Anti-Dumping Commission
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Ms Leora Blumberg
Member, Anti-Dumping Review Panel
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Canberra City ACT 2601

By e-mail: ADRP@industry.gov.au

Dear Ms Blumberg,

CERTAIN PREPARED OR PRESERVED TOMATOES EXPORTED FROM THE REPUBLIC OF ITALY

I write with regard to the public notice published on 11 July 2017 advising your intention to review the decisions of the Parliamentary Secretary to the Minister for Industry, Innovation and Science (the Parliamentary Secretary) to publish notices under subsection 269ZDB(1) of the *Customs Act 1901* (the Reviewable Decisions). The Reviewable Decisions were published on the Anti-Dumping Commission (Commission) website on 5 May 2017, referred to in Anti-Dumping Notice Nos. 2017/46 and 2017/47.

I understand that by 18 July 2017 the Commission had provided you with the *Statements of Essential Facts No. 349 and 354* (SEF 349/354), the submissions made by interested parties, the *Anti-Dumping Commission Report Nos. 349 and 354* (REP 349/354), the confidential attachments associated with all of these documents, and any other relevant information (as defined in section 269ZZK *Customs Act 1901*).

I have considered the applications for the Reviewable Decisions and have decided to make some comments on the various grounds raised therein. Please find attached my comments (***Attachment A*** refers), which I submit for your consideration.

I remain at your disposal to assist you in this matter, and I and / or officers from the Commission would be happy to participate in a conference if you consider it appropriate to do so.

Yours sincerely,

Dale Seymour
Commissioner
Anti-Dumping Commission

10 August 2017

PUBLIC RECORD

Attachment A

I make the following submissions in response to the grounds set out in the notice published on 11 July 2017. These grounds are with respect to the consideration by the Anti-Dumping Review Panel (ADRP) of the Reviewable Decisions of the Parliamentary Secretary and reported in REP 349/354.

I have grouped my submissions by reference to the grounds raised by each of the applicants. I remain of the view that, having given due consideration to the matters raised by the applicants and addressed in this Attachment, the approach taken in the reviews of measures and as outlined in REP 349/354 ought to be considered as being consistent with the relevant legislation and has resulted in the correct and preferable decision.

SPC Ardmona Operations Ltd (SPCA)

The Commission notes that the majority of SPCA's application appears to re-prosecute the matters which were examined in REP 360 and which were the subject of submissions which were addressed in REP 349/354, particularly at section 2.5.3 of that report. As has been explained previously, the Commission found that the actual amounts received by growers under the *Common Agricultural Policy* (CAP) and the *Single Payment Scheme* (SPS) had little, if any, discernible impact on prices gained for raw tomatoes sold to Feger and La Doria. I therefore concluded that the recorded costs of tomatoes represented a competitive market cost for the purpose of establishing normal values in the reviews of measures.

SPCA's claims appear to be based on a presumption that the Commission's verification must have been fatally flawed. SPCA prefers to rely on data which is circumstantial in nature, and contends that the circumstantial evidence ought to be considered to be more reliable and accurate than the information that the Commission has verified (see section 4.4 of REP 360 for details of verification). In particular, SPCA has relied on a single instance of a particular SPS payment value to determine that actual payments *generally* are of the same quantum. I respectfully disagree with this methodology.

I make specific observations in respect of each ground as follows.

1. **The Commission wrongly relied on data to the exclusion of other data in concluding that the evidence supplied by Feger di Gerardo Ferriaoli S.p.A (Feger) and La Doria S.p.A (La Doria) in *Anti-Dumping Commission 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 REP 349/354.**

SPCA's claims appear to proceed from a misunderstanding of the Commission's approach in REP 360. As noted at section 4.4.2 of REP 360, the Commission calculated a per kilogram value of the actual SPS payments received based on the actual volume of tomatoes purchased. The Commission was satisfied that the evidence presented to it by the growers supplying to Feger and La Doria demonstrated that the actual payments received were less than contended for by SPCA.

SPCA submits that the Commission did not correctly consider the impact of fallow land or SPS payments received in respect of other crops, arguing that the Commission's approach underestimated the amounts received in respect of raw tomatoes.

In my opinion, a review of the evidence received and calculations undertaken in REP 360 will show that this is not the case. All payments received by the grower were allocated on a per kilogram basis to the actual volume of raw tomatoes sold to Feger and / or La Doria.[1]

As was noted in section 2.5.3 of REP 349/354, the evidence provided by SPCA relates entirely to the theoretical value of SPS payments being made. Further, SPCA appears to assume that the amount referred to in the "application for assistance" (para 1.34 of its application to the ADRP refers), which is €2970.87 per hectare (ha), is indicative of the amount which is received by all growers. SPCA claims that the Commission has instead used an average single payment value (a figure of €1037 / ha)[2] and has therefore grossly underestimated the amount of subsidy being received.

REP 360, at section 4.4.2, demonstrated that the value of SPS payments actually received by growers supplying to Feger and La Doria varied considerably, from €287 / ha to €3872 / ha. There were also a number of growers that appeared to have not received any payment, although these are a very small proportion overall (less than 5 per cent by volume supplied). So, whilst the Commission had regard to the information provided by SPCA in REP 349/354, the Commission preferred to rely on the verified payments actually received by tomato growers and the verified volumes of raw tomatoes subsequently sold.

2. **The data supplied by Feger and La Doria in REP 360 and applied in REP 349/354 was not properly analysed 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.**

As noted above, the Commission considers that any SPS payments received in respect of fallow ground and / or for other crops have been included in the calculation. The Commission has accepted the submissions by the European Commission (EC) that the SPS payments made are in respect of the land holding, rather than the crops actually grown.

In any event, if a grower received an SPS payment and did not, in fact, produce tomatoes in that year (either due to the production of other crops or leaving the ground fallow), those growers would not be present in the data provided by Feger and La Doria (as no tomatoes would have been supplied).

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[1] To take an example, if a grower sold 100,000 kg of raw tomatoes and received an actual SPS payment of €1000, the per kilogram amount of SPS received was calculated by reference to the average yield rate per hectare (76,000 kg) to produce that many tomatoes. So:

100,000 ÷ 73,000	= 1.369 (the nominal quantity of hectares required to produce the tomatoes sold);
€1000 × 1.369	= €1369 (apparent value of SPS payments received for 100,000 kg of tomatoes);
€1369 ÷ 100,000	= €0.01369 (nominal value per kilogram of the SPS payment received).

The evidence obtained by the Commission showed that the actual amount paid to the grower was based on a defined land holding, so whether the land was fallow or used to also produce other crops, the total amount received has been captured within this calculation and applied solely to tomato sales.

[2] SPCA has calculated this figure by taking the average yield rate (73,000 kg per hectare) and applied it to the weighted average value of SPS payments received by growers supplying to Feger (€0.0142 / kg).

If a grower did use only half of its land holding to produce tomatoes in the relevant period, no adjustment would be required to the Commission's calculation methodology (which, as explained above, captured all SPS payments received in respect of the land holding of said grower).

The Commission does not consider that the historical data referred to by SPCA, that is, relating to periods prior to the review period in REP 349/354 and the investigation period in *Anti-Dumping Commission Report No. 276* (REP 276) and as reinvestigated in REP 360, is a sufficient basis on which to overturn the verified evidence of actual SPS payments received. Further, the Commission considers that the critique of the Commission's data and statistical analysis in REP 360 (refer to para 1.58 of SPCA's application and following paragraphs) is limited. As the expert appointed by SPCA was unable to access the underlying data due to its confidential nature, its analysis is based on charts with no axis markings and the Commission's explanation of its approach.

The Commission notes SPCA's argument that, but for the subsidy, tomato farms are not economic and therefore the subsidy bolsters farm incomes (which in turn means that the negotiated price for raw tomatoes is artificially low). The argument has been put in similar terms previously (for example, though in a different context, see document number 070 on the public record for REP 276).[3] SPCA ultimately concludes that Italian farms growing tomatoes would be unprofitable if not for the SPS.

On a practical level, the Commission's analysis is inevitably limited to the evidence which it has obtained; to address SPCA's argument completely would require the Commission to now also obtain evidence relating to the SPS payments received by, and the profitability of, the growers which supplied raw tomatoes to the cooperating exporters in the reviews of measures, and to then consider whether farms are profitable generally (i.e. without the SPS payment) in order to apply those findings to all exporters the subject of REP 349/354. I note that such information was not provided by the growers to those cooperating exporters and therefore was not provided to the Commission. Having found that the SPS payments received did not distort the costs paid by Feger and La Doria, two of the larger purchasers of raw tomatoes from amongst the exporters examined in these cases, I submit that it was reasonable to conclude that there was no distortion to raw tomato prices caused by the SPS generally.

One piece of evidence that SPCA particularly refers to is the amount of the "ceiling" of the SPS for tomatoes (approximately €187 million). SPCA claims that the total ceiling amount has been paid to growers of tomatoes; there is no evidence that this has actually occurred, and it is a claim that has been emphatically disputed by the EC. As a result of verifying the actual amounts paid to growers in REP 360, the Commission did not consider it necessary to resolve this disputed fact.

4. 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.

[3] "The cost of growing tomatoes in Italy could be one reason why there is such a high subsidy paid to tomato hectares. The comparison with other countries does not take into account differences in growing conditions, scale, crop health, operating conditions/costs and government programs in other countries. In addition, the Italian average raw tomato price used for comparison already has benefited from the SPS component. **In other words the raw tomato price would be higher if a subsidy was not paid to the grower**." [*emphasis added*]

The Commission considers that SPCA is selectively quoting from REP 349/354 to suggest that there is some doubt or uncertainty about the findings in REP 360 and their application to the Reviewable Decisions. Apart from the practical impediments to doing so (requiring the voluntary cooperation of growers supplying raw tomatoes to the cooperating exporters in REP 349/354), the new information provided by SPCA was not considered compelling in reaching a different conclusion regarding the quantum of SPS payments actually received by growers, as was explained in section 2.5.3 of REP 349/354. Having established that growers obtained prices which were not influenced by the SPS, the Commission concluded that the costs were competitive – and for the reasons set out in REP 349/354, these findings were equally attributable to the present circumstances.

Further, the findings in REP 360 also fall into the category of "any other matters that the Commissioner considers relevant." I consider the analysis undertaken in REP 360 to be robust, and the evidence offered by SPCA in derogation of those findings is not compelling.

5. The Commission'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 Commission could not investigate the claims made in the confidential application for review.

The claims made by SPCA are referred to in REP 349/354 at section 2.5.12. I can confirm that this ground was investigated in the course of the reviews of measures, and that there is no factual basis to the allegation. My reasons for so finding are included at ***Confidential Attachment 1***.

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.

The Commission explained its reasons for not finding a market situation in Section 2.5.3 of REP 349/354. The Commission considers that the evidence presented by SPCA was considered in the course of the reviews of measures and was not preferred, and therefore I consider that there is no basis for reaching a different conclusion.

Conserve Italia Soc. Coop. Agr. (Conserve Italia)

1. **The Commission 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.**

The Commission considers that the sales were appropriately included in calculation of the normal value, based on the information provided by Conserve Italia. The Commission's treatment of the differing models produced by Conserve Italia is set out in ***Confidential Attachment 1***.

2. **The Commission 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.**

The Commission considers that the evidence provided by Conserve Italia demonstrates that no adjustment should be provided for the drained weight. The Commission's treatment of the drained weight of the products produced by Conserve Italia is set out in ***Confidential Attachment 1***.

3. **The Commission did not take into account the claims raised by Conserve Italia concerning the different value of the CIRIO trademark in Italy and Australia.**

During the reviews of measures, Conserve Italia provided market research which demonstrated that its shelf pricing for CIRIO products in the domestic market was significantly higher than the average retail price for 400 gram canned tomatoes from other Italian producers. Conversely, in Australia it is a relatively new brand and does not command the same brand premium. Conserve Italia has therefore requested that the ADRP make an adjustment for this difference.

The adjustment proposed during the reviews by Conserve Italia was to decrease the normal value by an amount which would take into account this difference in brand premium between the domestic and export markets. However, no evidentiary basis was provided to the Commission to justify how this adjustment was arrived at, nor how it ought to be quantified. No evidence was provided that the CIRIO product is unable to be sold at a similar premium in Australian supermarkets relative to the private label products. The claim made in the application as to how to adjust for the brand value in the appeal was not presented to the Commission during the review. As a result, the Commission did not make the adjustment requested.

Mutti S.p.A (Mutti)

1. **The Commission 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 have not been deducted from the FOB price paid by such importers.**

As part of the verification process, the Commission provided Mutti with certain calculations for the purpose of establishing the dumping margin. Mutti had opportunities to review and comment on these calculations, but did not identify the substantive matter in respect of the AEP which has been subsequently raised in its application to the ADRP.

In any event, the Commission did take account of Mutti's deferred rebates in the dumping margin calculation by making an adjustment to the normal value. As outlined in section 6.1 of the Mutti verification report, the Commission made a downward adjustment to the normal value to reflect the particular off-invoice discounts for each sale, and then an upward adjustment to reflect the weighted average discount provided to the export sales. This allowed for a direct comparison between the ascertained normal value and the free on board export price.

The Commission's view is that the calculation has already taken into account the deferred rebates. However, if the ADRP comes to a different conclusion and considers that the AEP ought to be corrected, the Commission notes that there will need to be consequential adjustments to the normal value.

Le Specialita Italiane Srl (LSI)

1. **The methodology followed by the Commission to ascertain LSI's variable factors is flawed in that:**
    a. **the Commission should have calculated normal value on the basis of the data provided by LSI and previously verified by the Commission, resulting in the same normal value ascertained in *Anti-Dumping Commission Report No. 351* (REP 351);**
    b. **the Commission's calculation of the 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 level of LSI's weighted average normal value.**

The claims regarding the method of calculation for the ascertained normal value and AEP were addressed in section 3.3.6 of REP 349/354.

LSI argues that subsection 269TAC(1) enables the use of **sales** by other exporters (and therefore ordinary course of trade (OCOT) testing by reference to LSI's cost to make and sell), but this does not mean that the **normal values** determined for other exporters can be applied to LSI. There is no discussion of this claim in REP 349/354, as LSI did not present the Commission with this argument during the review. However, the Commission's view is that this interpretation does not align with the requirements set out in section 269TAAD for the undertaking of an OCOT test, nor does it address the requirements in subsection 43(2)(a)(ii) of the *Customs (International Obligations) Regulation 2015* with respect to how the Commission must establish the cost of production for the purpose of the OCOT test.[4]

The AEP is required to be calculated with regard to "any relevant information" under subsection 269TAB(3) where the preceding subsections are unable to be used (which will occur in any instance where there are no relevant export sales). In REP 351, the only relevant information available was the ascertained normal value. In REP349/354, there was significantly more reliable information, namely verified export prices comprising 93 per cent by volume of the exports under review.

The approach ultimately taken in REP 349/354 was proposed in the statement of essential facts, following which LSI made a submission raising the same issues as have been raised in its application for a review of the Reviewable Decisions. I do not consider that LSI's ability to defend its interests have been impacted by this approach.

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.**

While proposed by other interested parties, this issue is addressed at sections 2.5.4 and 2.5.6 of REP 349/354. I consider that the explanation in section 2.5.5 of REP 349/354 is otherwise sufficient to deal with the matters raised by LSI.

[4] For example, notwithstanding that LSI's goods may not be entered for home consumption, LSI does not produce goods in such a way that it actually incurs all of the costs that would normally be associated with the production of prepared or preserved tomatoes. Further detail on these circumstances are included in REP 351.

Confidential Attachment 1

SPCA – Ground 5

[redacted]

Conserve Italia - Ground 1

[redacted]

Conserve Italia – Ground 2

[redacted]