



## EUROPEAN COMMISSION

Directorate-General for Trade

Directorate H - Trade defence

Investigations IV Relations with third countries for Trade defence matters

Brussels, 30 June 2016

### **REVIEW INVESTIGATION BY THE AUSTRALIAN GOVERNMENT ON ANTI-DUMPING MEASURES OF PREPARED OR PRESERVED TOMATOES EXPORTED FROM ITALY EXCEPT FEGER AND LA DORIA**

#### **Written submission of the European Commission on Initiation**

On 25 May 2016, at the request of the Australian producer SPC Ardmona Operations Limited (SPCA), the Australian Anti-Dumping Commission initiated a review investigation of anti-dumping measures on imports of processed tomato products from all Italian exporters except by Feger and La Doria ('all other Italian exporters').

The European Commission is extremely disappointed about the initiation of this review since it is obvious that its main purpose is to transpose a methodology used for the calculation of the dumping margin which was strongly contested and challenged in the context of a previous case. This methodology leads to artificially inflated dumping margins and the Anti-Dumping Review Panel (ADRP) has recently instructed the Anti-Dumping Commission to reexamine its conclusions in that respect.

This new procedure is the fourth consecutive trade defence investigation in three years against imports of canned tomatoes from Italy (in addition to the three anti-dumping investigations, a safeguard case was initiated in June 2013). The number of cases as well as the methodology used in the most recent investigations unavoidably leads to the conclusions that Australia is making an abusive use of the trade defence instruments and imposing an unnecessary burden to the exporters concerned.

In this submission, the European Commission will first raise some procedural issues regarding Australia's approach to sampling and then reiterate its claims concerning the issue of the cost adjustment methodology which is manifestly incorrect, based on assumptions and wrong information.

## 1. Issues at initiation

### a) Sampling

The European Commission deeply regrets the approach followed by Australia with regards the sampling of Italian producers.

Contrary to its standard practice, Australia has requested all Italian exporters to fill in a full questionnaire reply. This is despite the fact that, given the high number of Italian exporters concerned by this investigation, Australia will obviously have to apply sampling in this case and only examine **a limited number** of questionnaire replies to reach its conclusions.

A total of 28 Italian producers/exporters have duly and timely completed Section A of the questionnaire (data requested to allow the selection of a sample) but the Australian authorities have nevertheless requested all these companies to reply to the full exporters' questionnaire if they still want to be considered as cooperative.

We fail to see the rationale of this decision which is **imposing an extremely burdensome and costly procedure** to all other Italian exporters and defeats the very purpose of sampling. In particular, because the information necessary to decide on a sample of exporting producers has been already at the disposal of the Anti-Dumping Commission since the 8 June.

It is very unfortunate that, in particular, given the context and the number of initiated investigations on the same product over the last few years, Australia is not making any efforts to reduce the burden on the Italian exporters, all being small and medium enterprises and some of which cooperated already in the original investigation only three years ago.

The European Commission is urging Australia to reconsider this decision and facilitate cooperation and a fair treatment to European exporters.

### b) Consideration of previous investigations

The European Commission wonders why in this case the Anti-Dumping Commission has decided that the findings of other investigations including the previous investigation on imports of Feger and La Doria will be considered during this review<sup>1</sup>.

Unfortunately, the Anti-Dumping Commission did not apply this principle in the previous investigation of Feger and La Doria. Indeed, Australia ignored almost completely the outcome of the original investigation against all Italian exporters (REP 217) which established that there was no dumping for Feger and La Doria.

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<sup>1</sup> Consideration Report 354. Section 2.6.

Furthermore, the Commission is concerned that, by applying this principle, Australia will simply transpose in this new review investigation the wrong methodology it has used against Feger and La Doria in the recent past.

In this sense, the European Commission is extremely disappointed to find that this random practice constitutes an **abusive use of the instrument**.

## **2. Grounds for review: Assessment of variable factors**

The Anti-Dumping Commission will investigate the complainant's claim according to which normal values of all other Italian exporting producers have increased since the original investigation because of *"changes in the cost of raw tomato production and in accordance with the approach taken in REP 276"*<sup>2</sup> (cost adjustment methodology).

Furthermore, the Anti-Dumping Commission will investigate the behavior of export prices since the complainant claims that they have not reflected the measures imposed in 2014 and that transactions may not be at arm's length -given that apparently retail prices have decreased or remained stable.

The European Commission strongly disagrees with the approach taken to review normal values in this investigation. Below are some important elements to be taken into account by the investigation authorities concerning normal value and export price:

### **a) Normal value**

As repeated in various occasions in the framework of the previous investigation (REP 276) the cost adjustment methodology used by Australia to increase the dumping margins of Feger and La Doria has a number of serious flaws and inconsistencies and is based on assumptions and the incorrect interpretation of publicly available information.

Finally, the European Commission understands that the absence of a *"particular market situation"* -as confirmed by the two previous investigations (REP 217 and REP 276)- is not contested in this review and hopes that the conclusions reached by Australia will be coherent with this finding.

The different flaws of the above-mentioned methodology are the following:

*(i) Addressing EU's income support mechanism in the framework of an anti-dumping investigation is contrary to the WTO law*

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<sup>2</sup> Consideration Report 354. Section 3.4.

According to Article 32.1 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") *"no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement"*.

**In other words, a subsidy should not be addressed in the framework of an anti-dumping investigation, in particular in the absence of a positive conclusion on the existence of a "particular market situation" (see below).**

By following the Australian authorities' logic, the eventual market distorting effects of a subsidy (countervailable or not) could always be investigated in an anti-dumping investigation and, as stated above, this is clearly not the case according to the WTO. This could be seen as a way of eluding certain fundamental principles of countervailing investigations, such as consultation of governments involved (Article 13 of SCM Agreement).

***(ii) EU aids to farmers are not price distortive***

The EU Single Payment Scheme -aid system to farmers-, based on which, the Anti-Dumping Commission imposed measures to Feger and La Doria, has been largely reformed already several years ago and is now a completely decoupled, non-specific income support scheme which is fully compatible with the WTO requirements and with paragraph 6 of Annex 2 of the Agreement on Agriculture. These aids thus have **no trade distorting effects or effects on production** and for that reason are considered a "Green-Box" measure in terms of paragraph 1 of Annex 2 of the Agreement on Agriculture<sup>3</sup>.

***(iii) Contradictory findings regarding the treatment of domestic sales***

In the framework of the two previous investigations, the Anti-Dumping Commission found that there was no *"particular market situation"* in the Italian market of canned tomatoes and hence concluded that **domestic sales prices of canned tomatoes in Italy are suitable for the calculation of the dumping margin**.

Despite the above findings, the Anti-Dumping Commission nevertheless still rejected the domestic sales prices recorded in the accounts of the exporters, based on Article 43(2) of the Australian Regulation<sup>4</sup>. It was indeed concluded that *"the cost recorded by Feger and La Doria for raw tomatoes in their records do not reasonably reflect competitive market costs"* and

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<sup>3</sup> WTO Agreement on Agriculture. ANNEX 2: DOMESTIC SUPPORT: THE BASIS FOR EXEMPTION FROM THE REDUCTION COMMITMENTS. 1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria: (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and, (b) the support in question shall not have the effect of providing price support to producers; plus policy-specific criteria and conditions as set out below.

<sup>4</sup> Section 43(2)- Australian Customs (International Obligations) Regulation 2015 determines that:

(a) *an exporter or producer of like goods keeps records relating to the like goods; and*  
(b) *the records: (i) are in accordance with generally accepted accounting principles in the country of export; and (ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;*

therefore the Anti-Dumping Commission decided to adjust the cost of production of the exporters by adding to the actual costs of raw tomatoes an amount corresponding to the aid supposedly received by their suppliers (the tomato farmers).

As a consequence, by **artificially increasing the cost of production**, the domestic sales prices for certain types of the product under investigation became loss making, thus treated as not being made in the "*ordinary course of trade*"<sup>5</sup> and excluded from the dumping margin calculation. This result-oriented methodology clearly contradicts the Anti-Dumping Commission's own conclusion that there is no "*particular market situation*" and therefore domestic sales prices are deemed as not unsuitable for the calculation of the dumping margins (see above). In essence the Anti-Dumping Commission created a situation of artificial dumping that would otherwise not exist.

*(iv) Absence of evidence that the cost of tomatoes in Italy is "not competitive"*

By adjusting costs, the Anti-Dumping Commission **suggested without any positive evidence that the cost of raw tomatoes in Italy is "not competitive"**, i.e. that tomato prices are artificially low due to government influence.

The European Commission submitted and explained during the previous investigation that the price in Italy of raw tomatoes for processing is one of the highest in the world. It is thus very difficult to come to the conclusion that prices for raw tomatoes in Italy would be artificially low and hence "*not competitive*".

In sum, the adjustment is simply based on the unsubstantiated allegation that the mere existence of direct payments to tomato farmers affects the raw tomato price downwards. The Anti-Dumping Commission could give no explanation on the reason why Italian domestic raw tomato prices are considered not to be competitive, simply because this is not the case. Based on the above, the conditions specified in Article 43(2) of the Customs (International Obligations) Regulation 2015 do not appear to be satisfied.

*(v) The cost adjustment calculation presents important flaws*

Without prejudice to the fact that no adjustment of cost is justified in this case, there were in addition obvious and important shortcomings in the calculations of this adjustment, based on the incorrect evaluation made by the Anti-Dumping Commission.

With respect to the alleged subsidy amount (€0,037 per Kg), it should be noted that the Anti-Dumping Commission **misunderstood the legal basis** and used the incorrect figure contained in an Italian Ministerial Decree from 17 October 2013 despite the fact that the European Commission submitted that this was incorrect.

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<sup>5</sup> Article 2.1 of the WTO ADA.

If the above submitted information had been duly taken into account by the Anti-Dumping Commission, it would have had no other alternative than to conclude that in 2014, the period of investigation, there can be no adjustment of cost since the above ceiling had already completely disappeared and the aids given to farmers were totally decoupled and integrated in the Single Payment Scheme.

*(vi) Absence of a "pass-through" analysis*

Notwithstanding the argumentation made so far, even if assuming that the two exporters concerned by the previous investigation would have – if at all – benefited indirectly from any type of aids, it is quite striking that the Anti-Dumping Commission **assumed that aids granted to farmers would have been fully transferred to the producers/exporters of canned tomatoes**. It is recalled that aids are only given to EU farmers that have the necessary entitlements (whatever they produce, independently of how much they produce and even if they don't produce at all) – thus not all tomato farmers necessarily receive any aids – and that these farmers are different legal/economic entities than the producers/exporters of canned tomatoes.

It is thus clearly wrong to assume that there is a full and automatic pass-through of the income support granted to farmers to the two exporters concerned.

**b) Export price**

The European Commission notes that the complainant's claim according to which retail prices had not reflected the measures imposed in 2014 is irrelevant to the assessment of export prices. Indeed, retail prices are influenced by the strategy followed by retailers and may not be representative of real Italian export prices, which will be provided in the questionnaires. Furthermore, the retail data provided covers 24 months and apparently not going back to before the imposition of provisional measures in November 2013.

In any event, the Australian import database showed that average export prices were rising in Australian dollars since the imposition of measures and the same trend is confirmed by the official EU export statistics (Eurostat) in Euros -in principle not subject to exchange rate variations. On this basis, it could possibly be assumed that export prices increase regardless the effect of the anti-dumping duties, which are not included in the statistics.

The Anti-Dumping Commission however showed reservations due to possible effect of exchange prices on the statistics, among other factors. In this regard, the European Commission expects that Australia will take the right approach in the assessment of export prices.

With regards the claim that transactions may not be at arm's length, the European Commission hopes that the arm's length assessment is made with real costs and prices from exporters and not after an artificial cost adjustment, as we saw in the previous investigation.

### **3. Conclusions**

The European Commission deeply regrets that once more, Italian processed tomatoes producers are subject to another investigation by Australia. The series of investigations initiated in the past three years, combined with their low investigation standards, clearly represented an abusive use of trade defence instruments by Australia.

Furthermore, as demonstrated by the recent decision regarding sampling and the fact that a doubtful methodology is intended to be replicated to all other Italian exporters, the on-going review does not seem to show an improvement in this regard.

The European Commission considers that the issues presented in this submission are essential to fairly assess the evolution of variable factors and urges Australia to give them the due attention.

In any case, a decision on the case is only expected after the conclusion of the ADRP's review of Feger and La Doria's investigation findings.

Finally, the European Commission also trusts that the Australian authorities will comply with their WTO obligations throughout the proceeding.