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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 on the initiation of the
investigation**

On 19 January 2015, at the request of the Australian producer SPC Ardmona Operations Limited (SPCA), the Australian Anti-Dumping Commission initiated an anti-dumping investigation on imports of processed tomato products from Italy by the companies Feger and La Doria.

The European Commission is extremely disappointed about this initiation because Feger and La Doria were already subject to a thorough anti-dumping investigation in 2013/2014, and in that case the Australian Anti-Dumping Commission terminated the procedure for the two companies¹ since the dumping margins they had established were below the *de minimis* levels.

The Australian authorities have now decided to reinvestigate Feger and La Doria, imposing an extremely burdensome and costly procedure on them, on the basis of very weak evidence at initiation and ignoring almost completely the verified outcome of the previous investigation.

In the opinion of the European Commission, the recently verified information (that showed no dumping) should have been considered as much stronger evidence than the *prima facie* evidence included in the new application submitted by the Australian industry. On this basis, Australia should inevitably have concluded that no new investigation should have been initiated, especially given the short time gap between both investigations. In this sense, the European Commission is extremely disappointed to find that this initiation constitutes an abusive use of the instrument.

In addition, it is particularly disturbing that the Australian authorities are yet again investigating whether a poorly alleged particular market situation exists in the fresh tomato market in Italy that would affect the price comparability of domestic sales to determine the normal value. This is difficult to understand especially since it was recently concluded in the previous case that no such situation existed².

¹ Anti-Dumping Notice 2014/22

² Point 6.1 - Final report 217 Prepared or preserved tomatoes - Italy

In this context, similarly to the previous case, the European Commission considers that government questionnaires sent to both the European Commission and the Italian authorities are not appropriate and not justified under the WTO rules.

In this submission, the European Commission will reiterate that the approach of the Australian authorities to the issue of the particular market situation is blatantly incorrect and clearly incompatible with WTO provisions. Finally, the Commission will raise some issues on injury and causality that will indicate that the evidence at initiation does not seem to be strong enough to initiate an investigation.

1. PARTICULAR MARKET SITUATION

As mentioned above, this is not the first time the European Commission has been requested by Australia to reply to a questionnaire concerning subsidies in the framework of an anti-dumping investigation. This time however the request comes just nine months after the Australian authorities had completed an identical investigation, reaching the following conclusions³:

*"The Commission considers that **there is no situation in the market in Italy such that sales in Italy are not suitable for use in determining a price under subsection 269TAC (1) of the Act**"(sales made in the ordinary course of trade)*

*"in the absence of positive evidence to the contrary, 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.**"*

The receipt of yet another questionnaire given the above quite recent conclusion is both surprising and disappointing because the investigating authority already had ample time and opportunity to examine the matter and could not find any positive evidence. The European Commission thus notes that this questionnaire might result in a reversal of the burden of proof to the detriment of EU exporters.

The reopening of this issue is apparently motivated by the complainant's submission of "*some new material that had not been considered in the previous investigation*"⁴. In that regard, the European Commission would like to bring to the Anti-Dumping Commission's attention the following considerations:

- There has been no change in the 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 authorities compared to the previous examination.

³ Point 6.1 and 6.8. Final report 217 Prepared or preserved tomatoes - Italy

⁴ Page 22 Consideration report 276 prepared or preserved tomatoes exported from Italy by Feger and La Doria

- 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 has an immediate effect on the price of raw tomatoes and this is simply incorrect.

Based on the above, the European Commission considers that Australia should have been more careful before accepting such apparently ‘new’ information as sufficient evidence thereby, questioning the conclusions of its own recent investigation. 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."*

As in the previous investigation, the European Commission is convinced that the approach followed by the Anti-Dumping Commission on the issue of the alleged particular market situation is erroneous, and reiterates the arguments already given on previous occasions. In doing so, it is intended to comment on some of the observations made in the Final Report 217⁵:

1. Addressing questions concerning subsidies in an anti-dumping investigation is in breach of WTO rules, which state clearly that *"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"* (Article 32.1 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement")). It is understood that the above provision covers all possible subsidies and does not differentiate any different "purpose of analysis" as suggested by the Australian authorities. Hereafter, subsidies can only be analysed in the framework of a countervailing investigation. Indeed, it is clear also 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.
2. The income aid for farmers -the Single Payment Scheme ('SPS')- is a completely decoupled, non-specific income support scheme and fully compatible with the WTO requirements and with paragraph 6 of Annex 2 of the Agreement on Agriculture. The **SPS has thus no trade distorting effects or effects on production** and for that reason is considered a "Green-Box" measure in terms of paragraph 1 of Annex 2 of the Agreement on Agriculture.

⁵ Point 6.3.1 Final report 217 Prepared or preserved tomatoes – Italy

"The Commission believes that the criticisms submitted by the EC and Italian Government reflect a collective misunderstanding of the differences between:

a) analysis of Government policies which are appropriately characterised as subsidy programs for the purposes of determining countervailable subsidies and the calculation of applicable countervailing duties under s.269TJ; and

b) consideration of subsidy programs for the purposes of market situation analysis for the purposes of s. 269TAC(2)(a)(ii)".

By following the Australian authorities' logics, 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 possible according to the WTO.

In addition, sending a questionnaire to the European Commission and the Italian government 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).

In any event and despite the above considerations, the previous investigation could not demonstrate that payments provided directly to tomato growers in Italy were transferred to processors in the form of lower prices. Given the short period of time which has elapsed since the previous investigation and the fact that there was no change in the Common Agricultural Policy, it would be very difficult to imagine how this would be possible now.

2. INJURY

According to Article 3.1 of the WTO ADA, a determination of injury *"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".*

Despite the lack of information on the **volume of allegedly dumped imports**, it can be deduced from the Consideration Report that imports from companies subject to duties have been substituted by sales from SPCA, Feger and La Doria. Indeed, market shares of the three companies have gone up while the market remained relatively stable. In other words, the imposition of duties has been effective because dumped imports have decreased.

That being said, and given that domestic sales increased in each subsequent year since 2012, and so did the domestic market share, the European Commission agrees with the view of the Anti-Dumping Commission (section 6.6.3) that the domestic industry does not seem to be suffering from injury caused by volume effects.

The European Commission however cannot agree with the fact that the injury claims based on volume effects are eventually acknowledged because it is likely that imports from Feger and La Doria have displaced domestic sales. This suggests that the domestic sales were expected to increase even more than what they did, which is quite an unusual claim, based on mere allegations and has no legal basis in terms of WTO ADA.

Regarding **price effects**, the Australian authorities are satisfied that there are grounds to conclude that the domestic industry has suffered from price suppression and price depression.

Despite the above, the European Commission considers that it is essential to have more information on the price dynamics of the Australian market so as to assess the effects of

import prices from Feger and La Doria on the domestic industry. In particular, information on the magnitude of these effects would allow assessing whether, according to Article 3.2 of the WTO ADA, these price effects have taken place “*to a significant degree*”.

Magnitudes of the yearly changes of the industry’s profit and profitability and undercutting, as well as annual prices of Italian imports are also very important to analyse if the evolution of these factors is interrelated.

Further to the above, the Anti-Dumping Commission acknowledges that the performance of the domestic industry in relation to the **other economic factors** has to be further examined. In this regard, it should be remembered that Article 3.4 of the WTO ADA, determines the requirement of the investigating authorities to examine “*all relevant economic factors and indices having a bearing on the state of the industry*” and the WTO jurisprudence has confirmed the obligation to analyse each and every factor listed in that article. The European Commission thus expects the Australian authorities to look at all the relevant factors during the course of the investigation.

Finally, the domestic industry seems to be suffering in 2014 the worst year in terms of losses but there are reasons to believe that this worsening in the profit and profitability indicators, as explained below in the causality analysis, is not directly caused by imports from Feger and La Doria.

3. CAUSALITY

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

To assess the above, and despite the scarce information disclosed at this point of the procedure, there are some trends that can be deduced from the Consideration Report. In particular, there is a lack of correlation between the profitability of the domestic industry and the elimination of the injurious effects of imports from Italy through provisional and definitive anti-dumping duties. In other words, the profitability increases in the absence of duties and decreases when duties are imposed.

Indeed, the domestic industry improved its profitability in 2013 before declining in 2014 to the lowest levels of the investigated period (magnitudes ignored). It should however be recalled that during most of 2013 the totality of imports from Italy were free from anti-dumping duties except for the last two months of the year⁶ and were considered to be a cause of injury (both dumped and non-dumped) in the previous investigation⁷. Yet, based on the

⁶ Anti-Dumping Notice No. 2013/85. On 1st November 2014, the Anti-Dumping Commission imposed provisional duties on all the Italian exporters except for two (La Doria and Conserve Italia).

⁷ Point 8.8.1- Final report 217 Prepared or preserved tomatoes – Italy.

information disclosed, it appears that there was no price suppression or depression in that year.

In contrast, in the first semester of 2014 it appears that there was a slight price suppression in the domestic market (magnitude unknown) and that the profitability of the domestic industry went down. This however occurred when the market was already protected from dumped imports since provisional duties of around 9% (above the actual dumping margins) and definitive duties of around 4% were applied to the majority of imports in the first and second quarters respectively.

The above analysis seems to suggest that **price effects are not influenced by the presence of dumped imports and that there might be other causes of injury affecting the performance of the domestic industry.**

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 other factors rather than any problems caused by imports.

In this respect, the Commission would like recall the importance 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 should be noted that the exchange rate AUD/EUR significantly depreciated since spring 2013, causing a considerable price increase of Italian imports (approximately +25%). Therefore, the exchange rate cannot be considered a cause of injury any more but to the contrary, an element representing a higher protection against imports than anti-dumping duties. Similarly, imports subject to anti-dumping duties cannot be considered to be a cause of injury any more since the duty already offsets the injurious effects of these imports.

In view of the above, the Australian investigating authorities should have a closer look at other factors that may have caused injury to the domestic industry, such as the ones already pointed out in the previous investigation, like private label strategies and supply diversification by supermarkets, or as mentioned above, structural inefficiencies of the domestic industry.

4. CONCLUSIONS

The Australian authorities have initiated this investigation on very weak grounds since another investigation on the same product concluded just a few months ago that the dumping margins for Feger and La Doria were below the *de minimis* levels. In this regard, the European Commission considers that this initiation represents an abusive use of the instrument.

The initiation of this anti-dumping investigation is even more questionable, to say the least, since it is based on flimsy allegations and certainly no new evidence that the Italian market for tomatoes is distorted by alleged subsidies to the fresh tomato growers. This is despite the negative conclusions drawn by Australia in a similar case very recently, and would clearly represent a breach of the WTO provisions.

Furthermore, there are still some important missing elements regarding import and domestic prices and the relevant economic factors that would need to be made available by the Anti-Dumping Commission in the course of the investigation.

Finally, it appears that there are other important factors to be investigated in depth that could be the cause of any injury to the domestic industry. The complainant has been incurring losses during all of the investigation period and had the highest losses in a year when the market was already protected by anti-dumping duties and by the depreciation of the AUD/EUR exchange rate.

The European Commission trusts that the Australian authorities will comply with their WTO obligations throughout the proceeding.