MELBOURNE
Orica Limited
ABN 24 004 145 868
1 Nicholson Street East Melbourne VIC 3002 Australia
T +61 3 9665 7111 F +61 3 9665 7937

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For PUBLIC FILE

Mr Justin Wickes
Director
Investigations 2
Anti-Dumping Commission
GPO Box 2013

Canberra ACT 2601

SENT BY EMAIL: investigations2@adcommission.gov.au

Public File

Dear Mr Wickes

Investigation 565 – Statement of Essential Facts – Orica Australia

I. Executive Summary

Orica Australia Pty Ltd ("Orica Australia") refers to the recent publication of Statement of Essential Facts No. 565 ("**SEF 565**") concerning the continuation of anti-dumping measures on ammonium nitrate (**AN**) exported to Australia from the Russian Federation ("**Russia**").

Orica Australia supports the Anti-Dumping Commission's ("**the Commission**") preliminary determinations that:

(i) there is a "particular market situation" concerning AN sold in the domestic market in Russia;

(ii) future exports of AN exported to Australia may be at dumped prices; and

(iii) future exports to Australia are likely to land at prices lower than current imports.

Orica Australia, however, disagrees with some aspects of the Commission's analysis of normal value which, it is submitted, have resulted in an underestimation of dumping margins.

Further (and critically), Orica disagrees with the Commission's conclusion at [1.3] and with the proposed recommendation at [1.4] that the Minister for Industry, Science and Technology ("**the Minister**") permit the anti-dumping measures to expire on 24 May 2021.

That conclusion and recommendation appears to depend on the conclusion (expressed at SEF 565 [7.11]) that the export of Russian AN "will most likely be for spot sales", that such sales account for less than 5 percent of the industry, and the Russian exports are therefore unlikely to cause material injury to the

Australian industry. Orica submits that this conclusion is not supported by the evidence before the Commission, for the reasons developed below – in short:

(i) Russia has spare capacity which is increasing with new investments at the Acron Group (+180Ktepa in late 2021) and Kemerovo (+200ktepa in 2022);

(ii) The presence of low-priced imports will drive price competition well beyond the 'spot' market;

(iii) Orica sales and EBIT will be impacted negatively by a loss of $xxxm in NPV over the next five years from price suppression due to the availability of low-priced imports from Russia as its contract portfolio expires and is tested through competitive tenders;

(iv) Orica sales and EBIT is directly impacted negatively by a loss of $xxxm in NPV at key major contracts by direct links to low priced imports.

Where the measures are continued, the measures should apply on the basis of a floor-price mechanism (as opposed to the recommended *ad valorem* methodology) to mitigate against injurious dumping.

The proper recommendation is that the Minister take steps to ensure that the measures do not expire on 24 May 2021. It is irrefutable that in the absence of anti-dumping measures Russian AN would be the lowest price point in the Australian market. There is therefore no reason for importers and users of AN to refrain from seeking out that supply, to the detriment of Australian industry supply and realised pricing.

II. Legislative provisions

Division 6A of the *Customs Act 1901* ("the Act") details the procedures to be followed by the Commissioner in dealing with an application for the continuation of anti-dumping measures.

Following investigation, Section 269ZHF(1) requires the Commissioner to provide the Minister with a report which recommends that the notice:

- remain unaltered;
- cease to apply to a particular exporter or to a particular kind of goods;
- have effect in relation to a particular exporter or to exporters generally as if different variable factors had been ascertained; or
- expire on the specified expiry date.

Pursuant to s 269ZHF(2), the central issue for the Commissioner is whether "*the expiration of the measures would lead, or be likely to lead, to a continuation of, or a recurrence of, the dumping or subsidisation and the material injury that the anti-dumping measure is intended to prevent*".

In SEF 565, the Commission refers to comments in ADRP Report No. 44 concerning the intent of the continuation provisions included in s.269ZHF. The ADRP stated[1]:

> "*….the exercise being conducted in a report under s.269ZHF is a hypothetical one. While it should be based on an analysis of facts found to exist during the inquiry period, it also requires the ADC to consider what is likely to occur in the future on the happening of a certain event, namely the expiry of the measures*."

The Commission must therefore consider the relevant facts in a continuation investigation that will enable it to determine whether there would "likely" be a continuation or recurrence of material injury. The assessment of

[1] ADRP Report No. 44, Clear Float Glass from The People's Republic of China, the Republic of Indonesia and the Kingdom of Thailand, Paragraph 61, P. 14.

likelihood will be a matter of prediction or inference from those facts, based on factors such as current trends, reputable analysis and normal commercial behaviour.

III. <u>'Likelihood' of dumping and material injury continuing or recurring</u>

(a) Dumping

As indicated above, the Commission concluded (at SEF 565 [6.4.1]) "*…it is the Commission's view that a particular market situation existed in respect of the domestic market for ammonium nitrate in Russia during the inquiry period.*" Normal values in Russia, therefore, could not be assessed on the basis of domestic selling prices under s 269TAC(1) of the Act.

The Commission received cooperation from two exporters in Russia – JSC Novomoskovsky ("**NAK Azot**") and JSC Nevinnomyssky Azot ("**Nevinka**"). In determining normal values for the two affiliated cooperative companies, the Commission compared the NAK Azot and Nevinka cost of gas with the determined gas benchmark price. The Commission assessed that the comparison of the gas cost with the benchmark for both NAK Azot and Nevinka did "*..not demonstrate that the market situation is having a substantial effect on domestic prices*".

Having determined that the cooperative exporters' purchase price for gas was comparable with the benchmark gas price, the Commission considered that a proper comparison was "permitted" and therefore established normal values for NAK Azot and Nevinka under s 269TAC(1).

In previous investigations involving AN (i.e. the original investigation and in earlier continuation inquiries No. 28, 104, 168) the Commission found that a particular market situation for AN in Russia existed and a surrogate normal value (based upon a producer in the United Kingdom) was used. The Commission's assessment in SEF 565 is inconsistent with previously determined normal values for AN in Russia prior to Report 312, and does not adequately explain the differences in adjustments to the gas benchmark as applied in the most recent continuation of measures Investigation 312. Additionally, the Commission has utilised an external gas benchmark price which it asserts is the NetConnect German ("**NCG**") hub price, based upon a "month head price" as distinct from a "1-day forward" price as the former has "higher trading volumes". The Commission made certain adjustments to the NCG month head gas price including:

- to achieve a Russian border price, deducting relevant German charges and costs to arrive at the border price;
- removal of relevant export costs and export transport costs;
- an "adjustment" to bring the gas price to a "netback price" equivalent so that it "is comparable to the price paid by the Russian exporters".

The Commission has relied heavily on the "Eurochem – Brattle Report" commissioned by the parent company of the cooperative exporters, upon which it has based adjustments to the gas benchmark price (i.e. NCG month head gas price). However, there was <u>no</u> indication from the Commission before the publication of SEF 565 that it was considering the use of the Eurochem – Brattle Report in the determination of an appropriate benchmark gas price for Russia. The Commission states at SEF 565 p 85:

> "*It is noted that no submissions were received from interested parties contesting the methodology applied in this report to establish a netback price.*"

This comment is curious, given that the Commission provided no indication to interested parties that it proposed to alter the methodology followed in Investigation 312 and therefore there was no opportunity to provide submissions with respect to the intended methodology. It is also noted that the Australian Industry provided a view of gas pricing to the Commission as part of its Application for the Continuation of the Measures (Confidential Attachment 5) and in Orica Australia's Industry Questionnaire Response (which details the market background to gas pricing in Russia and the influence of the GOR on gas pricing). At no stage did the Commission engage, discuss or question that gas price with Orica as part of the Verification or Material Injury assessment in its discussions as part of this Continuation Inquiry.

The Eurochem - Brattle Report confirms that in 2019 Gazprom supplied 67 per cent of domestic gas in Russia, with the Independent Gas Suppliers ("IGS") providing the balance. The independents Rosneft and Novatek account for 10 per cent[2]. The Eurochem - Brattle Report confirms:

- Gazprom is the dominant supplier in the domestic market (67 per cent);
- Gazprom supplies to household and industrial consumers at government regulated tariffs;
- the IGS focus on industrial users at unregulated prices, although "*they pay a regulated transport tariff to use the Gazprom-owned gas transportation system*";
- *IGS gas prices still strongly correlate with regulated industrial tariffs*; and
- it appears that domestic market prices are *most likely* below regulated tariffs.

These matters do not establish that the IGS operate free from Government of Russia ("**GOR**") influence. The IGS benefit from the government-regulated transmission tariffs and price gas at levels below the Gazprom government regulated gas prices in order to secure sales. The gas selling prices of the IGS cannot be considered market-determined prices free of GOR influence.

Relying on the Eurochem – Brattle Report, the Commission states that it has "reconstructed" the calculations of underlying data – including the cross-EU border gas transmission costs (which it found differ to those calculated in the Eurochem – Brattle Report) – for the first six months of the inquiry period. The Commission stated that it used more contemporaneous data available to it than in the Eurochem – Brattle Report, including the use of the NCG price data from Bloomberg, and the entry and exit fees for gas transmission.

Following the Commission's own assessment of what it considered to be EU border transmission costs, the Commission made an adjustment to remove the 30 per cent Russian export tax (or excise duty). This deduction was made as the Commission again stated that it "*did not receive any submissions concerning the methodology proposed in the Eurochem – Brattle Report*". The export tax should not be excluded from the benchmark gas price as this is a GOR tax for accessing Russian resources. This export tax is correctly included in the NCG month head gas price, which has been priced to compete with supply external to Russia.

Orica Australia has highlighted that the Russian gas transmission tariffs are determined by the GOR. The Commission has stated that the gas transmission tariffs (as per the Eurochem – Brattle Report at SEF 565, p86) are "reasonable" and has adopted these gas transportation costs to determine the gas price delivered to plant for the purposes of assessing GOR influence. Orica Australia does not consider it reasonable for the Commission to rely on gas transmission tariffs (that are determined by the GOR) in developing a benchmark that is intended to represent a gas price free of GOR intervention. This completely undermines the reliability of the gas benchmark.

The result is that Russian gas prices remain the subject of considerable GOR influence and therefore it is not appropriate or realistic to compare the delivered gas cost with the gas benchmark as has been detailed in the Industry Application and Orica Australia's Industry Questionnaire Response. The finding that a particular market situation for AN in Russia is the *correct* finding - but its consequences have not been correctly analysed. Orica Australia respectfully requests that the Commission reconsider the basis for calculating the net benchmark price to determine whether the cost of gas for NAK Azot and Nevinka is comparable to the benchmark.

The Commission assessed NAK Azot's exports to other countries during the investigation period as having a -0.9 per cent dumping margin [at SEF 565 [6.5.4]). Exports by Nevinka were at a dumping margin of 10.9 per cent (over the same period) [at SEF 565 [6.6.4]. The volume of exports to Australia in the investigation period were found to have a margin of dumping of 14 per cent [at SEF 565 [7.6.3]. It should be noted that Eurochem is not the only Russian AN producer that exports AN (whether LDAN or HDAN) as reflected in the Commission's analysis (the dumping margin of 14 per cent applied to another Russian exporter).

[2] The Cost of Russian Gas – A Benchmark Study on Russian Industrial Gas Prices prepared for Eurochem, 2 November 2020, P. 2.

The correct conclusion is that the exports to third countries by the majority of Russian exporters of AN during the investigation period were at dumped prices above negligible levels. It should be noted that anti-dumping measures apply in other jurisdictions for AN exported from Russia, including the EU, India and the Ukraine. The finding by the European Commission ("**EC**") in its sunset inquiry confirmed that it was *likely* that future exports of AN from Russia to the EU would be dumped. The correct assessment supports a high probability to be formed that future exports of AN to Australia will ***likely*** (as distinct from "may") be at dumped prices and that dumping margins are likely to be substantial.

For the above reasons, Orica Australia consider that the Commission's conclusions on the likelihood of future dumping of AN from Russia have been grossly understated.

(b) Material injury

If the measures were to be removed, the presence of dumped Russian AN imports would have an injurious profit impact of up to $xxxm in NPV over five years (or xxx% reduction) on Orica Australia's business, as contracts are exposed to market pricing through renewal negotiations. Orica refers to Confidential Annexure A for more detail, which forms part of this submission.

The conclusion in SEF 565 that exports from Russia would continue to be for "spot sales", and would be unlikely to cause material injury is unsound for the following reasons.

First, it is important to bear in mind that exports of AN from Russia have been subject to anti-dumping measures for a long period. There are two aspects to this.

One aspect is that the Commission has accepted as recently as Report 312 in April 2016 that the resumption of exports at dumped prices was likely to cause material injury, noting (at [5.3.1] of that Report) that the Australian industry was partially exposed to price competition from other sources (including imports). Any departure from that position now ought to be based on strong evidence that circumstances have changed in some important way. Orica Australia is not aware of any such evidence.

The other aspect is that the low volumes of exports from Russia in recent years are a reflection of the effectiveness of the anti-dumping measures, and consequently provide no guide whatsoever as to what the volume might be in the absence of measures. Rather, and on the contrary, there is every reason to expect that, if Russian exporters were able to sell into Australia at prices that undercut the local industry, they would absolutely take that opportunity.

Secondly, there is evidence before the Commission of some spare capacity in Russian AN manufacturing and indeed, evidence of plans to increase capacity. This is highlighted in the Confidential Appendix 7 to the Industry Application and the EC Report (which details additional spare capacity of over 200ktepa) and is not rebutted by the analysis in SEF 565 [7.5.3]. This Kemerovo AZOT expansion of 200ktepa scheduled in 2022 (a producer which currently exports through Eastern Russian ports) is additional new capacity, as well as the recently announced expansion by Acron Group (Russia's largest AN producer) of 180ktepa available from late 2021. At the time of plant commissioning, most AN plants have spare capacity and load product over time. That is consistent with the experience in Australia for both existing plants that expand their capacity and recent new builds in other countries. The prospect of dumped exports to Australia from Russian producers (not just Eurochem) is therefore real and is likely to extend well beyond the expiry date of the measures.

While Russian manufacturing is primarily directed at the agricultural sector (and thus HDAN), there is no impediment to converting plants to LDAN where an opportunity exists (cf SEF 7.5.3). In fact, we note that both Eurochem (at Novomoskov site) and Acron (at Novgorod site) have done that where they have expanded existing capacity. Even if conversion to produce LDAN were considered unlikely (which Orica Australia rejects), the Russian producers of HDAN that have low utilisation rates can export HDAN to Australia to compete with emulsion/liquid AN grades (the imported and locally produced goods being substitutable). HDAN has been the predominant AN product exported from Russia to Australia for which there is ongoing import demand for a solid grade of AN of at least xxxKtepa amongst Orica's competitors.

Thirdly, there is evidence of Russian exports into a number of other markets (2.9m tonnes exported to a range of countries during the Investigation Period at an average price of USD 178-186/te FOB Russia - refer

Confidential Attachment 8 of Industry Application). This confirms, at least, that production is not aimed solely at the domestic market. Some portion of that export effort could be redirected to Australia.

In that regard, with no anti-dumping measures in place, the Australian market would be an attractive one in which to seek a substantial share. It is a reasonably large market, in which Russian exporters already have some distribution links (as accepted at SEF [7.5.6]) and are expected to grow further. Given that the ex-works realised price to Orica Australia at $xxx/te (refer Orica Appendix A6.1- worksheet Weighted Avg AN Price) is substantially above the projected delivered cost to Australia from Russia (without measures at approx $xxx/te using the FOB export price to other countries), there is substantial and obvious opportunity for exporters to preferentially supply Australian customers. This is not unlike the market situation in Latin America which has underpinned Eurochem's investment in LDAN to supply that market with increasing volumes. There is also substantial incentive to do so.

Fourthly, while most sales in the Australian market take place under long term supply contracts, all of Orica Australia's supply contracts.

[*Commercially sensitive details about contract expiry and re-negotiation*]

This market behaviour was accepted by the Commission in Investigation 473.

Fifthly, Orica Australia's [*reference - contracts and impact of import pricing*]

imported AN at dumped prices (even at relatively low volumes) would therefore depress the price of Orica Australia's product even while these supply agreements remain in place. Orica refers to Annexure A for more detail in respect of Orica Australia's two significant contracts that contain this price adjustment.

[*Commercially sensitive details about contract supply*]

An additional submission relating to price impacts associated with these contracts has been provided to the Commission at Annexure A. Orica Australia requests an opportunity to meet with staff of the Commission so that any aspects of the contracts that remain unclear can be explained.

For the foregoing reasons Orica Australia submits that:

- it is unsound to proceed on the basis that, if the measures are allowed to lapse, exports from Russia will continue to be at low volumes and chasing only "spot" sales;
- even at low volumes, imports from Russia at low dumped prices would depress the prices received by Australian industry under existing contracts due to the transparency of import prices;
- loss of volume and/or price depression are to be expected after the expiry of existing contracts if AN exported from Russia at dumped prices is available.
- Existing spare capacity and the commissioning of new capacity of a total of 380Ktepa in late 20121 and through 2022 make it highly likely that Russian producers will export.
- There are no contractual limitations which limit the potential of any Russian producer to export to Australia

IV. Recommendation

Orica Australia agrees that a particular market situation for AN applies in Russia. There are concerns about the reliance on information from Eurochem – Brattle Report that influence the Commission's determination of a suitable benchmark gas price for comparison with the cooperative exporters' gas costs. It is reasonable to conclude that future exports of Russian AN to Australia will likely be at dumped prices (should the measures expire).

The evidence available to the Commission does not support a finding that should the measures expire the Australian industry will not sustain a recurrence of material injury. The operative floor-price mechanism has been effective since 2016. This has limited injurious exports to Australia from Russia. It cannot be concluded that due to the absence of pricing offers from Russian exporters, there will be no future impact should measure expire. Similarly, it cannot be concluded that Russian exporters do not have access to capacity (or could not switch to supply the Australian market) in the absence of measures.

Orica Australia contends that where the measures are continued, the most appropriate form of measure to be applied is that involving a floor price mechanism (either floor-price or combination method) and not *ad valorem* measures which are open to manipulation between trading companies and exporters.

The Commissioner should recommend to the Minister that she take steps to ensure that the measures on AN exported from Russia do not expire on 24 May 2021.

If you have any questions concerning this submission, please do not hesitate to contact me on (03) 9665 7309.

Yours Sincerely,

Malcolm Hart

Senior Market Manager AN – APA