



EUROPEAN COMMISSION

Directorate-General for Trade

Directorate H - Trade defence

Investigations IV Relations with third countries for Trade defence matters

Brussels, 9 August 2017

REVIEW BY THE ANTI-DUMPING REVIEW PANEL

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 (ADN 2017/47)

CERTAIN PREPARED OR PRESERVED TOMATOES EXPORTED TO AUSTRALIA FROM THE REPUBLIC OF ITALY BY AR INDUSTRIE ALIMENTARI S.P.A (ADN 2017/46)

Written submission of the European Commission to the Anti-Dumping Review Panel

On 4 May 2017, the Parliamentary Secretary to the Minister of Industry, Innovation and Science decided to review anti-dumping measures applying since April 2014 on imports of certain prepared or preserved tomatoes exported from Italy by all exporters except Feger di Gerardo Ferraioli S.p.A ('Feger'), La Doria S.p.A ('La Doria') and AR Industrie Alimentari S.p.A. ('AR'). The review was limited to examining whether the variable factors relevant to the measures had changed.

Following the conclusion of the review, three Italian exporters (Conserve Italia Soc. Coop. Agr., Mutti S.p.A. and Le Specialità Italiene Srl.) and the domestic industry (SPC Ardmona Operations Ltd. ('SPCA')) lodged review applications to the Anti-Dumping Review Panel ('ADRP'). A review of these measures was initiated on 11 July 2017.

The European Commission was an interested party throughout the anti-dumping investigation subject of this review (INV 349/354), in the original investigation involving all exporters (INV 217) and also in a separate investigation involving the exporters Feger and La Doria (INV 270). The European Commission was also an interested party in the review of INV 270 carried out by the ADRP, the conclusions¹ of which were published on 5 January 2017 and are particularly relevant to the case currently under consideration.

¹ ADRP Report No. 35. Prepared or Preserved Tomatoes exported from Italy by Feger and La Doria. November 2016. (Published January 2017)

In this regard, the European Commission is now concerned by the reintroduction of claims regarding findings made by the ADRP in the previous review². In particular, the ADRP clearly concluded that the initial cost adjustment for the Common Agricultural Policy's Single Payment Scheme ('SPS') in the dumping margin calculation should not be pursued any longer.

It has always been the European Commission's very clear understanding that the ADRP conclusions of January 2017 would not be put in question.

In this submission, the European Commission will recall that the EU aid system to farmers has been largely reformed already several years ago and is now a completely decoupled, non-trade distortive income support scheme, which is fully compatible with the WTO requirements and with paragraph 6 of Annex 2 of the Agreement on Agriculture.

The European Commission expects that the ADRP will demonstrate coherence and continuity in its legal reasoning and conclusions, and will therefore uphold its findings of January 2017, and will at the same time, correct any errors and make the necessary adjustments in the dumping margin calculations of the three Italian companies that applied for this review.

Finally, the European Commission will also comment the grounds - disclosed in the Notice under section 269ZZI of the Customs Act 1901 of 11 July 2017 - for which the ADRP is satisfied that they are reasonable for the decision to impose measures (the reviewable decision) not being the correct or preferable decision.

I. GROUNDS FOR REVIEW

The European Commission will discuss below the main elements of the claims made by the applicant SPCA and the Italian industry and will provide further explanation and information in relation to these claims.

I.A. AUSTRALIAN INDUSTRY - SPC ARDMONA OPERATIONS LTD

1. GROUNDS FOR REVIEW

1. The ADC inappropriately relied on data to the exclusion of other data in concluding that the evidence supplied by Feger and La Doria in ADC Reinvestigation Report No. 360 ("REP 360") was reliable in assessing the impact of historical tomato Common Agricultural Policy ("CAP") payments and new payments received by tomato growers supplying other exporters in ADC Report No. 349 & 354 ("REP 349 & 354");
 - i. The ADC did not consider that 2014 became the base year for the new Basic Payment Scheme (BPS) introduced in January 2015
 - ii. 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.
 - iii. The ADC ignored evidence which showed an amount for tomatoes which was similar to the per hectare amount of the subsidy under the BPS.

² ADRP Report No. 35. Prepared or Preserved Tomatoes exported from Italy by Feger and La Doria. Nov. 2016.

2. 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;
3. 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;
4. The ADC did not take into account SPCA's arguments on the data and analysis used in REP 349 & 354 which originated in REP 360;
5. The ADC's conclusion that an exporter (not a selected exporter and not a residual 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;
6. The assessment that there was no market situation was not sound as a result of the errors in the ADC's understanding of the Single Payment Scheme ("SPS") in 2014 and the new Basic Payment Scheme ("BPS") in 2015.

2. EUROPEAN COMMISSION COMMENTS ON THE GROUNDS FOR REVIEW

In Report No. 35, the ADRP concluded that the *"finding that the recorded costs of raw tomatoes was not a "competitive market cost" was incorrect"*³. The ADRP based the above conclusions on the analysis of the Anti-Dumping Commission's ('ADC') Reinvestigation Report Nr. 360.

These conclusions were also applied to the review on other exporters (INV 349/354). The domestic industry is now challenging them. However, the European Commission notes that the arguments used by the Australian industry are mainly based on a clearly wrong understanding of the EU's direct payments schemes, as explained below.

Given the above, the European Commission has chosen not to comment on each and every ground for review, since arguments are in many cases repetitive and overlapping. Below are the main elements on which the European Commission wishes to comment with the aim to adding clarity to the issues discussed. To begin with, the European Commission would like to once more clarify the functioning of EU direct payments and the switch between the systems applying in 2014 and 2015.

2.1 EU direct payment Schemes in 2014 and 2015

The Basic Payment Scheme (BPS) cannot be regarded as a form of the Single Payment Scheme (SPS) continuation since the **BPS is part of the new direct payments system** (new architecture of support), which further promotes decoupling and market orientation of the EU farmers. The new system of direct payments is composed by different direct payment schemes.

In this sense, the BPS offers a basic layer of income support to farmers, to be topped-up by other direct payments targeting specific issues or specific types of beneficiaries (the greening payment scheme or the young farmers payment scheme, among others). The BPS addresses

³ Para. 127 ADRP Report No. 35. Prepared or Preserved Tomatoes exported from Italy by Feger and La Doria. Nov. 2016.

the need to ensure a better distribution of support across the Union through the external and internal convergence.⁴

The BPS and any other decoupled direct payment schemes, such as the greening payment scheme, are decoupled payments to farmers with no obligation to produce certain crops or even to produce anything, in order to benefit from the decoupled support (maintaining area in a state suitable for grazing or cultivation is sufficient). Decoupled direct payments cannot be regarded as beneficial to processing industry or exporters; decoupled direct payments represent a general support available throughout the agricultural sector. The BPS (or the greening payment) does not provide a categorization between types of farmers.⁵

In 2015 the first allocation of the **BPS entitlements** took place and for each eligible hectare declared by a farmer, an entitlement was allocated in Italy (eligibility of a hectare is not linked to production or any sector, i.e. land lying fallow and maintained in a state suitable for cultivation or grazing is equally eligible as arable land used for producing any crops). It is to be noted that compared to the eligible area under the SPS in 2014, the eligible area under the BPS in 2015 in Italy is 26% higher. In other words, there are more BPS entitlements than there were SPS entitlements in Italy.

The value of the BPS entitlements is set according to completely different principles than it was done for the SPS entitlements. The overall policy objective of the BPS is to ensure a convergence towards a flat rate value per hectare (entitlement) by the year 2019; in other words the gap between the values of entitlements allocated to different farmers should be narrowed in Italy by 2019.

Furthermore, there is no difference between the values of the BPS entitlements allocated to the same farmer in Italy; however differences in the value may exist between different farmers. This is due to the calculation method applied, which in simple words can be explained as follows: a reference amount of the farmer⁶ is divided by the number of the BPS entitlements allocated to him/her in 2015 and the "final value" of those BPS entitlement will be further defined by the internal convergence steps (i.e. decrease or increase in order to move towards a flat rate by 2019).

Hence there are a number of factors due to which the value of the BPS entitlements will not reflect the value of the SPS entitlements held by a farmer and it is also not possible to make general approximations to estimate the value of the payment entitlements allocated to different farmers as both, the individual component, and also the overall objective of the internal convergence, play a role in setting the value of the BPS entitlements⁷.

⁴ https://ec.europa.eu/agriculture/sites/agriculture/files/direct-support/direct-payments/docs/basic-payment-scheme_en.pdf

⁵ For the definition of a "farmer" see Article 4(1)(a) of Regulation (EU) No 1307/2013.

⁶ Reference amount corresponds to a percentage of the payments received by the farmer in 2014 under the SPS, see Article 26(2) of Regulation (EU) No 1307/2013.

⁷ More information on the calculation of the value of entitlements (internal convergence) is available here: https://ec.europa.eu/agriculture/sites/agriculture/files/direct-support/direct-payments/docs/internal-convergence_en.pdf

As regards the **greening payment**, Italy decided to derogate from the general rule providing that the greening payment is applied as a flat-rate per eligible hectare. Instead, Italy applies the greening payment as a percentage to payment entitlements activated by a farmer. The objective of the greening payment is to enhance environmental performance of the Common Agricultural Policy via compulsory practices⁸ to be followed by farmers in order to contribute to climate and environment policy goals. Therefore, this payment is not used to "*offset the decreased value of the new entitlements*"⁹, as suggested by SPCA. The suggestion that a greening payment amounts to 60% of the BPS component also appears erroneous. If it is assumed that the BPS ceiling established for the year 2015 corresponds to a total number of payment entitlements activated in that year, then the greening payment corresponded to nearly 50 % of the value of payment entitlements activated by a farmer¹⁰.

As regards the **payment for young farmers**, it is noted that in 2015 such payment was available only to farmers who were no more than 40 years of age in the year 2015 and who had set up their agricultural holding for the first time as a head of the holding in the period 2010-2015. The European Commission has no information on the type of agricultural activity carried out by farmers who received payment for young farmers in 2015.

Based on the above, we can confirm that the introduction of the new system in 2015, even if it represented important changes in the system's architecture, did not affect the essence of the EU direct payments to farmers, which continues to be non-specific and decoupled in nature, and is even more distant to any production references than before.

2.2 Direct payment amounts in 2014 and 2015

References made by the applicant to the financial allocations under the EU direct payments in the year 2015 are not clear and appear to be erroneous. For the sake of completeness, some amounts are provided here below.

The national ceiling (or direct payments envelope) referred to in Annex II of Regulation (EU) No 1307/2013 in Italy for year 2015 is EUR 3 953 394 000. This amount is slightly lower than the 2014 figure (EUR 3 953 394 000, Regulation 73/2009 as amended by Regulation 1310/2013) due to the external convergence requirement amongst all Member States.

As introduced above, the similarity of the national ceiling before and after the reform does not mean that farmers receive the same amounts individually. On the contrary, the distribution of these amounts has changed to some extent due to the new and varied payment schemes deepening the decoupled nature of the new system.

To further clarify, and taking into account Member State's notifications, Regulation (EU) No 2015/1089 establishes budgetary ceilings for 2015, applicable to certain direct payment

⁸ Those practices relate to crop diversification, maintenance of the existing permanent grassland and having ecological focus areas on the agricultural area.

⁹ Point 1.9 Attachment A. Application to ADRP.

¹⁰ See the last subparagraph of Article 43(9) of Regulation (EU) no 1307/2013.

schemes; e.g. the BPS ceiling in IT is EUR 2 345.13 million, for the greening payment it is EUR 1 170.61 million and for the payment for young farmers EUR 39.02 million.

2.3 2014 as the base year for the BPS

Given the above, the year as the base year for the new BPS had a rather limited importance; it related only to identifying an individual reference amount, from which a share is "spread over" all eligible hectares (=entitlements) of the farmer in 2015 and further modified according to the internal convergence objectives of the new system (i.e. more equal distribution of direct payments amongst farmers).

In this regard, the European Commission re-iterates that the recurrent claim by the domestic industry that current direct payments to farmers are implicitly coupled ¹¹ since the decoupling was made on the basis of historical production is clearly wrong.

In this regard, and referring to the SPS, the European Commission submitted the following in the context of the INV 276:

The Australian complainant has argued that since the amount of the EU aids was based on levels of production in 2004-2006, these aids are necessarily still coupled to production in the investigation period.

This is however a wrong conclusion. In fact, the use of a reference period is unavoidable in order to define a certain amount of aid per hectare of eligible land once the new system was introduced¹² – and this is in fact allowed by the WTO Agreement on Agriculture. Entitlements are tradable and are now directly and only linked to the surface of eligible land (independent of the crop). A tomato farmer can also decide to change crop or cease production while keeping the entitlement. This is why there is no track of the actual amount currently received by specific sectors.

As we have stated on numerous occasions, our Common Agricultural Policy was reformed and the Single Payment Scheme¹³ is now completely decoupled. It is a non-specific income support system which is fully compatible with the WTO requirements. As a Green-Box measure it has no trade distorting effects. Agricultural policy sets comprehensive conditions for farming for the sake of ensuring broad goals of food security and food quality, as well as environment protection in rural areas.

In this context it is underlined once more that the reference period was 10 years before the investigation period of the review. It is thus impossible to claim that a farmer that produced a certain quantity of tomatoes or other crop in the reference period, still produces the same quantity/crop ten years later. Furthermore, the new system, the BPS introduced in 2015 moves even further away from any link to any specific production.

¹¹ Point 1.15 of Attachement A. Application SPCA to the ADRP.

¹² Entitlements (conditional rights to being paid EU income support) were assigned to Italian tomato farmers in 2008.

¹³ Basic Payment Scheme as from 2015.

2.4 There is no tomato component under the national ceiling for direct payments in Italy

Ignoring all the contrasted evidence submitted by the European Commission and the Italian industry, SPCA continues to insist on the fact that both in 2014 and 2015, there was a tomato component under the direct payments (or national) ceiling for Italy.

SPCA even manages to assign figures to this argument by completely failing to understand a Decree of the Italian government of 2013:

"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)"¹⁴

Based on wrong evidence for 2014 and deducing from this evidence the figure for 2015, the Australian industry makes some completely misleading calculation on the alleged tomato payment per hectare in the two years.

The European Commission must insist that the ADC and the ADRP do not accept such misused evidence and misinterpretation of legal documents as basis for any findings.

Regarding the 2014 supposed tomato allocation, as already submitted by the European Commission in December 2015:

"The national component for tomatoes in Italy (EUR 183 mn) was completely transferred to the Single Payment Scheme envelope as from January 2011¹⁵, when the transition period for decoupling for tomatoes was finalised.

In this regard, the Decree of the Italian Minister of Agriculture from October 2013 submitted by SPC¹⁶ refers to a completely different issue, i.e. the valuation method of the entitlements from the National Reserve¹⁷ and not yet assigned to any hectare. This valuation is based amongst other factors on the Italian overall national ceiling. This ceiling is used as a historical reference which does not mean that the ceiling per component (e.g. tomatoes) is used in 2014. Hence, assuming that the ceiling component for tomatoes is still applicable in any way is incorrect and misleading."

There is no possible way to make an estimation of the annual CAP direct payments to tomato growers in Italy since payments are decoupled from production and based on land declared by irrespective of whether any production existed or not. There is simply no track or link of such payments according to crop.

¹⁴ Point 1.4. SPCA application to ADRP. Attachment A.

¹⁵ SPC's submission refers to the moment of full decoupling of the tomato component of the national ceiling. As explained, it represents no evidence of the situation in 2014.

¹⁶ EPR 276 Nr 068

¹⁷ The National Reserve would be equivalent to the amount below the ceiling available to grant new entitlements.

2.5 There are no tomato entitlements as such

Similarly to the point above, SPCA is also insisting on the existence of tomato entitlements, meaning that growers producing tomatoes receive a payment specific to tomatoes.

As repeated on different occasions in the past, there is no "tomato entitlement" as such. EU direct payments income support mechanism continues to be of decoupled nature, not linked to any type of crop or any production at all.

The EU's Common Agricultural Policy was reformed and the current system is even more distant from any production references. It provides income support to farmers, which is fully compatible with the WTO requirements. As a Green-Box measure it has no trade distorting effects.

2.6 Voluntary coupled support (VCS) introduced in 2015

The European Commission reiterates that the only direct payment related to production is the Voluntary Coupled Support (VCS). The VCS could be implemented by Member States within strict limits and conditions, notably the VCS is available only to those regions or sectors where specific types of farming or specific agricultural sectors that are particularly important for economic, social or environmental reasons undergo certain difficulties (i.e. there is a risk of abandonment or of decline of production).¹⁸

Italy decided to apply the VCS regarding tomatoes for processing and such support is available to eligible farmers at an estimated amount EUR 117/ha in 2015 (financial envelope under this support measure for 2015 is set at EUR 11.29 million).

This is the only direct payment related to tomato production in Italy in 2015. Given the low value per hectare and the results of the flow-on effects analysis disclosed by the ADC, this payment does not seem to be very relevant to this review.

2.7 Evidence allegedly ignored on the amount of tomatoes per hectare payment under the BPS

The applicant also refers to the Italian national decree, which is based on the *de minimis* rules (Regulation (EC) No 1535/2007) and suggests that EUR 2 970.87 referred to in that decree regarding tomatoes corresponds to direct payments ("tomato entitlements") received by farmers and that such amount is translated into support under the BPS and the so-called greening payment since 2015. These allegations are completely erroneous.

The above mentioned decree and Regulation (EC) No 1535/2007 do not concern the EU direct payments. The *de minimis* support is another type of aid, which Member States may grant within strict limits and which is non-trade distorting support.

¹⁸ See in particular Article 52(3) of Regulation (EU) No 1307/2013 and Article and Article 52(3) of Regulation (EU) No 639/2014.

The European Commission also highlights that the decree relates to the *de minimis* assistance in terms of (public) contribution to the interests paid for a loan by an agricultural holding operated by a young farmer in a disadvantaged area. It concerns the year 2013/2014 and is not relevant for the given investigation period. Furthermore, the *de minimis* support does not translate into the EU direct payments or vice versa.

2.8 Payment entitlements register

In Attachment A of the Application to the ADRP, SPCA is making the following statement:

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.

As already explained, allegations that a farmer received the BPS payment entitlements based on the type of production, and that a farmer was allocated payment entitlements of different value are wrong. A farmer can have a set of payment entitlements with a different value as a result of a transfer of payment entitlements between farmers.

The payment entitlements register is necessary for a number of reasons related to the management of the BPS (among such reasons there is also the necessity to trace transfers of payment entitlements between farmers and to follow activation/non-activation of payment entitlements). In respect of the registration of entitlements for the management of the BPS it is not necessary and hence not required to include anything related to production or the cultivation of crops in the register.

As said above, a hectare of arable land is eligible for the BPS irrespective of whether it is lying fallow in the given year or whether it is used for cultivation of any crop (type of crop has also no impact on the eligibility of area for the purposes of activating an entitlement/receiving the BPS payment).

The same issue was already explained (in relation to SPS) in the European Commission submission of December 2015, made in the framework of INV 276 (Feger and La Doria).

Given the above, the European Commission notes that the legal text provided by SPCA does not mention that the type of crop should be included in the payment entitlement register. On the contrary, this is again another assumption made by SPCA to mislead the judgement of the ADRP.

Furthermore, the European Commission does not collect information from the Member States regarding individual situations of every farmer regarding the activity exercised on his/her hectares or regarding the value of payment entitlements held by a farmer.

That database is administered by the Italian Agency for Agricultural Payments ("AEGEA") and, to the knowledge of the European Commission, it was made available to the ADC in the framework of the reinvestigation No. 360.

In other words, the most accurate and reliable information concerning direct payments to growers through the SPS or the BPS has already been analysed by the ADC.

2.9 Flow on effect

The European Commission has repeatedly argued that the effect of any direct payments to tomato producers should be analysed in the context of an anti-subsidy investigation.

Indeed, according to Article 32.1 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") *"no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement"*.

In other words, a subsidy should not be addressed in the framework of an anti-dumping investigation, in particular in the absence of a positive conclusion on the existence of a particular market situation (see below). It is indeed clear from their separate existence that anti-dumping and countervailing measures are two instruments that reflect a different rationale and address situations of a different nature: on the one hand, market distorting effects by government subsidies, on the other hand, company-driven economic practices.

This being said, in order to see if there is any effect of the payments to farmers on the price of tomatoes paid by the Italian processing industry, the ADC analysed the correlation between the total SPS payments received by farmers supplying tomatoes to Feger and La Doria and the selling price of tomatoes.

Since prices are negotiated in annual framework contracts between growers and processors, taking into account climatic conditions, yield, etc., the ADC concluded that it could not be established that the SPS had any impact on prices. As reflected in the ADRP Report No35: *"43. The ADC concluded that the evidence does not support a finding that the SPS resulted in tomato prices which were lower than they otherwise would have been but for the SPS and that the SPS had no discernible impact on the prices actually paid by Feger and La Doria for raw tomatoes during the investigation period (..)*

(..) the Commissioner concluded that the cost of production for each exporter must be worked out using the information set out in those records, in accordance with s. 43(2) of the Regulation. I agree with the analysis and reasoning of the ADC in the Reinvestigation Report."

As explained by the European Commission that overall data relating to tomato production is not available due to the decoupled nature of the support schemes, a company specific assessment is the most reasonable approach.

2.10 Particular market situation

The European Commission considers that the whole argumentation regarding the existence of a particular market situation in Italy is extremely weak and based on assumptions and wrong data.

First, the changes in the EU direct payments system deepened decoupling and promoted the market orientation of the agricultural sector.

Second, SPCA wrongly assumes that there is a tomato payment and that tomato prices would be higher if the direct payments would not exist.

Third, the 2015 specific tomato payment is negligible and therefore, the situation cannot be considered to be different than it was under the previous system.

Fourth, this discussion took place already in INV 217 and INV 276 and was confirmed by an independent expert in the framework of the latter.

For the above reasons, this claim should be dismissed.

I.B. ITALIAN INDUSTRY

1. GROUNDS FOR REVIEW

Conserve Italia Soc. Coop. Agr.

1. The ADC wrongly included certain domestic sales in the normal value calculation of a particular model, thus causing a distorted assessment of Conserve Italia's dumping margin;
2. The ADC wrongly dismissed Conserve Italia's claim for a physical adjustment in order to reflect the existing difference between the net drained weight of a particular product sold in the domestic market and exported to Australia;
3. The ADC did not take into account the claims raised by Conserve Italia concerning the different value of the CIRIO trademark in Italy and Australia.

Mutti S.p.A.

1. The ADC failed to correctly work out Mutti's Ascertained Export Price (AEP) insofar as the amounts of the deferred rebates that Mutti paid to certain Australian importers

Le Specialità Italiane Srl.

1. The methodology followed by the ADC to ascertain LSI's variable factors in ADC Review No. 354 is flawed in that:
 - a. The ADC should have calculated LSI's normal value on the basis of the data provided by LSI and previously verified by the ADC, resulting in the same normal value ascertained in the framework of ADC Review No. 351 (which concerned the same investigation period of ADC Review No. 354);

- b.** The ADC's calculation of LSI's ascertained export price on the basis of the export prices of other exporters is unwarranted and LSI's export price should have been established at the same level of LSI's weighted average normal value, in line with well-established practice; and
2. The reviewable decision is incorrect since LSI's dumping margin was established as negative and therefore the investigation should be terminated and no Anti-Dumping measure should be imposed.

2. EUROPEAN COMMISSION COMMENTS ON THE GROUNDS FOR REVIEW

The European Commission does not have all the details of the calculation of the dumping margins for the three Italian exporters since these refer to company-specific data which is treated as confidential.

Following contacts with the exporters concerned, it would appear that the ADC made some **errors** and **rejected certain adjustments** claimed by the exporters for the calculation of the dumping margin and the ascertained export price.

In this respect, the European Commission urges the ADRP to duly take into consideration the elements provided by the exporters and ensure a fair and lawful approach consistent with the one followed in the original investigation.

The European Commission would also like to comment on the second and last ground submitted by Le Specialità Italiane Srl. (LSI). Given that the dumping margin of LSI was determined based on the weighted average export prices of cooperating exporters this claim would affect the dumping duties paid by other exporters.

The main problem comes from the fact that, following the review of measures, exporters will continue to pay a dumping duty, even if their dumping margin is *de minimis* or *less than 0%*¹⁹.

According to Article VI.2 of the GATT, **anti-dumping duties can only be imposed to dumped products**. Article 2.1 of the Antidumping Agreement ('ADA') defines dumped product as the product "*introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.*"

This inconsistency originates in the form of the measure "combination of fixed and variable method", which sets a fix duty and a variable duty.

No dumping and dumping below the *de minimis* level would normally result in the termination of the case for these companies. However, the ADC alleges that the Commissioner did not receive an application under 269SCA of the Customs Act 1901 to include revocation of the measures.

¹⁹ Report 349/354. Section 3.3.7. Page 30.

In this regard, reference is made to Article 5.8 of the WTO ADA whereby “...an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis* [...]. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price.”.

In this context, the European Commission considers that the investigation should be terminated against exporters with negative or *de minimis* dumping margins. Any measure, irrespective of the form it may take, e.g. duty ad valorem or floor price, would be unlawful and in breach of the requirements of the WTO Anti-Dumping Agreement since there is no need for the importing Member to offset any dumping for the exporters concerned.

II. CONCLUSIONS

It was the understanding of the European Commission that the ADRP conclusions of January 2017 concerning the cost adjustment to the cost of raw tomatoes in Italy would not be put in question.

In this regard, the attempt of the Australian industry to change this outcome based on very weak evidence, assumptions, misinterpretations and clear mistakes (once more), confirms that the ADRP's conclusions were well founded.

The ADC has used the most reliable evidence in order to assess any impact of EU direct payments to farmers before 2015. Given the non-trade distortive nature of the EU support to farmers and the non-existence of a particular market situation, the ADC has reached the only possible conclusion: “SPS had no discernible impact on the prices actually paid by Feger and La Doria for raw tomatoes during the investigation period”²⁰

The introduction of the new system in 2015, even if it represented important changes in the system's architecture, did not affect the essence of the EU direct payments to farmers, which continues to be non-specific and decoupled in nature, and is even more distant to any production references than before.

In conclusion, SPCA did not provide any new evidence that would affect the conclusions of the ADRP Report No 35, this is: the “*finding that the recorded costs of raw tomatoes was not a “competitive market cost” was incorrect*”²¹.

Given the above, the European Commission requests the ADRP to dismiss the six grounds for review submitted by the Australian industry since they are unfounded.

²⁰ Para 43. ADRP Report No. 35. Prepared or Preserved Tomatoes exported from Italy by Feger and La Doria. Nov. 2016.

²¹ Para. 127 ADRP Report No. 35. Prepared or Preserved Tomatoes exported from Italy by Feger and La Doria. Nov. 2016.