

Submission by the European Commission

Initiation by Australia of a safeguard investigation into swine meat

The European Commission (the 'Commission') wishes to thank the Australian authorities for the opportunity to participate in the safeguard inquiry into the imports of swine meat.

The Commission has examined the Productivity Commission Issues Paper, released by the Productivity Commission on 17 October 2007, and wishes to submit to the investigating authority the following comments in view of the conclusions of the accelerated report to be provided by 14 December 2007.

From the outset, even though it would appear that the Australian pig farmers seem to be currently experiencing a difficult situation, the Commission has strong doubts that imposing safeguard measures in this case would solve the farmers' problems and it is questionable whether any measure would comply with WTO standards.

It is obvious that the origin of the difficult situation of Australian farmers can be explained by a number of factors other than just imports, which – as will be explained below – only compete with the Australian production in a limited way.

In addition, the WTO safeguard agreement as well as the Article XIX of GATT clearly point to the fact that safeguard measures should only be used in exceptional circumstances and consequently the WTO legislation and jurisprudence have established very high standards and strict conditions for the imposition of such measures. The reasons for this most probably relate to the fact that – unlike anti-dumping and countervailing measures – safeguards concern fair trade.

The Commission wishes, therefore, to highlight certain specific issues that should be carefully addressed by the Australian authorities during their investigation. Those issues mainly concern the need to establish unforeseen developments, to determine serious injury suffered by the relevant domestic industry, as well as the importance to clearly distinguish and separate the various causes of any such injury.

I - Increase in imports and unforeseen developments

Article XIX GATT and the WTO safeguard agreement allow for safeguard measures to be taken where a domestic industry is suffering serious injury as a result of an unexpected sudden, sharp and significant increase in imports.

The Commission wishes to emphasize that the development of imports should be seen in the light of the removal of certain import restrictions that made impossible the import of pig meat in the Australian territory in the past.

Indeed, it was only as from 1998 that quarantine provisions were progressively lifted and that limited access to the Australian frozen pig meat market was gradually granted to Canada, Denmark, and later on (in 2005) to the USA. Even today certain Sanitary and Phytosanitary (SPS) requirements for the imports into Australia still exist and, according to Danish industry representatives, imported meat only compete to a limited extent with local production. Detailed information will be provided by the Danish exporters in this respect.

Furthermore, as already identified by the Australian Productivity Commission in its Issues Paper, the WTO jurisprudence has also clearly confirmed the necessity to demonstrate the existence of unforeseen development, in particular before applying any measure (AB, *US-Lamb*).

In this context, the Commission considers that it would be very difficult to claim the existence of unforeseen development when already in February 2004 the Australian government itself, in its Generic Import Risk Analysis for Pig Meat (p. 36), estimated that "*unrestricted pig meat imports may increase to approximately 90.000 tonnes per year*", which approximately corresponds to the expected import level in 2007.

II - Definition of the domestic industry and serious injury

The definition of the domestic industry is one crucial aspect of this investigation given that the investigating authorities will have to determine that serious injury is suffered by that domestic industry. The product subject to the investigation is meat of swine, frozen, other which falls within the tariff code 0203.29.00, and the relevant question is to determine who in Australia produces like or directly competitive products to the imported swine meat.

In this respect, the similarities between the present investigation and the *US-Lamb* safeguard case should be highlighted. In particular, the EC would like to draw attention of the investigating authority to the following conclusions of WTO Appellate Body (AB) in the *US-Lamb* case:

- in the Lamb meat investigation, the US had defined domestic industry to include, in addition to packers and breakers of *lamb meat*, the growers and feeders of *live lambs*, which provide inputs for the lamb meat production;
- the AB upheld the Panel's conclusion that the US acted inconsistently with the Safeguard agreement by including lamb growers within its investigation of the "domestic industry" (which was defined as lamb meat producers);
- the above was based on the fact that the relevant domestic industry should consist only of producers that have "output" of the "like" or "directly competitive" product (i.e. producers of meat and not growers and feeders);

In sum, the AB in *US-Lamb* has considered that if input products are not like or directly competitive with the end-products they cannot be used to define the domestic industry. It would appear that this reasoning would also apply in the current case and the Commission does not see how the investigating authority could depart from the AB's conclusions. Consequently, Australian pig farmers can not be correctly defined as domestic industry in this case.

III - Causality and other causes of injury

As indicated in the Productivity Commission Issues Paper, WTO law and jurisprudence only allow safeguard measures to the extent they address injury caused by the increased imports.

Therefore, the investigation should specifically identify and quantify separately the injury caused by imports and that caused by other factors ('separate and distinguish'). The Commission trusts that the Productivity Commission will apply this crucial WTO principle during its investigation. As a matter of fact, there are clear indications that the difficult

situation of pig farmers is due to a series of factors other than imports. This is of course without prejudice to the above claim that pig farmers can not constitute the domestic industry in this case.

Those other factors have been clearly identified in the Issues Paper. The Commission invites the investigating authorities to have a close look into the matter and further analyse those factors on the basis of all relevant information.

Finally, the Commission would like to underline that when evaluating the effect of imports, the Productivity Commission should take into consideration that the Australian industry is only exposed to limited world market competition due to the import requirements, as mentioned above.

IV - Type of safeguard measures and conclusion

In the light of the above, the Commission invites the Productivity Commission to analyse the unforeseen sudden, sharp and significant nature of imports of frozen pig meat into Australia, the existence of serious injury to the relevant Australian industry producing the like or directly competitive product, and the existence of a causal link between the imports and the situation of the industry, in particular by excluding the intervention of other factors.

The EC has strong doubts that these WTO legal requirements for the imposition of safeguard measures can be met in this case. In any event, it believes that any such measure would not be of assistance for the Australian pig farmers given that their allegedly precarious situation appears to be clearly caused by factors other than imports.

In any event, given that many fundamental issues still need to be investigated and clarified by the Productivity Commission, the Commission considers that the investigating authority could not claim the existence of critical circumstances that would justify the imposition of provisional measures. Indeed, the Productivity Commission should first clarify the various issues at stake and allow interested parties to comment on its initial assessment.

The European Commission would be grateful if the above-mentioned elements are fully taken into account for the remainder of this investigation, and fully supports its exporters in this case as any unwarranted safeguard measures would constitute an undue barrier to trade between the EC and Australia.