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

Written submission of the European Commission

The European Commission has carefully analyzed the Report on the assessment of the market situation factors for Italy for prepared and preserved tomatoes ('PPT').

The report concludes, when referring to the effects of the alleged distortions on the fresh tomato market in Italy, that *"any flow on effect may be relatively small"* on the price of PPT. The Australian Anti-Dumping Commission additionally affirms that the 'flow on' effect on the PPT market is insignificant.

The above conclusions appear to be fully in line with the conclusions of the Anti-Dumping Commission regarding the previous investigation:

"[i]n the absence of positive evidence to the contrary, 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."

The Anti-Dumping Commission further states that:

*"[t]he Commission considers that there is no situation in the market in Italy such that sales in Italy are not suitable for use in determining a price under subsection 269TAC (1) of the Act"(sales made in the ordinary course of trade)."*¹

In the European Commission's view the only possible conclusion that can be drawn on that basis is that no market situation exists in Italy which would affect the suitability of Italian PPT prices in the context of a dumping calculation.

¹ Final report 217, prepared or preserved tomatoes – Italy, Point 6.1 and 6.8.

The Anti-Dumping Commission's approach

The European Commission would nevertheless like to reiterate its grave concerns with regard to the type of assessment performed by the Australian Anti-Dumping Commission. As noted in our previous submissions the examination of the particular market situation cannot serve as a vehicle to counteract subsidies outside the framework of the WTO Agreement on Subsidies and Countervailing Measures ('ASCM'). In the particular circumstances of this case, it is difficult to delineate the scope of application of the ASCM and the type of analysis mandated by the notion of market situation for Italy for PPT.

The European Commission has already opposed this erroneous and non-WTO compatible approach in its earlier submissions. In this context the European Commission would like to once more underline that according to WTO rules "*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*" (Article 32.1 of the ASCM). ACSM imposes strict standards with regard to the countervailability of subsidies and such standards cannot be set aside by notions contained in the WTO Anti-dumping Agreement ('ADA').

The Australian investigating authority analyses the EU's Common Agricultural Policy ('CAP') support programs within the framework of an anti-dumping investigation. The analysis focuses on whether such programs are coupled or decoupled. The relevance of those notions in the context of an anti-dumping investigation is not clearly established. Indeed, the flow on (or pass through) argument and the apparent relevance of the type of subsidy in this particular case resembles to a large extent the steps undertaken in an anti-subsidy investigation.

Finally, it should be reminded that the income aid for farmers, the Single Payment Scheme ('SPS'), is a decoupled, non-specific income support scheme. It is compatible with the WTO requirements and with paragraph 6 of Annex 2 of the WTO Agreement on Agriculture. The **SPS has thus no trade distorting effects or effects on production** and for that reason is considered a "Green Box" measure in terms of paragraph 1 of Annex 2 of the Agreement on Agriculture.

Low evidentiary standard and factual inconsistencies

Without prejudice to the above stated position, the European Commission would also like to criticize the level of evidentiary standard in the Report. The report reveals a general misunderstanding of the CAP and contains some important factual mistakes. The main issues are explained below:

- 1) The report states that "*while explicitly decoupled from current output, historical reference subsidies are implicitly coupled to output*".² According to the report such implicit coupling is due to political and economic reasons. The European Commission

² Report on the assessment of the market situation factors for Italy for prepared and preserved tomatoes. Dr George Barker (26 June 2015), p. 15.

disagrees with such a poor level of evidentiary standard which relates to a number of statements in the report. Any conclusions in an anti-dumping investigation should be based on firm and positive evidence and not on mere hypotheses, assumptions or general statements.

- 2) The European Commission disagrees with the statement that the CAP has not been completely implemented in Italy. The CAP has been implemented in line with the relevant legal provisions.
- 3) The report gives a false impression of the SPS. The European Commission would like to stress once more that it is a decoupled type of support.
- 4) The report refers to competition aspects and alludes to the existence of "*potential distortions in the market due to the risk of Italian Producer Organizations engaging in cartel like behavior*"³. This is an astonishing allegation which in the European Commission's opinion cannot be deduced from the memo referred to in the report. The European Commission cannot understand or accept such statements in a formal report commissioned by the Australian Anti-Dumping Commission. In any case, even if there would have been such a practice, it would have resulted in higher prices of raw tomatoes and not lower.
- 5) Regarding regulations of imports, the report states that "*the law prohibits the import of fresh tomatoes from outside the EU for local sale*". This is factually incorrect since imports of fresh tomatoes of any type are allowed provided import duties are paid.⁴ There is even intra EU trade of fresh tomatoes during the investigation period. Yet even in these circumstances, there are elements that indicate that CAP payments are not transferred to prices since Italian tomatoes continue to have the highest price in Europe. This is not inconsistent with the findings of the Anti-Dumping Commission in the previous investigation: "*the price of fresh tomato paid by Italian processors was either similar or higher than the benchmark price of fresh tomato available in Australia*".⁵ In any case, even if there would have been import restrictions, it would have resulted in higher prices and not lower.
- 6) The results are based to a great extent on factors taken from *estimates from literature* from a report published in 2008 and thus well outside the investigation period. Furthermore, the data from the report refers to the EU market and not the Italian market.

³ Report on the assessment of the market situation factors for Italy for prepared and preserved tomatoes. Dr George Barker (26 June 2015), p. 21.

⁴ A tariff rate cannot per se be regarded as trade distorting.

⁵ Statement of essential facts, No. 217, p. 33.

- 7) In the European Commission's view, the report resembles a theoretical academic study rather than an assessment of facts based on firm and positive evidence required in AD investigations.

Conclusion

In the European Commission's view the approach of the Anti-Dumping Commission to analyze the effect of subsidies in the framework of an anti-dumping investigation contravenes the WTO rules. In any case, the income aid for farmers, the SPS, is a decoupled, non-specific income support scheme.

Overall and without prejudice to the above considerations, the results of the current analysis appear to be in line with the conclusions reached by the Anti-Dumping Commission in the previous investigation. In this sense, the European Commission considers that it has not been demonstrated either that a particular market situation exists or that payments provided directly to tomato growers in Italy are transferred to processors in the form of lower prices.

The European Commission trusts that the Australian authorities will comply with their WTO obligations throughout this proceeding.