

Anti-Dumping Review Panel

**Prepared or Preserved Tomatoes Exported from
the Republic of Italy by all exporters except
Feger di Gerardo Ferraioli, La Doria and AR
Industrie Alimentari and Prepared or Preserved
Tomatoes Exported from the Republic of Italy by
AR Industrie Alimentari**

Submission by Conserve Italia Soc. Coop. Agr.

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INTRODUCTION

On 25 May 2016, the Anti-Dumping Commission (the “**ADC**”) initiated the interim review No. 354 concerning the anti-dumping measures applicable to certain prepared or preserved tomatoes (“**PPTs**”) 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.

On 5 April 2017, the ADC concluded the investigation by adopting the Final Report Nos. 349 and 354 (the “**Final Report**”), in which the ADC concluded that the normal value, export price and the non-injurious price leading to the imposition of original measures have changed, and consequently recommended the Parliamentary Secretary to modify the ascertained variable factors in relation to all exporters, including Conserve Italia Soc. Coop. Agr. (“**Conserve Italia**”).

On 4 May 2017, on the basis of the recommendations contained in the Final Report, the Assistant Minister for Science and Parliamentary Secretary to the Minister for Industry, Innovation and Science (the “**Minister**”) published the ADN 2017/46 and the AND 2017/47 amending the anti-dumping measures in relation to imports of PPTs exported from 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 “**reviewable decision**”), including the PPTs produced by Conserve Italia.

On 4 June 2017, Conserve Italia lodged an application with the Anti-Dumping Review Panel (“**ADRP**”), claiming that the dumping calculation carried out by the ADC in the framework of review 354 was not correct, since a correct calculation would have resulted in a dumping margin of [**Confidential – Dumping Margin Calculation**]%, rather than 5.4% (see the revised dumping margin calculation provided under **Confidential Annex I**). Other applications were filed by SPC Ardmona Operations Ltd, Mutti S.p.A. and Le Specialità Italiane Srl.

On 11 July 2017, the ADRP published a notice under section 269ZZI of the Act, indicating the intention to conduct a review. The notice clarified that the three grounds contained in Conserve Italia’s application were all considered reasonable grounds for the reviewable decision not being the correct or preferable decision.

In accordance with its rights as an interested party under section 269ZZJ of the Act, Conserve Italia wishes to supplement its application for review by way of the additional comments contained in the present submission, concerning each of the above-mentioned grounds for review.

1. FIRST GROUND: CERTAIN DOMESTIC SALES SHOULD HAVE BEEN EXCLUDED FROM THE NORMAL VALUE CALCULATION OF MODEL [CONFIDENTIAL – PRODUCT INFORMATION]

Conserve Italia submits that the ADC wrongly included certain domestic sales in the normal value calculation of model [Confidential – Product information], thus causing a distorted assessment of Conserve Italia's dumping margin in the Final Report.

In particular, it is submitted that in calculating the normal value of model [Confidential – Product information] the ADC:

- (i) wrongly considered [Confidential – Product information] domestic sales as private-label sales, including them in the normal value calculation of model [Confidential – Product information], and
- (ii) unfairly included in the normal value calculation of model [Confidential – Product information] certain domestic sales of private-label [Confidential – Product information] sold to [Confidential – Client information], despite the particular physical characteristics of these goods, which are produced on the basis of a special tailored recipe that significantly differs from the recipe of all other [Confidential – Product information] products sold by Conserve Italia in both Italy and Australia.

Each of these claims will be discussed in greater detail below.

1.1 Domestic sales of [Confidential – Product information] should be excluded from the normal value calculation of model [Confidential – Product information]

As explained in section 2.3 of Conserve Italia's Verification Report,¹ for the purpose of model matching the ADC considered appropriate to take into account, *inter alia*, the criterion of the brand (i.e. whether the relevant PPTs were sold under a premium brand or under a private label). Therefore, for the purpose of the dumping margin calculation the ADC distinguished (i) premium-brand sales (under CIRIO trademark) and (ii) private-label sales.

Despite the above-described approach, the ADC has included Conserve Italia's domestic sales of [Confidential – Product information] made under [Confidential – Product information] in the domestic sales taken into account to calculate the normal value of model [Confidential – Product information], which concerns private-label sales of [Confidential – Product information]. However, this is not correct. As a matter of fact, [Confidential – Product information] is a brand (i.e. a

¹ See EPR 354, doc. 053.

trademark) owned by Conserve Italia, like CIRIO (even though CIRIO is an historical brand with a much higher value).

Therefore, as indicated in Conserve Italia's domestic sales table submitted in response to the antidumping questionnaire, **[Confidential – Product information]** should be treated as brand products and not private-label products. This is clearly confirmed by a very simple price analysis: the average unit ex-works sales price of standard private-label **[Confidential – Product Information]** amounts to € **[Confidential – Price information]** whereas the average unit ex-works sales price of **[Confidential – Product information]** is **[Confidential – Price information]** (see the domestic price analysis in **Confidential Annex I**).

Furthermore, it must be noted that **[Confidential – Product information]** are not exported to Australia, and as a result, are not comparable to the private-label **[Confidential – Product information]** produced by Conserve Italia and sold on the Australian market. Therefore, a fair normal value calculation should not include these sales among the private-label sales of **[Confidential – Product Information]** made on the domestic market.

1.2 [Confidential – Product information] are produced on the basis of a special recipe and should therefore be excluded from the normal value calculation of model [Confidential – Product information]

[Confidential – Product information] sold to **[Confidential – Client information]** are different from all other **[Confidential – Product information]** sold by Conserve Italia both on the domestic market and on the Australian market, because this customer requires Conserve Italia to manufacture the goods on the basis of a special recipe which is richer than the recipe used for producing all other private-label **[Confidential – Product information]**.

The richer recipe mainly stems from the fact the **[Confidential – Product information]** produced for **[Confidential – Client information]** have a higher “brix” level, as demonstrated by the technical specifications provided to the ADC during the investigation (see **Confidential Annex II**), which clearly show that **[Confidential – Product information]** produced for **[Confidential – Client information]** have a brix in the range of **[Confidential – Product information]**, whereas standard private-label **[Confidential – Product information]** produced for other customers have a brix in the range of **[Confidential – Product information]**.

The higher brix involves additional processing activities. In order to reach a higher degree of brix, some of the water naturally present in the tomato juice is evaporated and as a result, a more concentrated tomato juice is obtained, containing a greater amount of fresh tomatoes compared to **[Confidential – Product information]** of same weight.

A higher brix level brings a better flavour to the product as a result of the thicker and richer outcome, which also affects the prices. As a matter of fact, the domestic sales listing of Conserve Italia reveals that the **[Confidential – Product information]** produced for **[Confidential – Client information]** on the basis of the above-described richer recipe were sold at an average unit ex-works price of **[Confidential – Price information]** whereas the standard **[Confidential – Product information]** were sold at an average unit price of **[Confidential – Price information]** (see the domestic price analysis in **Confidential Annex I**).

It follows from the above that, for the purpose of a fair comparison, the sales of **[Confidential – Product information]** should be excluded from the normal value calculation of model **[Confidential – Product information]**. In fact, all the private-label **[Confidential – Product information]** exported to Australia were produced on the basis of a standard recipe, having lower brix content and therefore lower market value.

In the alternative, a physical adjustment should be applied to the normal value of the domestic sales of **[Confidential – Product information]**, in order to re-establish an apple-to-apple comparison with the export price of private-label **[Confidential – Product information]** exported to Australia. In fact, it has been clearly demonstrated that the higher quality of the product sold to **[Confidential – Client information]** has a “*demonstrable effect on the selling price of the goods*”, as requested by the Dumping and Subsidy Manual.

Finally, it should be noted that the above claim appears to be in line with the ADC’s practice, which acknowledged that the brix degree plays an important role in the comparability of agricultural products and their prices. For instance:

- in the framework of the antidumping investigation No. 41 concerning imports of, *inter alia*, pineapple juice concentrate from Thailand the product under investigation was defined, *inter alia*, on the basis of the brix degree (i.e. a “typical” brix of either 60% or 65%). Furthermore, as explained at section 3.1 of Final Report No. 41, the ADC excluded certain type of juice concentrate from the scope of the investigation on the basis of “*not fitting the description of the goods by virtue of the brix level*” (see **Annex III**).
- in the framework of the antidumping investigation No. 217 concerning imports of PPTs from Italy, the ADC acknowledged at section 3.2.2 of Feger’s Verification Report that the brix of the tomato juice determines the quality of the product.² This was also confirmed at section 5.2.2 of Final Report No. 217.³

² EPR 217, doc. 053.

³ EPR 217, doc. 091.

In light of the foregoing, it is submitted that the private-label **[Confidential – Product information]** sold to **[Confidential – Client information]** should be excluded from the normal value calculation of model **[Confidential – Product information]** as a result of the particular characteristics resulting from their higher brix levels, in line with the ADC's practice.

1.3 Conclusion on the first ground for review

In light of the foregoing, it is submitted that the reviewable decision is not the correct decision as Conserve Italia's dumping margin determinations are vitiated by the inclusion, in the normal value calculation of model **[Confidential – Product information]** (covering private-label **[Confidential – Product information]**), of the following transactions:

- (i) **[Confidential – Product information]** , which are NOT private-label products, and
- (ii) private-label **[Confidential – Product information]** sold to **[Confidential – Client information]**, which are manufactured on the basis of a special recipe.

In this respect, it must be noted that the Final Report simply disregarded the above claims without providing any solid ground for the rejection thereof, except for the timely completion of the investigation. However, such a procedural ground is ill-founded. The ADC in fact had sufficient time to complete the Final Report as the claims under discussion were raised (see **Confidential Annex IV**) just 3 working-days after the disclosure of the dumping calculations by the ADC, which took place immediately before the publication of the Statement of Essential Facts (the "**SEF**"). Moreover, they were also reiterated in Conserve Italia's response to the SEF.

Based on the arguments illustrated above, it is submitted that the normal value of model **[Confidential – Product information]** should have been determined on the basis of the domestic sales of private-label **[Confidential – Product information]** with the exclusion of (i) **[Confidential – Product information]** sold under the **[Confidential – Product information]** brand **[Confidential – Product information]**, and (ii) **[Confidential – Product information]** with a higher brix degree sold to **[Confidential – Client information]**.

Had the ADC correctly calculated the normal value of model **[Confidential – Product information]** (in accordance with the methodology proposed by Conserve Italia) this would have resulted in a dumping margin of **[Confidential – Dumping margin]** (rather than the margin of 5.4% calculated by the ADC). Moreover, should the ADRP decide to uphold all the three grounds for review submitted in the application for review, Conserve Italia's dumping margin would further decrease to - **[Confidential – Dumping margin]** (see **Confidential Annex I**).

2. SECOND GROUND: THE NORMAL VALUE OF MODEL [CONFIDENTIAL – PRODUCT INFORMATION] SHOULD HAVE BEEN ADJUSTED TO REFLECT THE DIFFERENT NET DRAINED WEIGHT OF THE GOODS SOLD DOMESTICALLY COMPARED TO THOSE EXPORTED TO AUSTRALIA

Conserve Italia submits that the dumping margin calculation carried out by the ADC does not take into account the physical difference - in terms of net drained weight - that affects the price comparability between the **[Confidential – Product Information]** sold in Italy and those sold in Australia.

The Dumping and Subsidy Manual allows physical adjustments for differences in physical characteristics (quality, chemical composition, structure or design) where the differences can be quantified to ensure fair comparison. Such quantification is clearly possible in the present case since **[Confidential – Product Information]** sold in Italy and in Australia are affected by an objective difference in terms of net drained weight (indicating, in substance, the content of solid tomato in each can).

In this respect it must be noted that the **[Confidential – Product Information]** sold in Italy have a net drained weight of **[Confidential – Business Information]** grams, while the **[Confidential – Product Information]** exported to Australia have a net drained weight of **[Confidential – Business Information]** grams. This is demonstrated by the evidence provided to the ADC during the investigation:

- the label affixed to the cans sold in Italy shows that each **[Confidential – Product Information]** can contains **[Confidential – Business Information]** grams of solid tomatoes (“*peso sgocciolato*” in Italian), while the label affixed to the cans sold in Australia () demonstrates that the amount of solid tomatoes contained in each can accounts for **[Confidential – Business Information]**% of the total matter in a can, i.e. the **[Confidential – Product Information]** cans contain **[Confidential – Business Information]** grams of solid tomatoes (see **Confidential Annex V**);
- the product specifications show that the drained weight of **[Confidential – Product Information]** sold in Italy (marked with the product code **[Confidential – Product Information]**) and Australia (marked with the product code **[Confidential – Product Information]**) are different (see **Confidential Annex VI**).

The different net drained weight is reflected in the selling prices. The domestic and export sales listings of Conserve Italia reveal that the unit normal value of **[Confidential – Product Information]** is € **[Confidential – Price Information]**, whereas the unit export price of the same product (but with a lower drained weight, i.e. less tomato substance) is € **[Confidential – Price Information]**. This clearly confirms that the physical difference in terms of net drained weight also has a

“demonstrable effect on the selling price of the goods” as requested by the Dumping and Subsidy Manual.

In light of the above, it is submitted that the normal value of **[Confidential – Product Information]** (model **[Confidential – Product Information]**) should be adjusted in order to reflect the existing physical difference between the goods sold on the domestic and Australian markets. To this effect, Conserve Italia requests that the normal value of model **[Confidential – Product Information]** should be adjusted downwards by **[Confidential – Normal Value Calculation]**%, as to make it comparable with the export price. In fact, the net drained weight (i.e. the tomato content) of the cans sold domestically is **[Confidential – Business Information]**% higher than the drained weight of the cans exported to Australia.

In this respect, it must be noted that the Final Report concluded that the normal value of model **[Confidential – Product Information]** cannot be adjusted to reflect the higher net drained weight of the goods sold domestically (compared to the net drained weight of the goods exported to Australia) because *“the cost to make for both models was identical, as they were from the same components”*. Therefore, according to the ADC, *“the verified information demonstrated that the contents of the tins are identical, and thus cannot be different”*. However, this conclusion is ill-founded. The higher net drained weight of the product sold domestically correspond to a higher tomato content in each can. Thus, Conserve Italia fails to understand how the ADC may conclude that *“the contents of the tins are identical, and thus cannot be different”*.

Therefore, it should be concluded that the different net drained weight is an objective difference which affects the price comparison. This was expressly acknowledged by the ADC in the Final Report No. 217 (adopted in the original investigation concerning imports of PPTs from Italy), which clarified that:

“For each cooperating exporter of prepared or preserved tomatoes, the Commission identified the principal physical characteristics of the goods exported in order to classify each export transaction into a particular model category. The characteristics generally included:

- 1. Type of tomato – whole, chopped, organic, etc*
- 2. Recipe – standard, value-added*
- 3. Can size – 500g, 800g, etc*
- 4. Container – tin easy-open, lacquered, non-lacquered, etc*

5. Drained weight – 60%, 70%.⁴

It follows that, in the ADC's practice, the net drained weight is a relevant factor to be taken into account for the purpose of a fair comparison.

Finally, the ADC's argument that analysing Conserve Italia's claim regarding the difference of net drained weight would have prevented the timely completion of the investigation cannot be accepted. As a matter of fact, the ADC had sufficient time to complete the Final Report as the claim under discussion was raised (see **Confidential Annex IV**) just 3 working-days after the disclosure of the dumping calculations by the ADC, which took place immediately before the publication of the SEF. Moreover, they were also reiterated in Conserve Italia's response to the SEF.

Based on the arguments illustrated under Section 2.1 above, it is submitted that the normal value of model **[Confidential – Product Information]** should have been adjusted downwards by **[Confidential – Normal Value Calculation]**% in order to reflect the physical difference in net drained weight between the products sold domestically and those exported to Australia.

Had the ADC correctly calculated the normal value of model **[Confidential – Product Information]** (in accordance with the methodology proposed by Conserve Italia) this would have resulted in a dumping margin of **[Confidential – Dumping Margin Calculation]**% (rather than the margin of 5.4% calculated by the ADC). Moreover, should the ADRP decide to uphold all the three grounds for review submitted in the application for review, Conserve Italia's dumping margin would further decrease to **[Confidential – Dumping Margin Calculation]**% (see **Confidential Annex I**).

3. THIRD GROUND: THE NORMAL VALUE OF MODELS [CONFIDENTIAL – PRODUCT INFORMATION], [CONFIDENTIAL – PRODUCT INFORMATION] AND [CONFIDENTIAL – PRODUCT INFORMATION] SHOULD HAVE BEEN ADJUSTED TO REFLECT THE HIGHER MARKET VALUE OF THE CIRIO TRADEMARK IN ITALY COMPARED TO AUSTRALIA

Conserve Italia submits that the reviewable decision is not correct since 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. In this respect, the following should be noted.

In Italy, CIRIO is a premium brand with an extremely long history dating back to 1856. The Italian consumers regard CIRIO-brand products as premium quality products with an extremely high reputation, as a result of which CIRIO is the leader

⁴ EPR 217, doc. 091.

on the Italian market. This is confirmed, *inter alia*, by the market research conducted by IRI (a leading market research firm) which was provided to the ADC during the investigation, and which demonstrates that the average unit sales price of CIRIO-brand **[Confidential – Product Information]** is the highest in the Italian market, being **[Confidential – Business Information]**% higher than the market average at the end of March 2017. Furthermore, the average unit sales price of CIRIO-brand **[Confidential – Product Information]** was **[Confidential – Business Information]**% above the prices of the same products with a private label (see **Confidential Annex VII**).

The position of the CIRIO brand in Australia is significantly different. In the Australian market, CIRIO is a young brand with a small market share. More importantly, the CIRIO brand does not have amongst the Australian consumers the same reputation that it has amongst Italian consumers. In other words, the brand awareness of the CIRIO products in Italy is much higher than in Australia. Therefore, the added-value of the CIRIO brand (that is to say, the “immaterial value” of the CIRIO trademark) is much higher in Italy than in Australia. This affects, in turn, the selling price of CIRIO-brand products sold in Italy, compared to those sold in Australia.

In order to calculate the different added-value (or immaterial value) of the CIRIO brand in Italy and Australia, reference is made to the information reported in Conserve Italia’s questionnaire reply with regard to the selling prices of **[Confidential – Product Information]**, i.e. the only model to be sold in both Italy and Australia under (i) the CIRIO brand, and (ii) private labels.

In carrying out such analysis, it can be observed that:

- the normal value of CIRIO-brand **[Confidential – Product Information]** sold in Italy is **[Confidential – Normal Value Calculation]**% higher than the normal value of private-label **[Confidential – Product Information]** sold in Italy, whereas
- the export price of CIRIO-brand **[Confidential – Product Information]** exported to Australia is just **[Confidential – Normal Value Calculation]**% higher than the export price of private-label **[Confidential – Product Information]** exported to Australia (see the revised dumping margin calculation provided under **Confidential Annex I**).

This suggests that the immaterial value of CIRIO trademark in Australia is, at the very least **[Confidential – Business Information]**% lower than in Italy.⁵ This clearly

⁵ In order to ensure a fair and sound assessment of the immaterial value of the CIRIO brand, the price difference between **[Confidential – Product Information]** and **[Confidential – Product Information]** has been calculated on the basis of (i) the export prices, as regard the Australian market, and (ii) the normal values as regards the Italian market (on the assumption that export prices and normal values are worked out as to make them fully comparable). Moreover, the normal value of **[Confidential – Product Information]** taken into account for the purpose of

demonstrates that the prices of CIRIO-brand products in the two markets are driven by the different brand awareness among consumers. In other words, the different brand awareness has a “*demonstrable effect on the selling price of the goods*”, as requested by the Dumping and Subsidy Manual. This difference should be taken into due account for the purpose of the dumping calculation through an adjustment.

In this respect, it is worth noting that the ADC’s practice confirms that a different level of brand awareness may justify an adjustment for the purpose of a fair comparison. For instance, in the framework of the review investigation No. 128 concerning the antidumping measures applicable to certain washing machines exported to Australia from Korea, the ADC adjusted downwards the price of certain washing machines sold under a premium brand in order to reflect the differences in the brand awareness of different trademarks.

In this regard, Final Report No. 128 pointed out that an adjustment to reflect the differences in the brand awareness of trademarks - like all adjustments for fair comparison - must be “*based on reasonable evidence that the factor has a price effect and that price effect can be reasonably quantified*”.⁶ In the case at hand, Conserve Italia’s claim for a downward adjustment to the normal value of CIRIO-brand products is based on verified information provided with the questionnaire response as well as documents issued by independent market research bodies. Furthermore, Conserve Italia’s questionnaire response provides the information for calculating the exact magnitude of the adjustment, by comparing the immaterial value of the CIRIO trademark in Italy and Australia.

As a result, Conserve Italia requests that a downward adjustment of **[Confidential – Normal Value Calculation]**% should be applied to the normal value of models **[Confidential – Product Information]**, **[Confidential – Product Information]** and **[Confidential – Product Information]** in order to reflect the difference between Italy and Australia in terms of immaterial value of the CIRIO trademark⁷.

In this respect, it must be noted once again that while Conserve Italia timely raised the above claim (see **Confidential Annex IV**) just 3 working-days after the disclosure

the present analysis is the normal value adjusted downwards to reflect the higher net drained weight of the products sold in Italy (otherwise, the difference would have been higher than **[Confidential – Business Information]**%).

⁶ EPR 128, doc. 008.

⁷ The added value of CIRIO trademark as regards the sales of **[Confidential – Product Information]** in Italy is **[Confidential – Business Information]**%, which means that the value of CIRIO trademark accounts for **[Confidential – Business Information]**% of the price of CIRIO-brand **[Confidential – Product Information]** sold in Italy. The added value of CIRIO trademark as regards the sales of **[Confidential – Product Information]** in Australia is **[Confidential – Business Information]**%. The amount of the adjustment was calculated as follows: **[Confidential – Business Information]**.

of the dumping calculations, the ADC failed to address it properly, as the Final Report did not provide any statement of reasons explaining why the claim was rejected.

Based on the arguments illustrated above, it is submitted that the normal value of the models **[Confidential – Product Information]**, **[Confidential – Product Information]** and **[Confidential – Product Information]** should have been adjusted downwards by **[Confidential – Normal Value Calculation]**% in order to reflect the existing difference between the immaterial value of the CIRIO brand (i.e. the brand awareness) in Italy and Australia.

Had the ADC correctly calculated the normal value of models **[Confidential – Product Information]**, **[Confidential – Product Information]** and **[Confidential – Product Information]** (in accordance with the methodology proposed by Conserve Italia), this would have resulted in a dumping margin of **[Confidential – Dumping Margin Calculation]**% (rather than the margin of 5.4% calculated by the ADC). Moreover, should the ADRP decide to uphold all the three grounds for review submitted in the application for review, Conserve Italia's dumping margin would further decrease to **[Confidential – Dumping Margin Calculation]**% (see **Confidential Annex I**).

4. CONCLUSION

In light of the foregoing, Conserve Italia respectfully requests the ADRP to make a recommendation under paragraph 269ZZK(1)(b):

- (i) recommending the Minister to revoke the reviewable decision and substitute it with a decision to publish a notice under subparagraph 269ZDB(1)(a)(ii) revoking the antidumping duties in relation to PPTs exported from Italy by Conserve Italia; or
- (ii) as a subordinate ground, recommending the Minister to revoke the reviewable decision and substitute it with a decision to publish a notice under subparagraph 269ZDB(1)(a)(iii), imposing antidumping duties in relation to PPTs exported from Italy by Conserve Italia, but with a reduced duty rate.