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**Subject: Australian Safeguard investigation into imports of meat of swine/ comments before definitive findings**

The European Commission (the 'EC Commission') has welcomed the determination against provisional measures restricting imports of meat of swine into Australia contained in the Accelerated Report (the 'Report'), released by the Australian Productivity Commission on 14 December 2007.

In particular, the EC Commission concurs with the Australian Commission's conclusion that there is no clear evidence that increased imports have caused or are threatening to cause serious injury to the domestic industry. The main cause of serious injury is the high domestic feed prices affecting pig meat production in Australia (finding 2.6 of the Report).

The EC Commission does not wish to repeat the arguments already raised in its first submission, but wishes to concentrate at this point only on the issues contained in the Productivity Commission's provisional findings, and which the EC Commission considers merit further clarification or comments. These especially relate, on the one hand, to the product scope and the industry definition as reflected by the injury analysis and, on the other hand, to the causal link and the 'non-attribution' analysis.

**The product and industry definition as reflected by the injury analysis**

The EC Commission would like to highlight that the definition of the product concerned is crucial in a safeguard investigation and that any flaw in this definition irremediably affects the injury analysis on which safeguard measures rely.

*Product definition*

The EC Commission acknowledges that imported frozen pig meat cuts and locally produced fresh pork cuts are like products. However it is considered that the Accelerated Report does not sufficiently substantiate its conclusion that Australian-produced dressed carcasses and

half-carasses, being input products, are directly competitive with imported cuts, which are end-products (cfr. finding 2.1 of the Report).

In the EC Commission's view, the Productivity Commission's definition of the "like" and "directly competitive" products is too broad and the assessment of substitution between carcasses and imported cuts is far from being conclusive. In particular, the Commission regrets the absence of any quantitative, factual and verifiable assessment of the degree of competition between these products, and the absence of a clear and verifiable definition of the market on which these products directly compete. Indeed the conclusion of the Accelerated Report in this respect does not rely on a sound economic analysis, but is merely based on one single paragraph which only refers to one single example, and without any apparent verification of the allegations (on page 14 of the Report).

The EC Commission therefore invites the Australian authorities to perform a genuine and in-depth analysis of interchangeability of locally produced carcasses and imported pig meat cuts. For example, WTO jurisprudence has suggested that economic measures of "elasticity of substitution" or "cross-price elasticity of demand" (Appellate Body (AB), *Japan-Alcoholic Beverages*) could be used in order to determine whether two products are directly competitive and substitutable. Alternatively, in the absence of a thorough analysis of the elasticity of substitution, it must be proved by other means that these products have common end-uses.

#### *Industry definition*

The Accelerated Report refutes the parallelism between the case under analysis and the *US-Lamb* case on the grounds that, in the latter case, the AB's decision only concerned the definition of the industry producing the "like" product and that the question whether cuts of lamb and live lambs were "directly competitive" products was not addressed in that case. The EC Commission notes, in this regard, that while the term "directly competitive product" was not at issue in the dispute, the AB nevertheless, by interpreting Article 4.1 c) of the SG Agreement, referred to both "like" or "directly competitive" product and stated that "input products can only be included in defining 'the domestic industry' if they are 'like or directly competitive' with the end-product" (AB, *US-Lamb*, point. 90).

In particular, the AB clearly underlined that in defining a "domestic industry" there is no justification in Article 4.1 c) or in any other provision of the SG Agreement for giving credence to, *inter alia*, the following criteria: continuous line of production between an input product and an end-product, or that there is substantial coincidence of economic interest between the producers of these products. Moreover, the AB made it very clear that these criteria cannot replace the "like" or "directly competitive" product test (AB, *US-Lamb*, point. 90). In other words, an investigating authority cannot define the "like" or "directly competitive" product on the basis of the production process (upstream/downstream), but should instead define the industry on the basis of the product. The Productivity Commission seems thus to have reversed this order.

According to the SG Agreement, a safeguard measure may be imposed against imported products where they cause injurious effects to the domestic industry that produces 'like or directly competitive' products (article 2.1 of the SG Agreement). Furthermore Article 4.1 of the SG Agreement refers to overall impairment in the position of a domestic industry. It would therefore be a clear departure from the text of the SG Agreement if not one but two industries were subject to a single investigation as a result of an incorrect definition of the directly competitive product. The Productivity Commission in fact considers pig producers

and primary processors as two different industries and not as a single one and analyses them separately.

Moreover, the Panel in the US-Lamb case has noted that in case of a high degree of economic interdependence between upstream producers and downstream processors, *"if a safeguard measure were applied in respect of imports of the finished product by definition this should also benefit the input producers"* (point 7.106). The Panel thus rebutted a too broad definition of the industry concerned and underlined the practical difficulties of such a definition in a safeguard case: *"even if we were to accept arguendo that a criterion of value-added at different stages of the production chain were relevant to the definition of a domestic industry in a safeguards investigation, we do not see how a cut-off percentage for such a test could be defined, nor at what level"* (point 7.108).

Therefore, in the absence of any economic and verifiable analysis in the Report, the EC Commission does not see on which basis the Productivity Commission can conclude that pig producers and primary processors – which produce products which are either like, or directly competitive with, imported pigmeat cuts (finding 2.2 of the Report) – constitute one single industry for the purpose of the SG Agreement.

### **Serious injury analysis**

The EC Commission is concerned by the conclusion of the injury analysis performed by the Productivity Commission. Indeed, it is concluded that while Australian pig producers are suffering serious injury, there is no clear evidence that the primary processing industry is currently suffering serious injury (finding 2.5 of the Report). As mentioned above, this is in clear contradiction with Article 4.1 of the Safeguard agreement which makes a clear reference to a domestic industry. The fact that pig producers and processing industries are facing two different situations underlines the argument above that products and industries have been incorrectly defined in the first place.

The EC Commission further notes that injury data are not sufficiently disclosed. Only trends have been reported, therefore, it is not clear on which data they are based, if they always cover the full investigating period and whether the period under consideration is always the same. As a result, interested parties are not granted the possibility of commenting on the substance of the case. In this regard, the EC Commission is unaware whether the injury analysis has taken into account the Productivity Commission's preliminary assessment that imported products are not sold on the fresh market.

In the light of the above, the EC Commission wishes to underline that the injury analysis performed by the Productivity Commission is neither conclusive nor reliable, since it is based on data of two industries which are not producing only like or directly competitive products but also goods that are sold on the fresh market to which imports have no access. Any measures imposed on such a basis would not be in compliance with WTO rules.

### **The causal link and the 'non-attribution' analysis**

The EC Commission is satisfied with the Productivity Commission's preliminary conclusion that there is no clear evidence that increased imports have caused or are threatening to cause serious injury to the domestic industry, the principal cause of serious injury being the higher domestic feed prices affecting pig meat production in Australia (finding 2.6 of the Report).

The EC Commission nevertheless invites the Productivity Commission to also take into consideration in its analysis other factors such as restrictions on the importation of grain material, as well as any other known causes which resulted in the deterioration of the competitive position relative to imports (see Report on p.42).

The Commission would also like to stress that the Productivity Commission itself recognizes that imports compete with domestic products only on a very limited part of the market and that they are not sold on the fresh market. Therefore, the Commission invites the investigating authority to investigate to which extent other products, like beef meat, have been substituting pig meat on the local fresh market as a result of the drought and which bearing this event had on the situation of the local industry.

All these other factors seem, indeed, to be of decisive importance in the swine meat case.

### **Subsidies**

Even though the alleged existence of subsidies granted to the EU industry is absolutely irrelevant in a safeguard case, the EC Commission would like to recall the following elements.

The Private Storage aid scheme was only introduced at the end of October 2007 and therefore it could not influence the conditions of EC exports into Australia during the period investigated by the Productivity Commission; the purpose of this scheme was to address the fall of internal market prices and maintain the level of prices on the EU market, which could in no circumstances affect the Australian market; the impact of this aid is negligible since only around 0,4% of the whole EU production of meat of swine benefited from this scheme.

As regard the Export Refund Scheme, it is important to note that it was only introduced at the end of November 2007 and again, therefore, it could not influence the conditions of EC exports into Australia during the period investigated by the Productivity Commission. In addition de-boned middles, which is the only product exported by Denmark to Australia, do not fall under the codes that benefit from it. Thus, the Australian market is not affected by the EU export refunds.

### **Conclusion**

The EC Commission trusts that the above issues relating to the definition of the "like and directly competitive product", the industry definition as well as the inappropriate injury analysis will be duly taken into due account for the remainder of this case. In any event, the Commission does not see how the Productivity Commission could depart from its conclusion that any injury has not been caused by imports but by other factors. In addition to the high feed prices, other elements like the restrictions on the importation of grain should also be seen as factors having a bearing on the state of the industry(ies).

The EC Commission therefore invites the Australian Productivity Commission to terminate this investigation without the imposition of any measures, which would only affect fair trade and would constitute an undue barrier for EC exports into the Australian market.