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The Director
Investigations Unit 2
Anti-Dumping Commission
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Cc: ADRP@industry.gov.au
Attention: Ms Leora Blumberg

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Dear Sir/Madam,

Preliminary Reinvestigation Report of certain findings in Report No. 565 – Ammonium Nitrate from Russia

I. Executive Summary

We refer to Preliminary Reinvestigation Report No. 565 (the "Preliminary Report") published on 1 July 2022. The Preliminary Report contains two key findings, namely:

(i) That an adjustment to the German gas benchmark for the Russian gas export tax ("GET") is still required to ensure that the benchmark is relevant to establishing what would be the competitive gas price in the Russian domestic market; and

(ii) The Anti-Dumping Commission ("the Commission") "*continues to find that it is not satisfied that the expiration of the anti-dumping measures would lead, or be likely to lead, to a continuation of or a recurrence of the material injury that the anti-dumping measures are intended to prevent.*"

Orica Australia ("Orica") disagrees with the Commission's findings. The reasons provided by the Commission that the GET is an appropriate deduction to arrive at a suitable competitive gas benchmark in Russia are incorrect and dismissive of the Australian industry's representations concerning the validity of the deduction. The Commission's incorrect determination of a valid benchmark therefore impacts its findings as to the constructed normal values and assessed dumping margins (which are therefore incorrect). Further, the Commission's reinvestigation of the finding that the expiration of the anti-dumping measure would lead, or would be likely to lead, to a continuation or recurrence of the material injury that the measure is intended to prevent is also impacted by the Commission's incorrect finding as to the benchmark.

The Commission's reinvestigation report has not provided any additional information to validate its position that the GET is an appropriate deduction to the benchmark. Accordingly, the deduction should be challenged and the benchmark should reflect an unadjusted gas cost as the surrogate gas benchmark in the Russian normal values for ammonium nitrate.

Orica reiterates its position as stated in its application for appeal to the ADRP that the ADC's recommendation (as affirmed by the Commission in its reinvestigation) is not the correct or preferable decision. The correct and preferred decision is that:

- the GET is not a valid deduction from the benchmark;
- Russian normal values include an unadjusted German border gas price (i.e. GET is included);
- Following the correct determination of normal values and the dumping margins (above negligible levels) the Commission finds that the expiration of the anti-dumping measure would lead, or would be likely to lead, to a continuation or recurrence of the material injury that the measure is intended to prevent.

The Reinvestigation Report does not reflect the correct or preferable decision and should be set aside.

II. Finding One: Russian Gas Export Tax Adjustment to the Gas Benchmark

The Commission states that upon reinvestigation its findings concerning the 30 per cent Russian Gas Export Tax ("GET") are as follows:

- the GET does not apply to domestic sales and is remitted by PJSC Gazprom ("Gazprom") to the Government of Russia ("GOR");
- The GOR applies a range of export taxes, although the GET is comparatively high to other export taxes;
- it acknowledges that the GOR "exerts significant influence" on Gazprom although as Gazprom operates on a profit motive, the GET is "*not operating as a tax or payment by a government-owned entity to itself*";
- the Commission rejects the applicants claims for not deducting the GET;
- The GET has the likely impact of increasing gas prices in Germany, however, for the purpose of the benchmark, an adjustment to the amount by which the tax impacts prices in Germany should be the amount of the adjustment; and
- the level of the adjustment (based upon the equilibrium model) is proposed at 28.4 per cent.

In directing a reinvestigation into the GET, the ADRP Member considered that the applicant industry's claims of *not* including an adjustment in the benchmark 'had merit' and worthy of further analysis. Orica agrees with the ADRP Member's comments in a conference with the Commission on 20 December 2021 where the ADRP Member stated:

> "…*that they found it somewhat anomalous that a major "cost" [being the 30 per cent GET] that increased the price of Russian natural gas to a level that amounted to a competitive market price when offered to customers in Germany, was subsequently deducted from that "competitive benchmark" as an adjustment. This appeared, in effect, to revert the "competitive benchmark" price back to what the price of natural gas was on the domestic market (which price had been found to be distorted, in accordance with the particular market situation finding). This appeared to [the member] to detract from the adjusted price still being a competitive benchmark*."

Similarly, Orica concurs with the ADRP Member's comment that the GET tax being "*a "tax" collected by the government, a sui generis "tax" or payment by a government-owned entity (that has an export monopoly) to the government could appear to be more like a payment to itself or an additional profit, rather than a cost incurred*." The ADRP Member further questioned "*whether the 30 per cent GET is an appropriate adjustment* *to make to the original price in the country of export (which was found to be distorted, per the particular market situation finding*)". Perhaps more relevantly, was the ADRP Member's concern that it was "*an unusual Situation where the country of origin of the external benchmark" used in the methodology was also the country of export of the product and the country of the particular market situation*".

It is this last point of the ADRP member that Orica considers the Commission has erred in its treatment of the GET as an adjustment. The Commission claims that Russia faces competition from other sources on the German gas market even though "*it is a significant supplier of gas to Germany and accounts for up to 40% of the supply into Germany*". The Commission was satisfied that "*Russian gas supply has a material impact on gas prices in Germany and that the imposition of the GET on exports of Russian natural gas to Germany had the effect of increasing the natural gas prices in Germany*."

It is therefore questionable as to why the Commission would make an adjustment to the German gas price to account for a tax that is imposed by the GOR on its majority-owned government entity Gazprom. Rather, an adjustment would only be contemplated on a German gas price if the tax was imposed by the German government (and would apply to all sources of supply). The GET is applied by the GOR for its export sales of Russian natural gas via pipeline only, which by law must be transacted by Gazprom as a monopoly arrangement. It is anomalous to deduct the GET to arrive back at the distorted domestic Russian gas supply price for the benchmark. It is noted that there is no GET applied to exports of liquid natural gas (LNG) from Russia, for which Russia is one of the two largest exporters and for which parties other than Gazprom are allowed to export.

The ADRP member is correct in questioning the rationale for the deduction of the GET. Orica is in agreement with the ADRP Member and rejects the Commission's findings as to the reasons (including Gazprom being a profit-oriented business, the GET is a 'usual' tax on exports, etc) that do not provide any support for providing a deduction.

Additionally, Orica has concern with the size and magnitude of the GET as it is inconsistent with the level of tax that applies to other exports that are taxed by the GOR. The Commission confirmed that "*The Russian GET of 30% is **high** compared to other Russian energy resources which attract percentage export duties between 5% and 6.5% (in so far as they attract export duties at all)*" (emphasis added). There is no GET applied to sales of LNG by comparison. In making this assertion, the Commission appears to substantiate Orica's position that the GET is indeed unusual, by the very fact that the rate of tax is so far in excess of what is ordinarily applied to other goods and is indiscriminately applied to only part of the natural gas resource from Russia which is exported. Additionally, LNG exports are not legally monopolised by Gazprom like the pipeline exports. It is therefore difficult to reconcile how the ADC then concludes that the GET is not unusual. Orica considers that the ADRP member's concerns about the GET as a typical "tax" similar to a goods and service tax ("GST") or a consumption tax are well stated. The GET is different to the low-level export taxes that the GOR applies (confirmed by the Commission's own research). Orica submits that the GET is a tax applied by the GOR on itself to a Russian resource that is the subject of GOR distortion upon domestic sales. Further, the GOR is well acquainted with the fact that Russia is a key (and influential) supplier into the European market via the German gas hub and can dictate the price it secures on export markets (indirectly by the 30 per cent GET levy). More recent events in 2022 with restrictions on gas flows from Russia to Europe and the subsequent five-fold increase in gas price make that abundantly clear.

Orica reiterates that the GET is not a typical tax as contemplated by the Commission. The GET is a specifically targeted 30 per cent tax that is comparatively higher than other GOR export taxes, especially in relation to all natural gas exports, and is intended for a single purpose. That purpose is as a levy that the GOR imposes on its own monopolistic natural gas supplier and distributor (in particular for exports via pipeline) to permit the GOR to bolster its government revenues on external sales to Russia of a Russian resource. The Commission's deliberation of other taxation regimes (Russia is unique with its abundant gas reserves) and the Commission's suggested alternative presenting Gazprom as a profit-oriented entity not subject to GOR control is simply unrealistic.

It is Orica's view that the Commission is steadfast with its view that the GET is an allowable deduction to the natural gas benchmark. The Commission's view is manifestly incorrect as the GET is an ***unusual*** tax or levy (inconsistent with other GOR export taxes at 5 or 6.5 per cent), is imposed to inflate the Russian gas price for supply into Germany where Gazprom is <u>the</u> major influencing supplier. The GOR imposes a tax (or levy) on its monopolistic gas supplier and distributor that it controls (despite the independence of minor shareholders that cannot exercise ‘control’) with the objective of not allowing the GOR distorted[1] domestic gas prices to translate to a benefit in markets outside Russia. A proper benchmark price is the prevailing German gas price unadjusted for taxes (or levies) imposed by a government other than Germany itself. The German gas price unadjusted is a true and proper benchmark gas price for contrasting and comparing GOR distortions on the Russian domestic gas price.

Ultimately, the Commission’s finding in the Report to adjust the benchmark German gas price for the GET, returns the benchmark to a distorted Russian gas price.

Orica considers that the Commission’s findings and recommendation to adjust the German gas benchmark price for the GOR-imposed 30 per cent GET is not the correct or preferable decision. Orica is firmly of the view that an adjustment to the German gas price to return the “benchmark” to an internal Russian gas price is unsubstantiated. It cannot be ignored that using a benchmark that is in fact derived from pricing that originates in the same country as the manufactured goods the subject of the measures is *unusual* and highly questionable.

III. Finding One: Normal values and dumping margin

Orica concurs that a particular market situation exists for ammonium nitrate (“AN”) sold in Russia.

As Orica finds itself in disagreement with the Commission as to the determination of the gas benchmark for Russia, Orica similarly disagrees with the reassessment of normal values and dumping margins as the assessed normal values are artificially low (reflecting a GOR influenced distorted gas price).

Orica therefore considers that the Commission’s assessment of normal values and dumping margins in the Report are incorrect and do not reflect the preferred normal values and dumping margins for AN in Russia.

IV. Finding One: Likelihood of Dumping Continuing or Recurring

Orica does not disagree with the Commission’s finding that imports of AN “will likely recur at some point in the future in the absence of the measures”. This conclusion is not in dispute.

Orica does challenge the Commission’s statement that “*it is a reasonable assumption” that imports of Russian AN “are more likely to be ‘spot sales’ or purchases to make up a shortfall*” of supply. This assumption is incorrect on two grounds, namely:

(i) The assessment completely disregards the effectiveness of the applicable measure through the injury and investigation periods; and
(ii) In the absence of measures, the industry importers will seek supply from the largest producer of AN globally, just as they have sourced from other countries including Chile, China, Lithuania, Sweden, Thailand and Vietnam in recent times.

The expiry of the measures will act as a catalyst for importers to seek out Russian AN as a source of supply for contract negotiations with the largest mining customers (and spot sales) following the expiry of the measures.

The Commission has failed to consider the nature of the contracting market in Australia that prices are negotiated at a market level at a point in time and then locked in for the duration of that contract. Hence the price impact from the threat of low cost dumped goods is felt at the time of negotiation and for the remainder

[1] “*Russian gas prices to the industrial sector were effectively subsidised below the long-run marginal cost of producing gas in Russia*”, CRU Nitrogen Cost Report, June 2020; “*free market prices [of gas] in Russia are always lower than regulated FAS prices*”, Fertecon Ammonia Outlook, April 2020.

of the contract. Hence the price from imports of dumped goods impacts significant volumes and is not only in respect of spot contract volumes.

Despite the Commission itself acknowledging that product from Russia is likely to be dumped and be cheaper than that from any other source, it thinks that buyers will not consider Russian sourced AN to lower costs or use as negotiating leverage against the Australian industry when they bid to supply term contracts in competition with Australian Industry. The commercial impact of low-priced dumped goods is pervasive across the setting of all contract prices not just those associated with so called small volume spot supply. The Commission's flawed thinking completely ignores the strong commercial drivers that mining companies (such as BHP, Glencore and many others) exert on suppliers to lower input costs during commercial negotiations.

Orica agrees that future imports of AN from Russia are likely. Orica disagrees that the Russian imports will be limited to spot sales.

V. Finding Two: Likelihood of injury continuing or recurring

The Commission, upon reinvestigation, has affirmed its finding in Report 565 that "*the Commissioner remains not satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury that the anti-dumping measure[s] are intended to prevent.*"

This conclusion is incorrect as it is based on an erroneous finding concerning the determination of normal values (and the calculation of the correct benchmark) and dumping margins, and a limited to view that future imports from Russia will be limited to 'spot' sales only.

The ADRP Member reinvestigation request concerning the likelihood of material injury recurring focused upon the reinvestigation of the normal value methodology results and subsequent impact of the calculated dumping margins and, the re-examination of the Russian production capacity and capacity utilisation following consideration of the information relating to the Russian AN producer Kemerovo's plant expansion.

The re-assessment of the benchmark adjustment and subsequent determination of normal values has been opposed by Orica as per the reasons at (II) above.

The Commission's view on the information relating to the Kemerovo facility is detailed at Section 6.4.1 which states:

> "*The commission's assessment of the further information provided in this investigation is that, although relevant, it is not sufficient to alter the commission's view that material injury is unlikely to ensue, if the measures expire. The furnishing of a media article promoting the expansion of a plant in Russia replicates claims made in the inquiry earlier without sufficiently explaining why the commission's assessment with respect to capacity and concerns about capacity was flawed or incorrect. However, additional capacity is not, in and of itself, determinative of the likelihood of the recurrence of material injury*."

Orica rejects the Commission's dismissive assessment of the relevant information about a producer that has previously exported AN to Australia and was active in seeking to supply to Australia immediately (within 7 days) following the expiration of the measures. Kemerovo's increased AN capacity enables it to further supply LDAN and HDAN into the Australian market where it has established distribution links and to seek out supply of larger volumes, including long-term contracts (in the absence of measures).

It is a further concern to Orica that the Commission has rejected the concerns about Kemerovo seeking to supply its increased capacity to Australia when the Commission has formed an incorrect view that "*the evidence does not demonstrate a link between the increased capacity and the grades of ammonium nitrate used extensively in Australia*." The Commission appears to have concluded that the Kemerovo expansion is limited to high density grades of AN which it suggests are not used extensively in Australia. The grades of AN manufactured by Kemerovo – both LDAN and HDAN – are used extensively in explosives manufacture and supplied into the Australian market[2]. In the original application by the Australian Industry of 27 July 2020, it was noted that*: The Commission has determined in past investigations...that the locally produced ammonium nitrate and the imported goods perform the same function and are used in the same end-use applications."* In fact, the reality is that imports of AN to Australia have been tracking at typically 50% each of HDAN and LDAN to meet customer needs for explosives and fertiliser products.

The Commission has further failed to properly consider the evidence put to it by Orica (Submission dated 25 March 2022) about expansion of AN exports from eastern Russian ports. As noted in that submission exports from Eastern Russian ports have been increasing: "*According to the export statistics from Tradedata International Pty Ltd, Russian exports of ammonium nitrate through Vladivostok and Port Nakhodka in Eastern Russia in 2019 and 2020 were 12,000te and 30,000te. Of these, exports from Kemerovo Azot accounted for in excess of 83% of the volume exported".* Additionally, Orica noted that *"rail tariffs in Russia are subsidized and bare no resemblance to the freight tariffs faced by Australian industry".* In their working document on Russia, The EU Commission expressed a similar view regarding Russian freight tariffs.

It is noted that most of these exports go to India, a market with amongst the cheapest AN prices. The fact that the Kemerovo plant is distant from the port is irrelevant. Clearly the ongoing and expanding volumes of these exports is still profitable business. Furthermore, the proximity of these ports to Australia offers a USD100/te ocean freight benefit over those from western Russian ports typically used by other Russian exporters. It is also noted that Glencore have provided no substantive evidence to support their claim about the unviability of such exports. Other Russian plants are equally a long distance from ports yet seem to be able to offer dumped goods at low prices which the Commission has failed to acknowledge.

The Commission's limited consideration of the Kemerovo plant expansion as requested by the ADRP Member as part of the reinvestigation satisfies the Commission's final conclusion. The incorrect benchmark methodology compounds the error as to the conclusions reached in the report that the Commission remains not satisfied as to the likely recurrence of material injury in the absence of the measures.

The Commission seems to have not understood that there have been few imports of goods from Russia because measures have been in place. Buyers have sought out other cheaper sources of supply [refer Table 7, p67 of the Reinvestigation report for the list of other sources used for imports to Australia]. In Orica's submission of 25 March 2021 (Sub 39), it is stated: *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."* In discussions with the Commission directly and in submissions by Orica as part of this Investigation, Orica has noted the country hopping behaviour in that buyers will go to cheaper AN import sources if they exist. The Commission provides no raison d'etre as to why that behaviour would cease in the presence of exports, which the Commission itself states in its Final Report, would be cheaper than those from any other source.

Orica finds itself in complete opposition to the Commission's conclusions in respect of Finding Two and remains of the view that the Minister's decision (based upon the Commissioner's finding and recommendation) that the Minister is not satisfied that the expiration of the measures would be likely to lead to material injury to the Australian industry, is the incorrect and not preferred decision.

VI. Conclusions

Orica rejects the Commissioner's findings in the Reinvestigation Report of Investigation No. 565 that the Commission remains not satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping and the material injury that the anti-dumping measure[s] are intended to prevent.

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[2] Final Report Investigation 565, p21-22*: "The Commission has again examined this issue…and remains satisfied that the goods exported to Australia from Russia, whilst not necessarily identical, are physically alike to the ammonium nitrate produced by the Australian industry."*

The Commission's reinvestigation findings are based upon a flawed assessment as to the adjustment of the 30 per cent GET on the benchmark gas price in Germany that returns the benchmark price to the level of the Russian distorted domestic price.

The further findings of the Commission that relate to the recurrence of material injury in the absence of measures are similarly flawed as the dumping margin assessed by the Commission is lower than it otherwise would be in the absence of the benchmark adjustment. For these reasons the Commission's findings in the Report remain incorrect and are not the preferable decisions for consideration by the Minister.

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

Yours faithfully,

Malcolm Hart
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