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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 on the Statement of Essential Facts and Preliminary Affirmative Determination (No. 276)

The European Commission has carefully analysed the Statement of Essential Facts and the Preliminary Affirmative Determination by which it was decided to impose provisional anti-dumping measures on imports of canned tomatoes exported from Italy by two companies, namely Feger and La Doria.

At the outset, the European Commission wishes to express its deep disappointment regarding the imposition of provisional measures and the conclusions reached in this report.

Furthermore, the European Commission is surprised – to say the least – by the absence of objectivity in the analysis. In particular, the complete lack of legal/economic supporting evidence in relation to the adjustments on the cost of production for the establishment of the dumping margins appears to be result oriented.

The European Commission urges the Australian authorities to duly take into consideration the arguments outlined below and conclude this investigation in the most objective manner.

I. BACKGROUND OF THE CASE

In order to have a better understanding of the arguments presented below, the European Commission considers that, given the history of the case, it is necessary to recall some elements related to the previous investigations (in the not so distant past) concerning the same product as well as some elements related to the initiation of the present case.

(i) Safeguard investigation (June 2013): It should first be reminded that Australia had initiated in 2013 a safeguard investigation against imports of canned tomatoes. Due to the nature of the instrument, imports from all countries of origin were targeted, but in fact Italy

was the main exporting country. This investigation was terminated in December 2013 without imposing any measures. This decision was mainly based on the following conclusions:

"The Productivity Commission found that increased imports of canned tomatoes have not caused serious injury to the domestic industry. The serious injury resulted from a combination of other factors including long-term import competition, supermarket private label strategies, a decrease in export volumes (likely as a result of the appreciation of the Australian dollar) and extreme weather events".

(ii) Anti-dumping investigation (July 2013): In parallel to the safeguard investigation, Australia had also initiated an anti-dumping investigation against imports of canned tomatoes from Italy. That investigation was concluded in April 2014 with the imposition of measures, except for the exports made by Feger and La Doria. No dumping margin could indeed be established for these two exporters.

Within the framework of the above investigation, the European Commission had expressed significant concerns because Australia considered the necessity to examine whether there was a "*particular market situation*"¹ which would make the sales prices of canned tomatoes in Italy not suitable for determining a domestic price for the calculation of the dumping margins. It was indeed alleged that certain EU aids given to farmers may have had a distorting effect on the Italian market for canned tomatoes.

In its final report, the Anti-Dumping Commission however concluded that there was no such "*particular market situation*" because "*[...] 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*"².

The Anti-Dumping Commission further concluded that it "*could not support a finding that these payments operate in a manner which distorts competitive market conditions*"³.

(iii) Anti-dumping investigation – Feger and La Doria (January 2015): Despite the above findings and only nine months after the imposition of measures, the Anti-Dumping Commission decided to initiate a new investigation against the two Italian exporters for which no dumping could be established. The decision to initiate a second case in such a short time period was mainly based on the fact that the new application "*contained a considerable amount of new factual information provided by SPCA [the Australian applicant] regarding the allegations of a market situation*"⁴.

¹ Article 2.2 of the WTO Anti-dumping Agreement.

² Anti-Dumping Commission, Final Report No.217, 21 March 2014, p. 34.

³ Anti-Dumping Commission, Final Report No.217, 21 March 2014, p. 34.

⁴ Anti-Dumping Commission, SEF No. 276 & PAD No. 276, 4 September 2015, para. 2.2.3, p 12.

It should be underlined that the initiation of a second investigation in less than a year after a negative determination is extremely unusual and contrary to the decision made in Doha by the Ministerial Conference (WTO) with regards the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, whereby "*investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed*"⁵.

Even though this text is not legally binding, the European Commission nevertheless notes with disappointment that the Australian authorities did not handle this file with the required special care. The fact that also in the current investigation the Anti-Dumping Commission concludes that there is no "*particular market situation*" (see below) in fact confirms the comments made by the parties at initiation stage. According to these comments, the current investigation was not warranted since the circumstances had not changed and the complaint indeed did not include any additional evidence regarding the existence of a "*particular market situation*".

Based on the above, the European Commission considers that Australia should not have accepted the apparently 'new' information as sufficient evidence in order to remain coherent with the conclusions of its previous investigation.

II. ESTABLISHMENT OF THE DUMPING MARGINS

1. "*Particular market situation*"

As mentioned above, the current investigation was initiated mainly on the basis of the alleged 'new' evidence of the existence of a "*particular market situation*". This was despite the fact that the original investigation concluded that there was no such market situation.

In order to have a fresh look at the issue at stake, Australia decided this time to hire an independent consultant to assess the situation. The current investigation however has confirmed the findings of the original case. Indeed, in the Statement of Essential Facts, the Anti-Dumping Commission concludes that it was "*not satisfied that there is a situation in the market in Italy for prepared or preserved tomatoes that makes sales of prepared or preserved tomatoes in that market unsuitable for use in determining a [domestic] price*"⁶.

In other words, the Anti-Dumping Commission concludes yet again that domestic sales prices of canned tomatoes in Italy are suitable for the calculation of the dumping margin.

⁵ DOHA WTO Ministerial Decision on "Implementation-related issues and concerns" Decision of 14 November 2001.

⁶ Anti-Dumping Commission, SEF 276 & PAD No. 276, 4 September 2015, para. 6.3.2, p.25.

2. Adjustment of costs

Despite the above findings, the Anti-Dumping Commission nevertheless – quite inexplicably and without any reasoning – goes on to conclude that *"the cost of raw tomatoes contained in Feger and La Doria's records do not reasonably reflect competitive market costs associated with the production or manufacture of like goods"*. On that basis, the Anti-Dumping Commission has 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).

The European Commission considers that this adjustment is unfounded, contradictory, and not supported by a single shred of evidence. This is based on the following elements:

(i) Contradictory findings regarding the treatment of domestic sales

The above conclusions are in direct conflict with the Anti-Dumping Commission's own findings on the absence of a *"particular market situation"* in both the original and in the present investigation.

Indeed, by artificially increasing the cost of production, the domestic sales prices for certain types of the product under investigation are likely to become loss making, thus treated as not being made in the *"ordinary course of trade"*⁷ and excluded from the dumping margin calculation. This methodology clearly contradicts the conclusion that there is no *"particular market situation"* and therefore domestic sales prices are not unsuitable for the calculation of the dumping margins (see above). It also creates a situation of artificial dumping that would otherwise not exist.

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

By adjusting costs, the Anti-Dumping Commission suggests -without any evidence- that the cost of raw tomatoes in Italy is *"not competitive"*,⁸ i.e. that tomato prices are artificially low due to government influence. It is quite astonishing that the Australia came to this unfounded conclusion.

First, the Anti-Dumping Commission itself recalls in the Statement of Essential Facts the following conclusions of its original investigation:

⁷ Article 2.1 of the WTO Anti-dumping Agreement.

⁸ Section 43- 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;

"(..) the direct payments under the CAP and other miscellaneous government payments were not material. This finding was backed by comparing the price paid by Italian exporters for the raw tomato input against a competitive market price benchmark for tomatoes, taken to be the Australian industry purchase price for tomatoes from local suppliers. Based on this benchmark, the prices in the Italian market were found to be similar or higher than the Australian prices paid. On this basis, the Commission concluded that the payments provided directly to tomato growers in Italy were not being passed through to processors in the form of lower prices".⁹

Second, it is generally recognized that the price in Italy of raw tomatoes for processing is one of the highest in the world. According to the OEIT (European Organisation of Tomato Industries), which represents the tomato processing industry from Italy, Spain, Portugal Greece and France, i.e. around 95% of the European production, the European prices are 20% higher than the price for tomatoes in California (which is a generally recognized benchmark).

The prices per tonne in the last three years developed as such:

	2012	2013	2014
OEIT Members €	80.7	81.8	85.9
California USD	76.5	77.7	91.5
California €	58.8	59.8	70.4

1.00 € = 1.30 \$

(Source: OEIT)

According to OEIT, in 2014 Northern and Southern Italian prices reached 93€/tonne and 95€/tonne, respectively.

All in all, these figures show clearly that for instance, California has lower prices than Italy. 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"*.

Finally, in its Statement of Essential Facts, the Anti-Dumping Commission does not offer one single piece of evidence showing that prices for raw tomatoes would be distorted. The adjustment is simply based on the totally unsubstantiated allegation that *"CAP payments made to tomato growers is such that those CAP payments have affected the prevailing market prices in Italy for raw tomatoes"*¹⁰. This constitutes quite an unacceptably weak standard of evidence – to say the least. The European Commission would have expected a more serious reasoning from the Australian authorities.

⁹ Anti-Dumping Commission, SEF No. 276 & PAD No. 276, 4 September 2015, Appendix 1, para. 6, p.56.

¹⁰ Anti-Dumping Commission, SEF No. 276 & PAD No. 276, 4 September 2015, para. 6.3.3, p.25.

In conclusion, the Anti-Dumping Commission could give no explanation on the reason why tomato prices are considered not to be competitive in Italy, simply because this is not the case. Even worse, by concluding that there is no "*particular market situation*", and hence that competitive market conditions of the processed tomato prices in Italy are not distorted (insignificant pass-through effects), the tomato prices in Italy are necessarily "*competitive*".

(iii) EU aids to farmers are not price distortive

The Anti-Dumping Commission also seems to completely ignore the fact that the EU aid system to farmers has been completely reformed already some 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 have thus 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.

(iv) Absence of a "pass-through" analysis

Notwithstanding the above, even if assuming that the two exporters concerned by this 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 aids granted to farmers to the prices of raw tomatoes paid by the two exporters concerned.

(v) Flaws in the calculations

Finally, and once more without prejudice to the fact that no adjustment of cost is justified in this case, there are obvious and important shortcomings in the evaluation made by the Anti-Dumping Commission in paragraph 6.3.4 of the Statement of Essential Facts.

The Anti-Dumping Commission has established a subsidy rate of €2.041 per hectares in 2012 on the following basis:

- "€137,975,250 (75% of €183,967,000)"¹¹, divided by,
- "67,586 hectares (GAIN Report 2012)"

This methodology in fact confirms that the amounts of aid granted above the ceiling, i.e. the decoupled aids under the Single Payment Scheme, are not to be considered for any cost adjustment. The European Commission fully agrees with this approach.

In this respect it should be noted that the Anti-Dumping Commission has used the wrong legal provisions in its calculations by making reference to Article 54(2)(b) of EC Regulation 73/2009. In fact, only Article 54(1) specifically refers to tomatoes:

"54. 1. Member States may retain, until 31 December 2011, up to 50 % of the component of the national ceilings referred to in Article 40 corresponding to support for the production of tomatoes."

From the above, it is obvious that the calculations contain the following major flaws:

- First, the percentage of the ceiling of 75% used by the Anti-Dumping Commission is wrong (that ceiling in fact refers to other fruits and vegetables). The percentage of the ceiling applicable to tomatoes is 50%.
- Second, the ceiling mentioned above was valid only until December 2011 and not 2012. In addition, Italy even voluntarily had decided to cut coupled support to tomato farmers already at the end of 2010.

It is recalled that, in this case, the investigation period, i.e. period used for the dumping calculation, corresponds to the calendar year 2014. That year is thus necessarily the only valid period for the establishment of dumping. There is no objective reason to use information related to previous years, rather the opposite. The Australian Anti-Dumping Commission nevertheless based its calculation on outdated and erroneous information.

On these grounds, the European Commission sees 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. According to Australia's correct interpretation, the decoupled aids under that scheme should indeed not be taken into consideration at all.

The European Commission does not understand why Australia has adjusted the 2014 cost of production of the exporters concerned based on 2010 figures. This appears to be totally lacking objectivity, in particular because the system has been completely reformed and does no longer apply.

¹¹ National ceiling payments to tomato farmers in Italy. Amount from Annex X. Council Regulation (EC) No 73/2009 of 19 January 2009.

3. Rejection of other adjustments

The European Commission does not have all the details of the calculation of the dumping margins for the two Italian exporters since these refer to company-specific data which is treated as confidential. Following contacts with the exporters concerned, it would appear that some adjustments they claimed for the calculation of the dumping margin have not been granted by the Anti-Dumping Commission.

The European Commission understands that these adjustments were however accepted by the Anti-Dumping Commission in the framework of the original investigation, but were refused this time without any apparent justified reason. The European Commission was very surprised to learn about this since these issues had not been raised during the verification visits which were also attended by European Commission officials.

There also appear to be some other issues in the calculations which are more than questionable. In particular, when constructing normal values, the Anti-Dumping Commission seems to have applied a methodology (application of a certain profit margin to adjusted costs) which artificially increases the normal values. This is of course notwithstanding the fact that costs should not be adjusted in the first place.

In this respect, the European Commission would strongly urge the Anti-Dumping Commission to duly take into consideration the elements provided by the exporters and ensure an approach consistent with the one followed in its original investigation.

III. INJURY/CAUSALITY

According to Article 3 of the WTO Anti-Dumping Agreement (WTO ADA) "*A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products*".

In this context, the Anti-Dumping Commission acknowledged in its own conclusions that quite a number of the relevant WTO injury indicators did not show any injury. This is for example the case of all the volume indicators, despite the fact that the complainant had claimed in its own application the existence of reduced sales volume and reduced market share.

The Anti-Dumping Commission concluded that injury in this case was only based on price suppression, reduced profit/revenue and reduced capacity utilization.

The conclusion on the existence of price suppression is based on a quite simplistic approach. Indeed, the Statement of Essential Facts merely shows that the cost of production increased more than prices, and concludes on that basis that the Australian industry was not in a position to increase prices sufficiently because of the alleged dumped imports. These

conclusions are however not duly substantiated and the European Commission considers that Australia failed to give any explanation based on "*positive evidence*" that this development was caused by the alleged dumped imports.

- First, the findings of undercutting which are used by the Anti-Dumping Commission are established on a very weak basis. Undercutting was indeed mainly established on a price comparison between the Australian domestic prices and the sales prices given by importers, for "selected customers". The European Commission is of the opinion that, since they were made available during the investigation, the actual export prices of Feger and La Doria should rather have been used. This is indeed the only possible way to ensure a reliable and comprehensive price comparison. Using only some sales prices, to selected customers, and given by some importers cannot be representative. In any case it cannot be as representative as considering the totality of the export transactions of the two Italian exporters concerned.

- Second, the Anti-Dumping Commission did not even analyse why costs increased. This is however particularly relevant in this case since the complainant "*SPCA has stated that a decline in its sales volumes caused by imported products has resulted in higher costs to make and sell because of reduced economies of scale which in turn leads to poor fixed costs recovery and eroded profits and profitability*"¹². In this respect, it is recalled that the Anti-Dumping Commission has not established injury in terms of declining volume, hence the reasons why costs have increased remains unexplained. Such an explanation is however key to the demonstration of price suppression.

As far as reduced profit is concerned, it should be noted that the complainant has been loss-making for years, and this is a clear indication of structural problems rather than injury caused by the alleged imports. The European Commission considers that the Anti-Dumping Commission should revise its analysis which does not adequately address the effect of causes other than the alleged dumped imports.

It is recalled that pursuant to Article 3.5 WTO ADA, "*The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports*".

It is very obvious in this case that the other factors played an essential role. These other factors were already mentioned in the other recent investigation. They mainly consist of the private label strategies and supply diversification by supermarkets, the effect of the exchange rate (before 2013) as well as the lack of investments made by SPCA which would result in ineffective production. The latter would most probably explain the losses incurred by the complainant in the last years and the reason why costs have increased.

¹² Statement of Essential facts No 276, paragraph 8.7.7, p.42.

IV. CONCLUSIONS

Based on the above arguments, the European Commission:

- 1. Regrets that yet another investigation against imports of canned tomatoes from Italy has been initiated without sufficient grounds. This investigation was indeed mostly based on the groundless allegation of the existence of a "*particular market situation*" which could not be demonstrated.**
- 2. Considers that the dumping margins in this case have been artificially inflated by adjusting cost elements without any legal or economic justification:**
 - EU aids to farmers are not distorting, as confirmed by the Anti-Dumping Commission itself. These aids are fully decoupled to production levels and should not be the basis for any cost adjustment.**
 - When using the appropriate year for its calculations of the adjustment, i.e. 2014, the Anti-Dumping Commission would necessarily draw the same conclusions.**
 - Prices of raw tomatoes in Italy are competitive and in fact one of the highest in the world.**
- 3. Requests the Anti-Dumping Commission to carefully analyse the comments made by the two Italian exporters with respect to the calculation of their dumping margin since some adjustments granted in the past seem to have been unduly rejected in this case.**
- 4. Requests the Anti-Dumping Commission to reconsider its injury and causality analysis which so far has not been based on "*positive evidence*" and did not involve an "*objective examination*". This includes the analysis of causes other than the alleged dumped imports.**