail to understand how SPCA can claim that, despite being regulated in the same way as 15 months ago, the support received by growers under the SPS would now be transferred to processors in the form of lower prices. Any serious complaint would have, at the very least, addressed this conclusion of the ADC.

- In its submission dated 8 April 2015, SPCA requests the ADC to take “a *tough stance*” to show that a lack of cooperation from ANICAV and AIIPA will not secure the benefit of a time extension. However, the services provided by ANICAV and AIIPA are detailed in question B1.10 of the questionnaires; given the nature of these services, it cannot be expected that either ANICAV or AIIPA would be capable of providing all the information requested in the questionnaire. Since this information is not available to these organisations – because they do not need it in order to provide their services – it cannot be considered that ANICAV or AIIPA did not cooperate with the investigating authorities.
- In its submission dated 9 April 2015, SPCA reported that AIIPA was involved in the negotiations of a “price agreement” for the 2015 harvest. This is outright wrong.

- As explained by AIIPA and ANICAV in their submissions, some framework agreements for the year 2015 do exist. However, they relate to factors such as processing, marketing, distribution of goods, quality standards, methods of payments etc. The price mentioned in these agreements is merely indicative, not binding. Suffice it to say that any agreement fixing the prices of raw tomatoes would be contrary to EU competition law.
- In any case, Feger and La Doria would like to remind that the framework agreement concluded for the 2015 harvest is irrelevant for the purpose of the “market situation” assessment since it does not concern the investigation period.
- In its submission dated 19 May 2015, SPCA quotes La Doria’s annual report for the year 2014 in an attempt to demonstrate the existence of a “market situation” in Italy. In this respect, the following should be noted.
  - In La Doria’s annual report there is no statement from which it can be inferred that the SPS has an impact on prices for raw tomatoes and that, in the absence of the SPS, such prices would be higher. On the contrary, the report points out that the SPS has contributed to “*avoid surpluses*”. Needless to say, a higher production of tomatoes would obviously cause a decrease in the level of prices. Therefore, SPCA’s statement that “*[i]f the farmer was not receiving income from the SPS then that income would have to be sourced from the sales price of raw tomatoes in a market free of distortion*” (see para. 5 of SPCA’s submission of 19 May 2015) is simply contradictory and wrong.
  - La Doria’s annual report explains that “*the European Food and Vegetable Reform, which was fully implemented in 2011, provid[es] grants to farmers independently of the type of crop grown and no longer, as was the case in the past, based on the quantity of tomatoes grown [...]*”. This is confirmed by para. 3 of SPCA’s submission, which acknowledges that “*La Doria admits to the subsidies being paid to the tomato farmers [...] in 2014 were decoupled*”.
  - SPCA further quotes a statement from La Doria’s report, according to which “*[i]n 2015 the measures of the common Agricultural Policy 2014-2020 (CAP) will be applicable, concerning the partial return of assistance to support the competitiveness and sustainability at the Italian tomato sector from industry. The subsidy which will be granted to farmers (in addition to the current decoupled subsidy which will be introduced with the entry into force of the new measures) was estimated at Euro 160/ha. It acts as a financial support to further stimulate the re-organisation of the entire chain in terms of rules and*

*increased efficiency and competitiveness, while at the same time not creating a future risk of overproduction due to its limited size".* However, this information relates to 2015 and has no relation whatsoever with the investigation period. As a matter of fact, all the alleged evidence submitted by SPCA with respect to the "market situation" assessment does not concern the investigation period and, as such, should be disregarded.

In light of the foregoing, Feger and La Doria submits that all SPCA's arguments regarding the alleged "market situation" in Italy are irrelevant, unsubstantiated and contradictory other than – in some cases – factually and legally wrong and, as such, should be disregarded.

Feger and La Doria respectfully reiterate their request that, in order to undertake the dumping analysis, the ADC should have recourse to a normal value based on the domestic prices of the exporting producers, as opposed to a constructed normal value.

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