

**Investigation No. 276 - Prepared or preserved
tomatoes exported from Italy by Feger di Gerardo
Ferraioli S.p.A. and La Doria S.p.A.**

**Observations on the alleged 'market situation'
submitted on behalf of Feger di Gerardo Ferraioli
S.p.A. and La Doria S.p.A.**

27 February 2015

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1. INTRODUCTION

On 19 January 2015, the Anti-Dumping Commission (“Commission”) initiated an anti-dumping investigation concerning imports of prepared and preserved tomatoes (“product under investigation”) exported from Italy by Feger di Gerardo Ferraioli S.p.A. (“Feger”) and La Doria S.p.A. (“La Doria”). The initiation of the investigation follows an anti-dumping complaint (“complaint”) filed by SPC Ardmona (“SPCA” or the “Complainant”).

The Complainant alleges, *inter alia*, that in the investigation period (i.e. the calendar year 2014) the supply and prices for raw tomatoes on the Italian market were distorted due to the payments that the tomato growers received under the Single Payment Scheme (the ‘SPS’) pursuant to the Common Agriculture Policy (‘CAP’) and that, as a result, the domestic prices of the product under investigation should not be used for the calculation of the normal value. As a consequence, according to the Complainant, the Commission should have recourse to a constructed normal value in light of the alleged particular ‘market situation’ on the Italian market for raw tomatoes.¹

However, it is important to note that the issue of the ‘market situation’ was already analysed by the Commission in another investigation – i.e. anti-dumping investigation No. 217 concerning prepared or preserved tomatoes exported from Italy (the ‘previous investigation’) – targeting the same country and the same goods which are the object of investigation No. 276.

In such investigation, which was concluded on 16 April 2014 - i.e. less than 10 months ago - the Commission found that “*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*” and that “*the evidence available to the Commission in the circumstances of the investigation is not sufficient to support a finding that these payments operate in a manner which distorts competitive market conditions and would lead the Commission to consider that it cannot use normal values pursuant to s.269TAC(1) (sales made in the ordinary course of trade)*”.²

The present document will demonstrate that (1) addressing the matter of the ‘market situation’ in the framework of an anti-dumping investigation rather than in a countervailing investigation is contrary to WTO law; (2) the SPS has no impact on the prices for raw tomatoes in the Italian market; (3) the information provided by the Complainant is irrelevant for the purposes of the ‘market situation’ analysis and; (4) the Complainant failed to provide evidence demonstrating a change of circumstances since the last investigation. These points will be addressed hereunder.

¹ Complaint, Section B-4.

² Final Report No. 217, p.34.

2. ADDRESSING THE MATTER OF THE 'MARKET SITUATION' IN THE FRAMEWORK OF AN ANTI-DUMPING INVESTIGATION RATHER THAN IN A COUNTERVAILING INVESTIGATION IS CONTRARY TO WTO LAW

At the outset, Feger and LA Doria wish to emphasise that the question of whether the SPS constitutes a subsidy to tomato growers should not be addressed in the framework of an anti-dumping investigation but, rather, in the framework of a countervailing proceeding.

Indeed, addressing questions concerning subsidies in an anti-dumping investigation would be 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 make any difference on the basis of the "purpose" of the analysis, as the Australian authorities seem to suggest. Therefore, any alleged subsidy and/or its alleged impact on the relevant market can only be addressed in the framework of a countervailing investigation.

This having being clarified it is submitted, *quod non*, that the SPS is fully WTO compatible, since it is not specific and is a completely decoupled income support scheme to farmers, in accordance with paragraph 6 of Annex 2 to the Agreement on Agriculture. Therefore, there is no doubt on the fact that the SPS has no trade distorting effects or effects on the production and is therefore to be considered a "Green-Box" measure in terms of paragraph 1 of Annex 2 of the Agreement on Agriculture. By accepting the logic followed by the Australian authorities, any effect that a subsidy (although not countervailable) may produce on the relevant market could always be investigated in the framework of an anti-dumping investigation. As explained above, this would be clearly not possible according to WTO law.

In any event, it is recalled once again that the Commission has already concluded, less than 10 months ago, 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"* and that *"the evidence available to the Commission in the circumstances of the investigation is not sufficient to support a finding that these payments operate in a manner which distorts competitive market conditions and would lead the Commission to consider that it cannot use normal values pursuant to s.269TAC(1) (sales made in the ordinary course of trade)".³*

³ Final Report No. 217, p.34.

In light of the above, Feger and La Doria fail to understand how the Commission may have decided to re-open a 'market situation' investigation on the sole basis of the "new material that had not been considered in the previous investigation" provided by SPCA. In this regard, it is submitted that the conclusions resulting from the new information submitted by the Complainant are based on mere allegations, since they simply assume that the mere existence of payments to tomato growers has an immediate effect on the price of raw tomato, without providing any demonstration of this circumstance. This is contrary to Article 5.2 of the WTO Anti-dumping Agreement, according to which "simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements" for the initiation of an anti-dumping investigation.

3. THE SINGLE PAYMENT SCHEME HAS NO IMPACT ON THE PRICE OF RAW TOMATOES IN THE ITALIAN MARKET

Contrary to what the Complainant alleges, the SPS has no impact on the price for raw tomatoes on the Italian market.

Pursuant to the SPS, farmers are entitled to receive every year a direct payment on the basis of (1) the hectares of land owned and (2) the entitlements held by each farmer in that particular year. An entitlement is a conditional right to receive the payment pursuant to the SPS which is (i) not attached to the land, (ii) is allocated to a person and is the property of that person and (iii) can be traded. The value of each entitlement is calculated on the basis of the amount of payments received during a reference period (2004-2006), by dividing this amount by the number of hectares which qualified for the support in the reference period.

Under the SPS, all farmers – whether or not tomato growers – receive a payment based on the hectares of land and the entitlement they own. These payments are *decoupled from production*. This means that all the farmers eligible for the SPS are granted a payment, *irrespective of what they produce, and of their volume of production*. The Complainant himself acknowledged that in calendar years 2011-2013 "the payments are in 100% decoupled form under the Single Payment Scheme".

Therefore and logically, the SPS cannot be considered to be an incentive to the production of tomatoes. On the contrary, since all farmers receive the payments irrespective of what and how much they produce, the SPS can be seen as a disincentive to production. As a matter of fact, the only reason for which the farmers may want to produce tomatoes is to make profits. In addition, since all the eligible farmers benefit from the SPS, this programme cannot be considered to have an impact on price competition amongst the Italian tomato growers.

This is further confirmed by the following considerations.

If the SPS had an impact on the prices for raw tomatoes on the Italian market, *quod non*, such effect would be that of lowering prices. This is indeed what is alleged by the Complainant. However, the prices on the Italian raw tomato market are amongst the highest in the world. In 2014, the price of long tomatoes was, on average, €105/MT, and the price of round tomatoes was about €95/MT. This is well above the average worldwide prices for raw tomatoes.

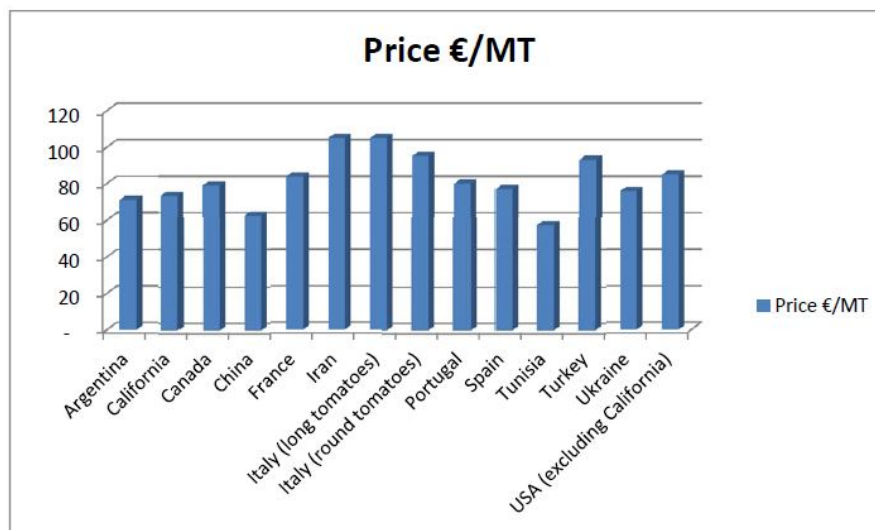


Chart 1: Prices for tomatoes in 2014. Source: World Processing Tomato Council

It is hard to reconcile the above data with SPCA's allegations regarding the alleged price distortion on the Italian market. The figures above show that, on the contrary, prices on the Italian market are higher than in most countries. This is further confirmed by the findings of the Commission during the previous investigation: *"In all instances, the Commission found that the price of fresh tomato paid by Italian processors was either similar or higher than the benchmark price of fresh tomato available in Australia"*.⁴

4. THE INFORMATION PROVIDED BY THE COMPLAINANT IS IRRELEVANT FOR THE PURPOSE OF THE 'MARKET SITUATION' ANALYSIS

In non-confidential attachment B.4.2, the Complainant provided information regarding the SPS and its alleged impact on the Italian market. The Commission considered that this was *"new material that had not been considered in the previous investigation"* and decided to re-assess the existence of a 'market situation' in Italy.

Feger and La Doria respectfully disagree with this conclusion. Below, it will be demonstrated that the information provided by the Complainant is irrelevant for the purposes of the 'market situation' assessment.

⁴ Statement of essential facts, No. 217., p. 33.

At the outset, it should be noted that non-confidential attachment B.4.2 merely contains an historical overview of the CAP which has no relation whatsoever with the calculation of the alleged domestic price distortion in the investigation period. This is confirmed by several statements, such as:

- *“Member States may retain, until 31 December 2011, up to 50% of the component of the national ceilings referred to in Article 40 corresponding to support for the production of tomatoes”;*
- *“That is to say that during the three-year transition period (2008-2010), 50% of the subsidy was in the coupled form while the other 50% of the national ceiling moved to the single payment scheme”;*
- *“Tomato News estimated that the payments received by the farmer during the 2008-2010 period was 34€/Tonne[...]”;*
- *“SPC Ardmona estimates that the subsidy paid in 2010 was up to 46% of the raw prices paid by the processors[...]”;*
- *“SPC Ardmona estimates that the subsidy paid in 2013 was up to 37% of the raw prices paid by the processors”.*

All these statements are irrelevant, since they do not concern the investigation period, *i.e.* 1 January 2014 - 31 December 2014, which is the only relevant period to be considered. Any other price related information has to be disregarded, as confirmed by the Commission itself: *“[t]he investigation period is 1 January 2014 to 31 December 2014. The Anti-Dumping Commission (the Commission) will examine exports to Australia of the goods by Feger di Gerardo Ferraioli S.p.A. and La Doria S.p.A. during that period to determine whether dumping has occurred”*⁵.

Also the Complainant’s conclusion that the amounts paid in 2013 under the SPS would have been up to 37% of the price paid for raw tomatoes by the prepared or preserved tomato processors should be disregarded.⁶ Indeed, such calculation not only does not concern the investigation period, but it is also totally unreliable, being based on outdated (not to say ‘historical’) data.

More importantly, the calculation of the amount paid under the SPS (irrespective of whether it represented 20%, 30%, 37% or even 100% of the price paid for raw tomatoes) is totally irrelevant for the ‘market situation’ assessment. Indeed, the question which should be analysed in the context of a ‘market situation’ assessment is not the amount of the alleged support, but whether or not such support has materially affected the domestic sales prices of the product under investigation.⁷

⁵ Anti-Dumping Notice No 2015/05, p.2.

⁶ Complaint, non-confidential attachment B-4.2

⁷ See Discussion Paper – Market Situation – s. 269 TAC(2)(a)(ii) – Guidance – Claims of Government Influence

In this respect it is submitted that non-confidential attachment B.4.2 does not provide any information and/or evidence regarding the actual impact of the alleged 'market situation' on the prices for raw tomatoes in the investigation period. The Complainant simply assumes that the mere existence of payments to tomato growers would have an effect on the price of raw tomato in the investigation period, without providing any demonstration of this circumstance

In light of the foregoing, it must be concluded that the Complainant's 'market situation' claim is not supported by evidence and should be dismissed.

5. THE COMPLAINANT FAILED TO PUT FORWARD NEW EVIDENCE AND ELEMENT WITH REGARDS TO THE MARKET SITUATION

As indicated, in the previous investigation the Commission examined, on its own initiative, whether the CAP had an impact on the prices of the product under investigation on the Italian market, and concluded that *"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"* and that *"the evidence available to the Commission in the circumstances of the investigation is not sufficient to support a finding that these payments operate in a manner which distorts competitive market conditions and would lead the Commission to consider that it cannot use normal values pursuant to s.269TAC(1) (sales made in the ordinary course of trade)"*.⁸

Despite this conclusion, the Complainant *"is of the view that the analysis of the market situation requires reconsideration"*. However, the Complainant and the Commission failed to provide evidence relating to changed circumstances, as requested by the Conclusion of the Doha Ministerial Conference regarding the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which reads as follows *"[...] 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."*⁹

The complaint merely recalls the existence of the SPS but does not indicate what would have changed since the last investigation, and how this alleged change would have had an impact on the domestic prices for raw tomatoes. Feger and La Doria wish to emphasise that, in any case, this would have been impossible since the CAP has not changed since the previous investigation.

⁸ Final Report No. 217, p.34.

⁹ Implementation-Related Issues and Concerns – Decision of 14 November 2001, WT/MIN01/17, 20 November 2001, para. 7.1.

In the previous investigation, the Commission verified whether the CAP had an impact on the prices for the years 2011, 2012 and 2013 (year-to-date). However, the payments received by farmers during these years were governed by exactly the same rules as the ones which determine the payments granted to farmers for the year 2014. In this respect, the following should be noted:

- as acknowledged by the Complainant, the payments granted to farmers are governed by Title III of Regulation 73/2009. This Regulation entered into force on 1 January 2009. It is therefore the regime which was analysed by the Commission during the previous investigation;
- Regulation 1307/2013 sets up a new regime, the Basic Payment Scheme. However, it also provides that *“Payment entitlements obtained under the single payment scheme in accordance with Regulation [...] No 73/2009 shall expire on 31 December 2014”*. Therefore, in 2014 the applicable rules whether those provided for by Regulation 73/2009, *i.e.* the Regulation which was applicable in the investigation period of the previous investigation;
- this is further confirmed by Regulation 1310/2013, which provides that *“Regulation (EU) No 1307/2013 of the European Parliament and of Council, which sets up new support schemes is to apply from 1 January 2015. Council Regulation (EC) No 73/2009 [...] continues to form the basis on which income support will be granted for farmers in calendar year 2014[...]”*.

In other words, the regime which, according to the Complainant, should be re-assessed by the Commission is exactly the same as the one the Commission already analysed.

It stems from the above that (1) the Complainant failed to provide evidence of a change of circumstances with regard to the SPS, but also that (2) the regime is exactly the same as the one applicable during the previous investigation. Since the Commission concluded that *“any payments provided directly to tomato growers in Italy are benefitting the growers in isolation and are not transferred to processions in the form of lower prices”*¹⁰, it is difficult to see how, in the present investigation, the Commission may reach a different conclusion.

6. CONCLUSION

To conclude, La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. submit that, in order to undertake the dumping analysis, the Commission should have recourse to a normal value based on the domestic prices of the exporting producers, as opposed to a constructed normal value. This conclusion is supported by the following elements:

¹⁰ Statement of essential facts, No. 217., p. 33.

- first, the question of whether the SPS constitutes a subsidy to tomato growers should not be addressed in the framework of an anti-dumping investigation but, rather, in the framework of a countervailing proceeding;
- second, pursuant to the SPS, direct payments to farmers are not coupled with production and therefore are not incentives to production. As a result, the SPS has no impact on the prices of raw tomatoes on the Italian market;
- third, the information provided by the Complainant is irrelevant for the purposes of the dumping calculation since it does not refer to the prices of 2014; moreover, the Complainant simply assumes that the mere existence of payments to tomato growers would have an effect on the price of raw tomato in the investigation period, without providing any demonstration of this circumstance;
- fourth, the Complainant failed to provide evidence of a change of circumstances with regard to the SPS; in any event, since the regime is exactly the same as the one applicable during the previous investigation, where it was concluded that no 'market situation' existed, it is impossible for the Commission to reach a different conclusion.

Considering the above, La Doria S.p.A. and Feger di Gerardo Ferraioli S.p.A. respectfully request the Anti-Dumping Commission to conclude, as it already did, that there is no 'market situation' which would justify the recourse to a constructed normal value.