

**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 Assessment of the Market  
Situation Factors in Italy for Prepared or  
Preserved Tomatoes**

**23 July 2015**

## 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. ('two exporters' or 'our Clients').

The initiation of this 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 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%. Therefore, on 20 March 2014, the Commission terminated the investigation with respect to the two exporters.

In the framework of the current investigation, the Commission entrusted an independent expert<sup>1</sup> to provide a Report regarding the possible existence of a "market situation" on the Italian market of processed and prepared tomatoes ("PPT"), in order to determine whether the normal value of the Italian market of PPT is suitable for comparison purposes.

The non-confidential version of the Report was published on the website of the Commission on 15 July 2015. The confidential version of the Report was made available to our Clients on 20 July 2015. The present submission summarises the views of our clients with regard to said Report.

## 2. LEGAL SUBSIDIES CANNOT GIVE RISE TO MARKET DISTORSIONS

At the outset, the two exporters wish to emphasise that the whole Report rests on the flawed premise that any public support is suitable to distort the market. However, subsidies which are lawful are by definition unable to distort the market. In fact, the market distortion does not derive from the fact that public support is granted to the

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<sup>1</sup> On 20 July 2015, in reply to a question submitted by the two exporters' counsel the Commission informed that it had provided confidential information of the relevant companies to the Expert whom it had selected and appointed (and whose name was kept confidential until the Report was published), without seeking prior authorization from the two exporters.

recipients but rather that this is done in non-compliance with the relevant international legislation.<sup>2</sup>

The Report superficially and misleadingly (see *infra*) presumes that the Single Payment Scheme (“SPS”) provided by the Common Agricultural Policy (“CAP”) amounts to an illegal subsidy. As will be seen below, this is not true.

The exporters therefore strongly claim that the Report should be disregarded as it fails to distinguish between legal and illegal subsidies and qualifies lawful measures as illegal subsidies producing market distortion effects.

## 2.1 The CAP is a green-box measure, fully WTO compliant

As repeatedly explained, the SPS is a green-box measure and, as such, fully WTO compliant.

Contrary to what is misleadingly submitted in the Report, in 2014 the CAP and, more specifically, the SPS, did *not* put in place a coupled income support to tomato growers.<sup>3</sup> In this respect, reference is also made to the opinion rendered by an independent expert attached hereto as Annex 1<sup>4</sup> which illustrates the main features of the system in 2014, i.e. the only year which is relevant to the present assessment.

Annex II to the WTO Agreement Agriculture provides that “*Income support measures 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 [...]*”. (Our emphasis) The Agreement then describes the different types of measures, including the *decoupled income support*, and provides that:

« (a) *Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.*

(b) *The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.*

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<sup>2</sup> The two exporters would like to draw the Commission’s attention to the fact that public measures are also granted in the Australian market of PPTs (see, e.g., the 22 million AUD granted to SPC by the Victorian Government)..

<sup>3</sup> This conclusion is further confirmed by the Report itself, which states that “*Under pressure from its WTO partners and threat of legal actions owing to the illegality under WTO rules its CAP subsidies, a far-reaching reform of CAP was decided in 2003 and 2004, with progressive implementation from 2005*”. In other words, the 2003 reform of the CAP was undertaken in order to make it fully WTO compliant pursuant to the pressure and threats of legal actions by the WTO Members.

<sup>4</sup> See Annex 1.

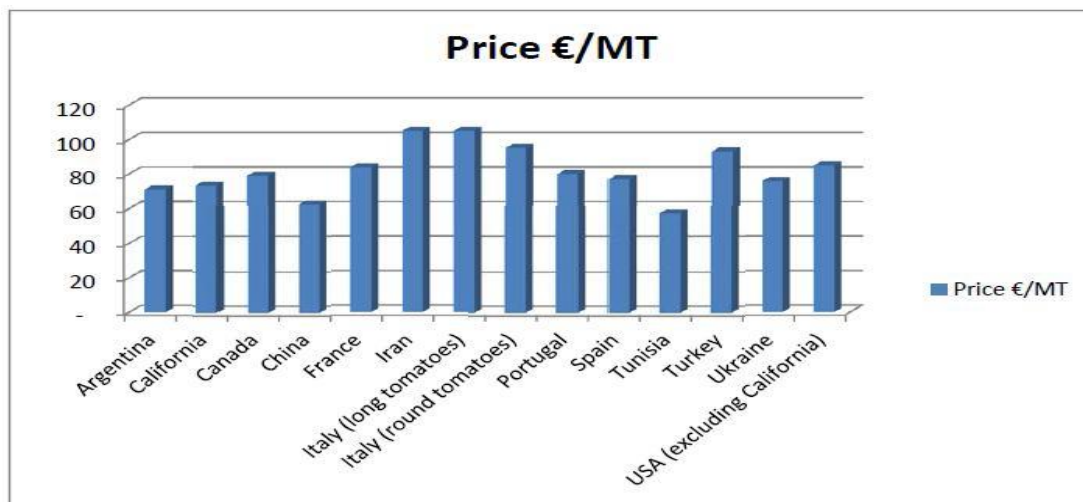
(c) *The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.*

(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.*

(e) *No production shall be required in order to receive such payments. »*

As already explained in our Clients' previous submissions, and confirmed by the above-mentioned independent opinion, the payments granted in 2014 are in line with the above described conditions and, thus, fully decoupled<sup>5</sup>. As a result, the payments received in 2014 did *not* – and could *not* - have *trade distorting effects* or effects on production.

The fact that the price of raw tomatoes in Italy is not depressed by allegedly illegal subsidies is further confirmed by the available market data,<sup>6</sup> which reveal that the prices of raw tomatoes on the Italian market are the highest worldwide.<sup>7</sup>



**Table 1: Prices for tomatoes in 2014. Source: World Processing Tomato Council**

<sup>5</sup> See Annex 1, section 2.

<sup>6</sup> As well as by the Commission itself which acknowledged 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*”, Statement of essential facts, No. 217., p. 33.

<sup>7</sup> As previously submitted and extensively verified by the Commission case handlers at the premises of the two exporters, in 2014 the price (net of transport costs) of raw tomatoes in South Italy was around [Confidential] €/tonne for round tomatoes and [Confidential] €/tonne for long tomatoes.

### 3. AN ALLEGED PARTICULAR MARKET SITUATION DOES NOT BY ITSELF RENDER THE DOMESTIC PRICE UNFIT FOR A PROPER COMPARISON

Even if the Commission were to conclude that a *particular market situation* occurred in Italy in 2014, *quod non*, this alone would not warrant disregarding the domestic prices. In fact, further analysis would be required to demonstrate that the alleged particular market situation actually distorted the normal value of PPT in Italy so as to render it unreliable.

In fact, as established by the GATT Panel in *EC – Cotton Yarn*, the existence of a market situation is only relevant if it renders the sales unfit for comparison. The Panel ruled that “[the question] was not whether or not a ‘particular market situation’ existed *per se*. A ‘particular market situation’ was only relevant insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison”.<sup>8</sup>

In light of the above, it is worth noting that the Report itself records a *gigantic* profit margin for the tomato growers. Indeed, according to the data in table 8, the profit recorded by the farmers would be 162% (prices of 0.116 €/kg - cost of 0.0442 €/kg).

Having the above in mind, it is hard to understand how such high and (extremely) profitable prices could justify an upward adjustment of the normal value of the downstream products. Such an adjustment could *in abstracto* take place in presence of evidence demonstrating that the purchase price of the raw material does not fully reflect its costs which, as seen above, is a situation non occurring in the present case.

In this respect it is recalled that pursuant to the WTO case-law, an authority “*may not assume that a subsidy provided to producers of the ‘upstream’ input product automatically benefits unrelated producers of downstream products, especially if there is evidence on the record of arm’s-length transactions between the two*” (emphasis added).<sup>9</sup> In such case, “*it is necessary to analyze to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon processed products.*”<sup>10</sup> Such an analysis requires determining whether the producer of the processed product obtained the input on terms more favourable than those that would otherwise have been commercially available to that producer.<sup>11</sup> Given the very high prices of raw tomatoes in Italy, such a conclusion seems impossible to reach in the present case.

Therefore, it is claimed that any alleged *particular market situation* in Italy, in presence of the extremely high prices of raw tomatoes (see the Report and the data verified by the Commission case handlers), would not justify making any adjustment to the normal value of the relevant exporters.

<sup>8</sup> GATT Panel Report, *EC – Cotton Yarn*, para 478.

<sup>9</sup> WTO Panel Report, *US – Softwood Lumber III*, para. 7.71

<sup>10</sup> WTO Appellate Body Report, *US Softwood Lumber IV*, para 140

<sup>11</sup> WTO Panel Report, *United States – Countervailing Measures on Certain Products from the European Communities*, para. 7.130-7.131 *in fine*.

It is also appropriate to recall that in the previous investigation the Commission concluded 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” and that “*the evidence available to the Commission in the circumstances of the investigation is not sufficient to support a finding that these payments operate in a manner which distorts competitive market conditions and would lead the Commission to consider that it cannot use normal values pursuant to s.269TAC(1) (sales made in the ordinary course of trade)*” (our emphasis).<sup>12</sup>*

As extensively discussed in our Clients’ previous submission, the CAP regime has *not changed* since the conclusions of the previous investigation. It is therefore hard to understand how the Report can be reconciled with the conclusions reached 15 months ago. Any conclusion to the effect that the CAP would in the framework of the current investigation cause a *particular market situation* to exist and distort the normal value of the PPT so as to warrant an adjustment of the normal value would be in stark contradiction with the conclusions previously reached by the Commission itself.

Therefore, even though the Report itself acknowledges that the “flow on” effect is relatively small, so much so that the Commission considers it to be “*insignificant*”,<sup>13</sup> it is claimed that the Commission should conclude that the alleged measures have produced NO effect at all on the PPT industry.

#### **4. ANTI-DUMPING INVESTIGATIONS CANNOT BE MISUSED TO RULE ON ALLEGED SUBSIDIES, WHOSE INVESTIGATION IS STRICTLY GOVERNED BY THE SCMA**

Any evaluation regarding the nature of illegal subsidy of the CAP should have taken place in compliance with the WTO legislation governing anti-subsidy investigations and not in the framework of the ongoing antidumping investigation.

The methodology adopted by the Commission is questionable, since it *de facto* amounts to entrusting a third party expert with the task of conducting – in a superficial and inaccurate fashion – an assessment of the relevant measures without complying with the principles laid down in the applicable legislation.

In this regard, it is appropriate to recall that Article 32.1 of the SCMA states that “*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*”.<sup>14</sup>

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<sup>12</sup> Final Report No. 217, p.34.

<sup>13</sup> Report p. 33.

<sup>14</sup> SCMA, Article 32.1.

Contrary to the allegations of the Commission, this provision covers all subsidies, without making any difference based on the purpose of the analysis.

## **5. THE CONCLUSIONS AND METHODOLOGY OF THE REPORT ARE ILL FOUNDED**

Not only, as discussed above, are the general premises of the Report flawed but so are also the conclusions reached and the methodology relied upon.

### **5.1 The conclusions reached in the Report are incorrect and ill-founded**

The Report draws three conclusions aimed at demonstrating the existence of a distortion in the Italian market of fresh tomatoes. Each of these conclusions will be addressed in turn.

#### **5.1.1 Alleged distorting effects of the Common Agricultural Policy**

The Report concludes that the CAP “*appears to have resulted in particularly distortionary effects on the raw tomato market in Italy*”,<sup>15</sup> specifically because of the explicit and implicit coupling of the payments received by the Italian tomato growers. These two points will be addressed in turn to illustrate the inaccuracies which undermine such conclusion and to demonstrate that the picture has been misinterpreted.

First, with regard to the explicit coupling, the Report indicates that an additional payment of 160€ per hectare entails that the payments made to farmers are coupled with the production of tomatoes. However, the Report clearly mentions that “*only recently an additional payment of 160 € per hectare (applicable from January 2015) was introduced which is explicitly coupled to production of tomatoes*”.<sup>16</sup> As already explained at length in our Clients previous submissions, any data relating to a period outside the period 1 January 2014 to 31 December 2014 is irrelevant.

Second, the Report alleges that the payments are implicitly coupled to production, since the amount of payments received is based on the historical tomato payments that the farmers received. In this regard, reference is made to the attached opinion of an independent expert which illustrates the features of the CAP and explains why it is incorrect to claim that the measures granted in 2014 were implicitly coupled.<sup>17</sup>

- First of all, as already explained in our Clients’ previous submissions, the payments are completely decoupled from production *since they are granted whether the farmer produces tomatoes or not*. In other words, whether a farmer grows tomatoes, oranges, salads or nothing on his land is not a

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<sup>15</sup> Report p. 32.

<sup>16</sup> Report p. 15.

<sup>17</sup> See Annex 1, section 2.



criterion on the basis of which the payments are granted. This is the exact definition of the decoupling. The independent opinion enclosed under Annex 1 confirms that *“Fischler reform introduced the decoupling of direct payments, on the basis of which they are granted independently of the production. As a consequence, a breakdown of the link between payments and production subject to payments took place. Farmers are therefore free to produce or not and receive anyway the aid in the form of a single payment to the extent that they respect the requirements imposed by the conditions.”*<sup>18</sup>

- Secondly, the payments are calculated on the basis of a reference period. Using a reference period is in line with paragraph 6(a) of Annex II to the WTO Agreement on Agriculture, which reads as follows: *“(a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period”*. In order to decouple the payments from the production, one has to resort to a base period. This is also confirmed by the opinion enclosed under Annex 1, which clarifies that the SPS benefited *“the historic farmer that in the base period (2004, 2005 and 2006) declared an area cultivated of raw tomato and received a payment on the basis of a quantity delivered through a contract concluded with a processor by the Producer Organization”* and/or *“the subjects who succeeded to their rights during or after the reference period”* (as it is well known, indeed, the certificates entitling to the SPS can be freely traded).<sup>19</sup>
- Thirdly, the payments are not granted to support production but to ensure that the farmers comply with the EU law requirements to keep land in a good agricultural and environmental condition (to avoid soil erosion, for instance). Again, this is confirmed by the independent opinion according to which *“the payment is conditional to the possession of an area allocated to agricultural activity, subjected to the maintenance of good agricultural and environmental conditions and to the respect of the criteria of mandatory management on public health and animal welfare”*.<sup>20</sup> This is further evidence that the payments are completely decoupled from the production.

#### 5.1.2 Alleged risk of Italian Producer Organisations engaging in cartel like behaviour

Secondly, the Report maintains that *“there appears to be scope for potential distortions in the market due to the risk of Italian Producer Organisations engaging in cartel like behaviour”*.<sup>21</sup> It is unclear on which evidentiary basis the Report relies upon since there is no official record of such infringements in the reports issued by the

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<sup>18</sup> See Annex 1, section 2.

<sup>19</sup> See Annex 1, section 3.

<sup>20</sup> See Annex 1, section 3.

<sup>21</sup> Report p. 32.



European Commission (the body in charge of conducting cartel investigations) and by the national competition authorities of the EU Member States, including the Italian “*Autorità Garante della Concorrenza e del Mercato*”.

Having clarified the foregoing, it is interesting to remark that a cartel in the Italian tomato growing industry would have produced an *increase* in the price of raw tomatoes. So, even accepting the unsubstantiated conclusion of the Report, the conclusion would be that such practices would have caused the price of raw tomatoes to be higher – and not lower - than what they would have been in their absence!

### 5.1.3 Alleged distorting effects of the Regulations on imports of raw tomatoes

Finally, the Report concludes that several features of the regulations on imports of raw tomatoes distort the market.

First, it is absolutely wrong to claim that “*the law prohibits the import of fresh tomatoes from outside the EU for local sale*”.<sup>22</sup> NO such a prohibition is in place in the EU. If the author of the Report has evidence indicating the contrary, it would be appreciated receiving a clear indication of such a piece of legislation.

It would appear that the Report has confused the fact that fresh tomatoes have to be processed within a very short period of time after their picking (maximum 24 hours), which limits their ability to be transported to far destinations,<sup>23</sup> with the existence of restrictions on imports.<sup>24</sup> As demonstrated by the independent opinion provided under Annex 2, “*fresh tomato fruits cannot be conveniently transported from Third Countries. Any hypothesis of fresh tomato import to supply the Italian processing plants cannot be considered realistic*”.<sup>25</sup>

Moreover, the exporters fail to see why the possibility to make use of the inward processing regime would amount to an evidence of market distortion. As a matter of fact, Annex II to the WTO Agreement on Subsidies and countervailing measures provides that “[...] *drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste)*”.<sup>26</sup>

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<sup>22</sup> Report, p. 22.

<sup>23</sup> This is further confirmed by the Report itself which, having concluded that the North and South of Italy are in close proximity (roughly 6 hours drive), states “*Having said that [...] the perishability of tomatoes once picked may mean that there is some scope for price differentials to emerge in raw tomatoes between the north and south*” and “[...] *it seems that the distance required to transport [tomatoes from Greece, France or Spain], may mean tomatoes from other European Countries are not close substitutes and therefore not relevant*”.

<sup>24</sup> With regard to the impossibility to transport tomatoes on long distances, please see Annex 2.

<sup>25</sup> Annex 2, p. 5.

<sup>26</sup> SCMA, Annex II, 1.

Our Clients fail to see ANY relevance of the above conclusion in the Report.<sup>27</sup>

#### 5.1.4 Preliminary conclusions

As demonstrated above, the three conclusions of the report, allegedly supporting the evidence of a particular market situation on the Italian PPT market, amount to mere unsubstantiated conjectures. In fact:

- The payments granted in 2014, in total compliance with the WTO Agreement on Agriculture, were fully decoupled from production;
- The risks of cartel behaviour of Producer Organisations amount to mere allegations, unsupported by any evidence or findings of such practices. As a matter of fact, on a purely logical ground, our Clients fail to understand how the existence of a cartel on an upstream market (raw tomatoes) could lead to a reduction of the prices on the downstream market (PPT);
- Imports of tomatoes are practically difficult, due to the fact that fresh tomatoes have to be processed within a very short period of time. However, no restriction on imports of raw tomatoes is in place in the European Union. In addition, the possibility to rely on a duty drawback scheme and the existence of Free Trade Agreements do not prove ANY distortion in the market.

## 5.2 The Report contains methodological flaws which undermine its entire content

Finally, our Clients submit that the methodology followed in the Report is flawed in several regards.

### 5.2.1 The calculation of the impact of the subsidy on the price of preserved tomatoes is vitiated by the use of incorrect data and methodology

Contrary to what is alleged in Tables 6, 7 and 8 of the Report, the variable cost of production of raw tomatoes is not 3.232 €/ha, but rather **[Confidential]**€/ha, as clearly shown in Annex 2, which relies upon independent and publicly available information.. It would therefore appear that the Report fails to take into account several costs incurred by the farmers.

As a result of the correction of the variable costs (from 3.232 €/ha to **[Confidential]**€/ha), the alleged subsidy expressed as a percentage of the variable cost drops from 24% to **[Confidential]**% and as a percentage of the variable cost net of the alleged subsidy drops from 32% to **[Confidential]**%.

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<sup>27</sup> The same is also true with regard to the possible implications deriving from the existence of a Free Trade Agreement with Mediterranean countries. Such agreements are covered – and explicitly allowed – by Article XXIV of the GATT. As a matter of fact, the European Union and Australia are currently negotiating the conclusion of a similar agreement.

The table below summarizes the figures listed in Table 6 of the Report and the revised figures.

	Report	Revised figures
EU CAP Subsidy (S) €/Ha	776	776
Variable Cost (VC) €/Ha	3,232	<b>[Confidential]</b>
% S / VC	24%	<b>[Confidential]</b> %
% S / (VC-S)	32%	<b>[Confidential]</b> %

**Table 2: Revised Table 6**

Having clarified the above, it is strongly claimed that there is no logical ground to express the percentage of the alleged subsidy by reference to the variable cost net of the alleged subsidy (%S/[VC-S]). In fact, as extensively discussed above, the payments are NOT related and dependent on the production of tomatoes. Thus, from a purely mathematical viewpoint, the ratio should be computed by reference to the full variable cost (**[Confidential]**€/ha). As such, the correct ratio (% S/VC) would be **[Confidential]**%.

Taking into account the revised figures in Table 2 above, the impact of the subsidy on the price of PPT in Italy has to be recalculated as follows.

Based on the alleged subsidy accounting for **[Confidential]**% of the variable cost (see Table 2) and the flow on rate of 73% (see Report), the effect of the alleged subsidy on the price of raw tomatoes would be **[Confidential]**% (as opposed to 23% indicated in the Report).

	Report	Revised figures
EU CAP Subsidy (S) €/Ha	776	776
Variable Cost (VC) €/Ha	3,232	<b>[Confidential]</b>
% S / VC	24%	<b>[Confidential]</b> %
% S / (VC-S)	<b>32%</b>	<b>[Confidential]</b> %
Flow on rate for Raw Tomatoes	73%	73%
<b>Effect on price of Raw Tomatoes</b>	<b>23%</b>	<b>[Confidential]</b> %

**Table 3: Revised figures**

Following the logic of the Report, the subsequent step would be to calculate the *flow on rate of the subsidy on PPT* and, as a result, the *impact of the subsidy on the price of PPT*. For this calculation, the relevant factors to be considered are (i) the share raw tomatoes in the overall cost of PPT, and (ii) the flow on rate for PPT.

With regard to the first factor, the figure of **[Confidential]**% used in the Report should be reduced to **[Confidential]**%, based on the actual data provided by the two exporters. In this respect it must be observed that according to Appendix I to the Report the share of raw tomatoes in the cost of PPT is about **[Confidential]**%.

However, this figure must be further corrected for the reasons explained in section 5.2.2 below, and amounts to less than **[Confidential]**%.

In view of the above corrections, the effect of the alleged subsidy on the price of PPT on the Italian market is not **[Confidential]**%, but **[Confidential]**% (*i.e.* [effect of the price of raw tomatoes \* share of the cost of raw tomatoes in the total cost \* flow on rate for PPT] or **[[Confidential]%**\* **[Confidential]%**\* **[Confidential]%**). The total calculation is detailed in Table 4 below.

	Report	Revised figures
EU CAP Subsidy (S) €/Ha	776	776
Variable Cost (VC) €/Ha	3,232	<b>[Confidential]</b>
% S / VC	(24%)	<b>[Confidential]</b> %
% S / (VC-S)	32%	<b>[[Confidential]%</b>
Flow on rate for Raw Tomatoes	73%	73%
<b>Effect on price of Raw Tomatoes</b>	23%	<b>[Confidential]</b> %
Spt (cost of Raw Tomatoes / total cost)	<b>[Confidential]</b> %	<b>[Confidential]</b> %
Flow on rate for Preserved Tomatoes	73%	73%
<b>Effect on price of Preserved Tomatoes</b>	<b>[Confidential]</b> %	<b>[Confidential]</b> %

Table 4: Revised and final figures

The foregoing demonstrates that the figure of **[Confidential]**%, which, according to the conclusion in the Report, would be the extent of price reduction triggered by the alleged subsidy on raw tomatoes passed on to the two PPT producers, is wrong. In fact, pursuant to the correction of the data discussed above, the figure should be **[Confidential]**%, as the table above highlights.

The above figure is in line with the figure of **[Confidential]**% also contained in the conclusion of the Report, which results from a calculation based on a different methodology which appears to be more accurate and reliable than the methodology based on the variable cost of production of raw tomatoes. Indeed, such calculation (pp. 30-31 of the Report) is based on the actual prices for raw tomatoes paid by the processors rather than on the cost of production incurred by the growers (which – as a matter of fact – are third parties not involved in the investigation).

#### 5.2.2 Appendix I to the Report is flawed due to the use of incorrect data

Appendix I contains the following errors:

- Appendix I to the Report states that the price of raw tomatoes paid in 2014 was **[Confidential]**€/kg. However, this price is inclusive of transportation cost, as it has been verified during the visits at the exporters' premises. The price net of transport cost is in the range of **[Confidential]**€/kg. Therefore, the raw tomatoes purchases costs account for **[Confidential]**% (and not

**[Confidential]**%) of industrial costs and around **[Confidential]**% of the total costs (as opposed to **[Confidential]**%).

- As a result, the calculation reported in Appendix I should be corrected as follows: 32% to be applied on **[Confidential]**€/kg (as opposed **[Confidential]**€/kg), which leads to a result of **[Confidential]**€/kg. This would represent an absolute increase of **[Confidential]**€/kg (**[Confidential]**). This figure, added to **[Confidential]**, equals to **[Confidential]**, representing a **[Confidential]**% increase in production costs (and not **[Confidential]**%).
- Moreover, for sake of completeness it is submitted that the calculation contained in Appendix 1 should be further corrected in the light of the methodology described in section 5.2.1 above, as follows:

	Methodology	Report	Revised figures
1. Price of tomatoes (€/g)		<b>[Confidential]</b>	<b>[Confidential]</b>
2. Price increase due to suppression of subsidy	Subsidy / VC = 776/3,232 or 776/ <b>[Confidential]</b>	32%	<b>[Confidential]</b> %
3. Result of the increase	Price of raw tomatoes +32% or + <b>[Confidential]</b> %	<b>[Confidential]</b>	<b>[Confidential]</b>
4. Absolute increase	Price of raw tomatoes - (price of raw tomatoes +32%) or price of raw tomatoes - (price of raw tomatoes + <b>[Confidential]</b> %)	<b>[Confidential]</b>	<b>[Confidential]</b>
5. La Doria's weighted cost per kg with subsidy		<b>[Confidential]</b>	<b>[Confidential]</b>
6. La Doria's weighted cost per kg without subsidy	La Doria's weighted costs - absolute increase	<b>[Confidential]</b>	<b>[Confidential]</b>
7. Increase of production cost in %	% between La Doria's weighted cost with and without subsidy	<b>[Confidential]</b> %	<b>[Confidential]</b> %

**Table 5: revised figures**

It follows that the alleged impact of the SPS on La Doria's cost would in any event not exceed **[Confidential]**%. It is claimed that the same conclusion also applies to Feger.

### 5.2.3 The Report is based on a misleading representation of the CAP payment mechanism

Finally, the Report fails to take into account another basic feature of the SPS. Indeed, the Report relies on the assumption that all tomato growers receive a flat payment of

776€/ha, However, this is wrong. A tomato grower can in fact receive a sum lower than 776 €/ha or even no payment. The amount of the payment in fact depends on a number of factors, such as the number of titles owned by each farmer and the value of each title (which is calculated on the historical use of the land).

Having the above in mind, to assume that ALL the suppliers of the two exporters received the maximum amount of 776 €/ha is ill-founded. Had the Commission checked this information during the long on-the-spot visits carried out at the premises of the two exporters they would have verified that many suppliers of the two exporters indeed received amounts smaller than 776 €/ha.

As it is shown by the randomly selected official declarations issued by AGEA (the Italian agency in charge of the management of the SPS) - attached under Annex 3 - in the year 2014:

- (i) many tomato growers dispose of less titles than hectares;
- (ii) the value of the overwhelming majority of the titles is well below 776€/ha (in this respect, it has to be noted that the value of the titles has been constantly decreased during the last years).

Such information is also summarized in the table below.

	Amount of payment allegedly received	Hectares owned	Total value of the entitlements	Average payment
Sample 1	776	[Confidential]	[Confidential]	[200-300]
Sample 2	776	[Confidential]	[Confidential]	[200-300]
Sample 3	776	[Confidential]	[Confidential]	[400-450]
Sample 4	776	[Confidential]	[Confidential]	[300-350]
Sample 5	776	[Confidential]	[Confidential]	[150-200]

Table 6: Samples of payments

Thus, it is claimed that the Report is totally flawed as it wrongly assumes that ALL the suppliers of the two exporters received the maximum possible payment (776€/ha) while this is not proved.

## 6. CONCLUSION

In light of the foregoing, our Clients strongly contest the conclusions of the Report:

- First of all, a finding of “market situation” requires the existence of an illegal subsidy. As previously explained, however, the CAP is fully WTO compliant and therefore cannot be considered to distort the price of raw tomatoes.

- Second, even if a particular market situation were to exist, *quod non*, this would not justify concluding that the price of PPT in Italy is unfit for proper comparison. In fact, in 2014 the price of raw tomatoes in Italy was extremely profitable and was among the highest in the world.
- Third, it is recalled that, in any event, the question of the legality of the CAP has been addressed in an anti-subsidy investigation, in accordance with WTO law, and not in the framework of an antidumping investigation.
- Fourth, both the conclusion and methodology of the Report were flawed.
  - About the conclusions
    - The first conclusion is based on the wrong premise that in 2014 the measures under consideration were coupled which is factually wrong.
    - The second conclusion is based on the unsubstantiated allegation that a cartel is in place in the raw tomato industry. If this were to be true, its effect would be to give rise to a price increase.
    - It is simply untrue that limits on import of raw tomatoes are in place in the EU. The fact that EU processors can avail themselves of the inward processing regime in no way proves, or even suggests, that the market is distorted.
  - About the methodology
    - Even accepting the logic and figures contained in the Report – *quod non* – it should be noted that the impact of the alleged subsidy on the price of PPT would be, in the worst scenario, **[Confidential]**% and not **[Confidential]**%.
    - Moreover, the above figure should be adjusted downward by eliminating the amount of alleged subsidy which the suppliers of the two exporters, which received amounts lower than 776 €/ha, did not obtain.

A final example further confirms that the Report rests on totally wrong data and flawed premises.

Table 8 of the Report argues that the price of raw tomatoes without subsidy is 0.116 €/kg. Appendix I then reports that the price paid by the exporters for raw tomatoes in 2014 was **[Confidential]**€/kg.



This amounts to **[Confidential]**!

## List of annexes

1. Opinion on the SPS by an independent expert
2. Opinion on the production and imports of raw tomatoes by an independent expert
3. Sample of payments received by tomato growers under the SPS  
**[Confidential]**