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Dumping investigation ADC 217 – Prepared or preserved tomatoes from Italy – Statement of Essential facts - Preliminary comments on Feger's dumping margin calculation

The present submission is filed on behalf of our client Feger di Gerardo Ferraioli S.p.A. ("Feger"). It provides Feger's comments on the revised dumping margin calculation received on Friday 4 September 2015 together with the Statement of Essential Facts ("SEF").

The present submission does not discuss the adjustment (or "replacement") of Feger's CTM made by the ADC in accordance with Regulation 43 (see SEF, Section 6.3.4). Feger will lodge comments regarding the lawfulness of such a cost adjustment in a separate submission.

At the outset, Feger emphasises that the correction of the material errors and the reconsideration of the issues discussed in the present submission on the part of the ADC would cause Feger's dumping margin to drop below the *de minimis* threshold.

Feger respectfully requests the ADC to carefully review all the points extensively addressed below.

1. THE PROFIT MARGIN USED IN THE DUMPING CALCULATION IS NOT CORRECT

In constructing the normal value for the models which were sold in the Australian market but not in the domestic market in the investigation period, the ADC used a profit margin [Confidential]. This profit margin was computed by comparing the domestic selling prices with a "non-adjusted" CTM, i.e. the CTM net of the "increase" applied by the ADC pursuant to Regulation 43 in order to reflect the alleged impact of the subsidies allegedly granted to tomatoes growers.

The profit margin [Confidential] has been subsequently applied to the "adjusted" CTM, i.e. the CTM increased by the amount of the subsidy allegedly granted to tomatoes growers under the CAP, in order to calculate the normal value pursuant to section 269 TAC(2)(c) of the Act.

Feger respectfully submits that the above-described approach is misleading and ill-founded.

In fact, if the profit margin is calculated by comparing the domestic selling prices with a particular CTM, then the same CTM should be used to construct the normal value pursuant to section 269 TAC(2)(c) of the Act. In the case under discussion, this means that if the CTM is adjusted to take into account the subsidy allegedly granted to tomato growers, then the normal value constructed in accordance with section 269 TAC(2)(c) of the Act should incorporate the profit margin generated from the "adjusted" CTM.

To construct the normal value by using the profit margin resulting from the "non-adjusted" CTM and then by applying it to the "adjusted" CTM gives rise to a double counting of the impact of the subsidy allegedly granted to tomatoes growers, which is reflected both in the CTM **and** in the profit.

The above conclusion finds further confirmation from the wording of Regulation 45(2), dealing with the "determination of profit", according to which:

"The Minister must, if reasonably practicable, work out the amount by using data relating to the production and sale of like goods by the exporter or producer of the goods in the ordinary course of trade."

As a result, the same cost used in the ordinary course of trade test (for the purpose of establishing which domestic transactions can be taken into account in the normal value calculation) must also be relied upon in calculating the domestic profit margin to be used for the purpose of subsection 296 TAC(5B). This is confirmed also by the wording of Article 2.2.2 of the WTO Anti-dumping Agreement.

In light of the above, it must be concluded that any increase of the CTM pursuant to Regulation 43 should, as a matter of consistency, involve the use of the profit margin deriving from the comparison of the domestic prices with the increased CTM for the purpose of constructing Feger's normal value pursuant to section 269 TAC(2)(c).

2. THE DUMPING MARGIN CALCULATION INCLUDES GOODS NOT PRODUCED BY FEGER

At the outset, it must be noted that the goods purchased (i.e not manufactured) and resold (i.e. traded) by Feger have been included in the dumping margin calculation. This is incorrect insofar as Feger's dumping margin should only include the goods manufactured by Feger.

[Confidential].

3. THE ADC'S REFUSAL TO GRANT A DOMESTIC ADJUSTMENT FOR "ADVERTISING" AND "QUALITY COINTROL" IS UNJUSTIFIED

In its questionnaire reply, Feger requested a downward domestic adjustment for advertisement expenses and quality control testing undertaken by certain domestic customers across the range of products produced and sold by Feger. This claim has been rejected since, as explained in Confidential Attachment 2 to the SEF:

[Confidential]

Such conclusion is ill-founded for the following reasons:

- during the verification visit Feger provided the visit team with comprehensive information and evidence regarding – *inter alia* – the "advertising" and "quality control" adjustments and the resulting costs borne by Feger. Moreover, Feger throughout the verification visits expressed its full availability to provide any additional evidence which the ADC would appreciate receiving. Despite this, during the verification visit the team did not raise any objection and did not request any further evidence regarding [Confidential]. Had the ADC been dissatisfied with the evidence submitted in connection with the "advertising" and "quality control" adjustments (even though, as will be seen below, the evidence submitted meets the evidentiary threshold), it should have informed Feger about this and, accordingly, granted it the opportunity to provide additional evidence during the verification visit. All this did not occur;

- it must be emphasized that in the previous investigation against the <u>same product</u> manufactured by the <u>same exporting producer</u> (i.e., Feger) that took place only two years ago, the ADC rightly decided that the <u>same documentary evidence</u> provided in the ongoing investigation was sufficient and adequate to warrant an identical claim for "advertising" and "quality control" adjustment in respect of advertisement and quality testing expenses incurred by Feger with regard to domestic sales [Confidential]. It is hard to understand why an adjustment which was warranted only two years ago would, all at once, be held to be unsubstantiated in presence of the same, identical, evidence. The inconsistency of this conduct is even more flagrant if one considers that the ADC has [Confidential] on the ground that <u>the same approach was followed in the previous investigation</u> [Confidential]. Such an "*à la carte"* approach, by which consistency with the previous investigation is invoked when this leads to an increase of the dumping margin while it is overlooked when it would give rise to a decrease of the dumping margin, is arbitrary and flagrantly flawed.

[Confidential]. Feger firmly claims that the ADC's conclusions in the SEF are ill-founded for the reasons outlined below.

3.1. Advertising adjustment

The ADC has relied upon three arguments to reject the advertising adjustment:

➢ *[Confidential]*

[Confidential – business sensitive information].

The foregoing demonstrates that the argument put forward in the SEF is ill-founded. [Confidential]. Thus, the SEF has unwarrantedly rejected a well-founded and substantiated claim for an adjustment aimed at offsetting an imbalance between domestic and export sales. Such a difference MUST be corrected through an adjustment. If not, this situation would give rise to an unfair comparison, contrary to s. 269TAC(8) of the Act.

➢ According to the ADC *[Confidential]*

[Confidential – business sensitive information].

In this respect, the ADC's attention is drawn to the fact that the allocation method used for the "advertising" adjustment does not differ from the allocation method used for other adjustments such as [Confidential] in respect of which the ADC did not, however, raise the same criticism. Again, Feger is confronted with an "*à la carte*" decision: the same allocation method is accepted in relation to certain adjustments while it is rejected when applied to advertising expenses.

➢ *According* to the ADC *[Confidential]*

[Confidential – business sensitive information].

In light of the foregoing, Feger strongly believes that the ADC's decision not to grant the "advertising" adjustment is manifestly groundless. [Confidential].

3.2. Quality Control adjustment

The ADC has invoked the following grounds to justify the rejection of Feger's claim for a quality control adjustment:

➢ Adjustments are not to be granted where *[Confidential]*

The above statement rests on a flawed understanding of the facts. [Confidential – business sensitive information].

- According to the ADC *[Confidential]*

[Confidential – business sensitive information] In this respect, the comments made above with regard to the similar position taken by the ADC in connection with advertising expenses equally apply here.

- The ADC noted that *[Confidential]*

[Confidential – business sensitive information]

- Finally, the ADC noted that *[Confidential]*

[Confidential – business sensitive information].

In light of the foregoing, Feger strongly claims that the decision not to grant the “quality control” adjustment is manifestly groundless. [Confidential]

4. THE ADC SHOULD APPLY AN ADJUSTMENT TO REFLECT THE DIFFERENT ADMINISTRATION COSTS BORNE FOR DOMESTIC AND EXPORT SALES

As discussed during the on-site visit and acknowledged in the Verification Report, the Italian market for tomato products is a very complex and competitive market, requiring extensive selling and general efforts on the part of the sellers. By contrast, sales to Australia by Feger do not require the same efforts and expenses. [Confidential].

In order to reflect the overall higher costs incurred for domestic sales as compared to sales in Australia, Feger claims that the cost for [Confidential] should be deducted from the normal value in order to ensure a fair comparison. Once again, the cost of such activities in incurred by Feger with regard to domestic sales, while in Australia the same cost is incurred by Feger’s customers.

Therefore, Feger claims that a downward adjustment should be made to the normal value to properly reflect the differences in the conditions of the sales TAC(8) and of the costs TAC(9). Therefore, it is submitted that net value of domestic sales should be adjusted by deducting the domestic administration extra cost incurred by Feger.

5. THE ADC HAS OVERESTIMATED THE “FINANCE COST”

In line with the methodology followed in the previous investigation, the ADC has added to Feger’s CTMS an amount for the so-called "Finance cost". This has been calculated on the basis of Feger's financial statement [Confidential]

This calculation relies on the assumption that all the “finance costs” [Confidential] relate to Feger’s operative costs concerning, *inter alia*, the product under investigation. However, this is not fully correct. In this respect, the following should be noted.

[Confidential – business sensitive information]

It goes without saying that financial expenses such as those indicated above have no relationship whatsoever with the operation of the processed tomatoes business and, as such, should not be reflected in the CTS. [Confidential].

As a result, the “finance cost” attributable to the product under investigation (thus, with the exclusion of costs NOT related to the product under investigation) accounts for [Confidential].

Feger respectfully claims that the “Dom CTMS” spreadsheet should be corrected accordingly.

6. THE ADC HAS COMPARED SALES TO CUSTOMERS OPERATING IN DIFFERENT LEVELS OF TRADE

[Confidential – business sensitive information]

It is respectfully submitted that - in order to ensure a fair comparison - only the domestic sales to customers at a level of trade comparable to the level of trade of Australian customers should be included in Feger’s dumping margin calculation. Therefore [Confidential].

7. CONCLUSION

The correction of the material errors and the reconsideration of the points discussed above would lead to a dumping margin of [Confidential] *de minimis* [Confidential]. Feger is confident that the ADC will take in due consideration the above comments and will revise its calculation accordingly to reach the conclusion that **Feger’s dumping margin is *de minimis***.