

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 Mutti S.p.A.

1. INTRODUCTION

On 25 May 2016, the Anti-Dumping Commission (the '**ADC**') initiated the interim review No. 354 ('**Review 354**') concerning the antidumping 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 No. 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 Mutti S.p.A. ('**Mutti**').

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 ADNs No. 2017/46 and 2017/47, amending the antidumping 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. (the '**reviewable decision**').

On 4 June 2017, Mutti lodged an application for review with the Anti-Dumping Review Panel ('**ADRP**'), claiming that the ADC's calculation of Mutti's AEP in the framework of Review 354 was not correct. Other applications were filed by SPC Ardmona Operations Ltd, Conserve Italia Soc. Coop. and Le Specialità Italiane S.r.l.

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 Mutti's ground of review is a reasonable ground 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, Mutti wishes to supplement its application for review by way of the additional comments contained in the present submission.

2. ANY AMOUNT THAT IS DETERMINED TO BE A REIMBURSEMENT OF THE KIND REFERRED TO IN SUBSECTION 269TAA(1A) SHOULD BE DEDUCTED FROM THE SELLING PRICE WHEN WORKING OUT THE ASCERTAINED EXPORT PRICE

The ADN No. 2017/47 clarifies that the antidumping measures targeting, *inter alia*, Mutti should be collected on the basis of the '*combination of fixed and variable duty method*' set out in the *Customs Tariff (Anti-Dumping) Regulation 2013*. As explained

in the *Guidelines on the Application of Forms of Dumping Duty*, the ‘combination duty’ comprises two elements:

- a) the **fixed duty element**, i.e. an *ad valorem* duty which applies to the higher of the export price ascertained during the investigation (‘AEP’) or the actual export price (‘DXP’); and
- b) the **variable duty element**, i.e. the difference between the DXP and the AEP, in case the DXP of the shipment is lower than the AEP.

Therefore, in order to determine the variable duty element under the ‘*combination of fixed and variable duty method*’ it is crucial to correctly determine the AEP. In this respect, the following legal provisions should be taken into account:

- according to Section 5(2) of the *Customs Tariff (Anti-Dumping) Regulation 2013*, the AEP is the ‘*export price of goods of that kind as ascertained, or last ascertained, by the Minister for the purpose of the notice*’;
- Section 4 of the *Customs Tariff (Anti-Dumping) Regulation 2013* provides that, in the context of that Regulation, ‘*export price has the meaning given by section 269TAB of the Customs Act 1901*’.

In the case of Mutti, the provision applied in the Final Report in order to calculate the export price was Section 269TAB(1)(a) of the Act. According to this provision, the export price is ‘*the price paid or payable for the goods by the importer, other than any part of that price that represents a charge in respect of the transport of the goods after exportation or in respect of any other matter arising after exportation*’.

In this regard, Section 269TAB(1A) further clarifies that ‘*[f]or the purposes of paragraph (1)(a), the reference in that paragraph to the price paid or payable for goods is a reference to that price after deducting any amount that is determined by the Minister to be a reimbursement of the kind referred to in subsection 269TAA(1A) in respect of that transaction*’ (emphasis added).

The Dumping and Subsidy Manual explains that ‘*Section 269TAA(1A) allows transactions affected by reimbursements that are a normal business practice to be treated as being at arms length, after having regard to any agreement or established trading practice. [...] A rebate may be considered part of price provided that the nature and manner of payment remain sufficiently connected with the sales transaction (e.g. volume rebate)*’.

In other words, Section 269TAA(1A) provides that, if it is possible to establish a sufficiently clear link between, on the one hand, the export sales transactions and, on the other hand, any deferred rebate made in accordance with the normal business practice, the consequence is that:

- the export transactions should be considered at arm's length despite the existence of compensatory arrangements between the exporter and the importer;
- the rebates under discussion should be considered as part of the selling price paid by the importer.

It follows that the above-mentioned deferred rebates should be deducted from the selling price paid by the importer when working out the export price under Section 269TAB(1)(a) of the Act.

Therefore, it must be concluded that the AEP should be worked out by deducting from the weighted average FOB price paid by the relevant importer(s) during the investigation period any amount that is determined to be a reimbursement of the kind referred to in subsection 269TAA(1A).

3. THE ADC FAILED TO DEDUCT THE DEFERRED REBATES 'MADE IN ACCORDANCE WITH THE NORMAL BUSINESS PRACTICE' WHEN WORKING OUT MUTTI'S ASCERTAINED EXPORT PRICE

Bearing the above in mind, it is submitted that the ADC failed to correctly work out Mutti's 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.

In this respect it must be noted that, as explained in Mutti's response to question B-6 of the Exporter Questionnaire and further detailed throughout the investigation, Mutti grants deferred rebates/discounts to two Australian customers, namely, [CONFIDENTIAL – CUSTOMERS DETAILS] (see, e.g., attachment B-2-1 to Mutti's questionnaire reply, provided herewith under **Confidential Annex 1**).

These discounts/rebates (which were reported in an aggregated form in Mutti's 'Australian sales' listing under the column '*CONTRIBUTES TO CUSTOMERS OUT OF INVOICE OTHERS*') may take different forms, namely:

1. Target rebates bestowed to the relevant customer/importer at the end of the financial year upon achievement of certain sales volumes and/or turnover (see **Confidential Annex 2**);
2. Turnover rebates granted to the customer/importer as a fixed percentage of the relevant turnover in a given year (see e.g. **Confidential Annex 3**);
3. Promotional rebates [CONFIDENTIAL – BUSINESS INFORMATION] are discounts granted to final consumers which are shouldered by Mutti rather than by the relevant customer/importer (see e.g. **Confidential Annex 4**);

4. Bonus rebates in the form of lump-sums [CONFIDENTIAL – BUSINESS INFORMATION] (see e.g. **Confidential Annex 3**).

The nature and characteristics of the above-described rebates/discounts clearly shows that these rebates are 'sufficiently connected' with the sales of the goods under consideration in the Australian market.

Moreover, it must be pointed out that the rebates/discounts under discussion (which, as explained, were reported in Mutti's 'Australian sales' listing) have been verified by the ADC and taken into account for the purpose of calculating Mutti's dumping margin, i.e. they have been deducted from Mutti's export price (*rectius*, added to Mutti's normal value, which is the same) for the purpose of calculating Mutti's dumping margin.

This clearly confirms that these discounts/rebates are '*sufficiently connected with the sales transaction*' and therefore must be '*considered part of price*' as provided by the Dumping and Subsidy Manual, which brings to the obvious conclusion that **they should have been deducted from the FOB price paid by Mutti's Australian customers when working out Mutti's AEP.**

4. CONCLUSION

In light of the foregoing Mutti respectfully submits that, by failing to deduct the above-discussed deferred discounts/rebates from the FOB price paid by Mutti's Australian customers, the ADC has unduly inflated Mutti's AEP. In fact, the ADC has set Mutti's AEP at the level of [CONFIDENTIAL – AEP] (FOB Credit 60 days), whereas the correct AEP (after deduction of the discounts/rebates under discussion) would result to be [CONFIDENTIAL – AEP] (the relevant calculation is provided under **Confidential Annex 5**).

The ADRP is therefore respectfully requested to recommend to the Minister, under sections 269ZZK(1) and (1A) of the Act, that the reviewable decision should be revoked and substituted with a decision to publish a notice under subparagraph 269ZDB(1)(a)(iii) imposing a reduced AEP in relation to PPTs exported from Italy by Mutti.