

**Investigation No. 276 – Prepared or preserved
tomatoes exported from Italy by Feger di Gerardo
Ferraioli S.p.A. and La Doria S.p.A.**

**Observations on the File Note published by the
Anti-Dumping Commission on 3 July 2015**

15 July 2015

Contents

1.	Introduction	3
2.	The decision not to verify SPCA's Data is in stark contradiction with the conduct taken vis-à-vis the two exporters and has led to ill-founded conclusions on injury	3
3.	The methodology followed by the Commission is flawed in several regards.....	5
3.1	The Commission cannot attribute to the two exporters any injury which allegedly occurred prior to 30 June 2013.....	5
3.2	It is impossible for the Commission to gather meaningful and reliable data on imports from the two exporters, and to determine the precise extent of the (alleged) injury these imports would have caused	6
4.	SPCA's financial situation dramatically improved, thereby precluding any conclusion that the imports from the two exporters caused injury to the domestic industry.....	7
4.1	SPCA's financial situation has drastically improved in the course of the past year and a half.....	7
4.2	Information is available indicating that any injury suffered by the domestic industry was caused by factors other than the imports from the two exporters	8
4.2.1	The appreciation of the Australian Dollar	8
4.2.2	The anti-dumping duties on imports originating in Italy.....	9
4.2.3	SPCA's costs.....	9
4.2.4	SPCA's Lack of investment.....	9
5.	Conclusion	10

1. INTRODUCTION

On 19 January 2015, the Anti-Dumping Commission (the '**Commission**') initiated the anti-dumping investigation No. 276 on imports of prepared and preserved tomatoes (the 'product under investigation') exported from Italy by Feger di Gerardo Ferraioli S.p.A. and La Doria S.p.A. (hereinafter also the '**two exporters**').

The initiation of the investigation follows the filing of an anti-dumping complaint (the '**complaint**') by the only Australian producer of the product under investigation, *i.e.* SPCA Ardmona (the '**Complainant**'). The Complainant maintains to have suffered material injury as from 'many years' due to the exports from Italy by La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. at allegedly dumped prices.

It is important to note that the proceeding No. 276 follows another investigation – *i.e.* the anti-dumping investigation No. 217 on prepared or preserved tomatoes exported from Italy (hereinafter also the '**previous investigation**') – targeting the same country and the same goods as the ones which are the object of the current investigation.

In the previous investigation, which was initiated on 10 July 2013, the Commission concluded that during the investigation period (*i.e.* from 1 July 2012 to 30 June 2013) the dumping margin of La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. was less than 2%. The Commission therefore rightly decided, on 20 March 2014, to terminate the investigation with respect to the two exporters.

As regards the other Italian exporters, on 16 April 2014 the Parliamentary Secretary to the Minister for Industry imposed anti-dumping measures on prepared or preserved tomatoes exported from Italy. These measures are due to expire on 15 April 2019. As a result, La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. are the only two Italian producers of the product under investigation currently not subject to anti-dumping duties.

The present submission summarises the views of our clients with regard to the file note published by the Anti-Dumping Commission on 3 July 2015 (the '**File Note**').

2. THE DECISION NOT TO VERIFY SPCA'S DATA IS IN STARK CONTRADICTION WITH THE CONDUCT TAKEN VIS-À-VIS THE TWO EXPORTERS AND HAS LED TO ILL-FOUNDED CONCLUSIONS ON INJURY

The Commission has decided not to undertake verification visits at SPCA's premises, on the ground that the cost and sales data provided by SPCA for the purposes of the investigation are "*of a similar nature and detail to that provided for the purposes of the previous investigation*".

Our Clients strongly oppose this decision.

Firstly, the assumption that the verification of SPCA's data is unnecessary is in stark contradiction with the approach followed by the Commission with regard to the two exporters. The Commission considers that the data provided by SPCA for the purposes of the current investigation are "*of a similar nature and detail to that provided for the purpose of the previous investigation*". However, a different view was taken with regard to the exporters' data, which were meticulously verified on the spot, even though a similar verification had been undertaken only a few months before. As it can be seen, the Commission is following diametrically different approaches in respect of the domestic industry and the two exporters. This amounts to a serious infringement of the principle of equality.

Secondly, a verification of the data provided by SPCA would have allowed the Commission to realize that SPCA's financial situation has considerably improved.

The Commission assumes that SPCA has been suffering injury from allegedly dumped imports from the two exporters. However, as explained hereunder (see section 4) not only do *publicly available data* show that SPCA's financial situation has improved, but they also demonstrate that SPCA is currently doing well.

In the Coca-Cola Amatil Annual Report of 2014, one can read that "*SPCA delivered a significant improvement in earnings to deliver a close to breakeven result, driven by improved ranging, successful new product launches and productivity improvements. SPCA's share of tomatoes grew 5% [...]. Perfect Fruit was launched with over 350 customers and high demand from customers. In Fruit, the 700g packs have exceeded expectations while the new packaging for the 170g snack cup is attracting new customers to the fruit snacking category*".¹

Moreover, in the File Note, the Commission concludes that "*the deteriorating margin between revenue and cost to make and sell for SPCA is indicative of price suppression as SPCA has been unable to raise its prices to a level that would enable it to either make a profit or reduce its losses*".

However, the 2014 Annual Report of Coca-Cola Amatil states that SPCA's "EDLP" strategy lead to an increase of market shares. EDLP, which stands for "Every Day Low Pricing", is defined as a strategy whereby a producer provides low prices to the customers, every single day, without any special pricing discount, sale etc. Therefore, it is acknowledged that SPCA adopted a policy whereby it artificially maintains low prices. Such a circumstance should and would have been noticed by the Commission, should it had undertaken verifications at SPCA's premises.

All the above – and the additional comments submitted *infra* – reveal that the decision not to verify the unsupported allegations put forward by SPCA infringes the

¹ Coca-Cola Amatil, Annual Report 2014, p. 20.

principle of non-discrimination and leads to accepting as correct *ex parte* data which are contradicted by publicly available information.

Thus, our Clients argue that in the absence of a detailed verification of SPCA's data, to assume that SPCA has suffered material injury amounts to a mere unsubstantiated conjecture. To base the investigation findings on such unsubstantiated and untrue allegations would be unwarranted.

3. THE METHODOLOGY FOLLOWED BY THE COMMISSION IS FLAWED IN VARIOUS REGARDS

As explained hereunder, our Clients consider that the investigation is methodologically flawed. These flaws prevent reaching any meaningful conclusion on the injury allegedly suffered by SPCA.

3.1 The Commission cannot attribute to the two exporters any injury which allegedly occurred prior to 30 June 2013

Our Clients would like to recall that there is an important overlap between the injury analysis periods of the original and current investigations. Indeed, in the previous investigation, the injury analysis period was 1 January 2009 to 30 June 2013, while, in the current investigation, this period goes from 1 January 2010 to 31 December 2014.

This circumstance necessarily entails *legal consequences*, as explained in our Clients' previous submissions. Indeed, it was determined in the original investigation that our Clients' dumping margin was *de minimis* and that, therefore, the two exporters *did not cause any injury*. In other words, the Commission itself acknowledged that imports from Feger and La Doria did *not cause injury* to the Australian industry *until 30 June 2013*.

Our Clients therefore respectfully submit that the methodology described in the File Note is flawed, as it takes into account the alleged injury suffered since 1 January 2010. However, the Commission already determined that *no injury can be attributed to our Clients* until, at the very least, 30 June 2013.

In conclusion, any data relating to the period between 1 January 2010 and 30 June 2013 should be disregarded. At the very least, the conclusion reached through the use of such data should not contradict the findings of the Commission in the previous investigation.

3.2 No meaningful and reliable data on imports relating to the two exporters can be identified and, thus, to determine the precise extent of the (alleged) injury these imports would have caused is not possible

For the calculation of the price paid by retailers to the two exporters, the Commission proposes to “do this by using data from the ACBPS import database. Specifically, the Commission proposes to construct weighted average unit (per kilogram) selling prices by taking the sum of free on board export prices, amounts for duty and where applicable the dumping duty. Where available, the Commission will use amounts for shipping and importation costs, into-store costs and the gross margins for importers for 2014. Otherwise, the Commission will use such data ascertained from verified importers data from the previous dumping investigation.”

In that regard, the two exporters would like to point to the methodological flaw that vitiates the entire investigation. The investigation covers two exporters, as opposed to the whole country. This methodology, which appears to be inconsistent with WTO law, entails technical difficulties preventing the gathering of reliable data on imports of the product concerned for the purposes of the injury analysis.

One fails to see how the Commission can separately identify, among the data gathered from the ACBPS import database, the imports manufactured from the two exporters concerned from the imports coming from all the other Italian exporters. This is further confirmed by the Commission, which indicates that “the Commission proposes to construct weighted average unit (per kilogram) selling prices by taking the sum of free on board export prices, amounts for duty and where applicable the dumping duty”. Since the two exporters’ dumping margin was found to be *de minimis* in the previous investigation, they are not subject to any dumping duty. Therefore, the dumping duty referred to by the Commission can only be the dumping duty applicable to imports from other Italian exporters.

Even if this first stage were to be feasible, *quod non*, it would then be difficult, if not impossible, to determine the precise extent of the injury caused by the imports coming from the two exporters.

Likewise, since the Commission does not have data on imports originating from the other Italian exporters, it would not be in a position to assess any possible effect of imports originating from other Italian producers on any injury allegedly suffered by SPCA.

It is recalled that, pursuant to Article 3.5 of the WTO Anti-Dumping Agreement (“**ADA**”), the Commission is obliged to examine any known factor other than the dumped imports in its causation analysis. These factors include, *inter alia*, imports originating from other Italian producers.

In the light of the foregoing, it would appear that the approach laid down in the File Note might attribute to the two exporters responsibility for injury caused by sources other than their exports. All this would be flagrantly illegal.

4. SPCA'S FINANCIAL SITUATION DRAMATICALLY IMPROVED, THEREBY PRECLUDING ANY CONCLUSION THAT THE IMPORTS FROM THE TWO EXPORTERS CAUSED INJURY TO THE DOMESTIC INDUSTRY

The two exporters submit that SPCA's financial situation has dramatically improved in the course of the years 2014-2015. Moreover, clear elements are available indicating that any injury suffered by the Australian industry cannot be attributed to imports from our Clients, but rather to different – well-documented – factors.

4.1 SPCA's financial situation has drastically improved in the course of the past year and a half

As indicated above (see section 2), publicly available information reveal that SPCA is currently doing well. This is confirmed by the 2014 Annual Report of Coca-Cola Amatil: *"SPCA delivered a significant improvement in earnings to deliver a close to breakeven result, driven by improved ranging, successful new product launches and productivity improvements. SPCA's share of tomatoes grew 5% due to improved shelf positioning, EDLP and the benefits of the anti-dumping legislation. Perfect Fruit was launched with over 350 customers and high demand from customers. In Fruit, the 700g packs have exceeded expectations while the new packaging for the 170g snack cup is attracting new customers to the fruit snacking category".*²

Other sources point to the same conclusion. Ms Watkins, CEO of the beverage and food processing of Coca-Cola Amatil, indicated that *"After many challenging years and restructuring initiatives, SPC Ardmona delivered a close-to-breakeven result in 2014 and we're confident it will continue to improve".*³ *"Early promise that we might just be on the right track can be seen in SPC's 2014 financial result which saw the business deliver a significant improvement in earnings after years of significant losses. Over the past 24 months, we have: relaunched and modernised our logo; introduced new "Aussie" consumer friendly packaging; and invested in state of the art packaging machinery and new packaged format technology [...] It is an exciting time for SPC and you can feel the excitement amongst our employees, growers, consumers, suppliers and retailers. We have overcome adversity and I believe a successful and productive future is ahead".*⁴

² Coca-Cola Amatil, Annual Report 2014, p. 20.

³ "SPC Profiting – Coca-Cola Amatil Boss confident SPC Ardmona is heading into positive financial territory", 13 May 2015, www.pressreader.com

⁴ "SPC a story of 'the brand that could': Watkins", 13 April 2015, www.cis.org.

4.2 Information is available indicating that any injury suffered by the domestic industry was caused by factors other than the imports from the two exporters

In the course of the previous investigation, and in their submissions made in the framework of the current investigation, our Clients have consistently argued and proved that any injury suffered by SPCA was caused by a combination of factors. In particular, our Clients considered that, *inter alia*, the appreciation of the Australian Dollar, the strategy of the Australian major retailers, and the lack of competitiveness of SPCA due to its production and sales costs, were the causes of the injury allegedly suffered by the domestic industry. Therefore, changes in these factors triggered a clear improvement of SPCA's results.

4.2.1 The appreciation of the Australian Dollar

The injury suffered by the Australian industry was mainly caused by the appreciation of the Australian dollar, through its direct negative impact on exports, and positive impact on imports. This is a widely documented factor, acknowledged by the Anti-dumping Commission and the Productivity Commission.⁵ However, the Australian dollar has lost a substantial part of its value in the course of the years 2013-2014, as demonstrated in the graph below.

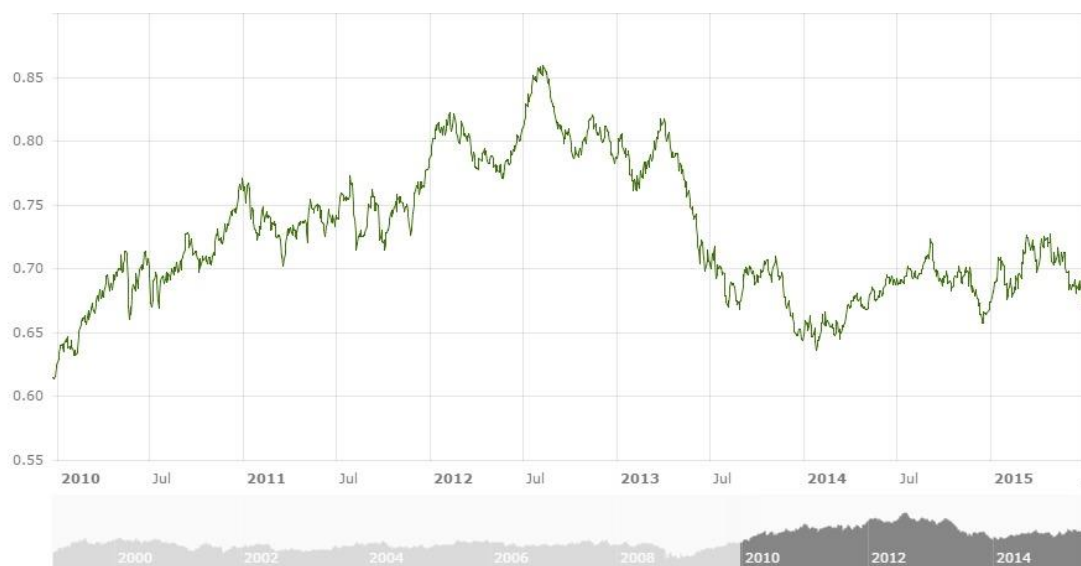


Figure 1: AUD vs EUR. Source: European Central Bank

The value of the Australian dollar steeply increased from 2010 to 2012, to finally reduce during the course of 2013. In 2014 the AUD reached its lowest point since 2009. This logically benefited the Australian commercial balance, and as a result

⁵ Final Report No. 217, section 8.8.3 ; Productivity Commission, Safeguard Inquiry into the Import of Processed Tomato Products, Section 2.5.

SPCA, both in terms of exports of its products, and decrease of imports of competing products.

4.2.2 The anti-dumping duties on imports originating in Italy

In addition, the adoption of anti-dumping duties on imports of processed tomatoes originating in Italy (*except for the two exporters, whose dumping margin was de minimis*) allowed a reduction of the imports pressure put on SPCA.

4.2.3 SPCA's costs

In a speech delivered at the Centre for Independent Studies, Ms Alison Watkins, CEO of the beverage and food processing of Coca-Cola Amatil, reported that "*Analysis undertaken by KPMG in 2014 concluded that out of 10 developed countries examined (including the UK, US and Germany) Australia's food processing sector has the highest costs of doing business. Australia was among the most expensive countries for labour costs, facility costs, transpositions costs energy/utility costs*".⁶ This conclusion is shared by many, including by the Australian Food and Grocery Council.⁷

The previous Annual Reports of Coca-Cola Amatil emphasised on the need to reduce SPCA's costs of production and sales.⁸ As a result, SPCA's costs were indeed reduced, as indicated in the 2014 Annual Report.⁹ This reduction in costs of production and sales resulted in a long due improvement in the competitiveness of SPCA.

4.2.4 SPCA's Lack of investment

As previously explained, SPCA has been facing financial turmoil since 2010 (which coincides with the increased value of the AUD). This is not only documented in Coca-Cola Amatil's Annual Reports, but also, widely, in the Australian press.

Considering that the financial turmoil was partly due to SPCA's decisions, the Federal Government refused to provide 25 million AUD for investments. According to Tony Abbott, "*It is very important that we take seriously the requests that different organisation may put to us as a government, but in the end businesses have got to put their house in order*".¹⁰

In particular, it is the lack of investments and innovations that led SPCA's to its financial problems. According to Peter Kelly himself "*To build a sustainable and*

⁶ "SPC a story of 'the brand that could': Watkins", 13 April 2015, www.cis.org.

⁷ AFGC, Submission of 11 October 2011 to the Senate select committee on Australia's food processing sector, in response to the inquiry into Australia's food processing sector, p.4.

⁸ "[...] CCA has undertaken a substantial restructuring of the SPCA business with initiatives undertaken to materially reduce the cost of doing business [...]", Coca-Cola Amatil, Annual Report 2013, p.2.

⁹ Coca-Cola Amatil, Annual Report 2014, p. 20.

¹⁰ See « Tony Abbott cabinet rejects \$25m assistance plea from SPC Ardmona », 30 January 2014, www.theguardian.com

profitable business in Australia you need to innovate; to innovate you need to invest.¹¹ This lack of investment is a general trend in the Australian food industry; according to KPMG “[...] *total private investment (i.e. fixed and financial capital) in the food, beverage and tobacco manufacturing industry has been relatively flat over the past 10 years [...] This indicates that, to continue to remain competitive, the food and grocery industry may some catching up to do in terms of investment*”.¹²

This lack of investment was due, *inter alia*, to the shift of value from food suppliers to retailers and consumers, which led to a decline in profitability of 40% from 2010 to 2014. According to Ms Alison Watkins, “[t]hese shifts have resulted in a number of Australian food processor struggling to make an investment case to invest new capital that will enable them to continue manufacturing”.¹³

It is only recently that the Victorian Government decided to grant a 22 million AUD assistance package to SPCA, while 78 million AUD were provided by Coca-Cola Amatil. In total, it is therefore 100 million AUD, almost a quarter of which comes from the tax-payers’ money, that have been granted to SPCA.

These 100m AUD “*will result in the implementation of a transformation plan designed to reduce costs, improve productivity, modernise our production facilities, revitalise our brand portfolio and return the business to profitability*”.¹⁴

As acknowledged by SPCA’s representatives, SPCA was suffering due to the lack of investments (especially in respect of packaging) and an old image. Investments made in this area have produced – based on the statements of the CEO of its mother company – immediate positive results.

5. CONCLUSION

To conclude, La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. submit that the methodology followed by the Commission suffers several flaws:

- First of all, not only is the Commission’s decision not to verify the data provided by SPCA and the Australian retailers discriminatory, but it also flaws the conclusions regarding injury. Indeed, the verification of SPCA’s data would demonstrate that this company has not only recovered from its past turmoil, but it is actually doing well.
- Secondly, the Commission should not attribute any injury allegedly suffered before 30 June 2013 to the two exporters.

¹¹ « Tony Abbott cabinet rejects \$25m assistance plea from SPC Ardmona », 30 January 2014, www.theguardian.com

¹² Australian Food and Grocery Council, “Competitiveness & sustainable growth”, pp. 18-19.

¹³ See “SPC a story of ‘the brand that could’: Watkins”, 13 April 2015, www.cis.org.

¹⁴ *Ibid.*

- Thirdly, the fact that the current investigation targets two exporters, as opposed to a country, prevents the Commission from reaching any meaningful and supported conclusion regarding the alleged injury caused by imports from our Clients.
- Fourthly, the File Note reveals that the Commission has overlooked the developments of SPCA's economic situation and that factors other than imports from Italy contributed to the injury allegedly suffered by SPCA.

In view of the above, our Clients respectfully request the Commission to terminate its investigation on imports of certain prepared or preserved tomatoes.