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ANTI-DUMPING INVESTIGATION BY THE AUSTRALIAN GOVERNMENT ON IMPORTS OF PREPARED OR PRESERVED TOMATOES EXPORTED FROM ITALY BY FEGER AND LA DORIA

Written submission of the European Commission to the

Anti-Dumping Review Panel

On 10 February, the Parliamentary Secretary to the Minister of Industry, Innovation and Science decided to impose anti-dumping measures on imports of prepared or preserved tomatoes exported from Italy by Feger and La Doria. After the imposition of measures, the two companies and the Government of the Italian Republic lodged review applications to the Anti-Dumping Review Panel. A review of these measures was initiated on 13 April.

The European Commission was an interested party throughout the anti-dumping investigation subject of this review and also in the previous investigation involving all Italian exports of prepared or preserved tomatoes to Australia.

In this submission, the European Commission will go through the different grounds -disclosed in the Notice under section 269ZZI of the *Customs Act 1901* on 13 April- for which the Anti-Dumping Review Panel is satisfied that they are reasonable for the decision to impose measures (the reviewable decision) not being the correct or preferable decision.

I. BACKGROUND OF THE CASE

In order to have a better understanding of the arguments presented below, the European Commission considers that, given the history of the case, it is necessary to recall some elements related to the previous investigations -in the not so distant past- concerning the same product as well as some elements related to the initiation of the case under review.

(i) **Safeguard investigation (June 2013)**: It should first be recalled that Australia had initiated in 2013 a safeguard investigation against imports of canned tomatoes. Due to the nature of the safeguard instrument, imports from all origins were targeted, but in fact Italy

was the main exporting country. This investigation was terminated in December 2013 without imposing any measures. This decision was mainly based on the following conclusions:

"The Productivity Commission found that increased imports of canned tomatoes have not caused serious injury to the domestic industry. The serious injury resulted from a combination of other factors including long-term import competition, supermarket private label strategies, a decrease in export volumes (likely as a result of the appreciation of the Australian dollar) and extreme weather events".

(ii) Anti-dumping investigation No. 217 (July 2013): In parallel to the safeguard investigation, Australia had also initiated an anti-dumping investigation against imports of canned tomatoes from Italy.

Within the framework of the above investigation, Australia examined whether there was a "particular market situation"¹ which would make the sales prices of canned tomatoes in Italy not suitable for determining a domestic price for the calculation of the dumping margins. It was indeed alleged that certain EU aids given to farmers may have had a distorting effect on the Italian market for canned tomatoes.

In its final report, the Anti-Dumping Commission however concluded that there was no such "particular market situation" because "[...] the evidence indicates that any payments provided directly to tomato growers in Italy are benefitting the growers in isolation and are not transferred to processors in the form of lower prices"².

The Anti-Dumping Commission further concluded that it "could not support a finding that these payments operate in a manner which distorts competitive market conditions"³.

That investigation was concluded in April 2014 with the imposition of measures, except for the exports made by Feger and La Doria. No dumping margin could indeed be established for these two exporters.

(iii) Anti-dumping investigation No. 276 – Feger and La Doria (January 2015): Despite the above findings, and only nine months after the imposition of measures, the Anti-Dumping Commission decided to initiate a new investigation against the two Italian exporters for which no dumping could be established. As it will be explained below, the European Commission considers that the initiation of this investigation was not justified, and its conclusions were both unfounded and contradictory.

¹ Article 2.2 of the WTO ADA.

² Anti-Dumping Commission, Final Report No.217, 21 March 2014, p. 34.

³ Anti-Dumping Commission, Final Report No.217, 21 March 2014, p. 34.

II. GROUNDS FOR REVIEW

(A) THE INITIATION OF THE INVESTIGATION LACKED LEGAL BASIS UNDER WORLD TRADE ORGANISATION (WTO) LAW AS THE APPLICATION FOR THE INVESTIGATION DID NOT MEET THE STANDARD OF EVIDENCE, THE INVESTIGATION WAS INITIATED LESS THAN 12 MONTHS AFTER THE CONCLUSION OF ANOTHER INVESTIGATION, AND THE SCOPE OF THE FRESH INVESTIGATION SHOULD HAVE BEEN COUNTRY-WIDE.

It is recalled that the decision to initiate a second anti-dumping case, less than a year after the first one, was mainly based on the supposition that the new application *"contained a considerable amount of new factual information provided by SPCA [the Australian applicant] regarding the allegations of a market situation"*⁴.

In this regard, Article 5.2 of the WTO Anti-dumping Agreement ('WTO ADA'), when referring to evidence contained in an application determines that *"Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph."* Article 5.3 also requires that *"The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation"*.

The conclusions resulting from the allegedly new information submitted by the complainant are based on mere allegations and conjecture and thus lacking a methodological approach. Indeed, it is simply assumed that the mere existence of certain income-related payments to tomato growers (not to the producers of the product concerned) has an immediate effect on the price of raw tomatoes and this is incorrect.

There was no change in the EU's Common Agricultural Policy in between the two investigation periods that could have any impact in the price dynamics of fresh tomatoes market in Italy. In other words, there is absolutely no new available information to the investigating authority (Anti-Dumping Commission) compared to the previous examination.

In the opinion of the European Commission, the recently verified information (that had shown no dumping) should have been considered as much stronger evidence than the suppositions included in the new application submitted by the Australian industry.

The European Commission considers that Australia should not have accepted the apparently 'new' information as *"sufficient evidence"* in order to remain coherent with the conclusions of its previous investigation and should have rejected the application, following the requirements of Article 5.8, according to which *"An application (...) shall be rejected and an investigation*

⁴ Anti-Dumping Commission, SEF No. 276 & PAD No. 276, 4 September 2015, para. 2.2.3, p. 12.

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."

Based on the above, the European Commission is extremely concerned to find that this initiation constitutes an abusive use of the instrument and is against Articles 5.2, 5.3 and 5.8 of the WTO ADA.

Furthermore, the fact that also in the latest investigation the Anti-Dumping Commission concludes that there is no "*particular market situation*" confirms in fact that the initiation of the latest investigation was not warranted since the circumstances had not changed and the complaint indeed did not include any additional evidence regarding the existence of a "*particular market situation*".

In this context, the Doha Ministerial declaration (WTO) with regards the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 should be recalled: "*investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed*"⁵.

The European Commission considers that, based on the above, the Australian authorities did obviously not handle this file with the required special care, and could not demonstrate any change of circumstances.

(B) THE INJURY AND CAUSALITY ASSESSMENT CARRIED OUT BY THE ADC WAS FLAWED IN RELATION TO THE PERIOD OF INJURY ASSESSMENT, THE UNDERCUTTING ANALYSIS, THE CONCLUSION REACHED ON PRICE SUPPRESSION, CONSIDERATION OF ALL RELEVANT ECONOMIC FACTORS AND NON-ATTRIBUTION ANALYSIS.

(i) Period of injury assessment

The injury analysis period for the investigation currently under review starts on 1 January 2010 and ends on 31 December 2014. It therefore overlaps with the period already investigated in the framework of the first investigation, i.e. from 1 January 2009 to 30 June 2013.

⁵ DOHA WTO Ministerial Decision on "Implementation-related issues and concerns" Decision of 14 November 2001.

Given the fact that the original investigation concluded that imports from Feger and La Doria were not dumped and did not cause any injury in the period January 2009 - June 2013, it should be impossible and illogical to conclude the opposite for the same period in the second investigation. The injury findings should thus be limited to the period July 2013 - December 2014.

(ii) Price suppression and undercutting

According to Article 3 of the WTO ADA "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products".

- 1) The conclusion on the existence of **price suppression** is based on a quite simplistic approach. Indeed, the Final Report No. 276 merely shows that the cost of production increased more than prices, and concludes on that basis alone that the Australian industry was not in a position to increase prices sufficiently because of the alleged dumped imports⁶. These conclusions are however not duly substantiated and the European Commission considers **that Australia failed to give any explanation based on "positive evidence"** that this development was caused by the alleged dumped imports.

In particular, the Anti-Dumping Commission did not even analyse why costs increased. This is however particularly relevant in this case since the complainant "*SPCA has stated that a decline in its sales volumes caused by imported products has resulted in higher costs to make and sell because of reduced economies of scale which in turn leads to poor fixed costs recovery and eroded profits and profitability*"⁷. In this respect, it is recalled that the Anti-Dumping Commission has not established injury in terms of declining volume, hence the reasons why costs have increased remains unexplained. Such an explanation is however key to the demonstration of price suppression.

- 2) **Price undercutting** was also established on a very weak basis. Undercutting was indeed mainly established on a price comparison between the Australian domestic prices and the sales prices given by importers for "selected customers". In cases where producers were directly selling to retailers, prices were even constructed using data from the ACBPS import database, which is quite surprising. The European Commission is of the opinion that since the actual export prices of Feger and La Doria were made available to the Anti-Dumping Commission during the investigation (and were also verified), they should rather have been used. This is indeed the only possible way to ensure a reliable, fair and

⁶ Final Report No 276 Para. 7.6.1.

⁷ Statement of Essential Facts No 276, Para. 8.7.7

comprehensive price comparison. Using only some sales prices, to selected customers, given by some importers cannot be representative. In any case it cannot be as representative as considering the totality of the export transactions of the two Italian exporters concerned. The European Commission also notes that the Anti-Dumping Commission has never provided any reasoned explanation why it has chosen this peculiar/selective method for the undercutting calculation.

(iii) All relevant economic factors

Article 3.4 of the WTO ADA requires that the examination of the impact of dumped imports on the domestic industry "*shall include an **evaluation of all relevant economic factors and indices having a bearing on the state of the industry***" and it gives a list of fifteen indicators⁸. The WTO Panel, when referring to such indicators, confirms that "*the examination of the impact of dumped imports must include an evaluation of all the listed factors in Article 3.4*"⁹.

In this regard, the Final Report No. 276 is far from complying with this condition. Indeed, important factors such as employment, wages, growth, productivity, return on investment or actual or negative effects on cash flow are simply missing, manifestly contradicting the WTO requirements.

With regards to the factors that are addressed in the Final Report, the information disclosed is very poor and clearly insufficient to make a meaningful assessment of the alleged injury suffered by the domestic industry. Indeed, this is the case regarding output, ability to raise capital or investments, inventories, utilization of capacity or the magnitude of the dumping margin. As a matter of example, factors such as assets or the capital investment are given at company level and are not representative. Regarding the latter, it is particularly concerning that despite the claims of different parties about the relevance that a possible lack of investment could have in the injury suffered by the domestic industry¹⁰, investigating authorities could not even approximate a trend specific to processed tomato.

In sum, the European Commission considers that the Australian authorities failed to conduct the impact analysis of dumped imports on the domestic industry. On the one hand this is so because not all the relevant factors were examined and on the other, because no "evaluation" of the relevant economic factors has been made according to the understanding of the WTO Panel, which in this regard concludes that "*the 'evaluation' to which Article 3.4 refers is the*

⁸ "actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments."

⁹ Panel Report, EC - Bed Linen. Para. 6.156

¹⁰ Final Report No 276. Para. 7.8.7

process of analysis and interpretation of the facts established in relation to each listed factor”¹¹.

(iv) Non attribution

When referring to causation, the WTO ADA requires that *"it must be demonstrated that imports are, through the effects of dumping causing injury within the meaning of this Agreement"*.

Furthermore, it is also recalled that pursuant to Article 3.5 WTO ADA, *"The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports"*.

It is very obvious in this case that the other known factors played an essential role. The European Commission considers that if the impact and importance of these other factors had been assessed objectively, injury should have been attributed to them rather than to the imports of La Doria and Feger.

These other factors were already mentioned in the investigation No. 217 and the safeguard investigation initiated in July 2013, and mainly consisted on the following:

- **Private label strategies and supply diversification by supermarkets**. As reflected in the Final Report of the previous investigation, private label strategies of major supermarkets contributed to the competitive environment in the Australian market. This issue was also evaluated by the Productivity Commission (in the framework of the safeguard investigation), which concluded that *"private label strategies can cause injury irrespective of imports"*¹² and that this strategy *"has affected the ability of local manufacturers to charge premium prices for their own label products"*¹³. In the Final Report No 276 the Anti-Dumping Commission has not significantly changed the line taken in the previous investigation.
- **The effect of the exchange rate**. According to the Final Report No. 217, the appreciation of the Australian dollar was a significant contributing factor to the injury suffered by the domestic industry¹⁴. Additionally, the Productivity Commission, in the safeguard case, concluded that *"the appreciation of the Australian dollar (...) was the main factor behind the decrease in FOB and supermarket unit values."*¹⁵. It appears that the Australian investigating authorities reach now the completely opposite

¹¹ Panel Report. Egypt - Steel Rebar. Para. 745

¹² Inquiry report - Safeguards Inquiry into the Import of Processed Tomato Products – p. 57

¹³ Inquiry report - Safeguards Inquiry into the Import of Processed Tomato Products – p. 12

¹⁴ Anti-Dumping Commission. Final Report No. 217 Para. 8.8.3

¹⁵ Inquiry report - Safeguards Inquiry into the Import of Processed Tomato Products – p. 53

conclusion since the Final Report 216 concludes that *"the material injury (...) that the Australian industry has suffered (...) is not attributable to the effects of the changes in the exchange rate in the investigation period"*¹⁶ even if the investigation periods overlap significantly. This conclusion is reached by an unreliable comparison of endpoints and is contrary to fact -competitive loss due to exchange rate- that has been widely reflected in the Australian and financial press.

- **Lack of investments made by SPCA.** This has indeed resulted in ineffective production and would most probably explain the losses incurred by the complainant in the last years. It is also the real reason why costs have increased. Indeed, it is striking that the domestic industry has been suffering losses during the four consecutive years covered by the investigation. This would indicate that the domestic industry is suffering from structural problems and/or injury from factors other than imports. As discussed above, it is unfortunate that the complainant did not provide the information regarding the capital investment injury factor specific for the product concerned (processed tomato) -but only at company level- and that the Anti-Dumping Commission could not approximate it either, releasing SPCA from the burden of proving the alleged injury resulting from low capital investment. In this regard, Australia has breached its obligations set in Article 3.5 of the WTO ADA according to which *"The demonstration of a causal relationship (...) shall be based on an examination of all relevant evidence before the authorities."* Finally, the lack of investments during the investigation period becomes even more evident given that after the investigation period, in 2015/16, SPCA commissioned and launched a new A\$ 36 million tomato processing line¹⁷.

The Australian Ministerial Direction on Material injury¹⁸ notes that *"The injury must also be greater than that likely to occur in the normal ebb and flow of business"* and this does not seem to be the case for the Australian canned tomato industry.

In this respect, the European Commission considers that the Anti-Dumping Commission did not adequately examine or address the effect of causes other than the alleged dumped imports. It is clear that imports from Feger and La Doria did not make injury greater than what would have occurred *in the normal ebb and flow of business*.

Finally, Australia should also look at other possible causes of injury such as the decrease of export sales, exports from other Italian producers (still undercutting AUS prices) and the increasing costs to make and sell.

¹⁶ Anti-Dumping Commission. Final Report No. 276 Para. 8.8.3

¹⁷ Media Release: New Tomato campaign major milestone for SPC. April 26, 2016

¹⁸ Ministerial Direction on Material Injury 2012. Subsection 269TA(I) of the *Customs Act 1901*. 1 June 2012.

(C) THE ADJUSTMENT TO THE COST FOR RAW MATERIALS INFRINGES WTO LAW AND DOES NOT MEET THE CONDITIONS UNDER SECTION 43(2) OF THE CUSTOMS (INTERNATIONAL OBLIGATIONS) REGULATION 2015.

(C.1) THE ADJUSTMENT TO THE COST FOR RAW MATERIALS INFRINGES WTO LAW

(i) Addressing EU's income support mechanism in the framework of an anti-dumping investigation is contrary to the WTO law

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.

By following the Australian authorities' logic, the eventual market distorting effects of a subsidy (countervailable or not) could always be investigated in an anti-dumping investigation and, as stated above, this is clearly not the case according to the WTO.

Finally, sending a questionnaire to the European Commission and the Italian government (as the Anti-Dumping Commission did on 5th February 2015) in the context of an anti-dumping investigation, which is in essence company-specific, could be seen as a way of eluding certain fundamental principles of countervailing investigations, such as consultation of governments involved (Article 13 of SCM Agreement).

(ii) EU aids to farmers are not price distortive

Despite several submissions made by the European Commission, the Anti-Dumping Commission also completely ignored and disregarded the fact that the EU aid system to farmers has been largely reformed already several years ago and is now a completely decoupled, non-specific income support scheme which is fully compatible with the WTO requirements and with paragraph 6 of Annex 2 of the Agreement on Agriculture. These aids have thus **no trade distorting effects or effects on production** and for that reason are

considered a "Green-Box" measure in terms of paragraph 1 of Annex 2 of the Agreement on Agriculture¹⁹.

(C.2) THE ADJUSTMENT TO THE COST FOR RAW MATERIALS DOES NOT MEET CONDITIONS UNDER SECTION 43(2) OF THE CUSTOMS (INTERNATIONAL OBLIGATIONS) REGULATION 2015

Following the analysis of the information and reasoning made in the Final Report No. 276, there are a number of strong reasons to conclude that the conditions set in Section 43(2) of the Customs (International Obligations) Regulation 2015 are not met. These are the following:

(i) Contradictory findings regarding the treatment of domestic sales

As mentioned above, the current investigation was initiated mainly on the basis of the alleged 'new' evidence of the existence of a "*particular market situation*". This was despite the fact that the original investigation concluded that there was no such market situation.

In order to have a fresh look at the issue at stake, Australia decided this time to engage an independent consultant to assess the situation. The investigation under review however reconfirmed the findings of the original case. Indeed, in the Statement of Essential Facts No. 276, the Anti-Dumping Commission concluded that it was "*not satisfied that there is a situation in the market in Italy for prepared or preserved tomatoes that makes sales of prepared or preserved tomatoes in that market unsuitable for use in determining a [domestic] price*"²⁰. This was also confirmed in the Final Report.

In other words, the Anti-Dumping Commission concluded yet again that domestic sales prices of canned tomatoes in Italy are suitable for the calculation of the dumping margin.

Despite the above findings, the Anti-Dumping Commission nevertheless – quite inexplicably and without any reasoning – still rejected the domestic sales prices recorded in the accounts of the exporters, based on Article 43(2) of the Australian Regulation²¹. It was indeed concluded

¹⁹ WTO Agreement on Agriculture. ANNEX 2: DOMESTIC SUPPORT: THE BASIS FOR EXEMPTION FROM THE REDUCTION COMMITMENTS. 1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria: (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and, (b) the support in question shall not have the effect of providing price support to producers; plus policy-specific criteria and conditions as set out below.

²⁰ Anti-Dumping Commission, SEF 276 & PAD No. 276, 4 September 2015, para. 6.3.2, p. 25.

²¹ Section 43(2)- Australian Customs (International Obligations) Regulation 2015 determines that:

(a) an exporter or producer of like goods keeps records relating to the like goods; and
(b) the records: (i) are in accordance with generally accepted accounting principles in the country of export; and
(ii) reasonably reflect competitive market costs associated with the production or manufacture of like goods;

that *"the cost recorded by Feger and La Doria for raw tomatoes in their records do not reasonably reflect competitive market costs"* and therefore the Anti-Dumping Commission decided to adjust the cost of production of the exporters by adding to the actual costs of raw tomatoes an amount corresponding to the aid supposedly received by their suppliers (the tomato farmers).

As a consequence, by artificially increasing the cost of production the domestic sales prices for certain types of the product under investigation became loss making, thus treated as not being made in the *"ordinary course of trade"*²² and excluded from the dumping margin calculation. This result-oriented methodology clearly contradicts the Anti-Dumping Commission's own conclusion that there is no *"particular market situation"* and therefore domestic sales prices are deemed as not unsuitable for the calculation of the dumping margins (see above). In essence the Anti-Dumping Commission created a situation of artificial dumping that would otherwise not exist.

Furthermore, the European Commission considers that this adjustment is unfounded and not supported by a single shred of evidence, as outlined below.

(ii) Absence of evidence that the cost of tomatoes in Italy is "not competitive"

By adjusting costs, the Anti-Dumping Commission suggests -without any positive evidence- that the cost of raw tomatoes in Italy is *"not competitive"*, i.e. that tomato prices are artificially low due to government influence. It is quite astonishing that Australia's authority came to this unfounded conclusion.

First, the Anti-Dumping Commission itself recalls in the Statement of Essential Facts the following conclusions of its original investigation:

"(..) the direct payments under the CAP and other miscellaneous government payments were not material. This finding was backed by comparing the price paid by Italian exporters for the raw tomato input against a competitive market price benchmark for tomatoes, taken to be the Australian industry purchase price for tomatoes from local suppliers. Based on this benchmark, the prices in the Italian market were found to be similar or higher than the Australian prices paid. On this basis, the Commission concluded that the payments provided directly to tomato growers in Italy were not being passed through to processors in the form of lower prices".²³

Second, as the European Commission submitted and explained during the investigation, it is generally recognized that the price in Italy of raw tomatoes for processing is one of the

²² Article 2.1 of the WTO ADA.

²³ Anti-Dumping Commission, SEF No. 276 & PAD No. 276, 4 September 2015, Appendix 1, para. 6, p. 56.

highest in the world. According to the OEIT (European Organisation of Tomato Industries), which represents the tomato processing industry from Italy, Spain, Portugal Greece and France, i.e. around 95% of the EU production, the European prices are 20% higher than the price for tomatoes in California (which is a generally recognized benchmark).

The prices per tonne in the last three years examined during the investigation developed as such:

	2012	2013	2014
OEIT Members €	80.7	81.8	85.9
California USD	76.5	77.7	91.5
California €	58.8	59.8	70.4

1.00 € = 1.30 \$

(Source: OEIT)

According to OEIT, in 2014 Northern and Southern Italian prices even reached 93€/tonne and 95€/tonne, respectively. It is thus very difficult to come to the conclusion that prices for raw tomatoes in Italy would be artificially low and hence *"not competitive"*.

Finally, in the Final Report No. 276 the Anti-Dumping Commission confirmed this point by referring to *"relatively high"*²⁴ Italian tomato prices, but **it did not offer one single piece of positive evidence showing that Italian domestic prices for raw tomatoes would be distorted or artificially low**. The adjustment is simply based on the unsubstantiated allegation that the mere existence of direct payments to tomato farmers affects the raw tomato price downwards: *"the totality of direct income support payments made to growers of raw tomatoes in Italy have significantly affected the prevailing market prices in Italy for raw tomatoes"*²⁵.

Furthermore, according to the Final Report *"the limited reforms to CAP are associated with falls in tomato production and the increase in prices in Italy"*²⁶. In the view of the European Commission the above assertion only demonstrates that in the recent past EU direct payments may be the cause of price hikes and not cheaper inputs. In addition, the assumption that

²⁴ Final Report 276. Para. 6.4.6.

²⁵ Final Report 276. Para. 6.4.8.

²⁶ Final Report 276. Para. 6.4.6.

tomato prices in Italy "*would have been higher without the influence of the direct income support to growers of raw tomatoes*" is a simplistic supposition not supported by any facts.

In sum, the whole reasoning is inconclusive with respect to the non-competitiveness of tomato prices in Italy.

Indeed, the Anti-Dumping Commission could give no explanation on the reason why Italian domestic raw tomato prices are considered not to be competitive, simply because this is not the case. Even worse, by concluding that there is no "*particular market situation*", and hence that competitive market conditions of the processed tomato prices in Italy are not distorted (insignificant pass-through effects or insignificant government influence on inputs), the only viable conclusion could be that tomato prices in Italy are necessarily "*competitive*". This is confirmed by the fact that Australia was not able to find an alternative benchmark price (as it is its usual practice) that would be more "*competitive*" than the Italian prices.

Based on the above, the conditions specified in Article 43(2) do not appear to be satisfied.

(D) THE ADC WRONGLY DETERMINED THE MAGNITUDE OF THE COST ADJUSTMENT AND ITS IMPACT ON THE DUMPING MARGIN OF FEGER AND LA DORIA, DUE TO THE CALCULATION OF THE ALLEGED SUBSIDY PER KG OF RAW TOMATOES PRODUCED IN ITALY, THE PASS-THROUGH ANALYSIS AND INCORRECT PROFIT MARGIN USED WHEN CONSTRUCTING NORMAL VALUE FOR FEGER AND LA DORIA.

(i) The cost adjustment calculation presents important flaws

Without prejudice to the fact that no adjustment of cost is justified in this case, there are in addition obvious and important shortcomings in the calculations of this adjustment, based on the incorrect evaluation made by the Anti-Dumping Commission in paragraphs 6.4.5 (assessment of competitive market costs) and 6.4.9 (method of cost adjustment) of the Final Report.

In the European Commission's view, these shortcomings are due to the following facts:

1. The Anti-Dumping Commission could not find a suitable benchmark -a higher price to use as alternative to Italian tomato prices- for the dumping margin calculation simply because there does not seem to be one.
2. There is no possible way to make an estimation of the annual CAP payments to tomato growers in Italy since payments are decoupled from production and based on land ownership irrespective of whether any production existed or not. There is simply no track or link of such payments according to crop.

Despite the above, the Anti-Dumping Commission has established a "subsidy rate" of €0,037 per kilogram in 2014 on the following basis:

- €183,967,000, allegedly, the "total grower payments for tomatoes in 2014" divided by,
- 4,911,000,000 kg, total production volume in 2014.

With respect to the alleged subsidy amount, it should be noted that the Anti-Dumping Commission misunderstood the legal basis it has used. Indeed, the Anti-Dumping Commission used a figure contained in an Italian Ministerial Decree from 17 October 2013 which stated that *"a national ceiling was fixed by the Italian Government under the SPS for 2014 and within that national ceiling was an allocation of €183,970,000 for direct income support payments to be made to growers of raw tomatoes"*²⁷.

This is despite the fact that the European Commission submitted the following information in December 2015 which was totally ignored by the Anti-Dumping Commission:

"The national component for tomatoes in Italy (EUR 183 mn) was completely transferred to the Single Payment Scheme envelope as from January 2011²⁸, 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 SPC²⁹ refers to a completely different issue, i.e. the valuation method of the entitlements from the National Reserve³⁰ 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."

If the above submitted information had been duly taken into account by the Anti-Dumping Commission, it would have had no other alternative than to conclude that in 2014, the period of investigation, there can be no adjustment of cost since the above ceiling had already completely disappeared and the aids given to farmers were totally decoupled and integrated in the Single Payment Scheme.

(ii) Absence of a "pass-through" analysis

Notwithstanding the argumentation made so far, even if assuming that the two exporters concerned by this investigation would have – if at all – benefited indirectly from any type of

²⁷ Final Report 276. Para. 6.4.5.

²⁸ 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.

²⁹ EPR 276 Nr 068

³⁰ The National Reserve would be equivalent to the amount below the ceiling available to grant new entitlements.

aids, it is quite striking that the Anti-Dumping Commission assumed that aids granted to farmers would have been fully transferred to the producers/exporters of canned tomatoes. It is recalled that aids are only given to EU farmers that have the necessary entitlements (whatever they produce, independently of how much they produce and even if they don't produce at all) – thus not all tomato farmers necessarily receive any aids – and that these farmers are different legal/economic entities than the producers/exporters of canned tomatoes.

It is thus clearly wrong to assume that there is a full and automatic pass-through of the income support granted to farmers to the two exporters concerned.

(E) THE CALCULATION OF FEGER'S DUMPING MARGIN WAS INCORRECT AS THE ADC UNDULY REJECTED DOWNWARD DOMESTIC ADJUSTMENTS IN RELATION TO 'ADVERTISING', 'QUALITY CONTROL' AND 'ADMINISTRATION COSTS' AND THE ADC OVER ESTIMATED FEGER'S 'FINANCE COSTS'.

The European Commission does not have all the details of the calculation of the dumping margins for the two Italian exporters since these refer to company-specific data which is treated as confidential. Following contacts with the exporters concerned, it would appear that certain adjustments they claimed for the calculation of the dumping margin have not been granted by the Anti-Dumping Commission.

The European Commission understands that these adjustments were however accepted by the Anti-Dumping Commission in the framework of the original investigation, but were refused this time without any apparent justification. The European Commission was very surprised by the Anti-Dumping Commission's treatment of these claims since these issues had not been raised during the verification visits which were also attended by European Commission officials.

There also appear to be some other issues in the calculations which are more than questionable. In particular, when constructing normal values, the Anti-Dumping Commission seems to have applied a methodology (application of a certain profit margin to adjusted costs) which artificially increases the normal values. This is of course notwithstanding the fact that costs should not be adjusted in the first place.

In this respect, the European Commission would strongly urge the Anti-Dumping Review Panel 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.

III. CONCLUSIONS

The European Commission regrets that Australia has decided to impose anti-dumping measures against Feger and La Doria, after concluding an investigation presenting such an

unusual number of important contradictions and inconsistencies, both within the same investigation and with regards to the findings of the previous investigation concerning the same product.

According to the European Commission, the most critical and blatant inconsistency concerns the treatment of Italian domestic sales. Indeed, by adjusting costs (and consequently the final sales price) based on an assumption that the mere existence of aids to farmers renders the cost of raw tomatoes in Italy *"not competitive"* the Anti-Dumping Commission erroneously concludes that the sales prices of processed tomatoes are distorted which is in clear contradiction with its own finding of no *"particular market situation"*.

Other contradictions arising from this investigation regard the following issues:

- While the investigation periods of the two investigations largely overlap, Feger and la Doria were not found to be dumping and to have caused injury in the previous investigation as opposed to the finding of the investigation under review.
- Similarly, the conclusions regarding the effect of exchange rates on injury contradict those of the previous investigation.
- Some adjustments to the dumping margin calculations made in the previous investigation were rejected in the second investigation without much justification.

Additionally, there are a number of important flaws regarding different aspects of this investigation:

- Grounds for initiation are weak, unsubstantiated and not based on *"sufficient evidence"*.
- The Anti-Dumping Commission failed to conduct a proper impact analysis of dumped imports on the domestic industry, which is not based on *"positive evidence"*.
- The Anti-Dumping Commission is incorrectly attributing injury from other factors to the investigated imports.
- There is no *"positive evidence"* that the cost of tomatoes in Italy is not competitive. To the contrary, there is clear undisputed evidence that the tomato prices in Italy are amongst the highest in the world.
- The calculation of a subsidy/kg of raw tomatoes is based on a misunderstanding of the CAP, on incorrect figures and made under the false assumption of a 100% pass through.

In sum, Australia is obviating some important WTO obligations which are also reflected in the Australian anti-dumping-related regulations.

Based on the above, the European Commission respectfully requests that the Anti-Dumping Review Panel examines carefully and takes a critical look at all the issues raised above, which will inevitably conclude that measures on processed tomato products from Feger and La Doria are not warranted.