



Application for review of a Ministerial decision

Customs Act 1901 s 269ZZE

This is the approved¹ form for applications made to the Anti-Dumping Review Panel (ADRP) on or after 2 March 2016 for a review of a reviewable decision of the Minister (or his or her Parliamentary Secretary).

Any interested party² may lodge an application for review to the ADRP of a review of a ministerial decision.

All sections of the application form must be completed unless otherwise expressly stated in this form.

Time

Applications must be made within 30 days after public notice of the reviewable decision is first published.

Conferences

You or your representative may be asked to attend a conference with the Panel Member appointed to consider your application before the Panel gives public notice of its intention to conduct a review. Failure to attend this conference without reasonable excuse may lead to your application being rejected. The Panel may also call a conference after public notice of an intention to conduct a review is given on the ADRP website. Conferences are held between 10.00am and 4.00pm (AEST) on Tuesdays or Thursdays. You will be given five (5) business days' notice of the conference date and time. See the ADRP website for more information.

¹ By the Acting Senior Member of the Anti-Dumping Review Panel under section 269ZY *Customs Act 1901*.

² As defined in section 269ZX *Customs Act 1901*.

Further application information

You or your representative may be asked by the Panel Member to provide further information to the Panel Member in relation to your answers provided to questions 10, 11 and/or 12 of this application form (s269ZZG(1)). See the ADRP website for more information.

Withdrawal

You may withdraw your application at any time, by following the withdrawal process set out on the ADRP website.

If you have any questions about what is required in an application refer to the ADRP website. You can also call the ADRP Secretariat on (02) 6276 1781 or email adrp@industry.gov.au.

PART A: APPLICANT INFORMATION

1. Applicant's details

Applicant's name: SPC Ardmona Operations Ltd

Address: Level 1 678 Victoria Street, Richmond ,Vic 3121 Australia

Type of entity (trade union, corporation, government etc.): Manufacturer

2. Contact person for applicant

Full name: Reg Weine

Position: Managing Director

Email address: reg.weine@spc.com.au

Telephone number: 03 9861 8902

3. Set out the basis on which the applicant considers it is an interested party

SPC was the applicant who applied for review to the Anti-Dumping Commission (ADC) that led to the reviewable decision.

4. Is the applicant represented?

Yes ☒ No

If the application is being submitted by someone other than the applicant, please complete the attached representative's authority section at the end of this form.

****It is the applicant's responsibility to notify the ADRP Secretariat if the nominated representative changes or if the applicant become self-represented during a review.****

PART B: REVIEWABLE DECISION TO WHICH THIS APPLICATION RELATES

5. Indicate the section(s) of the *Customs Act 1901* the reviewable decision was made under:

☐ Subsection 269TG(1) or (2) – decision of the Minister to publish a dumping duty notice

☐ Subsection 269TH(1) or (2) – decision of the Minister to publish a third country dumping duty notice

☐ Subsection 269TJ(1) or (2) – decision of the Minister to publish a countervailing duty notice

☐ Subsection 269TK(1) or (2) decision of the Minister to publish a third country countervailing duty notice

☐ Subsection 269TL(1) – decision of the Minister not to publish duty notice

☒ Subsection 269ZDB(1) – decision of the Minister following a review of anti-dumping measures

☐ Subsection 269ZDBH(1) – decision of the Minister following an anti-circumvention enquiry

☐ Subsection 269ZHG(1) – decision of the Minister in relation to the continuation of anti-dumping measures

6. Provide a full description of the goods which were the subject of the reviewable decision

tomatoes, whether peeled or unpeeled, prepared or preserved otherwise than by vinegar or acetic acid, either whole or in pieces (including diced, chopped or crushed) with or without other ingredients (including vegetables, herbs or spices) in packs not exceeding 1.14 litres in volume

7. Provide the tariff classifications/statistical codes of the imported goods

Subheading 2002.10.00 (statistical code 60)

8. Provide the Anti-Dumping Notice (ADN) number of the reviewable decision

If your application relates to only part of a decision made in an ADN, this must be made clear in Part C of this form.

ADN No. 2017/46

ADN No. 2017/47

9. Provide the date the notice of the reviewable decision was published

4 May 2017 ADN No. 2017/46

4 May 2017 ADN No. 2017/47

****Attach a copy of the notice of the reviewable decision (as published on the Anti-Dumping Commission's website) to the application****

Attached as part of this document.

PART C: GROUNDS FOR THE APPLICATION

If this application contains confidential or commercially sensitive information, the applicant must provide a non-confidential version of the grounds that contains sufficient detail to give other interested parties a clear and reasonable understanding of the information being put forward.

Confidential or commercially sensitive information must be marked '**CONFIDENTIAL**' (bold, capitals, red font) at the top of each page. Non-confidential versions should be marked '**NON-CONFIDENTIAL**' (bold, capitals, black font) at the top of each page.

For lengthy submissions, responses to this part may be provided in a separate document attached to the application. Please check this box if you have done so: ☒

- 10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.**

See Attachment A

- 11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to question 10.**

See Attachment A

- 12. Set out the reasons why the proposed decision provided in response to question 11 is materially different from the reviewable decision.**

Do not answer question 12 if this application is in relation to a reviewable decision made under subsection 269TL(1) of the Customs Act 1901.

See Attachment A

PART D: DECLARATION

The applicant/the applicant's authorised representative [*delete inapplicable*] declares that:

- The applicant understands that the Panel may hold conferences in relation to this application, either before or during the conduct of a review. The applicant understands that if the Panel decides to hold a conference *before* it gives public notice of its intention to conduct a review, and the applicant (or the applicant's representative) does not attend the conference without reasonable excuse, this application may be rejected;
- The information and documents provided in this application are true and correct. The applicant understands that providing false or misleading information or documents to the ADRP is an offence under the *Customs Act 1901* and *Criminal Code Act 1995*.

Signature: 

Name: Reg Weine

Position: Managing Director

Organisation: SPC Ardmona Operations Ltd

Date: 29 / 5 / 2017

PART E: AUTHORISED REPRESENTATIVE

This section must only be completed if you answered yes to question 4.

Provide details of the applicant's authorised representative

Full name of representative: Jules Croft

Organisation: Blackburn Croft & Co

Address: Level 3 149-155 Parnell Road Auckland 1151 New Zealand

P O Box 37553, Auckland 1151 New Zealand

Email address: bcc@tradecon.co.nz

Telephone number: +64 9 3584242

Representative's authority to act

****A separate letter of authority may be attached in lieu of the applicant signing this section****

The person named above is authorised to act as the applicant's representative in relation to this application and any review that may be conducted as a result of this application.

Signature:.....



(Applicant's authorised officer)

Name: Reg Weine

Position: Managing Director

Organisation SPC Ardmona Operations Ltd

Date: 29/5/2017



ANTI-DUMPING NOTICE NO. 2017/46

Certain Prepared or Preserved Tomatoes

**Exported to Australia from the Republic of Italy by AR Industrie
Alimentari S.p.A**

Findings in Relation to a Review of Anti-Dumping Measures

Notice under subsection 269ZDB(1) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission has completed a review, which commenced on 21 April 2016, of the anti-dumping measures applying to certain prepared or preserved tomatoes (the goods) exported to Australia from the Republic of Italy (Italy) AR Industrie Alimentari S.p.A. (ARIA). The review was limited to examining whether the variable factors relevant to the taking of the anti-dumping measures as they affect ARIA have changed.

Recommendations resulting from that review, reasons for the recommendations and material findings of fact and law in relation to the review are contained in *Anti-Dumping Commission Report Nos. 349 and 354* (REP 349/354).

I, CRAIG LAUNDY, the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science¹ have considered REP 349/354 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of facts and law set out in REP 349/354.

Under subsection 269ZDB(1)(a)(iii) of the *Customs Act 1901* (the Act), I declare that, for the purposes of the Act and the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act), that, with effect from the date of publication of this notice the dumping duty notice currently applying to the goods exported to Australia from Italy by ARIA is to be taken to have effect as if different variable factors (being the export price, normal value and non-injurious price) had been fixed in respect of ARIA, relevant to the determination of duty.

Particulars of the dumping margin established for ARIA and the effective rate of duty is set out in the following table.

Exporter	Fixed rate of duty	Duty Method
ARIA	17.8%	combination of fixed and variable duty

¹ On 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science. For the purposes of this decision the Minister is the Parliamentary Secretary to the Minister for Industry, Innovation and Science.

The actual duty liability may be higher than the effective rate of duty due to a number of factors. Affected parties should contact the Anti-Dumping Commission (the Commission) business.gov.au on 132846 or +61 2 6213 6000 or at clientsupport@adcommission.gov.au for further information regarding the actual duty liability calculation in their particular circumstance.

To preserve confidentiality, details of the revised variable factors such as Ascertained Export Price (AEP) and Normal Value and Non-Injurious Price (NIP) will not be published.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel (www.adreviewpanel.gov.au) in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

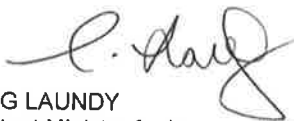
The Anti-Dumping Review Panel can be contacted by mail, phone, fax or email:

Anti-Dumping Review Panel
c/o Legal, Audit and Assurance Branch
Department of Industry, Innovation and Science
10 Binara Street
CANBERRA CITY
ACT 2601, AUSTRALIA
Phone: +61 2 6276 1781
Fax: +61 2 6213 6821
Email: ADRP@industry.gov.au

REP 349/354 has been placed on the Commission's public record. The public record may be examined at www.adcommission.gov.au. Alternatively, the public record may be examined at the Commission's office during business hours by contacting the case manager on the details provided below.

Enquiries about this notice may be directed to the case manager on telephone number (03) 8539 2467, fax number +61 3 8539 2499 (outside Australia) or email operations1@adcommission.gov.au

Dated this 4th day of May 2017



CRAIG LAUNDY
Assistant Minister for Industry, Innovation and Science
Parliamentary Secretary to the Minister for Industry, Innovation and Science



ANTI-DUMPING NOTICE NO. 2017/47

Certain Prepared or Preserved Tomatoes

**Exported to Australia from the Republic of Italy by all exporters
except Feger di Gerardo Ferraioli S.p.A, La Doria S.p.A and
AR Industrie Alimentari S.p.A**

Findings in Relation to a Review of Anti-Dumping Measures

Notice under subsection 269ZDB(1) of the Customs Act 1901

The Commissioner of the Anti-Dumping Commission has completed a review, which commenced on 25 May 2016, of the anti-dumping measures applying to certain prepared or preserved tomatoes (the goods) exported to Australia from the Republic of Italy (Italy) by all exporters except Feger di Gerardo Ferraioli S.p.A, La Doria S.p.A and AR Industrie Alimentari S.p.A. The review was limited to examining whether the variable factors relevant to the taking of the anti-dumping measures as they affect those exporters have changed.

Recommendations resulting from that review, reasons for the recommendations and material findings of fact and law in relation to the review are contained in *Anti-Dumping Commission Report Nos. 349 and 354 (REP 349/354)*.

I, CRAIG LAUNDY, the Assistant Minister for Industry, Innovation and Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science¹ have considered REP 349/354 and have decided to accept the recommendations and reasons for the recommendations, including all the material findings of facts or law set out in REP 349/354.

Under subsection 269ZDB(1)(a)(iii) of the *Customs Act 1901* (the Act), I declare that, for the purposes of the Act and the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act), that, with effect from the date of publication of this notice the dumping duty notice currently applying to the goods exported to Australia from Italy for all exporters except Feger di Gerardo Ferraioli S.p.A, La Doria S.p.A and AR Industrie Alimentari S.p.A is to be taken to have effect as if different variable factors (being the export price, normal value and non-injurious price) had been fixed in respect of those exporters, relevant to the determination of duty.

Particulars of the dumping margins established for each of the exporters and the effective rates of duty are set out in the following table.

¹ On 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science. For the purposes of this decision the Minister is the Parliamentary Secretary to the Minister for Industry, Innovation and Science.

Exporter/country	Fixed rate of duty	Duty Method
Calispa S.p.A.	0%	combination of fixed and variable duty
Conserve Italia Soc. Coop. Agricola	5.4%	combination of fixed and variable duty
De Clemente S.p.A.	0%	combination of fixed and variable duty
Le Specialità Italiane Srl	0%	combination of fixed and variable duty
Mutti S.p.A	3.2%	combination of fixed and variable duty
Princes S.p.A	0.1%	combination of fixed and variable duty
Alfonso Sellitto S.p.A.	0%	combination of fixed and variable duty
Attianese S.p.A. (Attianese)	0%	combination of fixed and variable duty
Conserve Manfuso SRL	0%	combination of fixed and variable duty
Davia S.p.A.	0%	combination of fixed and variable duty
Felice Conserve SRL	0%	combination of fixed and variable duty
FPD SRL	0%	combination of fixed and variable duty
Giaguaro S.p.A.	0%	combination of fixed and variable duty
ICAB S.p.A. La Fiammante	0%	combination of fixed and variable duty
IMCA S.p.A.	0%	combination of fixed and variable duty
La Regina del Pomodoro SRL	0%	combination of fixed and variable duty
Nolana Conserve SRL	0%	combination of fixed and variable duty
Pancrazio S.p.A.	0%	combination of fixed and variable duty
Rispoli Luigi & C. SRL	0%	combination of fixed and variable duty
All other / uncooperative exporters	118.0%	combination of fixed and variable duty

The actual duty liability may be higher than the effective rate of duty due to a number of factors. Affected parties should contact the Anti-Dumping Commission (the Commission) business.gov.au on 132846 or +61 2 6213 6000 or at clientsupport@adcommission.gov.au for further information regarding the actual duty liability calculation in their particular circumstance.

To preserve confidentiality, details of the revised variable factors such as Ascertained

Export Price (AEP) and Normal Value and Non-Injurious Price (NIP) will not be published.

Interested parties may seek a review of this decision by lodging an application with the Anti-Dumping Review Panel (www.adreviewpanel.gov.au) in accordance with the requirements in Division 9 of Part XVB of the Act, within 30 days of the publication of this notice.

The Anti-Dumping Review Panel can be contacted by mail, phone, fax or email:

Anti-Dumping Review Panel
c/o Legal, Audit and Assurance Branch
Department of Industry, Innovation and Science
10 Binara Street
CANBERRA CITY
ACT 2601, AUSTRALIA
Phone: +61 2 6276 1781
Fax: +61 2 6213 6821
Email: ADRP@industry.gov.au

REP 349/354 has been placed on the Commission's public record. The public record may be examined at www.adcommission.gov.au. Alternatively, the public record may be examined at the Commission's office during business hours by contacting the case manager on the details provided below.

Enquiries about this notice may be directed to the case manager on telephone number (03) 8539 2467, fax number +61 3 8539 2499 (outside Australia) or email operations1@adcommission.gov.au

Dated this 4th day of May 2017


CRAIG LAUNDY
Assistant Minister for Industry, Innovation and Science
Parliamentary Secretary to the Minister for Industry, Innovation and Science

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.

First Ground

The ADC inappropriately relied on data to the exclusion of other data in concluding that the evidence supplied by Feger and La Doria in REP 360 was reliable in assessing the impact of historical tomato CAP payments and new payments received by tomato growers supplying other exporters in REP 349/354.

- The ADC did not consider that 2014 became the base year for the new Basic Payment Scheme (BPS) introduced in January 2015.
- The ADC failed to examine the Regulations which show that the value of individual historical entitlements is recorded at the time a farmer applies for the total subsidy.
- The ADC ignored evidence which showed an amount for tomatoes which was similar to the per hectare amount of the subsidy under the BPS.

The ADC did not consider that 2014 became the base year for the new Basic Payment Scheme (BPS) introduced in January 2015.

- 1.1. In REP 276¹ the CAP payment based on historical payments to tomato growers in the base years 2004-2006 was determined by taking the actual total available to tomato farmers of €183,970,000 and dividing by the total production volume in 2014. This gave a sum of €0.037 per kg².
- 1.2. This resulted in the ADC deciding that costs for raw tomatoes did not reasonably reflect competitive market costs for the purposes of section 43(2) of the Customs (International Obligations) Regulation 2015.³
- 1.3. When using the €0.037/kg to adjust verified recorded costs in case 276 it was found that some sales were not in the ordinary course of trade. This led to a higher proportion of unprofitable transactions and in those instances normal values were based on a constructed value.
- 1.4. An important piece of evidence in REP 276 was the Government of Italy Ministerial Decree (17 October 2013) which showed that the historical amount allocated to tomatoes (€183,970,000) would continue in 2014 (the period of the dumping investigation in case 276)⁴
- 1.5. As a result of examining the Decree REP 276 noted:

1 REP 276 was reinvestigated in REP 360 and reviewed in ADRP No.35

2 REP 276 page 31

3 Customs Regulation

4 REP 276 pge 30

This evidence is consistent with the evidence provided by Feger and La Doria and demonstrates that:

- *The SPS was applicable to raw tomatoes from 1 January 2011;*
- *the Italian Government set national ceilings under the SPS; and*
- *direct income support payments are made on an annual basis to growers of raw tomatoes in Italy*

- 1.6 Since the introduction of tomatoes grown in Italy to the, then new, Single Payment Scheme growers were left in no doubt that their income support would continue.

An exporters' submission noted:

Since 2011, the decoupled aid was fully recognised to the owners of entitlements (100%).⁶

Regulation 1120/2009⁷ also confirmed this in Article 30:

As the case may be, Article 40 of Regulation (EC) No 73/2009 shall apply to the value of all the payment entitlements existing before the integration of fruit and vegetable support and to the reference amounts calculated for fruit and vegetable support⁸.

- 1.7 These payments continued in Italy with the new BPS by reference to Article 26 paragraph 2 of Regulation 1307/2013:

A fixed percentage of the payments the farmer received for 2014 under the single payment scheme, in accordance with Regulation EC No 73/2009....

Further payments were also based on the amount the farmer received in 2014 such as the greening payment as explained below.

- 1.8 The period of dumping in Review 349 and 354 (Review 349/354) was 1 April 2015 to 31 March 2016. From the beginning of 2015 a new scheme to administer CAP payments was introduced and replaced the Single Payment Scheme. This new scheme (referred to as the Basic Payment Scheme, BPS) established 2014 as the base year for the new entitlements based on the historical entitlements available in 2014. (The replaced historical entitlements expired on 31 December 2014). The national ceiling in Italy (which includes the tomato allocated payment and other sector specific payments) was disbursed as two mandatory payments: a basic payment (58% of the total national ceiling) and the payment for greening (30% of the total national ceiling, as distinct from the percentage allocation of this amount to the entitlements held in 2014). Italy also introduced a payment for young farmers (1%) and a new payment for coupled support limited to 11% of the total national ceiling available in Italy. (For tomatoes coupled support is 2.63% of the 11%).⁹ As provided in Article 22, paragraph 2, of Regulation (EU) No 1307/2013 Italy chose to increase the allowable part of the basic payment by 3%.

⁵ ibid

⁶ EPR 051/354 para 12

⁷ Regulation can refer to EU or EC Regulations

⁸ EPR 051/354 para 13

⁹ ManualfortheManagementofDirectAidsCampaign.pdf pge 101 of 141 EPR 063b/354

- 1.9 The BPS is a mechanism to partially address the fact that some entitlements under the SPS were of different values (some very high and some much lower). In practice the value of the entitlements to the tomato farmer remain similar. For example, a farm having historical tomato entitlements in 2014 would take the value of those entitlements plus the adjusted 3 % and multiply the amount by 58%. The decreased value of the new entitlements would be offset by the mandatory greening payment. The greening payment is additional to the basic payment.
- 1.10 One of the objectives of the new CAP is the enhancement of environmental performance through a mandatory "greening" component of direct payments which will support agricultural practices beneficial for the climate and the environment applicable throughout the Union. For that purpose, Member States should use part of their national ceilings for direct payments in order to grant, on top of the basic payment, an annual payment which may take account of internal convergence in the Member State or region, for compulsory practices to be followed by farmers addressing, as a priority, both climate and environment policy goals. Those practices should take the form of simple, generalised, non-contractual and annual actions that go beyond cross-compliance and that are linked to agriculture, such as crop diversification, the maintenance of permanent grassland, including traditional orchards where fruit trees are grown in low density on grassland, and the establishment of ecological focus areas.¹⁰
- 1.11 In the above extract it is noted that the greening "principles" can be overtaken if the greening payment will assist in attaining the convergence of the value of payment entitlements. This emphasises that the new scheme is still an income support scheme as described by the European Court of Auditors¹¹ (and others including the EC).
- 1.12 Article 47 of Regulation 1307/2013 notes that this mandatory payment is to be based on 30% of the national ceiling. In Italy, the greening payment per farm is calculated as a percentage as provided in Article 43 of Regulation 1307/2013.¹² This percentage is estimated as 60% of the total value of the payment entitlements that the farmer has activated.¹³ This means that despite the changes to the scheme in 2015 sector specific payments can still be identified including the historical tomato payment.
- 1.13 As one commentator observed on the introduction of the new scheme in 2015, "Farmers should not "panic" if the rights will have a lower value than in the past, because those who own the rights to the basic payment can then access the other payment types (greening, young farmers, coupled."
- 1.14 From 1 January 2015 tomato farmers had access to a new subsidy of €160 per hectare coupled to the growing of tomatoes. This was budgeted to account for around €11.3 million per year. But it should be noted that the historical subsidies and the new entitlements under the BPS remain essentially coupled
- 1.15 This was explained in the LECA report as follows:

10 Regulation 1307/2013 paragraph 37

11 European Court of Auditors 2014 Report 08

12 SingleApplicationInformation.pdf pge 29 of 53 EPR 051g/354

13 <https://tinyurl.com/y8wkp5gl> (third paragraph)

The use of “historical reference” payments, which are implicitly coupled, together with a new explicitly coupled payment means that a significant part of CAP payments with respect to tomatoes are still effectively coupled to production. Thus while technically farmers may receive “historical reference” payments that are not explicitly tied to current output, for political and economic reasons the payments are still likely to be implicitly tied to output. For political reasons fully decoupled historical reference payments appears politically unsustainable. Such subsidies would become politically threatened if farmers’ historical reference payments became disproportionate to their current activity, to illustrate for example at the extreme, if the farmers were to produce nothing. Thus farmers know that politically their future subsidies depend on maintaining output, and will behave accordingly. In addition, farmers are likely to allocate their capital, including subsidies, as they have done in the past to producing output that exploits their farms’ known comparative advantage and maximises their profits. For economic reasons, in the short run (barring any major change) farmers past output is likely to be a proxy for current output, meaning current subsidies will bear a relationship to current output. Thus while explicitly decoupled, historical reference subsidies are implicitly coupled.¹⁴

- 1.16 The economic incentive to continue to grow tomatoes even though a subsidy can be paid without growing tomatoes is important. The EC has argued that the actual amount received by a tomato grower cannot be ascertained as a payment under the CAP can be made even if tomatoes and other crops are not grown . But the investment in machinery and intellectual knowledge in the efficient farms supplying tomatoes for processing has continued despite this possibility.
- 1.17 It can now be shown that the historical sector specific amount allocated to tomatoes in 2014 has continued under a new delivery system in 2015.

Table 1 **Comparison of the tomato subsidy in 2015 with 2014**

	2015 (INV 354)	2014 (INV276)
Investigation Period	1 April 2015-31 March 2016	1 January- 31 December 2014
Calendar Year		
Single Payment Scheme		€183,970,000
Increased by 3% on the adjusted base, effectively 2.1% of the 2014 amount	€187,833,370	
Basic Payment Scheme (58%)	€108,943,355	
Greening top up (60%)	€65,366,013	
Coupled Payment	€11,288,599	
Young Farmer	€1,878,334	
Total subsidy for tomatoes	€187,476,301	€183,970,000
Production Volume	5,393,000,000	4,911,000.000
Hectares growing tomatoes	73,809	66,000
Per hectare for hectares growing tomatoes and tomato hectares at rest	€2,540	€2,787

1.18 Coupled payments are shown in the above table as part of the new amount compared to the sector specific tomato payment before the changes in 2015. The coupled payment requires evidence of a contract with a processor of tomatoes. As the processor already has supply contracts with the growers holding historical entitlements it would be in the processor's interest to ensure that the coupled payment benefited the income of the current tomato supplier and not enter into supply contracts with smaller suppliers. This additional income to the tomato grower contributes to the grower being able to supply tomatoes.

1.19 But the ADC did not examine the changes in 2015. If it had it would have found that the updated hectare amount was more reliable than the selected information supplied by exporters which was an average value of all farm subsidies, not just tomatoes.

The ADC failed to examine the Regulations which show that the value of individual historical entitlements is recorded at the time a farmer applies for the total subsidy

1.20 In REP 349/354 the ADC did not acknowledge the requirement that applications for the single payment required evidence of the farmer's access to different entitlements of different values.¹⁵ The ADC accepted the EC's assurances that this information was not available and not recorded. Believing that the entitlement for tomatoes was not available and not recorded the ADC relied on selected information provided by the exporters which was not specific to tomatoes.

1.21 But the Regulations show that entitlements have different values and must be declared in order to receive a single payment.

1.22 Article 68 of Regulation 1306/2013 refers to the system recording the payments made to farmers. This integrated system requires:

- (a) a computerised database;
- (b) an identification system for agricultural parcels;
- (c) a system for the identification and registration of payment entitlements;
- (d) aid applications and payment claims;
- (e) an integrated control system;
- (f) a single system to record the identity of each beneficiary of the support referred to in Article 67(2) who submits an aid application or a payment claim.

1.23 The identification of agricultural parcels and the identification of payment entitlements, confirms that there are entitlements of different values and that these are recorded.

1.24 In one of the regional guides to explain the single application process it is noted:

Support under the basic payment scheme shall be granted to farmers who request it in the single application. The payment entitlements, activated with a corresponding eligible area, give it a right to annual payment of the amounts indicated.¹⁶

¹⁵ EPR 051 and 064/354

¹⁶ SingleApplicationInformation2015pdf. Paragraph 10.4, page 25 of 53. EPR 051g/354

- 1.25 Again, this shows that payment entitlements have different values and they must be recorded.
- 1.26 Explanatory paragraph 8 in Regulation 640/2014 explains the requirements to ensure that payment entitlements can be audited:

In order to ensure a proper implementation of the basic payment scheme and related payments as provided for in Title III of Regulation (EU) No 1307/2013, Member States should establish an identification and registration system for payment entitlements which ensures that the payment entitlements are traceable and which allows, inter alia, to cross-check areas declared for the purposes of the basic payment scheme with the payment entitlements available to each farmer and between the different payment entitlements as such.

- 1.27 The reference to “different payment entitlements as such” demonstrates there are entitlements of different values which can be identified through the identification and registration system.
- 1.28 Article 18 (paragraph 7) of Regulation 640/2014 demonstrates that the value of different payment entitlements is known as the average of these different values is used to calculate the basic payment.

For the purpose of calculating the aid under the basic payment scheme, the average of the values of different payment entitlements in relation to the respective area declared shall be taken into account.

- 1.29 Article 15 paragraph 1 of Regulation 809/2014 explains that the single application can be amended:

After the final date of submission of the single application or payment claim, individual agricultural parcels or individual payment entitlements may be added or adjusted in the single application or payment claim provided that the requirements under the direct payment schemes or rural development measures concerned are respected.

The reference to adding or adjusting individual payment entitlements in the single application means that the details of the entitlement, including its value, is known at the time an application for payment is made.

- 1.30 There is a national registry of entitlements (titles). As part of the integrated system, this national registry would record the number of entitlements and the value of individual entitlements according to the historical payment received for that entitlement.¹⁷
- 1.31 When a farmer makes an application for income support the farmer notifies the paying agency of the detail of the farm including the different entitlement values of different crops.

¹⁷ AGEACircular2015of427AuditCheck.pdf pge 35 of 79 paragraphs 8 and 9, EPR 051b/354. REP 276 pge 75

These amounts are then combined into the one value to be disbursed as a single value incorporating other payments. In 2014 a farmer growing tomatoes and with historical entitlements only had one payment related to tomatoes. Now there are at least two payments relating to the historical entitlements, the basic payment and the greening top up. In addition to these is the coupled payment which is not based on historical entitlements and the young farmer.

- 1.32 It has now been shown that information on the value of different entitlements is recorded and could have been made available to the ADC. However, the ADC then proceeded to use selected information supplied by the exporters. That information used an average of all subsidies paid to a tomato farmer. That is the subsidy was not solely related to tomatoes. Using an average value meant that the actual tomato subsidy would be lower.

The ADC ignored evidence which showed an amount for tomatoes which was similar to the per hectare amount of the subsidy under the BPS.

- 1.33 Evidence of the different value of entitlements has been found in an application for assistance under the young farmer provisions¹⁸. The application shows a date of 3 August 2015 and the values mentioned in the application were relevant for the Review but were ignored. The relevant Regulations mentioned in the application show that the aid granted in the form of loans must have at least 50% collateral and one form of collateral is assumed to be shown in the form relating to payments per hectare from different crops. This document also reflects the recording of the value of different entitlements as shown in the above discussion on the relevant Regulations.
- 1.34 The tomato payment in the application for assistance is shown as €2,970.87 per hectare. It is not known if this value incorporates the coupled subsidy of €160/hectare. To maintain consistency with the figures in the application for funding the coupled payment has not been added to €2,970.87. In Table 1 above the amount per hectare in 2015 has been estimated at €2,540. The per hectare value in Table 1 has reduced from 2014 because of the increase in hectares growing tomatoes. But not all of these hectares qualify for the amount per hectare established in the 2004-2006 base years. The amount per hectare in 2015 is similar to the value in the application for funding. This is evidence which is more reliable than the selected data supplied by the exporters as the subsidy applying only to tomatoes is identified.
- 1.35 This amount when multiplied by the increased hectares in 2015 does not reconcile to the total tomato payment in Table 1. This is because not all hectares growing tomatoes would receive a payment or the same amount because of historical differences in the performance of each tomato farm. It is however the best estimate given that the actual amounts paid to holders of tomato entitlements has not been supplied by the GOI.¹⁹
- 1.36 The following table illustrates the understating of the actual tomato subsidy when the ADC used average subsidy values applying to other crops. The table also demonstrates the effect of taking in to account that the effective subsidy increases when adjusted for fallow land.

¹⁸ ApplicationFunding2015.pdf. EPR 064b/354

¹⁹ Government of Italy

The table only shows the historical subsidy entitlement. If a farmer was not eligible for the historical entitlement then the tomato subsidy would be nil. The tomato value is taken from the application for assistance document.

- 1.37. For a farm exceeding 30 hectares (as an example) there must be at least 3 different crops and the main crop may not occupy more than 75% of the arable hectares. The two main crops must not occupy more than 95% of the total arable land.²⁰
- 1.38. Clearly the land that is fallow receives the subsidy²¹ and had the ADC consulted the relevant Regulations and taken into account that tomatoes cannot be grown on the same land in successive years it would not have reached the conclusion it did. In SEF 349/345 the ADC stated that it considered that the findings in REP 360 were relevant to the review of measures.²² One of the findings was that the subsidy (from the exporter supplying the most information) was €0.0142/kg. If fallow land was accounted for this would increase to €0.0284/kg. (It is evident in REP 349/354 that the relevant Regulations were not cited or cross checked to test the assertions of the EC. (The ADC incorrectly or partially cited some Regulations.)²³
- 1.39. The following table uses the actual amounts from the application for assistance document.

Table 2 **Estimating the tomato subsidy per KG**

Crop	Tomatoes	Wheat	Maize	Total
Subsidy/hectare €	2,970.87	726.46	1,122.80	
Tomato yield kg/ha	73,000			
Eligible hectares	50	30	20	100
Entitlement/Securities Value €	148,543.5	21,793.8	22,456	192,793.3
Average BPS/ha using ADC method				1,927.9
Historical subsidy/ha	2,970.8	726.45	1,122.8	
Tomatoes grown subsidy/ha	2,970.8			
Total effective subsidy/ha including tomato ha at rest (25 growing ha and 25 at rest ha)	5,941.6			
Tomato subsidy €/kg	0.081			

- 1.40. The ADC has used an average single payment value and assumed that the farm grows only tomatoes and has not taken into account the Regulations controlling crop size. The ADC effectively used an amount of €1,036.60 per hectare for 2015 based on information relating to 2014 which included subsidies paid not solely to tomatoes but included payments to other crops. This average value could not be reliably used as a proxy for the actual tomato subsidy.

20 Manual for the management of direct aids campaign.pdf. page 129 of 142 EPR 063b/354

21 Article 4, paragraph 1(f) Regulation 1307/2013

22 SEF 349/354 pge 16

23 EPR 063/354 para 24-27

- 1.41 From the above table, the effect of using an average value on the actual tomato payment is shown. For example, an average BPS/ha from all crops is €1,928/ha. But the actual tomato subsidy per hectare is €2,971 which is an increase of 54 per cent on the average value. What the ADC has not taken into account is that the land on which tomatoes are grown in one year cannot be used the following year for growing tomatoes and the land not used (fallow land) still receives the tomato entitlement. This results in a subsidy of €0.081/kg using the tomato value from the application for assistance document to illustrate the effect of receiving a subsidy on all hectares allocated to tomatoes.

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to Question 10.

- 1.42 From the ADC's statement that the findings in REP 360 are relevant to the review of measures, it can be seen that the review had accepted the data that showed the estimated subsidy was €0.0142 per kg which was 15.4% of the negotiated price.(€0.0142/€0.092) But using information that related solely to tomatoes the estimated subsidy as a proportion of the negotiated price between the growers of tomatoes and tomato processors is 88.0% (€0.081/€0.092). This means that if the tomato subsidy was not paid then the income of tomato farmers would reduce. Tomato processors would be unable to increase the prices paid for tomatoes to the extent of the subsidy. The tomato price at €0.092/kg is not a competitive price. Therefore the tomato price of €0.092/kg should be uplifted by €0.081/kg when applying the ordinary course of trade test (OCOT).The ascertained normal value should be calculated to take into account the adjusted cost of raw tomatoes and the normal value in the review should be replaced.

12. Set out the reasons why the proposed decision provided in response to Question 11 is materially different from the reviewable decision.

- 1.43 SPC submits that the proposed decision is materially different from the reviewable decision. The ADC incorrectly assessed the subsidy. By adjusting the tomato price there will be sales outside the OCOT. The additional cost of raw tomatoes will result in a higher cost of production, which would result in a higher proportion of unprofitable transactions. This will mean that in using subsection 269TAC(2)(c) to establish a normal value dumping could be found for those transactions.

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.

Second Ground

The data supplied by Feger and La Doria in REP 360 and applied in REP 349/354 was not properly analysed in REP 349/354 and led to the incorrect conclusion which was applied to the other exporters.

- 1.44 The data did not allow an accurate calculation of the income support received by tomato growers. The subsidy in the form of SPS payments received and revealed to the ADC related to not only tomatoes but products other than tomatoes.

- 1.45 The ADC was supplied selected certificates showing the single payment received for each farmer growing tomatoes. As has been explained above, applicants for the single payment must provide details of the value of each entitlement used to calculate the single payment. The single payment used by the ADC is an average of not only the historical tomato payment, but also other payments. (See above paragraph 1.28)
- 1.46 In using an average value, the actual value of the tomato entitlement received as part of the single payment will be reduced. This is because the value of a tomato entitlement is often higher than other crops.
- 1.47 The exporter selected information also gave the ADC the number of hectares in each farm which contributed to the calculation of the single payment. For example, a tomato farm will grow other crops such as maize and wheat. These lower value entitlements (maize and wheat) will then form part of the single payment along with the tomato entitlement. The ADC assumed that the farms from which the data was provided only grew tomatoes. This was divided into the total SPS payments for the relevant farms. This calculation failed to take into account that the subsidy per hectare is still paid for a tomato plot that is at rest.
- The ADC was aware of the fact that the tomato entitlement was paid on fallow land.²⁴
- 1.48 The ADC ignored this fact when it concluded that the SPS payment for the two exporters (Feger and La Doria) was around €0.0142 per kilo.
- 1.49 If the fact that only one half of the hectares assumed to be growing tomatoes was taken into account, then this subsidy would be around €0.0284 per kilo. This would increase the subsidy as a percentage of the negotiated price from 15.4% to 30.9%.
- 1.50 It is surprising that the information selected by the exporters gave virtually an identical subsidy per kilo across the suppliers for which information was provided to the ADC.²⁵ This is surprising because it suggests that the single payment was comprised of virtually identical individual payment entitlements, the value of which can vary depending on the crop and the historical performance of the farm. The ADC recorded that the certificates showing the single payment for the total hectares on each farm covered 85 percent of the volume of raw tomatoes purchased by Feger and only 37 percent of the tomatoes purchased by La Doria. The ADC was satisfied with this information because it was able to access the AGEA website to confirm the accuracy of the certificates supplied. The ADC was allowed limited access to the website which showed the total subsidy received by each farm. But what the ADC did not realise was that the information held on each farm in the AGEA database could also reveal how the single payment was comprised. That is, what the value of the tomato entitlements and the hectares was for each supplying farm.
- 1.51 The ADC then took the value of around €0.0142 per kilo and compared this average SPS value with the known negotiated tomato price in 2014. As part of its analysis, the ADC

²⁴ EPR 063/354 para. 16

²⁵ EPR 063/354 fn. 24

considered whether growers that received a payment under the SPS would be selling tomatoes at a lower price. This demonstrates the lack of understanding of the SPS. The SPS is an income support payment based on historical values. It shelters the tomato grower from any shortfall in the tomato farm income due to the variability in the negotiated price. It is a fixed value. The negotiated price reflects supply, growing conditions and quality/brix levels in the relevant tomato crop. The price can vary from season to season.

1.52 The SPS (and the reconfigured 2015 payments under the BPS) are a form of income support.²⁶ The sector specific tomato payment was based on a historical period using the years 2004-2006 and the payments received in 2014 (based on 2004-2006) are the basis for the payments in 2015.

1.53 It is well recorded that the tomato historical entitlement (in whatever form it has been delivered) has been an important part of the economics of growing tomatoes for processing in Italy. The tomato payment subsidises grower costs and therefore, the price of raw tomato to the processor. In the publication “Pomodoro! The History of Tomato in Italy” it was noted:

(a) The reform has been particularly relevant for the processed tomato sector (in Italy), where the subsidies represented about 50 percent of the entire producer’s revenue. (Stated in reference to the tomato grower.)

(b) Recently however, the subsidy has been half the grower’s price, or to put it another way, once the costs are accounted for (fertiliser, labour), any profit that the growers make for the labour, is the subsidy itself.²⁷

1.54 Prior to the full integration of payments to fruit and vegetables (including tomatoes) into the SPS, Rickard (2008) estimated the effect on the cost of tomatoes to a processor if there was a 50 percent reduction in EU domestic support. This calculation is different from the calculation of the effective subsidy in Table 2. But, relevantly, the conclusion was that prices paid for raw tomatoes would increase by 12.2%. This has been estimated as an increase in the raw tomato price of 24.4% if the subsidy was completely removed based on ensuring supply.²⁸ That is, there would be an impact on the raw tomato price if the sector-specific tomato payment was not available.²⁹

1.55 The income support delivered by the tomato payment and keeping raw tomato prices artificially low was recorded in Final Report 276:

LECA endorses this concept in its report by explaining that, consistent with economic theory, even the limited reforms to the CAP are associated with the falls in tomato production and the increase in prices in Italy. Solazzo also suggests that post 2011,

26 European Court of Auditors 2014 Report No 08, and BPS at https://ec.europa.eu/agriculture/sites/agriculture/files/direct-support/direct-payments/docs/basic-payment-scheme_en.pdf

27 David Gentilore Columbia University Press 2010

28 EPR 060/276 para 14

29 EPR 060/276

thanks to prices agreed with the processing industry, which were higher than those in the period before the reform, the reduction in output has not been as large as it could have been. This suggests that the relatively high prices referred to by the exporters, would have been higher without the influence of the direct income support to growers of raw tomatoes.³⁰

- 1.56 Having seen that the tomato payment is income support for the farmer growing tomatoes, the comparison of an average subsidy value derived from the tomato subsidy and other crop subsidies with the negotiated market price of tomatoes is of little use.
- 1.57 The ADC does not normally compare an average subsidy from like and non-like goods to determine its impact on a like good. For example, if the ADC was examining subsidies on hot rolled coil it would not look at an average of subsidies relating to non-hot rolled coil products such as aluminum extrusions.
- 1.58 The ADC should have recognized that the data it was analysing in order to show a relationship between the average SPS value and the negotiated market price was not suitable for a regression analysis. Namely, if regression were to be used it needs a proper statistical framework which was not understood by the ADC.
- 1.59 Certain fundamental conditions relating to regression analysis were not present and yet the ADC incorrectly drew conclusions. The assumptions needed for a classical regression model are:
- The regression line has a linear relationship and this was not present.
 - Constant variance, and this was not present.
 - Residuals come from a normal distribution and are independent of one another.
 - The independent variables are not correlated with one another. This can lead to another violation of regression called multicollinearity.
 - There was an element of bias in the data.³¹ This means that the selection of certain observations was given more “weight” than others, ie there has to be random selection in any statistical sample design.
- 1.60 In REP349/354 the ADC referred to “multi-variate analysis”. It appears this reference is incorrect as this type of analysis applies when there are more than two variables. However, SPC’s expert analysis on the errors made by the ADC in using a regression analysis were apparently ignored.³² The ADC was of the view that it was not appropriate to comment on the interpretation of data from REP 360 even though it was applied in REP 349/354.
- 1.61 The ADC found there was a subsidy of €0.0142/kg. Even though the data was flawed, this is a significant proportion of the negotiated price for tomatoes, being 15.4% (€0.0142/€0.092). Nevertheless, the ADC did not examine the magnitude of this subsidy. Instead the ADC

³⁰ EPR 051/354 fn38

³¹ EPR 063/354 and 064/354

³² REP 354 pge 14, second paragraph

incorrectly used a regression analysis and failed to understand that the tomato farmer has two sources of income, the tomato payment and the negotiated price. The ADC also used the incorrect statistical term of “correlation analysis” when it was in fact seeking to use a regression analysis. It also tried to assume correlation meant one variable causes an effect for another which is not correct. If the tomato subsidy reduced this would put downward pressure on the tomato farm’s income. The price of tomatoes to the processors could not replace the subsidy. The negotiated price of tomatoes does not reflect a competitive cost.

11. Identify what, in the Applicant’s opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to Question 10.

- 1.62. SPC believes that the correct or preferable decision is that using regression analysis to support a finding that the tomato subsidy does not affect the cost of tomatoes to the processor is incorrect. The identified tomato subsidy is also based on non-tomato values and that the tomato subsidy identified in Table 2 should be used. The decision should recognize that the tomato subsidy is an income to the tomato farmer which, if removed, would make it uneconomic to continue the business of growing tomatoes. This means that the current negotiated price of tomatoes is not a competitive market cost. An adjustment to the tomato cost of the exporters in the review is required. The normal value should be re calculated. The additional cost of raw tomatoes will result in a higher cost of production, which results in a higher proportion of unprofitable transactions. This will mean that in using subsection 269TAC(2)(c) of the Act³³ to establish a normal value dumping could be found for those transactions.

12. Set out the reasons why the proposed decision provided in response to Question 11 is materially different from the reviewable decision.

- 1.63 The reviewable decision did not recognise the inter-relationship between the tomato payment and the economics of growing tomatoes in Italy. The proposed decision will properly adjust the negotiated price paid by the processors to tomato growers by the amount of the identifiable tomato subsidy which is shown to be 88% of the negotiated price and not 15.4% as used in REP 349/354. This will increase the production costs of the exporters in the review.

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.

³³ Customs Act 1901

Third Ground

When compared with other data, the Feger and La Doria analysis applied to REP 349/354 is inconsistent with other information and should not have been used in the reviewable decision.

1.64 The ADC has used the REP 360 data in the review but this gives results inconsistent with other information.

1.65 The following table summarizes the inconsistencies.

Table 3 **Inconsistencies**

	REP 349/354	Adjust 349/354	SPC 349/354	Final 276
Subsidy per hectare €	1,037	2,073	2,971	2,704
Subsidy per kg(€/kg)of raw tomato	0.0142	0.0284	0.081	0.037
Average price of raw tomato in 2014 and 2015	0.092	0.092	0.092	0.092
% change in raw tomato price	15.4	30.9	88.0	40.2
Change from known historical tomato subsidy (€187,476,301)	-€119 million	-€50 million	none	none
Growing hectares	66,000	66,000	73,089	66,000
Growing hectares increased to	180,787	89,472	none	none

Some calculations affected by rounding.

1.66 The second column (REP 349/354) shows the values used in REP 349/354 as implicitly imported from REP 360. The next column shows what the calculation should have been by allowing for the effect of the per hectare subsidy doubling as it is paid on land that grew tomatoes the previous year and is now resting. The “SPC 349/354” column shows SPC’s calculation using the subsidy per hectare from the application for assistance document. The “REP 276” column shows the calculation in that report for the calendar year 2014.

1.67 The second row (subsidy per kg) shows that in REP349/354 the subsidy has been calculated at a particularly low level because it was based on average subsidies on the information selected by exporters and did not take into account tomato hectares that are rested. In

taking into account fallow land, the subsidy increases to €0.0284/kg as shown in the next column. (Adjust 349/354)

- 1.68 The average price of raw tomato in the fourth row is the actual negotiated price between the organisation representing tomato growers and the organisations representing the processors of tomatoes. There may be small differences in the prices set for the Northern and Southern regions of Italy but these have been ignored.
- 1.69 The row “percentage change in raw tomato price” is the percentage change in the raw tomato price taking into account the subsidy.
- 1.70 The row “Change from the known historical tomato subsidy” shows the impact of the total subsidy calculated by the ADC against the known tomato amount that increased in 2015. This shows that if the figures in Review 349/354 are correct, then there has been a massive saving in the amount of decoupled payments. This saving of €119 million means that only 37% of the known tomato subsidy has been paid out to exporters in REP 349/354. This is a result which is just not possible. The economic and political factors around not only payments to holders of tomato entitlements but also other crops/livestock would have resulted in huge civil and political unrest.
- 1.71 The row “growing hectares” shows the actual hectares in 2014 applicable to the ADC’s analysis. The column SPC 349/354 shows the hectares in 2015.
- 1.72 The final row shows what would happen if the subsidy figure in REP 349/354 was applied against the known historical tomato subsidy and what the increase in the area growing tomatoes would be. (€187,476,301/ €1,037) There is no evidence that the tomato payment would not be used completely in any year.
- 1.73 As can be seen, the area growing tomatoes in order to fully account for the historical payment would be around 181,000 hectares, up from the current tomato growing hectares of 66,000 in 2014. If the amount was adjusted for fallow land, then the increase would be around 90,000 hectares (€187,476, 301/€2,073). Again this is not possible. The SPS payment for historical tomato entitlements and the BPS with a coupled payment has been designed with the purpose to control and stabilise the supply of raw tomatoes and provide income support to tomato farms.
- 1.74 To assess if there had been savings of €119 million, the category covering “Direct aids aimed at contributing to farm incomes, lifting farm income variability and meeting environment and climate objectives” expenditure for Italy was examined. Even though this category is at a high level (i.e. all payments are included) this category increased between 2014 and 2015, demonstrating that the calculation used in Review 349/354 is wrong. This is shown in the following table.

Table 4 European Agriculture Guarantee Fund³⁴

Category 05 03	2014	2015
Direct Aids Total (€million)	3,902,241	3,920,203
Change %		0.46

Source: Annex 10

11. Identify what, in the Applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to Question 10.

- 1.75 SPC submits that the identified inconsistencies mean that the Feger and La Doria analysis used in REP 349/354 and applied to other exporters in the review should be rejected.

12. Set out the reasons why the proposed decision provided in response to Question 11 is materially different from the reviewable decision.

- 1.76 In REP 349/354 there was no "sensitivity check" taken with the results of the information provided by Feger and La Doria and with the information supplied in the review. Had a proper check been undertaken, then the ADC should have recognised the discrepancy with other data. If the Feger and La Doria analysis is rejected, then the subsidy per kilo would be materially different and increase from €0.0142 per kg to €0.081 per kg.

10. Set out the grounds on which the Applicant believes that the reviewable decision is not the correct or preferable decision.

Fourth Ground

The ADC did not take into account SPC's arguments on the data and analysis used in REP 349/354 which originated in REP 360.

- 1.77 In REP 349/354 the ADC noted that:

The Commission notes that the analysis of the data in REP 360 has been accepted by the ADRP and the Parliamentary Secretary. The Commission does not consider it appropriate to revisit the interpretation of the data from REP 360 in these reviews.³⁵

- 1.78 In REP 349/354 the ADC referred to REP 360:

The Commissioner's Report (*Anti-dumping Commission Reinvestigation Report No.360* or REP 360) found that the CAP payments received by growers of raw tomatoes **did not appear to influence** the prices paid by Feger and La Doria. **In the absence of any further evidence** to the contrary, the Commissioner found that the raw material cost of tomatoes reported in the accounting records of Feger and La

³⁴ https://ec.europa.eu/agriculture/cap-funding/financial-reports/eagf_en

³⁵ REP 354 pg 14

Doria reasonably reflected a competitive market cost, and therefore recommended that no uplift be applied in the dumping margin calculation.³⁶(emphasis added)

- 1.79 The words “did not appear to” and “in the absence of any further evidence to the contrary” suggest that the ADC reached a tentative conclusion on the material it examined in REP 360. SPC was not given the opportunity to comment on the ADC’s analysis before REP 360 was given to the ADRP.³⁷
- 1.80 In announcing an extension to the time to publish the Statement of Essential Facts, the Commissioner noted that the conclusions in the ADRP’s review may have an impact on the appropriate approach to be taken in the review.

I am currently reinvestigating the findings of Final Report 276, concerning PTT’s exported by Feger and La Doria, which is the subject of a review being conducted by the Anti-Dumping Review Panel (ADRP). The outcomes of that reinvestigation, the recommendations of the ADRP and the Parliamentary Secretary’s decision in relation to those recommendations may have an impact on the appropriate approach to determining the variable factors in these reviews of measures. To take into account the ADRP’s review and the Parliamentary Secretary’s decision following the review of Final Report 276, I requested an extension to the deadline for the publication of both SEFs under subsection 269ZH1(1)(e) of the Customs Act 1901 (the Act).³⁸

- 1.81 During the review SPC provided the ADC with information that had not been considered in REP 360 as the period of investigation was different and there was a new subsidy scheme in that period. SPC also provided expert opinion on the use of a regression analysis and how those statistical conclusions were not suitable for the review of all other exporters in REP 349/354. The incorrect use of an average value for the examination of the tomato subsidy in the review was also brought to the attention of the ADC as were other matters .
- 1.82 SPC is of the view that the Customs Act 1901 (the Act) does not endorse the ADC’s interpretation that it is not appropriate to revisit the interpretation of data from REP 360 which was applied in REP 349/354.
- 1.83 Subsection 269ZD(2) of the Act states:

Subject to subsection (3), in formulating the statement of essential facts, the Commissioner:

- (a) must have regard to:*
- (i) the application or request; and*
 - (ii) any submissions relating generally to the review that are received by the Commissioner within 40 days after the publication of the notice under subsection 269ZC(4), (5) or (6); and*

³⁶ REP 354 pge 9

³⁷ EPR 057/354

³⁸ Anti-Dumping Notice No.2016/76 8 August 2016

(iii) any other submission received by the Commissioner relating generally to the review if, in the Commissioner's opinion, having regard to the submission would not prevent the timely placement of the statement of essential facts on the public record; and

(b) may have regard to any other matters that the Commissioner considers relevant.

- 1.84 In addition, subsection 269ZDA(3)(b) demonstrates that the Commissioner “may have regard to any other matter that the Commissioner considers to be relevant to the review” when deciding on recommendations to be made to the Minister.
- 1.85 The Act does not preclude matters to be considered because they have formed part of another report. New information may have been presented and circumstances may have changed since the completion of that report.
- 1.86 SPC provided the ADC with detailed information on the EC and EU Regulations governing the administration of the new basic payment scheme introduced from 1 January 2015. SPC also referred the ADC to the new coupled payment (€160/ha) which applied from the same date. The information on the administration of the basic payment scheme (and the earlier SPS scheme) showed that information on the value of individual entitlements was recorded and could be made available.
- 1.87 The availability of this information would have allowed the ADC to provide a more accurate assessment of the value of the tomato subsidy. If this information was not supplied then the known tomato subsidy per hectare was the most accurate information.
- 1.88 Instead the ADC relied on a sample selected by the exporters and which involved average values of payments under the SPS and not values related solely to the tomato payments.
- 1.89 The ADC in not considering “it appropriate” to accept SPC’s arguments has affected SPC’s ability to represent its interest.

11. Identify what, in the applicant’s opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to Question 10.

- 1.90 The ADC had no authority to ignore submissions made by SPC that commented on the accuracy of the findings in REP 360 as applied to REP 349/354. SPC provided information which was not in REP 360 and identified errors in the regression analysis in REP 360. Therefore, SPC believes that the correct or preferable decision is its submissions should be considered and evaluated as part of the review.

12. Set out the reasons why the proposed decision provided in response to Question 11 is materially different from the reviewable decision.

- 1.91 A full and complete consideration of SPC’s submissions and evaluation of the ADC’s approach in REP 360 as applied to REP 349/354 would form part of Review 349/354. This consideration and evaluation is materially different from the reviewable decision and would

result in the cost of raw tomatoes to the processors being identified as not reasonably reflecting competitive market costs.

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.

Fifth Ground

The ADC's conclusion that an exporter was selling at arm's length was not based on an examination of the exporter's accounts and therefore the ADC could not investigate the claims made in the confidential application for review. The exporter was not a selected exporter and not a residual exporter.

- 1.92 In confidential attachment 4 to the review application, SPC explained that the named exporter had supplied PPTs in 400g cans which had similar (and sometimes lower) retail prices in the Australian market prior to the imposition of the 26.35% dumping duty in April 2014.
- 1.93 SPC demonstrated what the impact on the retail price could be if dumping duties were applied. This is shown in the indexed values in the following table.

Table 5 **Retail Price Impacts**

Calendar Years	2013	2014	2015
Average retail selling price \$/400g	100	97	93
Average retail selling price with full dumping \$/400g	100	130	136
Expected increase in price %	nil	+34	+46

2013=100. Some values rounded.

- 1.94 The ADC concluded that :

The sales by the importer were found to be profitable.and no evidence was found to support a theory that the exporter was reimbursing dumping duties. As such, the Commission regards the sales in question as arms length (sic) and will not treat the sale as being at a loss.³⁹

- 1.95 But if the ADC did not actually examine the relevant financial data then there is no justification to state there is no evidence of that fact. As described in Inglewood "a

³⁹ REP 354 pge 21

statement that there is no evidence of the existence of a particular fact is not the same as a statement that the fact in issue does not exist”⁴⁰

- 1.96 SPC’s evidence was not referred to in the SEF and accordingly SPC asked the ADC in SPC’s response to the SEF if the matter had been addressed.⁴¹

11. Identify what, in the applicant’s opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to Question 10.

- 1.97 In SPC’s opinion the correct decision should result in a proper examination of the evidence and if this was done, then the correct dumping duties would be imposed and the increased retail price would address the material injury. The applicable rate is no longer 26.35% but 118.0%.

12. Set out the reasons why the proposed decision provided in response to Question 11 is materially different from the reviewable decision.

- 1.98 The ADC did not examine relevant evidence and had it done so there would be an adjustment to the exporter’s ascertained export price. This examination of relevant evidence is materially different from the reviewable decision.

10. Set out the grounds on which the applicant believes that the reviewable decision is not the correct or preferable decision.

Sixth Ground

Because of the errors in the ADC’s understanding of the SPS in 2014 and the new BPS in 2015 the assessment that there was no market situation was not sound.

- 1.99 The ADC examined average SPS payments which covered subsidies for tomato and other crops/livestock. The actual tomato subsidy was not properly examined and the effect of the subsidy on the price paid by tomato processors for raw tomatoes was ignored.
- 1.100 The influence of the GOI on the tomato sector increased in 2015 with the introduction of a payment to the tomato farmer coupled to raw tomato production and a contract with a processor.
- 1.101 The identification by the ADC that a historical tomato payment was still paid on fallow land means that the subsidy (incorrectly determined for the reasons in the other grounds) was understated at €0.0142/kg. It should be €0.0284/kg.
- 1.102 These values were obtained from wrong data. SPC’s data appears to be based on the actual tomato payment. The effective subsidy per kg is considerably higher when the payment on fallow land is taken into account.

⁴⁰ Inglewood Olive Processors limited v Chief Executive Officer of Customs (Full Fed Ct 31 May 2005[2005]FCAFC 101
⁴¹ EPR 063/354

- 1.103 The ADC's analysis in REP 349/354 did not identify the importance of the subsidy to a farm growing tomatoes. A tomato farm has three potential sources of income : the historical based subsidy (the basic payment and greening top up), the coupled payment from 2015 and the negotiated price. If the tomato subsidy is insufficient then a higher price from processors needs to offset the reduction. But the processors are constrained by the price sensitivity of the retail price. Prior to 2015 it was recognized that the subsidy or the negotiated price was not sufficient and so a coupled payment was introduced in 2015.
- 1.104 The following table compares the various subsidy calculations.

Table 6 **Subsidy Impact on Tomato Grower Income**

	REP 349/354	REP 349/354 with fallow	REP 276	REP 276 with fallow	SPC with fallow
Subsidy €/ha	1,057	2,114	2,704	5,408	5,942
Subsidy per kg of raw tomato €/kg	0.0142	0.029	0.037	0.074	0.081
Average price of raw tomato in 2014 and 2015 €/kg	0.092	0.092	0.092	0.092	0.092
% increase in tomato farm income due to the subsidy	15.4	31.5	40.2	80.4	88.0

- 1.105 Table 6 shows the subsidy as a percentage of the selling price of raw materials (after taking into account REP 360) was found to be 14.5% in REP 349/354. This is a significant subsidy but was not fully analysed as the ADC incorrectly used regression analysis in its examination of the effects of the subsidy. Despite knowing that the subsidy was paid on fallow land the ADC did not adjust its data. This would have increased the subsidy to 31.5%. If the subsidy was based on the known amount of the tomato payment and the effect of fallow land is taken into account then the subsidy is nearly the same as the price paid by the processors to purchase raw tomato. (88% of the raw tomato price)
- 1.106 The tomato subsidy is a significant element of the economics of growing tomatoes in Italy. This subsidy is a result of a directive from the Government of Italy to ensure supply and continuing investment in the tomato crop required by tomato processors. If the subsidy was not paid then tomato processors would have to increase the price paid to the growers of tomatoes.

11. Identify what, in the applicant's opinion, the correct or preferable decision (or decisions) ought to be, resulting from the grounds raised in response to Question 10.

- 1.107 SPC's opinion is that a tomato farm cannot be economic without the subsidy. The farmer cannot offset the subsidy with a higher price from the processors. Therefore, the raw tomato price paid by the processors is a distorted price directly linked to a government mandate. The market for processed tomato should be considered to be a market situation.

This would mean that the normal values for canned tomatoes could not be obtained using the price paid or payable under subsection 269TAC(1).

12. Set out the reasons why the proposed decision provided in response to Question 11 is materially different from the reviewable decision.

- 1.108 The method for calculating normal values would be materially different. The distorted price for raw tomatoes paid by processors would be adjusted to a competitive price in the calculation of a normal value. This would result in an increase in the costs to produce canned tomatoes with the normal value being significantly higher than the export price and dumping duties would be imposed.

CONCLUSION

- 1.109 In light of the above information SPC respectfully requests the Review Panel to recommend to the Parliamentary Secretary that the reviewable decision be revoked and substitute a new decision which would take into account -

- That a market situation exists in Italy such that the price paid or payable for processed tomatoes cannot be used and that a constructed normal value be used.
- Or, correct the calculation of normal values ,recognizing that the costs for raw tomatoes do not reasonably reflect competitive market costs for the purpose of section 43(2) of the Customs Regulation.
- The exporter's accounts be examined to determine why substantial dumping duties have not resulted in increased selling prices in Australia.