

# Blackburn Croft & Co

Trade Consultants

Blackburn Croft & Co Limited  
149-155 Pamell Road  
PO Box 37-553, Pamell  
Auckland, New Zealand  
Telephone: 64-9-358 4242  
Fax: 64-9-358 4343  
Email: [bcc@tradecon.co.nz](mailto:bcc@tradecon.co.nz)  
Website: [www.tradecon.co.nz](http://www.tradecon.co.nz)

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Anti-Dumping Review Panel Secretariat  
GPO Box 2013  
Canberra City ACT 2601  
AUSTRALIA

[adrp@industry.gov.au](mailto:adrp@industry.gov.au)

Non - confidential

**Certain Prepared or Preserved Tomatoes 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 (ADN 2017/47)**

**Certain Prepared or Preserved Tomatoes Exported to Australia from the Republic of Italy by AR Industrie Alimentari S.p.A (ADN 2017/46)**

SPC Ardmona Operations Limited (SPC) submits the following on the grounds accepted by the ADRP for the reviewable decision not being the correct or preferable decision.

As a procedural matter, SPC wishes to draw to the attention of the Panel Secretariat that the Panel Member examining this reviewable decision is the same Panel Member who examined the reviewable decision in ADRP Report No.35 (5 January 2017). That ADRP Report accepted the findings of REP 360. The methodology and conclusions of REP 360 were applied in REP 349 & 354 and the criticism and appropriateness of that methodology is a significant part of SPC's submission that some of the conclusions in REP 349 & 354 were not the correct or preferable decisions.

The ADRP published the following grounds relating to SPC.

## **First Ground**

- 1. The ADC inappropriately relied on data to the exclusion of other data in concluding that the evidence supplied by Feger and La Doria in ADC Reinvestigation Report No. 360 ("REP 360") was reliable in assessing the impact of historical tomato Common Agricultural Policy ("CAP") payments and new payments received by tomato growers supplying other exporters in ADC Report No. 349 & 354 ("REP 349 & 354").**

- 1.1. In REP 276<sup>1</sup> the CAP payment based on historical payments to tomato growers in the base years 2004-2006 was determined by taking the actual total available to tomato farmers of €183,970,000 and dividing by the total production volume in 2014. This gave a sum of €0.037 per kg<sup>2</sup>.
- 1.2. This resulted in the ADC deciding that costs for raw tomatoes did not reasonably reflect competitive market costs for the purposes of section 43(2) of the Customs (International Obligations) Regulation 2015.<sup>3</sup>
- 1.3. When using the €0.037/kg to adjust verified recorded costs in case 276 it was found that some sales were not in the ordinary course of trade. This led to a higher proportion of unprofitable transactions and in those instances normal values were based on a constructed value.
- 1.4. An important piece of evidence in REP 276 was the Government of Italy Ministerial Decree (17 October 2013) which showed that the historical amount allocated to tomatoes (€183,970,000) would continue in 2014 (the period of the dumping investigation in case 276)<sup>4</sup>
- 1.5. As a result of examining the Decree REP 276 noted:

*This evidence is consistent with the evidence provided by Feger and La Doria and*

*demonstrates that:*

- *The SPS was applicable to raw tomatoes from 1 January 2011;*
- *the Italian Government set national ceilings under the SPS; and*
- *direct income support payments are made on an annual basis to growers of raw tomatoes in Italy*<sup>5</sup>

- 1.6 Since the introduction of tomatoes grown in Italy to the, then new, Single Payment Scheme growers were left in no doubt that their income support would continue.

An exporters' submission noted:

*Since 2011, the decoupled aid was fully recognised to the owners of entitlements (100%).*<sup>6</sup>

Regulation 1120/2009<sup>7</sup> also confirmed this in Article 30:

*As the case may be, Article 40 of Regulation (EC) No 73/2009 shall apply to the value of all the payment entitlements existing before the integration of fruit and vegetable support and to the reference amounts calculated for fruit and vegetable support*<sup>8</sup>.

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<sup>1</sup> REP 276 was reinvestigated in REP 360 and reviewed in ADRP No.35

<sup>2</sup> REP 276 page 31

<sup>3</sup> Customs Regulation

<sup>4</sup> REP 276 pge 30

<sup>5</sup> ibid

<sup>6</sup> EPR 051/354 para 12

<sup>7</sup> Regulation can refer to EU or EC Regulations

<sup>8</sup> EPR 051/354 para 13

And yet despite this overwhelming evidence that the full amount of subsidy was transferred to the SPS, both in the form of industry comment and legislative provisions, the ADC relies on a deliberately misleading statement to legitimise its calculation of a low level of subsidy:

The European Commission noted the data in Appendix 1 of REP 276 which showed a subsidy rate of €0.0345/kg in 2001 when payments were coupled and only €0.01725/kg in 2011 after the reduction of capped payments by 50%.<sup>9</sup>

1.7 Article 30 in Regulation 1120/2009 in above paragraph 1.6 clearly shows the EC is incorrect. As has been pointed out to the ADC numerous times, when the SPS was extended to tomatoes (and other crops) in Italy there was a three year transition period, 2008 - 2010. In that period, one-half of the historical entitlement was retained as a coupled payment, and one-half of the historical amount was immediately transferred to the SPS. That is, the €0.01725/kg in 2011 was only half of the amount and the full amount was transferred to the SPS.

1.8 These payments continued in Italy with the new BPS by reference to Article 26 paragraph 2 of Regulation 1307/2013:

*A fixed percentage of the payments the farmer received for 2014 under the single payment scheme, in accordance with Regulation EC No 73/2009....*

Further payments were also based on the amount the farmer received in 2014 such as the greening payment as explained below.

1.9 The period of dumping in Review 349 & 354 was 1 April 2015 to 31 March 2016. From the beginning of 2015 a new scheme to administer CAP payments was introduced and replaced the Single Payment Scheme. This new scheme (referred to as the Basic Payment Scheme, BPS) established 2014 as the base year for the new entitlements based on the historical entitlements available in 2014. (The replaced historical entitlements expired on 31 December 2014). The national ceiling in Italy (which includes the tomato allocated payment and other sector specific payments) was disbursed as two mandatory payments: a basic payment (58% of the total national ceiling) and the payment for greening (30% of the total national ceiling, as distinct from the percentage allocation of this amount to the entitlements held in 2014). Italy also introduced a payment for young farmers (1%) and a new payment for coupled support limited to 11% of the total national ceiling available in Italy. (For tomatoes coupled support was initially based on 2.63% of the 11%).<sup>10</sup> As provided in Article 22, paragraph 2, of Regulation (EU) No 1307/2013 Italy chose to increase the allowable part of the basic payment by 3%.

1.10 The BPS is a mechanism to partially address the fact that some entitlements under the SPS were of different values (some very high and some much lower). In practice, the value of the entitlements to the tomato farmer remain similar. For example, a

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<sup>9</sup> REP 360 pge 25

<sup>10</sup> ManualfortheManagementofDirectAidsCampaign.pdf pge 101 of 141 EPR 063b/354

farm having historical tomato entitlements in 2014 would take the value of those specific entitlements plus the adjusted 3% and multiply the amount by 58%. The decreased value of the new entitlements would be offset by the mandatory greening payment. The greening payment is additional to the basic payment.

- 1.11 In some instances, if the value of payment entitlements reached a certain level where the increase would lead to a windfall profit for the farmer, then the windfall profit would revert to the national reserve.<sup>11</sup> The greening payment varies according to individual farms. In Italy the estimated average greening payment is around 52 percent of the base payment.<sup>12</sup>
- 1.12 From 2015-2019 Italy adopted the “Irish” model to gradually converge the payments per hectare received by individual farmers. It is recognised that by 2019 the payments received by individual farmers across all Italian farms will change but will not achieve a uniform amount per hectare. Quite how this would apply to the growers of raw tomatoes is unclear given the importance of the subsidy in contributing to tomato farmer incomes and supply of raw tomatoes to processors. Because the “convergence” is still based on historical entitlements (such as those in the tomato base years 2004-2006 and now 2014), it is not expected that the subsidy per hectare available to growers of tomatoes plus the decoupled payment introduced in 2015, is likely to see any significant change in the amount available to growers of tomatoes at the end of 2019.
- 1.13 One of the objectives of the new CAP is the enhancement of environmental performance through a mandatory “greening” component of direct payments which will support agricultural practices beneficial for the climate and the environment applicable throughout the Union. For that purpose, Member States should use part of their national ceilings for direct payments in order to grant, on top of the basic payment, an annual payment which may take account of internal convergence in the Member State or region, for compulsory practices to be followed by farmers addressing, as a priority, both climate and environment policy goals. Those practices should take the form of simple, generalised, non-contractual and annual actions that go beyond cross-compliance and that are linked to agriculture, such as crop diversification, the maintenance of permanent grassland, including traditional orchards where fruit trees are grown in low density on grassland, and the establishment of ecological focus areas.<sup>13</sup>
- 1.14 In the above extract, it is noted that the greening “principles” can be overtaken if the greening payment will assist in attaining the convergence of the value of payment entitlements. This emphasises that the new scheme is still an income support scheme as described by the European Court of Auditors<sup>14</sup> (and others including the EC).
- 1.15 Article 47 of Regulation 1307/2013 notes that this mandatory payment is to be based on 30% of the national ceiling. In Italy, the greening payment per farm is calculated as a percentage as provided in Article 43 of Regulation 1307/2013.<sup>15</sup> This percentage is

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<sup>11</sup> Regulation 1307/2013 Article 28

<sup>12</sup> <http://www.venetoagricoltura.org/upload/Europe%20Direct/Quademo%2016%20di%20Europe%20Direct%20Veneto.pdf> See Tab.4

<sup>13</sup> Regulation 1307/2013 paragraph 37

<sup>14</sup> European Court of Auditors 2014 Report 08

<sup>15</sup> SingleApplicationInformation.pdf pge 29 of 53 EPR 051g/354

estimated as 60% of the total value of the payment entitlements that the farmer has activated.<sup>16</sup> This means that despite the changes to the scheme in 2015 sector specific payments can still be identified including the historical tomato payment.

- 1.16 As one commentator observed on the introduction of the new scheme in 2015, “Farmers should not “panic” if the rights will have a lower value than in the past, because those who own the rights to the basic payment can then access the other payment types (greening, young farmers, coupled.”
- 1.17 From 1 January 2015 tomato farmers had access to a new subsidy of €160<sup>17</sup> per hectare coupled to the growing of tomatoes. This was budgeted to account for around €11.3 million per year. But it should be noted that the historical subsidies and the new entitlements under the BPS remain essentially coupled.
- 1.18 This was explained in the LECA report as follows:

*The use of “historical reference” payments, which are implicitly coupled, together with a new explicitly coupled payment means that a significant part of CAP payments with respect to tomatoes are still effectively coupled to production. Thus while technically farmers may receive “historical reference” payments that are not explicitly tied to current output, for political and economic reasons the payments are still likely to be implicitly tied to output. For political reasons fully decoupled historical reference payments appear politically unsustainable. Such subsidies would become politically threatened if farmers’ historical reference payments became disproportionate to their current activity, to illustrate for example at the extreme, if the farmers were to produce nothing. Thus farmers know that politically their future subsidies depend on maintaining output, and will behave accordingly. In addition, farmers are likely to allocate their capital, including subsidies, as they have done in the past to producing output that exploits their farms’ known comparative advantage and maximises their profits. For economic reasons, in the short run (barring any major change) farmers past output is likely to be a proxy for current output, meaning current subsidies will bear a relationship to current output. Thus while explicitly decoupled, historical reference subsidies are implicitly coupled.<sup>18</sup>*

- 1.19 The economic incentive to continue to grow tomatoes even though a subsidy can be paid without growing tomatoes is self-evident. The EC has argued that the actual amount received by a tomato grower cannot be ascertained as a payment under the CAP can be made even if tomatoes and other crops are not grown. But the investment in machinery and intellectual knowledge in the efficient farms supplying tomatoes for processing has continued despite this possibility.
- 1.20 It can now be shown that the historical sector specific amount allocated to tomatoes in 2014 has continued under a new delivery system in 2015.

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<sup>16</sup> <https://tinyurl.com/y8wkp5gl> (third paragraph)

<sup>17</sup> In 2017 this has increased to €165 per hectare

<sup>18</sup> LECA Report EPR 040/276 page 21

Table 1 Comparison of the tomato subsidy in 2015 with 2014

	2015 (INV 354)	2014 (INV276)
Investigation Period	1 April 2015-31 March 2016	1 January- 31 December 2014
Calendar Year		
Single Payment Scheme		€183,970,000
Increased by 3% on the adjusted base, effectively 2.1% of the 2014 amount	€187,833,370	
Basic Payment Scheme (58%)	€108,943,355	
Greening top up (60%)	€65,366,013	
Coupled Payment	€11,288,599	
Young Farmer	€1,878,334	
Total subsidy for tomatoes	€187,476,301	€183,970,000
Production Volume	5,393,000,000	4,911,000.000
Hectares growing tomatoes	73,809	66,000
Per hectare for hectares growing tomatoes and tomato hectares at rest	€2,540	€2,787

- 1.21 Coupled payments are shown in the above table as part of the new amount compared to the sector specific tomato payment before the changes in 2015. The coupled payment requires evidence of a contract with a processor of tomatoes. As the processor already has supply contracts with the growers holding historical entitlements it would be in the processor's interest to ensure that the coupled payment benefited the income of the current tomato supplier and not enter into supply contracts with smaller suppliers. This additional income to the tomato grower contributes to the grower being able to supply tomatoes.
- 1.22 But the ADC did not examine the changes in 2015. If it had it would have found that the updated hectare amount was more reliable than the selected information supplied by exporters which was an average value of all farm subsidies, not just tomatoes.
- 1.23 In REP 349 & 354 the ADC did not acknowledge the requirement that applications for the single payment required evidence of the farmer's access to different entitlements of different values.<sup>19</sup> The ADC accepted the EC's assurances that this information was not available and not recorded. Believing that the entitlement for tomatoes was not available and not recorded the ADC relied on selected information provided by the exporters which was not specific to tomatoes. The ADC relied on the selected information, even though it was quite different from the tomato specific payment of €2,701 per hectare in REP 276.<sup>20</sup>

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<sup>19</sup> EPR 051 and 064/354

<sup>20</sup> REP 276 pge 31. €0.037 per kg at a yield of 73,000 kg per hectare

- 1.24 But the Regulations show that entitlements have different values and must be declared in order to receive a single payment.
- 1.25 Article 68 of Regulation 1306/2013 refers to the system recording the payments made to farmers. This integrated system requires:
- (a) a computerised database;
  - (b) an identification system for agricultural parcels;
  - (c) a system for the identification and registration of payment entitlements;
  - (d) aid applications and payment claims;
  - (e) an integrated control system;
  - (f) a single system to record the identity of each beneficiary of the support referred to in Article 67(2) who submits an aid application or a payment claim.
- 1.26 The identification of agricultural parcels and the identification of payment entitlements, confirms that there are entitlements of different values and that these are recorded.
- 1.27 In one of the regional guides to explain the single application process it is noted:
- Support under the basic payment scheme shall be granted to farmers who request it in the single application. The payment entitlements, activated with a corresponding eligible area, give it a right to annual payment of the amounts indicated.<sup>21</sup>*
- 1.28 Again, this shows that payment entitlements have different values and they must be recorded.
- 1.29 Explanatory paragraph 8 in Regulation 640/2014 explains the requirements to ensure that payment entitlements can be audited:
- In order to ensure a proper implementation of the basic payment scheme and related payments as provided for in Title III of Regulation (EU) No 1307/2013, Member States should establish an identification and registration system for payment entitlements which ensures that the payment entitlements are traceable and which allows, inter alia, to cross-check areas declared for the purposes of the basic payment scheme with the payment entitlements available to each farmer and between the different payment entitlements as such.*
- 1.30 The reference to “different payment entitlements as such” demonstrates there are entitlements of different values which can be identified through the identification and registration system.
- 1.31 Article 18 (paragraph 7) of Regulation 640/2014 demonstrates that the value of different payment entitlements is known as the average of these different values is used to calculate the basic payment.

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<sup>21</sup> SingleApplicationInformation2015pdf. Paragraph 10.4, page 25 of 53. EPR 051g/354

*For the purpose of calculating the aid under the basic payment scheme, the average of the values of different payment entitlements in relation to the respective area declared shall be taken into account.*

- 1.32 Article 15 paragraph 1 of Regulation 809/2014 explains that the single application can be amended:

*After the final date of submission of the single application or payment claim, individual agricultural parcels or individual payment entitlements may be added or adjusted in the single application or payment claim provided that the requirements under the direct payment schemes or rural development measures concerned are respected.*

The reference to adding or adjusting individual payment entitlements in the single application means that the details of the entitlement, including its value, is known at the time an application for payment is made.

- 1.33 There is a national registry of entitlements (titles). As part of the integrated system, this national registry would record the number of entitlements and the value of individual entitlements according to the historical payment received for that entitlement.<sup>22</sup>

- 1.34 When a farmer makes an application for income support the farmer notifies the paying agency of the detail of the farm including the different entitlement values of different crops. These amounts are then combined into the one value to be disbursed as a single value incorporating other payments. In 2014 a farmer growing tomatoes and with historical entitlements only had one payment related to tomatoes. Now there are at least two payments relating to the historical entitlements, the basic payment and the greening top up. In addition to these is the coupled payment which is not based on historical entitlements and the young farmer.

- 1.35 It has now been shown that information on the value of different entitlements is recorded and could have been made available to the ADC. However, the ADC proceeded to use selected information supplied by the exporters. That information used an average of all subsidies paid to a tomato farmer. That is the subsidy was not solely related to tomatoes.  
Using an average value meant that the actual tomato subsidy would be lower.

- 1.36 In REP 276 an average subsidy received by farms growing tomatoes and other crops was not used. What was used was an allocation of the known amount available to holders of historical tomato entitlements and this was allocated by the total production of raw tomatoes grown for processing. SPC believes that this was a more accurate method at that time when other information had not been made available to the ADC. In Report 349 & 354 the ADC incorrectly observed that:

SPCA claims that the Commission incorrectly interpreted the data obtained in REP 360. SPCA states that, "As the tomato specific payment at €2,802 per

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<sup>22</sup> AGEACircular2015of427AuditCheck.pdf pge 35 of 79 paragraphs 8 and 9, EPR 051b/354. REP 276 pge 75



hectare cannot be isolated from the total *Single Payment Scheme (SPS) payment under the CAP, the distortionary effect on tomatoes was incorrectly assessed.*<sup>23</sup>

- 1.37 Contrary to the observation by the ADC, SPC does believe that the per hectare amount available for the holders of historical tomato entitlements can be isolated from the Single Payment Scheme and its successor (the BPS) as it has been shown that the value of different entitlements held by a farmer is recorded. The ADC was not given the information of the value of individual tomato entitlements. In the absence of this information, the best information available to the ADC would have been the allocated amount of the historical tomato payment as identified in this submission.
- 1.38 Evidence of the different value of entitlements has been found in an application for assistance under the young farmer provisions<sup>24</sup>. The application shows a date of 3 August 2015 and the values mentioned in the application were relevant for the Review but were ignored. The relevant Regulations mentioned in the application show that the aid granted in the form of loans must have at least 50% collateral and one form of collateral is assumed to be shown in the form relating to payments per hectare from different crops. This document also reflects the recording of the value of different entitlements as shown in the above discussion on the relevant Regulations.
- 1.39 The tomato payment in the application for assistance is shown as €2,970.87 per hectare. It is not known if this value incorporates the coupled subsidy of €160/hectare. To maintain consistency with the figures in the application for funding the coupled payment has not been added to €2,970.87. In Table 1 above the amount per hectare in 2015 has been estimated at €2,540. The per hectare value in Table 1 has reduced from 2014 because of the increase in hectares growing tomatoes. But not all of these hectares qualify for the amount per hectare established in the 2004-2006 base years. The amount per hectare in 2015 is similar to the value in the application for funding. This is evidence which is more reliable than the selected data (averages of tomatoes and other crops) supplied by the exporters as the subsidy applying only to tomatoes is identified.
- 1.40 This amount when multiplied by the increased hectares in 2015 does not reconcile to the total tomato payment in Table 1. This is because not all hectares growing tomatoes would receive a payment or the same amount because of historical differences in the performance of each tomato farm. It is however the best estimate given that the actual amounts paid to holders of tomato entitlements has not been supplied by the GOI.<sup>25</sup>
- 1.41 The following table illustrates the understating of the actual tomato subsidy when the ADC used average subsidy values applying to other crops. The table also demonstrates the effect of taking in to account that the effective subsidy increases when adjusted for fallow land. The table only shows the historical subsidy entitlement. If a farmer

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<sup>23</sup> REP 349 & 354 para 2.5.2. The €2,802 per hectare figure was the amount used in SPC's application for a review.

<sup>24</sup> ApplicationFunding2015.pdf. EPR 064b/354

<sup>25</sup> Government of Italy

was not eligible for the historical entitlement then the tomato subsidy would be nil. The tomato value is taken from the application for assistance document.

- 1.42. For a farm exceeding 30 hectares (as an example) there must be at least 3 different crops and the main crop may not occupy more than 75% of the arable hectares. The two main crops must not occupy more than 95% of the total arable land.<sup>26</sup>
- 1.43 Clearly the land that is fallow receives the subsidy<sup>27</sup> and had the ADC consulted the relevant Regulations and taken into account that tomatoes cannot be grown on the same land in successive years it would not have reached the conclusion it did. In SEF 349 & 345 the ADC stated that it considered that the findings in REP 360 were relevant to the review of measures.<sup>28</sup> One of the findings was that the subsidy (from an average of the two exporters) was €0.0145/kg<sup>29</sup>. If fallow land was accounted for this would increase to €0.029/kg. (It is evident in REP 349 & 354 that the relevant Regulations were not cited or cross checked to test the assertions of the EC. The ADC incorrectly or partially cited some Regulations.)<sup>30</sup>
- 1.44 The following table uses the actual amounts from the application for assistance document.

Table 2 **Estimating the tomato subsidy per KG**

Crop	Tomatoes	Wheat	Maize	Total
Subsidy/hectare €	2,970.87	726.46	1,122.80	
Tomato yield kg/ha	73,000			
Eligible hectares	50	30	20	100
Entitlement/Securities Value €	148,543.5	21,793.8	22,456	192,793.3
Average BPS/ha using ADC method				<b>1,927.9</b>
Historical subsidy/ha	<b>2,970.8</b>	<b>726.45</b>	<b>1,122.8</b>	
Tomatoes grown subsidy/ha	2,970.8			
Total effective subsidy/ha including tomato ha at rest (25 growing ha and 25 at rest ha)	5,941.6			
Tomato subsidy €/kg	0.081			

- 1.45 The ADC has used an average single payment value and assumed that the farm grows only tomatoes and has not taken into account the Regulations controlling crop size. The ADC effectively used an amount of €1,058.50<sup>31</sup> per hectare for 2015 based on information relating to 2014 which included subsidies paid not solely to tomatoes but included payments to other crops. This average value could not be reliably used as a proxy for the actual tomato subsidy.

<sup>26</sup> Manual for the management of direct aids campaign.pdf. page 129 of 142 EPR 063b/354

<sup>27</sup> Article 4, paragraph 1(f) Regulation 1307/2013

<sup>28</sup> SEF 349 & 354 pge 16

<sup>29</sup> In the application this figure was €0.0142. The new figure is an average of the two figures from page 23 REP 360. As a result, the use of this average has changed some of the figures used in the application

<sup>30</sup> EPR 063/354 para 24-27

<sup>31</sup> Using an historical yield of 73,000 kg/hectare x €0.0145/kg

- 1.46 From the above table, the effect of using an average value on the actual tomato payment is shown. For example, an average BPS/ha from all crops is €1,928/ha. But the actual tomato subsidy per hectare is €2,971 which is an increase of 54 per cent on the average value. What the ADC has not taken into account is that the land on which tomatoes are grown in one year cannot be used the following year for growing tomatoes and the land not used (fallow land) still receives the tomato entitlement. This results in a subsidy of €0.081/kg using the tomato value from the application for assistance document to illustrate the effect of receiving a subsidy on all hectares allocated to tomatoes.
- 1.47 From the ADC's statement that the findings in REP 360 are relevant to the review of measures, it can be seen that the review had accepted the data that showed the estimated subsidy was €0.0145 per kg which was 15.8% of the negotiated price. (€0.0145/€0.092) But using information that related solely to tomatoes the estimated subsidy as a proportion of the negotiated price between the growers of tomatoes and tomato processors is 88.0% (€0.081/€0.092). This means that if the tomato subsidy was not paid then the income of tomato farmers would reduce. Tomato processors would be unable to increase the prices paid for tomatoes to the extent of the subsidy. The tomato price at €0.092/kg is not a competitive price. Therefore, the tomato price of €0.092/kg should be uplifted by €0.081/kg when applying the ordinary course of trade test (OCOT). The ascertained normal value should be calculated to take into account the adjusted cost of raw tomatoes and the normal value in the review should be replaced.
- 1.48 The impact of the subsidy on the income of a farm growing tomatoes is summarised in the following table:

Table 3 Subsidy Impact on Tomato Grower Income

	REP 349&354	REP 349&354 with fallow	REP 276	REP 276 with fallow	SPC with fallow
Subsidy €/ha	1,059	2,118	2,701	5,402	5,942
Subsidy per kg of raw tomato €/kg	0.0145	0.029	0.037	0.074	0.081
Average price of raw tomato in 2014 and 2015 €/kg	0.092	0.092	0.092	0.092	0.092
% increase in tomato farm income due to the subsidy	15.8	31.5	40.2	80.4	88.0

- 1.49 The second column shows the subsidy per hectare derived from the total subsidies received by a farm growing tomatoes as provided by the exporters to the ADC. Because in any given year land on which tomatoes are grown has to be "rested" (being fallow land), the actual subsidy received (based on historical entitlements per hectare) is paid for production on one-half of the historical tomato hectares. This means that the subsidy for, say, 20 hectares is paid on just 10 hectares. The third column captures the effective subsidy paid on the hectares growing tomatoes. Because of the subsidy paid per hectare, REP 276 concluded that the cost of tomatoes was not a competitive cost. The per kilo amount (€0.037) calculated in REP 276 was multiplied by an average yield of 73,000 kg per hectare to give €2,701 per hectare. In the fifth column this has been doubled to take into account the land actually used for growing tomatoes in any

one growing season. The sixth column is the amount per hectare derived from the above Table 2.

- 1.50 If a farm did not receive the additional income through the historical entitlement payments (in whatever form they have been, or are delivered), the tomato farmer would have to increase revenue through an increase in the price of raw tomatoes (with the reasonable assumption that farm costs would be at the most efficient level given the long-term commitment of the farm to grow tomatoes). The price that the tomato farmer receives for raw tomatoes is an annual negotiated market price between the processors and the producer organisations. It is not therefore a price that can be readily moved upwards to compensate the farmer for any loss of subsidy income. In fact, the introduction of a coupled support payment in 2015, indicates the importance of the subsidy to a tomato farmer's income and the failure of the negotiated market price to cover the costs (and profit, if any) of growing tomatoes.
- 1.51 The last row in the above table shows that using the flawed information derived from REP 360, the tomato price would have to increase by 15.8% if the tomato farmer was able to stay in business if the subsidy was removed. Using this low figure, it is clear that the raw tomato cost is not a competitive cost and needs to be adjusted. In practice, the effective subsidy using the average of all SPS payments from REP 360 shows that the price would have to increase by 31.5%. The price sensitivity of the market for canned tomatoes in Italy would not tolerate the actual non-subsidised cost of raw materials impacting on the retail selling price.
- 1.52 But the ADC wrongly dismissed the significance of this increase in the raw tomato price if the subsidy was removed. The ADC did not understand that the impact of this subsidy (even though understated) would have on the assessment of a competitive market cost. The ADC did not consider the competitive market cost implication as it wrongly referred to the methodology used to determine market situation in REP 276 and referred to in REP 360 (and ultimately REP 349 & 354):

The Commission's view is that the SPS confers an economic advantage to its recipients. Whether that advantage is shared between the recipient (the growers) and their customers (Feger and La Doria), was the subject of some discussion in the LECA Report, focusing particularly on supply and demand elasticity. LECA's view was that, after considering the characteristics of the market for raw tomatoes in Italy, that any amount of the SPS which flowed on from the growers to consumers was unlikely to be zero, and equally unlikely to be 100 percent.<sup>32</sup>

- 1.53 However, the flow-on of the subsidy is not relevant to ascertain that the subsidy means that the cost of tomatoes is not a competitive market cost. The ADC has previously distinguished between the test for a competitive market cost and the test for market situation. The ADC decided that a flow on analysis for a market situation assessment was a "separate and distinct process" from the adjustment of the cost of production while conducting the OCOT test:

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<sup>32</sup> REP 360 pge 27

Section 6.4.10 of REP 276 noted that Feger and La Doria objected to the adjustment of the cost of production by the full amount of the subsidy paid to growers. Instead, Feger and La Doria argued that only 73 percent of the amount of the subsidy should have been applied, on the basis that this “flow on” amount was identified in the market situation assessment. The Commission concluded that a flow-on analysis for a market situation assessment is a separate and distinct process from the adjustment of the cost of production while conducting the OCOT test.<sup>33</sup>

- 1.54 Therefore, the ADC was incorrect in dismissing the relevance of the 15.8% in considering whether the subsidy would affect raw tomato costs of processors. This level of subsidy (even though it is understated) should have allowed the Commission to be satisfied that the costs recorded by the exporters for raw tomatoes in their records did not reasonably reflect competitive market costs for the purposes of section 43(2) of the relevant Customs Regulation.
- 1.55 There is no historical evidence that the negotiated market price in Italy has reached a point such that the tomato subsidy was not needed or could be reduced.

#### **Second Ground**

- 2. The data supplied by Feger and La Doria in REP 360 and applied in REP 349 & 354 was not properly analysed in REP 349 & 354 and led to the incorrect conclusion which was applied to the other exporters.**
  - 2.1 The data taken from REP 360 did not allow an accurate calculation of the income support received by tomato growers and was not the best information available to the ADC. The subsidy in the form of SPS payments received and revealed to the ADC related to not only tomatoes but products other than tomatoes.
  - 2.2 The ADC was supplied selected certificates showing the single payment received for each farmer growing tomatoes. As has been explained above, applicants for the single payment must provide details of the value of each entitlement used to calculate the single payment. The single payment used by the ADC is an average of not only the historical tomato payment, but also other payments. (See above paragraph 1.28)
  - 2.3 In using an average value, the actual value of the tomato entitlement received as part of the single payment will be reduced. This is because the value of a tomato entitlement is often higher than other crops.
  - 2.4 The exporter selected information also gave the ADC the number of hectares in each farm which contributed to the calculation of the single payment. For example, a tomato farm will grow other crops such as maize and wheat. These lower value entitlements (maize and wheat) will then form part of the single payment along with the tomato entitlement. The ADC assumed that the farms from which the data was provided only grew tomatoes. This was divided into the total SPS payments for the relevant farms. This calculation failed to take into account that the subsidy per hectare is still paid for a tomato plot that is at rest.

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<sup>33</sup> REP 276 pge 24

- The ADC was aware of the fact that the tomato entitlement was paid on fallow land.<sup>34</sup>
- 2.5 The ADC ignored this fact when it concluded that the SPS payment for the two exporters (Feger and La Doria) was around €0.0145 per kilo.
- 2.6 If the fact that only one half of the hectares assumed to be growing tomatoes was taken into account, then this subsidy would be around €0.029 per kilo. This would increase the subsidy as a percentage of the negotiated price from 15.8% to 31.5%. (See Table 3)
- 2.7 It is surprising that the information selected by the exporters gave virtually an identical subsidy per kilo across the suppliers for which information was provided to the ADC.<sup>35</sup> This is because it suggests that the single payment was comprised of virtually identical individual payment entitlements, the value of which can vary depending on the crop and the historical performance of the farm. The ADC recorded that the certificates showing the single payment for the total hectares on each farm covered 85 percent of the volume of raw tomatoes purchased by Feger and only 37 percent of the tomatoes purchased by La Doria. The ADC was satisfied with this information because it was able to access the AGEA website to confirm the accuracy of the certificates supplied. The ADC was allowed limited access to the website which showed the total subsidy received by each farm. But what the ADC did not realise (or was not given access to) was that the information held on each farm in the AGEA database could also reveal how the single payment was comprised. That is, what the value of the tomato entitlements and the hectares was for each supplying farm.
- 2.8 The ADC then took the value of around €0.0145 per kilo and compared this average SPS value with the known negotiated tomato price in 2014 (which was also the same in 2015). As part of its analysis, the ADC considered whether growers that received a payment under the SPS would be selling tomatoes at a lower price. This demonstrates the lack of understanding of the SPS. The SPS is an income support payment based on historical values. It shelters the tomato grower from any shortfall in the tomato farm income due to the variability in the negotiated price. It is a fixed value. The negotiated price reflects supply, growing conditions and quality/brix levels in the relevant tomato crop. The negotiated market price can vary from season to season.
- 2.9 The SPS (and the reconfigured 2015 payments under the BPS) is a form of income support.<sup>36</sup> The sector specific tomato payment was based on a historical period using the years 2004-2006 and the payments received in 2014 (based on 2004-2006) are the basis for the payments in 2015.
- 2.10 It is well recorded that the tomato historical entitlement (in whatever form it has been delivered) has been an important part of the economics of growing tomatoes for processing in Italy. The tomato payment subsidises grower costs and therefore, the price of raw tomato to the processor. In the publication “Pomodoro! The History of Tomato in Italy” it was noted:

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<sup>34</sup> EPR 063/354 para. 16

<sup>35</sup> EPR 063/354 fn. 24

<sup>36</sup> European Court of Auditors 2014 Report No 08, and BPS at [https://ec.europa.eu/agriculture/sites/agriculture/files/direct-support/direct-payments/docs/basic-payment-scheme\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/direct-support/direct-payments/docs/basic-payment-scheme_en.pdf)

(a) *The reform has been particularly relevant for the processed tomato sector (in Italy), where the subsidies represented about 50 percent of the entire producer's revenue. (Stated in reference to the tomato grower.)*

(b) *Recently however, the subsidy has been half the grower's price, or to put it another way, once the costs are accounted for (fertiliser, labour), any profit that the growers make for the labour, is the subsidy itself.<sup>37</sup>*

2.11 Prior to the full integration of payments to fruit and vegetables (including tomatoes) into the SPS, Rickard (2008) estimated the effect on the cost of tomatoes to a processor if there was a 50 percent reduction in EU domestic support. This calculation is different from the calculation of the effective subsidy in Table 2. But, relevantly, the conclusion was that prices paid for raw tomatoes would increase by 12.2%. This has been estimated as an increase in the raw tomato price of 24.4% if the subsidy was completely removed based on ensuring supply.<sup>38</sup> That is, the 2008 study suggested there would be an impact on the raw tomato price if the sector-specific tomato payment was not available.<sup>39</sup> The hypothetical increase in the price (or cost of tomatoes to the processor) following removal of the subsidy demonstrates that the tomato price is not a competitive market cost. But the ADC was not persuaded by this supporting evidence. It is recalled that the ADC's subsidy as applied to REP 349 & 354 was not properly examined for the purpose of a competitive market cost as the basis of the test used was for market situation and not for the OCOT. (See above paragraphs 1.52 – 1.54)

2.12 The income support delivered by the tomato payment keeping raw tomato prices artificially low was recorded in Final Report 276:

*LECA endorses this concept in its report by explaining that, consistent with economic theory, even the limited reforms to the CAP are associated with the falls in tomato production and the increase in prices in Italy. Solazzo also suggests that post 2011, thanks to prices agreed with the processing industry, which were higher than those in the period before the reform, the reduction in output has not been as large as it could have been. This suggests that the relatively high prices referred to by the exporters, would have been higher without the influence of the direct income support to growers of raw tomatoes.<sup>40</sup>*

2.13 Having seen that the tomato payment is income support for the farmer growing tomatoes, the comparison of an average subsidy value derived from the tomato subsidy and other crop subsidies with the negotiated market price of tomatoes is of little use.

2.14 The ADC does not normally compare an average subsidy from like and non-like goods to determine its impact on a like good. For example, if the ADC was examining subsidies on hot rolled coil it would not look at an average of subsidies relating to non-hot rolled coil products such as aluminum extrusions.

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<sup>37</sup> David Gentilore Columbia University Press 2010

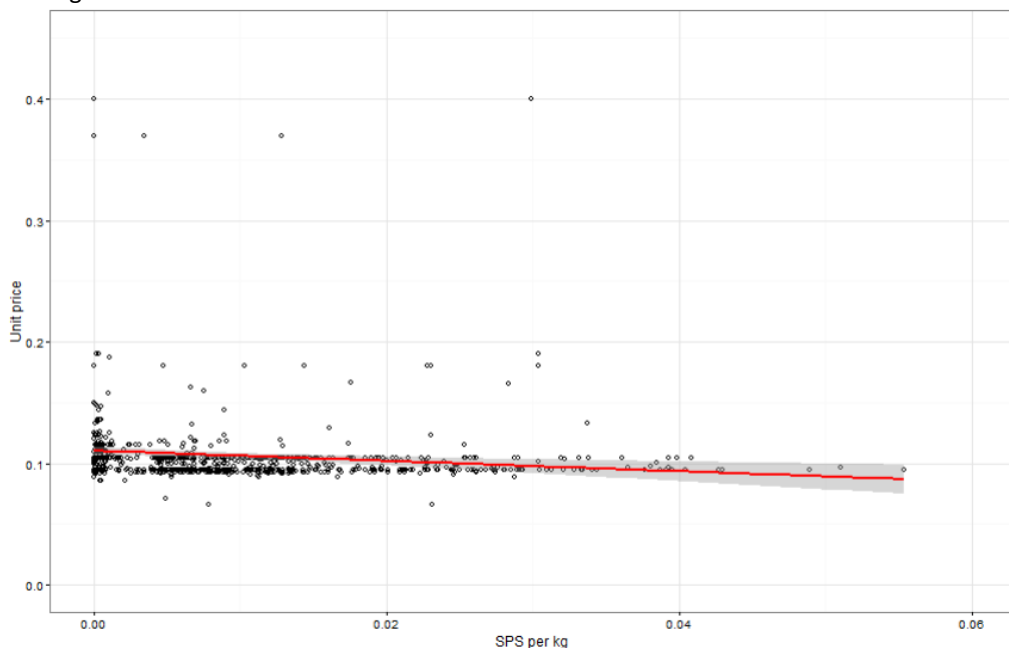
<sup>38</sup> EPR 060/276 para 14

<sup>39</sup> EPR 060/276

<sup>40</sup> EPR 051/354 fn38

- 2.15 In SEF 349 & 354 the ADC plotted the average values of all SPS payments and concluded that the average SPS payment of all crops did not vary with the negotiated market price of raw tomatoes. This is correct and does not need a graph to understand this. This demonstrates a failure by the ADC to understand the SPS. A further example of the ADC's lack of understanding is the hypothesis that the farmer receiving the most subsidies would be selling tomatoes below the negotiated market price.<sup>41</sup> The SPS tomato payment is designed to support the income of a farmer growing tomatoes as it is recognised that the negotiated market price could not cover the full cost of growing tomatoes in Italy. The ADC then used the following chart and incorrectly concluded that there was no connection between the SPS and the cost of tomatoes to the processors of canned tomatoes. Figure 1 is from SEF 349 & 354.

Figure 1



**Chart 1 – Correlation analysis (SPS payments received per kg, unit prices paid)**

- 2.16 The ADC should have recognised that the data it was analysing in order to show a relationship between the average SPS value from all crops and the negotiated market price for raw tomatoes only was not suitable for a regression analysis. Namely, if regression was to be used it needs a proper statistical framework which was not understood by the ADC.
- 2.17 Certain fundamental conditions relating to regression analysis were not present and yet the ADC incorrectly drew conclusions. The assumptions needed for a classical regression model are:
- The regression line has a linear relationship and this was not present.
  - Constant variance, and this was not present.

<sup>41</sup> Information used by the ADC covered all subsidies so it is difficult to understand the logic of this analysis.



- Residuals come from a normal distribution and are independent of one another.
- The independent variables are not correlated with one another. This can lead to another violation of regression called multicollinearity.
- There was an element of bias in the data.<sup>42</sup> This means that the selection of certain observations was given more “weight” than others, ie there has to be random selection in any statistical sample design.

2.18 In REP349 & 354 the ADC referred to “multi-variate analysis”. It appears this reference is incorrect as this type of analysis applies when there are more than two variables. However, SPC’s expert analysis on the errors made by the ADC in using a regression analysis was ignored.<sup>43</sup> The ADC was of the view that it was not appropriate to comment on the interpretation of data from REP 360 even though it was applied in REP 349 & 354.

2.19 The ADC found there was an average subsidy of all crop payments of €0.0145/kg. Even though the data was flawed, this is a significant proportion of the negotiated price for tomatoes, being 15.8% (€0.0145/€0.092). Nevertheless, the ADC did not examine the magnitude of this subsidy. Instead the ADC incorrectly used a regression analysis and failed to understand that the tomato farmer has two sources of income, the tomato payment and the negotiated price. The ADC also used the incorrect statistical term of “correlation analysis” when it was in fact seeking to use a regression analysis. It also tried to assume correlation meant one variable causes an effect for another which is not correct. If the tomato subsidy reduced this would put downward pressure on the tomato farm’s income. The price of tomatoes to the processors could not replace the income from the subsidy. Therefore, the negotiated price of tomatoes does not reflect a competitive cost.

2.20 The following chart illustrates the correct comparison of the impact of the subsidy and the negotiated market price on the income of a tomato farmer. The chart shows that with the subsidy level at around €0.081 per kg and the negotiated price of €0.092 per kg and the coupled payment (€160/hectare)<sup>44</sup> the total income was around €0.175 per kg. Assuming that this income per kg is the minimum needed to grow tomatoes then the shortfall between the negotiated market price and required income increases if the negotiated market price decreases. If this trend continued then it would quickly become uneconomic to grow tomatoes and the canned tomato processors would not have sufficient volumes of tomatoes at the required price to remain competitive in the manufacture of canned tomatoes. The downward sloping line is the price paid by the processing company to the PO/grower.

2.21 There is no historical evidence that the negotiated market price in Italy has reached a point such that the tomato subsidy was not needed or could be reduced.

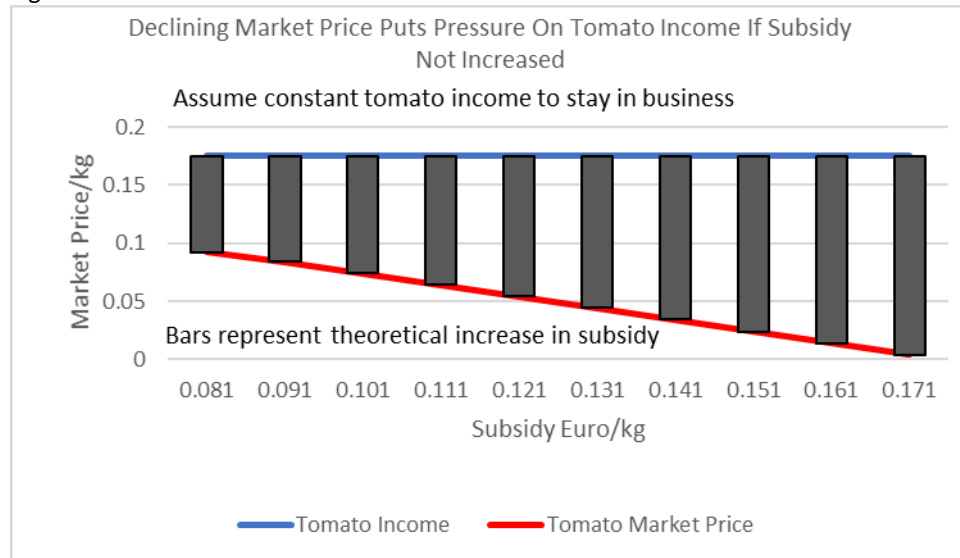
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<sup>42</sup> EPR 063/354 and 064/354

<sup>43</sup> REP 354 pge 14, second paragraph

<sup>44</sup> Using yield of 73,000 kgs per hectare.

Figure 2



- 2.22 The ADC referred to a comment presumably made at a meeting with SPC on Friday 24 February 2017:<sup>45</sup>

SPC has stated that “tomato growers are price-takers and would not survive if not for the historical tomato payment”. The evidence provided in REP 360 demonstrated that there were growers who received little or no payments under the SPS for any crops. As such, this allegation cannot be substantiated.

- 2.23 As the ADC should have known, the tomato payments under the SPS (and now the BPS) were based on historical entitlements for those farms growing tomatoes in the base years 2004 – 2006 and now, 2014. It is therefore perfectly obvious that if a tomato farmer does not have an historical entitlement, it will not receive a tomato subsidy. This changed in 2015 when all tomato farmers were able to access the €160 per hectare coupled payment. When fruit and vegetables were included in the SPS in Italy, subsidies for other crops were determined on historical base years.

### Third Ground

- 3. When compared with other data, the Feger and La Doria analysis applied to REP 349 & 354 is inconsistent with other information and should not have been used in the reviewable decision.**

- 3.1 The ADC has used the REP 360 data in the review but this gives results inconsistent with other information.

- 3.2 The following table summarizes the inconsistencies.<sup>46</sup>

<sup>45</sup> The non-confidential letter summarising this meeting was not placed on the EPR and is attached

<sup>46</sup> EPR 063/354. If the negotiated market price of the tomatoes was a competitive cost then there would be no need for the subsidy.

Table 4            **Inconsistencies**

	REP 349&354	Adjust 349&354	SPC 349&354	Final 276
Subsidy per hectare € <sup>47</sup>	1,059	2,118	5,942	2,701
Subsidy per kg(€/kg) of raw tomato	0.0145	0.029	0.081	0.037
Average price of raw tomato in 2014 and 2015	0.092	0.092	0.092	0.092
% change in raw tomato price	15.8	31.5	88.0	40.2
Change from known historical tomato subsidy (€187,476,301)	-€118 million	-€48 million	none	none
Growing hectares	66,000	66,000	73,089	66,000
Growing hectares increased to	177,031	88,516	none	none

Some calculations affected by rounding.

- 3.3 The second column (REP 349 & 354) shows the values used in REP 349 & 354 as implicitly imported from REP 360. The next column shows what the calculation should have been by allowing for the effect of the per hectare subsidy doubling as it is paid on land that grew tomatoes the previous year and is now resting. The “SPC 349 & 354” column shows SPC’s calculation using the subsidy per hectare from the application for assistance document. The “REP 276” column shows the calculation in that report for the calendar year 2014.
- 3.4 The second row (subsidy per kg) shows that in REP349 & 354 the subsidy has been calculated at a particularly low level because it was based on average subsidies on the information selected by exporters and did not take into account tomato hectares that are rested. In taking into account fallow land, the subsidy increases to €0.029/kg as shown in the next column. (Adjust 349 & 354)
- 3.5 The average price of raw tomato in the fourth row is the actual negotiated price between the organisation representing tomato growers and the organisations representing the processors of tomatoes. There may be small differences in the prices set for the Northern and Southern regions of Italy but these have been ignored.
- 3.6 The row “percentage change in raw tomato price” is the percentage change in the raw tomato price taking into account the subsidy.
- 3.7 The row “Change from the known historical tomato subsidy” shows the impact of the total subsidy calculated by the ADC against the known tomato amount that increased

<sup>47</sup> Using an historical yield of 73,000 kg/hectare

in 2015. This shows that if the figures in Review 349 & 354 are correct, then there has been a massive saving in the amount of decoupled payments. This saving of €118 million means that only 37% of the known tomato subsidy has been paid out to exporters in REP 349 & 354. This is a result which is just not possible. The economic and political factors around not only payments to holders of tomato entitlements but also other crops/livestock would have resulted in huge civil and political unrest.

- 3.8 The row “growing hectares” shows the actual hectares in 2014 applicable to the ADC’s analysis. The column SPC 349 & 354 shows the hectares in 2015.
- 3.9 The final row shows what would happen if the subsidy figure in REP 349 & 354 was applied against the known historical tomato subsidy and what the increase in the area growing tomatoes would be. (€187,476,301/ €1,059) There is no evidence that the tomato payment would not be used completely in any year.
- 3.10 As can be seen, the area growing tomatoes in order to fully account for the historical payment would be around 177,000 hectares, up from the current tomato growing hectares of 66,000 in 2014. If the amount was adjusted for fallow land, then the increase would be around 88,000 hectares (€187,476, 301/€2,118). Again, this is not possible. The SPS payment for historical tomato entitlements and the BPS with a coupled payment has been designed with the purpose to control and stabilise the supply of raw tomatoes and provide income support to tomato farms.
- 3.11 To assess if there had been savings of €118 million, the category covering “Direct aids aimed at contributing to farm incomes, lifting farm income variability and meeting environment and climate objectives” expenditure for Italy was examined. Even though this category is at a high level (i.e. all payments are included) this category increased between 2014 and 2015, demonstrating that the calculation used in Review 349 & 354 is wrong. This is shown in the following table.

Table 5 **European Agriculture Guarantee Fund<sup>48</sup>**

Category 05 03	2014	2015
Direct Aids Total (€million)	3,902,241	3,920,203
Change %		0.46

Source: Annex 10

- 3.12 In REP 349 & 354 there was no “sensitivity check” taken with the results of the information provided by Feger and La Doria and with the information supplied in the review. Had a proper check been undertaken, then the ADC should have recognised the discrepancy with other data. If the Feger and La Doria analysis is rejected, then the subsidy per kilo would be materially different and increase from €0.015 per kg to €0.081 per kg.

**Fourth Ground**

- 4. The ADC did not take into account SPCA’s arguments on the data and analysis used in REP 349 & 354 which originated in REP 360.**

<sup>48</sup> [https://ec.europa.eu/agriculture/cap-funding/financial-reports/eagf\\_en](https://ec.europa.eu/agriculture/cap-funding/financial-reports/eagf_en)

4.1 In REP 349 & 354 the ADC noted that:

The Commission notes that the analysis of the data in REP 360 has been accepted by the ADRP and the Parliamentary Secretary. The Commission does not consider it appropriate to revisit the interpretation of the data from REP 360 in these reviews.<sup>49</sup>

4.2 In REP 349 & 354 the ADC referred to REP 360:

The Commissioner's Report (*Anti-dumping Commission Reinvestigation Report No.360* or REP 360) found that the CAP payments received by growers of raw tomatoes **did not appear to influence** the prices paid by Feger and La Doria. **In the absence of any further evidence** to the contrary, the Commissioner found that the raw material cost of tomatoes reported in the accounting records of Feger and La Doria reasonably reflected a competitive market cost, and therefore recommended that no uplift be applied in the dumping margin calculation.<sup>50</sup>(emphasis added)

4.3 The words "did not appear to" and "in the absence of any further evidence to the contrary" suggest that the ADC reached a tentative conclusion on the material it examined in REP 360. SPC was not given the opportunity to comment on the ADC's analysis before REP 360 was given to the ADRP.<sup>51</sup> Even though the ADC used information not available in the REP 276 investigation, a draft report was not provided to interested parties prior to the report being given to the ADRP. The Dumping and Subsidy Manual applicable to the time of the reinvestigation (June-October 2016) noted:

"As the Commissioner is only permitted to have regard to the information and conclusions to which the Review Panel was permitted to have regard, the Commission will not publish a 'Statement of Essential Facts' or equivalent report to solicit comments from interested parties prior to making a report to the Review Panel."

This sentence no longer appears in the latest version of the Dumping and Subsidy Manual dated April 2017. The decision to accept new information in the reinvestigation contradicts the interpretation of the Panel Member in Appendix 2 of ADRP Report No.14 (17 October 2014).

4.4 In announcing an extension to the time to publish the Statement of Essential Facts, the Commissioner noted that the conclusions in the ADRP's review may have an impact on the appropriate approach to be taken in the review.

I am currently reinvestigating the findings of Final Report 276, concerning PPT's exported by Feger and La Doria, which is the subject of a review being conducted by the Anti-Dumping Review Panel (ADRP). The outcomes of that reinvestigation, the recommendations of the ADRP and the Parliamentary Secretary's decision in relation to those recommendations may have an

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<sup>49</sup> REP 354 pge 14

<sup>50</sup> REP 354 pge 9

<sup>51</sup> EPR 057/354

impact on the appropriate approach to determining the variable factors in these reviews of measures. To take into account the ADRP's review and the Parliamentary Secretary's decision following the review of Final Report 276, I requested an extension to the deadline for the publication of both SEFs under subsection 269ZH1(1)(e) of the Customs Act 1901 (the Act).<sup>52</sup>

4.5 During the review SPC provided the ADC with information that had not been considered in REP 360 as the period of investigation was different and there was a new subsidy scheme in that period. SPC also provided expert opinion on the use of a regression analysis and how those statistical conclusions were not suitable for the review of all other exporters in REP 349 & 354. The incorrect use of an average value for the examination of the tomato subsidy in the review was also brought to the attention of the ADC as were other matters.

4.6 SPC is of the view that the Customs Act 1901 (the Act) does not endorse the ADC's interpretation that it is not appropriate to revisit the interpretation of data from REP 360 which was applied in REP 349 & 354.

4.7 Subsection 269ZD(2) of the Act states:

*Subject to subsection (3), in formulating the statement of essential facts, the Commissioner:*

*(a) must have regard to:*

*(i) the application or request; and*

*(ii) any submissions relating generally to the review that are received by the Commissioner within 40 days after the publication of the notice under subsection 269ZC(4), (5) or (6); and*

*(iii) any other submission received by the Commissioner relating generally to the review if, in the Commissioner's opinion, having regard to the submission would not prevent the timely placement of the statement of essential facts on the public record; and*

*(b) may have regard to any other matters that the Commissioner considers relevant.*

4.8 In addition, subsection 269ZDA(3)(b) demonstrates that the Commissioner "may have regard to any other matter that the Commissioner considers to be relevant to the review" when deciding on recommendations to be made to the Minister.

4.9 The Act does not preclude matters to be considered because they have formed part of another report. New information may have been presented and circumstances may have changed since the completion of that report.

4.10 SPC provided the ADC with detailed information on the EC and EU Regulations governing the administration of the new basic payment scheme introduced from 1 January 2015. SPC also referred the ADC to the new coupled payment (€160/ha)

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<sup>52</sup> Anti-Dumping Notice No.2016/76 8 August 2016

which applied from the same date. The information on the administration of the basic payment scheme (and the earlier SPS scheme) showed that information on the value of individual entitlements was recorded and could be made available.

- 4.11 The availability of this information would have allowed the ADC to provide a more accurate assessment of the value of the tomato subsidy. If this information was not supplied then the known tomato subsidy per hectare was the most accurate information.
- 4.12 Instead the ADC relied on a sample selected by the exporters and which involved average values of payments under the SPS and not values related solely to the tomato payments.
- 4.13 The ADC in not considering “it appropriate” to accept SPC’s arguments has affected SPC’s ability to represent its interest.
- 4.14 The ADC had no authority to ignore submissions made by SPC that commented on the accuracy of the findings in REP 360 as applied to REP 349 & 354. SPC provided information which was not in REP 360 and identified errors in the regression analysis in REP 360.

**Fifth Ground**

**5. The ADC’s conclusion that an exporter (not a selected exporter and not a residual exporter) was selling at arm’s length was not based on an examination of the exporter’s accounts and therefore the ADC could not investigate the claims made in the confidential application for review.**

- 5.1 In confidential attachment 4 to the review application, SPC explained that the named exporter had supplied PPTs in 400g cans which had similar (and sometimes lower) retail prices in the Australian market prior to the imposition of the 26.35% dumping duty in April 2014.
- 5.2 SPC demonstrated what the impact on the retail price could be if dumping duties were applied. This is shown in the indexed values in the following table.

Table 6 **Retail Price Impacts**

Calendar Years	2013	2014	2015
Average retail selling price \$/400g	100	97	93
Average retail selling price with full dumping \$/400g	100	130	136
Expected increase in price %	nil	+34	+46

2013=100. Some values rounded.

- 5.3 The ADC concluded that:

*The sales by the importer were found to be profitable and no evidence was found to support a theory that the exporter was reimbursing dumping duties.*

*As such, the Commission regards the sales in question as arms length (sic) and will not treat the sale as being at a loss.<sup>53</sup>*

- 5.4 But if the ADC did not actually examine the relevant financial data (the financial records of the exporter and importer) then there is no justification to state there is no evidence of that fact. As described in Inglewood “a statement that there is no evidence of the existence of a particular fact is not the same as a statement that the fact in issue does not exist”<sup>54</sup>
- 5.5 SPC’s evidence was not referred to in the SEF and accordingly SPC asked the ADC in SPC’s response to the SEF if the matter had been addressed.<sup>55</sup>
- 5.6 If the sales by the importer were found to be profitable then that is only one part of the evidence that the ADC should have pursued. If the into-store price to the importer (from the exporter) had not changed since the imposition of measures in April 2014, then it would indicate that there was a need to review the ascertained export price. The exporter was uncooperative in the original investigation (REP 217) and was uncooperative in REP 349 & 354. Based on the preceding Table 6, the imposition of a 26.35% dumping duty in April 2014 had no impact on the retail price. In REP 349 & 354 the uncooperative duty rate applying to this exporter increased to 118%. If the financial records of the exporter and importer were properly scrutinized then the reason for the retail price not increasing when the anti-dumping duty was 26.35% could be understood.

#### **Sixth Ground**

6. The assessment that there was no market situation was not sound as a result of the errors in the ADC’s understanding of the Single Payment Scheme (“SPS”) in 2014 and the new Basic Payment Scheme (“BPS”) in 2015.
- 6.1 The ADC examined average SPS payments which covered subsidies for tomato and other crops/livestock. The actual tomato subsidy was not properly examined and the effect of the subsidy on the price paid by tomato processors for raw tomatoes was ignored.
- 6.2 The influence of the GOI on the tomato sector increased in 2015 with the introduction of a payment to the tomato farmer coupled to raw tomato production and a contract with a processor.
- 6.3 The identification by the ADC that a historical tomato payment was still paid on fallow land means that the subsidy (incorrectly determined for the reasons in the other grounds) was understated at €0.0145/kg. It should be €0.029/kg.
- 6.4 These values were obtained from wrong data. SPC’s data appears to be based on the actual tomato payment. The effective subsidy per kg is considerably higher when the payment on fallow land is taken into account.
- 6.5 The ADC’s analysis in REP 349 & 354 did not identify the importance of the subsidy to a farm growing tomatoes. A tomato farm (with historical entitlements) has three

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<sup>53</sup> REP 354 pge 21

<sup>54</sup> Inglewood Olive Processors limited v Chief Executive Officer of Customs (Full Fed Ct 31 May 2005[2005]FCAFC 101

<sup>55</sup> EPR 063/354



significant sources of income : the historical based subsidy (the basic payment and greening top up), the coupled payment from 2015 and the negotiated price. If the tomato subsidy is insufficient then a higher price from processors needs to offset the reduction. But the processors are constrained by the price sensitivity of the retail price. Prior to 2015 it was recognized that the subsidy or the negotiated price was not sufficient and so a coupled payment was introduced in 2015.

6.6 The following table compares the various subsidy calculations.

Table 7 **Subsidy Impact on Tomato Grower Income**

	REP 349&354	REP 349&354 with fallow	REP 276	REP 276 with fallow	SPC with fallow
Subsidy €/ha	1,059	2,118	2,701	5,402	5,942
Subsidy per kg of raw tomato €/kg	0.0145	0.029	0.037	0.074	0.081
Average price of raw tomato in 2014 and 2015 €/kg	0.092	0.092	0.092	0.092	0.092
% increase in tomato farm income due to the subsidy	15.8	31.5	40.2	80.4	88.0

6.7 Table 7 shows the subsidy as a percentage of the selling price of raw materials (after taking into account REP 360) was found to be 15.8% in REP 349 & 354. This is a significant subsidy but was not properly analysed as the ADC incorrectly used regression analysis in its examination of the effects of the subsidy. That analysis incorrectly tried to discover a connection between the annual negotiated price and the total historical subsidies paid to a farmer growing tomatoes and other crops.

6.8 Despite knowing that the subsidy was paid on fallow land the ADC did not adjust its data. This would have increased the subsidy to 31.5%. If the subsidy was based on the known amount of the tomato payment and the effect of fallow land is taken into account then the subsidy is nearly the same as the price paid by the processors to purchase raw tomato. (88% of the raw tomato price)

6.9 The tomato subsidy is a significant element of the economics of growing tomatoes in Italy. This subsidy is a result of a directive from the Government of Italy to ensure supply and continuing investment in the tomato crop required by tomato processors. If the subsidy was not paid then tomato processors would have to increase the price paid to the growers of tomatoes.

6.10 A tomato farm cannot be economic without the subsidy. The farmer cannot offset the subsidy with a higher price from the processors. Therefore, the raw tomato price paid by the processors is a distorted price directly linked to a government mandate. Because of the GOI's policies reducing this major input the market for canned tomatoes should be considered to be a market situation. This would mean that the normal values for canned tomatoes could not be obtained using the price paid or payable under subsection 269TAC(1).

6.11 It is recalled that the subsidy received by a tomato farmer for the historical hectares growing tomatoes is not directly linked to the annual negotiated market price. The

subsidy (being payments received under the Basic Payment Scheme) supplement the income of the farmer growing tomatoes. Using the average subsidy found in REP 360 and applied in REP 349 & 354, the impact on the raw tomato price using flow-on (elasticity) and not using flow-on can be demonstrated. The format of these tables is based on the analysis in the LECA Report.<sup>56</sup> Using the ADC’s incorrect figures (because those values did not represent only payments relating to tomatoes) it can be seen that there are significant changes in the raw tomato price taking into account elasticities (22.89%) and without flow-on effects (31.48%). If the correct figures are used then the range could be from 59% to 88%.

Table 8

Impact on Raw Tomato Price		REP349/354	SPC	REP 276
<b>With fallow land</b>				
a	Subsidy per hectare (Euro /ha)	2,114	5,942	5,402
b	Yield per hectare	73,000	73,000	73,000
c	Subsidy per kg(Euro/kg) of raw tomato	a/b	0.0290	0.0814
d	Flow on (elasticity) %	72.73%	72.73%	72.73%
e	Change in price of tomato per kg (Euro) with flow on	c*d	0.0211	0.0592
f	Average price of raw tomato Euro/kg in 2014/2015	0.092	0.092	0.092
g	% change in raw tomato price per kg (Euro)with flow on	(e/f)*100	22.89	64.35
h	% change no flow on	(c/f)*100	31.48	88.48

6.12 To further illustrate the impact of the subsidy on the price of prepared and preserved tomatoes (canned tomatoes) the following table suggests a significant movement in the price – or potential movement. The price of canned tomatoes in Italy is extremely price sensitive (as it is in Australia).

Table 9

Impact on Prepared and Preserved Tomatoes		REP349/354	SPC	REP 276
<b>With fallow land</b>				
a	Ratio of raw tomato kg to 1 kg PPT	1.6	1.6	1.6
b	Subsidy per kg (Euro/kg) of raw tomato	0.0290	0.0814	0.0740
c	Subsidy per kg (Euro/kg) of PPT	a*b	0.0463	0.1302
d	Flow on (elasticity) %	72.73%	72.73%	72.73%
e	Change in price of PPT with flow on (Euro/kg)	c*d	0.0337	0.0947
f	Weighted average price of PPT (SPC estimate)	0.54	0.54	0.54
g	% change in PPT price with flow on	(e/f)*100	6.24	17.54
h	% change in PPT price with no flow on	(c/f)*100	8.58	24.12

6.13 The above tables show there is a significant distortion in the price of raw tomatoes and the price of canned tomatoes such that a normal value cannot be based on the price paid or payable.

6.14 As has been seen earlier in this submission, the LECA Report concluded that “... any amount of the SPS which flowed on from the growers to consumers was unlikely to be zero, and equally unlikely to be 100 percent”. That conclusion was based on a

<sup>56</sup> EPR 040/276 pge 30 and 31

subsidy estimate of €775/6 per hectare compared with the subsidy per hectare identified in REP 276 of €2,701. SPC's estimate of the LECA calculation was that the percentage change in the PPT price with flow-on was around 2.3 percent and without flow-on around 3 percent. Using a more accurate method of assessing the effective subsidy shows that the price of PPTs is significantly distorted with the selling price of PPTs being understated by 16-24%. As can be seen from Table 9, the range of 6.2-8.6% is significantly greater than the LECA calculation (2.3-3%) which contributed to the no market situation conclusion.

- 6.15 This evidence of an estimated large distortion in the retail selling price of canned tomatoes strongly suggests that there is a market situation, and therefore the normal values for canned tomatoes cannot be obtained using the price paid or payable under Subsection 269TAC(1).

7. **Conclusion**

- 7.1 SPC submits that the comments on the above grounds (together with the comments in the application) point to grounds to recommend to the Minister to revoke the reviewable decision.