

*Case No COMP/M.4151 –  
Orica/Dyno*

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 7(3)

Date: 11.4.2006



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11/04/2006

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PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 7(3) DECISION

**To the notifying party**

Dear Sirs,

**Subject: Case No COMP/M.4151 – Orica/ Dyno**

1. We refer to your application for a derogation from the suspension obligation provided for in Article 7(1) of Council Regulation (EC) No 139/2004 (“the EC Merger Regulation”) with regard to the proposed acquisition by Orica Limited (“Orica”) through its wholly-owned subsidiary Orica Investments Pty Limited of sole control of certain businesses of the Dyno Nobel ASA group of companies (“Dyno Nobel”), submitted pursuant to Article 7(3) of the EC Merger Regulation on 7 March 2006, as amended by your letter of 4 April 2006, as well as to your further submissions of 10, 15 and 22 March 2006.

**I. THE PARTIES AND THE OPERATION**

2. Orica is an Australia-based public company, listed on the Australian Stock Exchange and involved in four main businesses, namely mining services, chemicals, consumer products and fertilisers.
3. The target of the acquisition comprises all of the European, Middle Eastern, African, Asian and Latin American businesses of Dyno Nobel Holding ASA (“Dyno Nobel”, Norway), except for Dyno Nobel's 50% interest in DetNet South Africa (pty) Ltd (South Africa) and DetNet International Ltd (Ireland) and Dyno Nobel's Mexican initiation systems production facility (“the Target”). The Target is active on the markets of commercial explosives and detonators.
4. The concentration arises as a result of the second stage of a two-stage process. Both stages were signed on the same day, on 19 September 2005. In the first stage, the seller, Macquarie Bank Limited (“Macquarie”), acquired the whole of Dyno Nobel from Industri Kapital, a European private equity firm, and Ensign-Bickford

Industries. This first transaction was completed on 30 November 2005. Macquarie then separated Dyno Nobel in two separate business entities. Macquarie retained all the Australian, New Zealand and North American businesses and the 50% interest in the DetNet initiation systems joint ventures as well as the Mexican initiation systems facility (“New Dyno”) with a view of launching an initial public offering (IPO) for this company, which completes on 13 April 2006. In the second stage, Orica acquires sole control over all the Middle Eastern, African, Asian and Latin American businesses of Dyno Nobel, except for Dyno Nobel’s 50% interest in the DetNet joint ventures and the Mexican initiation systems facility, from Macquarie.

5. The present operation consists in the acquisition by Orica of sole control of the Target from Macquarie. This operation, which does not have a Community dimension within the meaning of Article 1 of the EC Merger Regulation, was notified to the Commission on 28 March 2006 after the Commission decided, on 27 March 2006, to examine the case following a referral request pursuant to Article 22 of the EC Merger Regulation and Article 6(3) of Protocol 24 to the EEA Agreement made by the Kingdom of Sweden and joined by the Federal Republic of Germany and the Kingdom of Norway.

## **II. THE REQUEST FOR DEROGATION**

6. By the original request of 7 March 2006, Orica requested a partial derogation from the suspensive effect provided for by Article 7(3) of the EC Merger Regulation to allow the implementation of the concentration with regard to the assets of the Target situated outside the EEA.
7. By its amended request of 4 April 2006, Orica now requests:
  - (1) a derogation to enable each of Orica’s subsidiary Orica International IP Holdings Inc (United States of America) and New Dyno’s subsidiary Dyno Nobel Asia Pacific Ltd (Australia) to execute
    - (a) the deed of novation between Dyno Nobel Asia Pacific Ltd as retiring party, Orica International IP Holdings Inc as substitute party and Placer Dome (PNG) Limited (“Placer Dome”, Papua New Guinea) as continuing party regarding the Explosives Supply Agreement between the retiring party and the continuing party dated 20 October 2000 for the provision of explosives products and associated services by the retiring party to the continuing party, as varied, and
    - (b) the deed of novation between Dyno Nobel Asia Pacific Ltd as retiring party, Orica International IP Holdings Inc as substitute party and PT Kaltim Prima Coal and PT Armino Prima (“KPC”, Indonesia) as continuing parties regarding Contract No KPC-15-30-2004 between the retiring party and the continuing parties dated 13 April 2004 on the provision of ammonium nitrate and initiating explosive including associated services;

- (2) a derogation to enable Macquarie to transfer to Orica, and to enable Orica to acquire, Macquarie's interest in each of the following entities:
  - (a) Inversiones Dyno Nobel Chile Ltda (Chile) and its subsidiaries Dyno Nobel Chile S.A., DENASA (Argentina) and Accesorios para Explosivos Problast Ltda,
  - (b) Dyno Nobel Latin America S.A., UPEX S.A. and Dyno Nobel Samex S.A. and its subsidiary Nitratos SRL En Liquidación Peru SA (Peru),
  - (c) Sasol Dyno Nobel (Pty) Limited (South Africa).
8. Orica states that the businesses and assets to which the amended derogation request relates constitute approximately 14% of the overall value of the Target and approximately 37% of the value of the Target's non-EEA businesses.
9. On 11 April 2006, Orica made the following commitments to the Commission:
  - “1. Pending a decision by the Commission pursuant to Article 6(1)(b) or Articles 8(1) to 8(3) of the EC Merger Regulation, Orica will undertake to ensure that the businesses acquired pursuant to the derogation are ‘ring fenced’ from the EEA businesses of Dyno Nobel, such that no information about the EEA businesses is passed from the entities still held by the Seller to the entities being acquired pursuant to the derogation.”
  2. Pending a Commission decision pursuant to Article 6(1)(b) or Articles 8(1) to 8(3) of the EC Merger Regulation, Orica will undertake not to make any changes to the corporate structure of the entities acquired pursuant to the derogation, nor to dismiss any of the management of those entities or to make any similar change that would hinder restoration of the status quo ante; provided however, that exercise by a joint venture partner of its pre-emption rights will not constitute a breach of this undertaking.
  3. Should the Commission take a decision pursuant to Article 8(3) of the EC Merger Regulation, Orica will, if required by the Commission, undertake,
    - (a) with respect to those entities acquired pursuant to this derogation, to take all reasonably practicable steps (including requesting any necessary consents) to transfer these entities back to the Seller, and
    - (b) with respect to contracts novated to Orica pursuant to this derogation, to offer to the customer served under the contract to assign or otherwise transfer the contract to the Seller.”

### **III. THE CONDITIONS FOR A DEROGATION PURSUANT TO ARTICLE 7(3) OF THE EC MERGER REGULATION**

10. Pursuant to Article 22(4)(1), second sentence, of the EC Merger Regulation, *“Article 7 shall apply to the extent that the concentration has not been implemented on the date on which the Commission informs the undertakings concerned that a request has been made”*.

11. Pursuant to Article 7(1) of the EC Merger Regulation, a concentration falling under that Regulation shall not be implemented either before its notification or until it has been declared compatible with the common market. Pursuant to Article 7(3) of the EC Merger Regulation, the Commission may, on reasoned request, grant a derogation from the obligation imposed in Article 7(1). In deciding on the request, the Commission must take into account *inter alia* the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.

**A. THE OPERATION FALLS UNDER THE SUSPENSION OBLIGATION PURSUANT TO ARTICLE 7(1) OF THE EC MERGER REGULATION**

12. The operation consisting in the acquisition by Orica of sole control of the Target from Macquarie falls under the EC Merger Regulation by virtue of the Commission decisions of 27 March 2006 to examine the case referred to it by the Swedish, German and Norwegian competition authorities pursuant to Article 22 of the EC Merger Regulation. In accordance with Article 22(4)(1), the operation therefore falls under the suspension obligation pursuant to Article 7(1) of the EC Merger Regulation to the extent that it had not been implemented on the date on which the Commission informed the parties that the referral request had been made. The Commission had informed Orica on the referral request pursuant to Article 22 made by the Swedish Competition Authority on 21 February 2006.

**B. THE EFFECTS OF THE SUSPENSION ON THE UNDERTAKINGS CONCERNED AND ON THIRD PARTIES**

**1. Orica's submission**

13. Orica submits that the application of the suspensive effect to the concentration regarding assets located outside the EEA is causing immediate critical damage to the parties, which is increasing in intensity day by day. This damage consists in:

- a substantial weakening of the Target businesses located outside the EEA due to their ongoing dependency on New Dyno for the supply of raw materials as well as for the transfer of supply contracts,
- the lack of motivation of New Dyno, as a competitor newly quoted on the stock market following the IPO which, according to public statements, has the declared intention to re-enter the geographic markets in which the Target operates, to preserve the value and goodwill of the Target,
- the lack of interest of Macquarie in managing the Target,
- the extended period of uncertainty for employees, customers, suppliers and joint venture partners,
- tangible monthly loss of around EUR 4 to 5 million resulting from lost profits, project team/consulting sunk costs and lost synergy benefits.

14. More specifically regarding the Target's assets to which the amended derogation request refers, Orica submits the following:
15. With regard to the *supply contracts* referred to in paragraph 7(1) above, the particular customers KPC and Placer Dome have already signed novation deeds. These customers are currently being supplied with products by New Dyno, whose marketing personnel also own the customer relationship.
16. The contract with Placer Dome is valid from 1 January 2000 for the life of Placer Dome's gold mine in Papua New Guinea, which is expected to be another five to ten years, for the exclusive supply of ammonium nitrate, IS and "down-the-hole" services. The contract also covers the supply of bulk and packaged emulsion. The contract has a right of first refusal in favour of the incumbent supplier (currently New Dyno's subsidiary Dyno Nobel Asia Pacific) to supply additional product and services needs, and it includes a "meet or release" provision, whereby the supplier needs to be able to demonstrate before the fourth calendar quarter of each year an ability to cost-effectively and reliably supply the mine in the following year. Orica therefore considers it a matter of great urgency that Orica be able to become the supplier, so that it can demonstrate its ability to supply. Moreover, the customer is able to trial a new technology at the mine. This presents New Dyno, which is already testing this technology in other mines in the region, with the advantage to take business away from Orica before the latter even becomes the supplier under the contract. Placer Dome has a global account with New Dyno, so unless the present supply agreement is novated to Orica soon, New Dyno is strongly positioned to make a competing bid for retention of Placer Dome's mine in Papua New Guinea as part of the global supply contract. In addition, the contract to be novated contains provisions whereby Placer Dome could initiate a mechanism to exit the contract due to "hardship", which Orica fears could be invoked as a result of the confusion which has been created by the inability of Orica to execute the novation deed which Placer Dome has already agreed to.
17. The contract with KPC is valid for five years from 1 July 2004 for the supply of all requirements of ammonium nitrate and IS to KPC's coal mine. The original requirement was for 60,000 tonnes per year of ammonium nitrate, but the requirement has risen to 80,000 tonnes per year. Under the contract, the extra 20,000 tonnes are under negotiation with New Dyno, since the contract provides that the supplier, currently New Dyno's subsidiary Dyno Nobel Asia Pacific, has the first opportunity to supply the extra requirements. Dyno Nobel therefore has an advantage over Orica in competing for the supply of the extra 20,000 tonnes, because Orica is currently unable to compete through the Target businesses.
18. Both the Target's businesses with Placer Dome and KPC are currently being threatened with labour union action as a result of employees' continuing uncertainty in regard to their long term future. Union action would be very adverse to the customers and further threatens Orica's ability to acquire the contracts. Furthermore, the remoteness of the locations in question makes it extremely difficult for the Target or Orica to recruit and retain qualified employees. Orica states that New Dyno is actively pursuing the recruitment of key employees in Indonesia. The key manager running the KPC contract (and who had agreed terms to transfer to Orica upon contract novation) has been approached by New Dyno to apply for a position with them and in addition two employees of the Orphan

Business in Indonesia have resigned. One has joined New Dyno and the other has been approached to have discussions with New Dyno.

19. The Target businesses in Asia are currently being managed from Oslo by a senior executive unfamiliar with the operations in that region as the New Dyno Australian business formerly managed the Asian Target business. In a letter to the Commission dated 15 March 2006, KPC submits that the fact that because of the suspension obligation Dyno Nobel Asia Pacific Ltd and Orica have declined to sign the deed of novation already executed by KPC causes significant difficulty to KPC, which has made great efforts in ensuring the smooth transition of supplier from Dyno Nobel Asia Pacific Ltd to Orica.
20. With regard to the Target's business in *Chile* referred to in paragraph 7(2)(a) above, Orica and Enaex, an initiating systems customer of the Target and licensee of its bulk and packaged explosives technology, had agreed in principle to maintain the existing contractual relationships. However, Enaex has only agreed to a short period during which the re-negotiations can take place, and this severely prejudices Orica, which does as yet not have detailed knowledge of the Target's business upon which to negotiate with Enaex. If Orica is prevented from acquiring the Target business in Chile, this will undermine its ability to successfully convince Enaex to maintain the relationship, and in the worst case Enaex may withdraw from the commitments it has given thus far. This puts Enaex, which is the major customer in Chile with a strong position across South America, in an extraordinarily enhanced bargaining position. Orica understands that New Dyno representatives have already approached Enaex with a view to take over the Target's existing contractual relationships with that company. In addition, Placer Dome has a global account with New Dyno, and the Chilean Target business supplies the Place Dome mining operations in Chile, so unless the business is acquired by Orica soon, New Dyno is strongly positioned to make a competing bid for retention of those operations as part of the global supply contract.
21. The Target's business in *Peru* referred to in paragraph 7(2)(b) above is a 50.5% interest in a joint venture company, Dyno Nobel Samex SA ("Samex"), which is jointly controlled by Dyno Nobel and Enaex and also supplied ammonium nitrate by Enaex. Enaex has a pre-emptive right over the acquisition by Orica of the Target's interest in Samex, which it is able to exercise either before or after the acquisition of the Target by Orica. Orica and Enaex were about to agree upon acquisition of the Peruvian interest and commence renegotiation of a multitude of product supply and technology licensing issues which arise under the current joint venture agreements by reason of the transfer to Orica. As in the case of the Chilean business, Orica is severely disadvantaged by having to negotiate without detailed knowledge of the Target's business. If Orica is prevented from acquiring the interest and progressing these negotiations, it raises the risk that Enaex would exercise its pre-emption right at its earliest opportunity resulting in the joint venture interest being lost for Orica.
22. Likewise, the Target's business in *South Africa* referred to in paragraph 7(2)(c) above is another joint venture where the joint venture partner, Sasol, has a pre-emptive right over the transfer of a 40% interest to Orica. This pre-emption right will be triggered for a period of 60 days from when Dyno Nobel's joint venture holding is either transferred within the group to the Dyno Nobel ASA family of companies, away from the part of the group which is to be spun off in the New Dyno IPO, or it is transferred to Orica. The transfer, either to the Dyno Nobel ASA

group or to Orica, must take place before the IPO completes on 13 April 2006, and at that point the pre-emptive right will be triggered. This joint venture is a technology licensee of New Dyno and is also supplied with initiating system components by New Dyno. Orica understands that Sasol has written to New Dyno and Macquarie asking when the pre-emptive notice will be served. It is critical that Orica have the full range of options for dealing with the pre-emption rights, and for negotiating with Sasol on the acquisition of the interest and the replacement of New Dyno as the technology and components supplier as soon as possible. In a similar way in which Orica is prejudiced in Chile and Peru, Orica will need to negotiate without detailed knowledge of the Target business, whilst at the same time facing competition from New Dyno which is the current technology and product supplier to the joint venture and whose personnel have significant historical relationships with Sasol.

23. A report by "The Australian" newspaper of 7 April 2006 confirmed New Dyno's attempts to regain customers from the Target in Asia and Latin America, reporting a planned sales pitch by New Dyno's chief executive Peter Richards to a Papua New Guinea miner in the week of 10 April 2006.
24. The damage described above is, according to Orica, due to exceptional circumstances, namely:
  - The sale of the Target by Macquarie to Orica was signed at the same time as the sale of the whole of Dyno Nobel from Industri Kapital and Ensign-Bickford Industries to Macquarie but could only be carried out once the first transaction had been implemented.
  - Following the transfer of Dyno Nobel to Macquarie, the latter has created, with New Dyno, a potential competitor of the Target which is not prevented from re-entering the Target's markets by any non-compete clause in the sale agreement.
  - New Dyno is being sold by Macquarie by an IPO, and the management of New Dyno has declared their intention to compete vigorously with the Target in the markets where the Target is active and where Orica cannot yet implement the acquisition because of the suspensive effect of EU merger control.
  - Orica was not able to avoid the delay caused by the referral request pursuant to Article 22 made by the Swedish Competition Authority by making a pre-notification referral request pursuant to Article 4(5) of the EC Merger Regulation since the legal conditions for that provision to apply were not fulfilled, as the concentration is only notifiable in two Member States (Sweden and Germany).

## **2. Assessment**

25. It appears from the derogation request that the suspension of the operation has harmful effects on the Target due to the fact that until the operation can be consummated, the Target is owned by Macquarie and managed by New Dyno, which has the explicit intention to re-enter the market in which the Target is active as a competitor and is not prevented from doing so by a non-compete obligation.
26. These adverse effects are in general related to the suspension obligation laid down in Article 7(1) of the EC Merger Regulation as such and do not go beyond the effects that that obligation generally has on the parties of a concentration that falls



under the application of the EC Merger Regulation. They are partly caused by the fact that Orica knowingly took the risk of entering into a transaction structured in such a way that the business it intended to acquire would remain in the hands of a competitor for a certain period of time without protecting itself by entering into a non-compete obligation as is common practice in merger and acquisition transactions.

27. Inasmuch as Orica refers to the fact that the present case falls under the suspension obligation pursuant to the EC Merger Regulation by virtue of a referral pursuant to Article 22 of the EC Merger Regulation, this cannot as such be considered as an exceptional circumstance since the referral procedure laid down in that Article is part of the general system of merger control established under the EC Merger Regulation, which is based on the principle of *ex ante* merger control.
28. This holds true even more for financial loss caused by the simple delay of implementation of the transaction, such as lost profits or synergy gains or administrative costs related to the transaction.
29. Nonetheless, with regard to the Target's asset referred to in paragraph 7 above, which are the object of the amended derogation request, Orica has shown specific and exceptional harmful effects that appear on the basis of the information provided by the parties to go beyond the normal effects that the suspension of any merger transaction has on the parties of that transaction.
30. Regarding the transfer of the supply contracts referred to in paragraph 7(1) above, the situation is exceptional insofar as due to the structure of the transaction (geographic split of entities and assets between New Dyno and the Target), these contracts are not being transferred to the acquirer as part of a stand-alone business and therefore cannot be honoured by the Target before its acquisition by Orica. Hence, the respective customers have to be temporarily supplied by New Dyno, thus creating uncertainty for all parties involved and entailing the risk for the Target of loss of those customers.
31. Regarding the transfer of the subsidiaries and joint venture stakes in Chile, Peru and South Africa referred to in paragraph 7(2) above, the exceptional harm caused by the suspension for these Target businesses are due to the specific relationship between the Target, on the one hand, and Enaex and Sasol respectively, on the other hand.
32. The suspension of the operation may also adversely affect *third parties* with regard to the assets mentioned in paragraph 7 above, since it creates uncertainty and delay for the customers, suppliers and joint venture partners of the Target in those countries, in particular Placer Dome, KPC, Enaex and Sasol. As far as KPC is concerned, this is particularly underlined by KPC's letter to the Commission dated 15 March 2006.

## **C. THE THREAT TO COMPETITION POSED BY THE CONCENTRATION**

### **1. Orica's submission**

33. There are two main markets where the parties have overlapping activities, namely that of commercial/industrial *explosives* and that of *detonators (initiating systems or IS)*.

34. According to Orica, the partial derogation requested would not pose any threat to competition in the EEA. The *explosives* markets are at most national in scope, so that any transfer of assets outside the EEA to Orica has no impact whatsoever on competition in EEA markets. Even if the *initiation systems* markets were to be regarded as world-wide, (i) the parties' combined world-wide market shares are very low (about 8%), excluding any harm to competition on the assumption of a world-wide market, and (ii) due to the parties' substantial overcapacities in their European production facilities, there are virtually no imports by the parties from facilities located outside the EEA, so the transfer of the Target's assets outside the EEA to Orica would not materially influence competition within the EEA in any way.

## 2. Assessment

### (i) *The market of initiating systems (IS)*

35. IS are used to detonate commercial explosives in a predictable, reliable and safe manner. There are three different "generations" of IS available on the market at the moment: electric IS, non-electric IS, and latest-generation electronic IS.

36. *Electric detonators*, are the first generation of IS, are well established in terms of technology and have been present in the market place in various revised forms for over 100 years. As the name suggests they require the use of electric current to initiate the detonator and start the explosion.

37. *Non-electric detonators* are the second generation of IS and are becoming a more or less mature technology. They do not require an electric current but use a shock wave that is transferred down a signal tube to the detonator to initiate the explosion. They have displaced electric detonators in many applications in the period since their introduction to the market due to several operational and safety benefits. This reduces the potential for premature firing through the presence of extraneous electrical energy or currents.

38. *Electronic detonators* are the next generation product and are currently in the process of commercialisation. They provide greater flexibility and performance given their higher level of specification of delay time firing accuracy. The electronic initiating system contains a micro-chip which allows it to undertake more complex blast patterns and delays. The electronic initiating system is in its infancy and the cost of this type of initiator is much higher than that of electric and non-electric detonators.

39. Orica considers that electric and non-electric detonators are interchangeable. Although they might be differentiated on the basis of level of safety, quality and sophistication, they remain on the same relevant market, as contrary to electronic IS, which is the latest generation, has not entered the market fully yet.

40. According to the information submitted by the Orica the relevant geographic wholesale market for IS should be defined as an EEA-wide, if not worldwide market. Detonators are easy and cheap to transport and the market is characterized by the absence of trade barriers. Approximately 30% (58 million) of all IS (93 million) produced in the EEA are exported to destinations outside the EEA. However, almost all EEA wholesale IS is derived from within the EEA. Orica

estimates that less than 1% of current EEA wholesale IS are derived from outside the EEA.

41. At the retail level, most end user customers obtain their IS requirements from national/local suppliers. Typically, IS systems are delivered with the explosives, in order to ensure the timely deliver of both essential elements to the blast. Distribution is thus a vital part of IS sales. Given the possibility of joint delivery of explosives and IS distributors are able to ensure points of entry into the market by new suppliers of IS. The distributors can support, encourage and even sponsor new entry, exercising the combined buying power of their end users in the same way as a buying agent would. For the above reasons Orica believe that the relevant geographic market for retail sales of IS is national.
42. In relation to IS, the market has grown with the increased demand for explosives and will continue to be linked to that growth. New players have entered the wholesale IS market recently and some have left.
43. In a possible *world-wide wholesale IS market*, the Dyno Nobel Group has approximately 10% of supply by volume and Orica has approximately 5% of supply. Orica would have a post merger share of 8%.
44. In a possible *EEA-wide wholesale IS market*, the parties' combined market share would be close to 50% (Orica 22%, Dyno Nobel 29%) according to the Swedish Competition Authority (43% according to Orica).

(ii) *The market of commercial explosives*

45. Explosives for commercial application can be divided into three separate types, namely, packaged explosives, ammonium nitrate fuel oil (ANFO) and bulk emulsion. While these products vary in their typical use, most producers around the world would produce all three products and suppliers tend to supply at least ANFO and packaged explosives.
46. Packaged explosives are typically contained in a cartridge. They tend to be used for smaller projects and in underground mining. However, new technology has increasingly allowed the use of bulk emulsion in both surface and underground mining applications.
47. ANFO is a simple bulk explosive which can be used in situations where large quantities of explosives are required such as mining and quarrying operations. ANFO is only used in dry environments, as it degrades rapidly in moist conditions.
48. Bulk emulsion explosives are particularly useful for wet locations because they are highly water resistant. As indicated by its name, bulk emulsion is not transported in packages or cartridges but rather is transported in large quantities in special trucks or containers for use in mining and quarrying operations. The bulk emulsion is typically mixed or blended in the truck from non-explosive semi products and are sensitised while being pumped straight from the truck or container into the borehole thereby becoming an explosive. Bulk emulsion is used in large surface mines and is now also being used increasingly in underground mining operations as new technologies are being developed that enable delivery of bulk emulsions to boreholes in confined underground mines.

49. According to the information submitted by Orica packaged explosives and bulk explosives are typically used in different end-use applications. However, bulk explosives such as ANFO and bulk emulsion are largely interchangeable.
50. As packaged explosives are easily transportable Orica considers the geographic market to be EEA-wide. On the other hand, transportation of bulk explosives is seldom because of costs, regulatory rules and the volatile nature of explosives, the scope of geographic market is national/local.
51. According to Orica, customer preference for brand loyalty and product differentiation do not play any significant part in customer choice for explosives. On the other hand, high level of service is crucial in relation to explosives. Accordingly, the distribution system is vital. Smaller customers typically will not have the capacity or facilities to store the explosives. As such, they will require the delivery of the explosives as and when they need them. The explosives will then need to be primed into the appropriate location with the IS prepared, linking the explosives with the IS. Once prepared, the explosives must be used and cannot be left unattended. This is particularly so for bulk emulsion which must be used above a specific temperature. As a result, the customer requires on-time delivery, at the time that they have ordered supply. Failure to deliver on time can delay the blast to the following day causing delay and costs consequences. This high level of service removes any necessary advantage that would otherwise come with market share. Small distributors who are able to provide high levels of personalized service can compete with large suppliers, sometimes more favorably so.
52. The parties' activities overlap with significant market shares in the Swedish markets for retail packaged explosives (Orica 12%, Dyno Nobel 44%), wholesale ANFO (Orica 26%, Dyno Nobel 45%) retail ANFO (Orica 13%, Dyno Nobel 43%), retail bulk emulsions (Orica 4%, Dyno Nobel 60%) and retail IS (Orica 7%, Dyno Nobel 65%), as well as in the Norwegian markets for wholesale and retail bulk emulsion (Orica 7%, Dyno Nobel 93%), wholesale ANFO (Orica 13%, Dyno Nobel 81%), retail ANFO (Orica 13%, Dyno Nobel 81%) and retail IS (Orica 9%, Dyno Nobel 84%). Orica has offered to remove these overlaps by divesting the Orica business active in these markets, Orica Kimit, and has submitted draft commitments to that effect.

(iii) *Conclusion*

53. According to the available information, the operation appears to raise serious competition issues within the Member and EFTA States for which the Commission has jurisdiction in application of Article 22 of the EC Merger Regulation, Sweden, Germany and Norway. However, since (i) the markets for explosives are either national or at most EEA-wide in scope and (ii) given the parties' low combined world-wide market share (8%) the market for wholesale IS would only raise competition concerns if they were EEA-wide in scope, these competition issues are entirely related to markets or (in the case of IS) possible markets that are at most EEA-wide in scope. Furthermore, according to the available information, it can be excluded that competition in those markets within the three above mentioned States is in any way affected by the acquisition of the assets for which under Orica's amended request a derogation is sought, namely the supply contracts with customers in Papua New Guinea and Indonesia and the subsidiaries and joint venture interests in Chile, Peru and South Africa.

#### **D. BALANCE OF INTERESTS**

54. Based on the above, it appears that, whilst the suspension obligation could seriously harm the viability of the Target's businesses in Papua New Guinea, Indonesia, Chile, Peru and South Africa, thereby negatively affecting the parties to the concentration as well as the Target's customers, suppliers and joint venture partners concerned, any possible threat to competition caused by the operation would be clearly limited to the parties' operations and assets situated within the EEA. Therefore, granting the limited partial derogation requested by Orica in its amended derogation request would end the above mentioned adverse effects of the suspension without posing any possible threat to competition within the Member and EFTA States falling under the Commission's jurisdiction pending the examination of the concentration by the Commission.
55. Given the fact that the businesses and assets to which the amended derogation request relates constitute only a limited part of the overall operation, granting such a derogation also does not significantly adversely affect the Commission's means to address any possible threat to competition within its jurisdiction by seeking appropriate remedies or, if necessary, declare the concentration incompatible with the common market.
56. Therefore the Commission finds that a derogation can be granted in accordance with and to the extent requested by Orica's amended derogation request.

#### **IV. CONDITIONS AND OBLIGATION**

57. According to Article 7(3), 3<sup>rd</sup> sentence, of the EC Merger Regulation, the derogation may be made subject to conditions and obligations.
58. In order to ensure that the exercise of the derogation, in accordance with the request, will not have any effect on competition within the Member and EFTA States for which the Commission has jurisdiction pursuant to Article 22 of the EC Merger Regulation, the derogation is made subject to the obligation that Orica, in accordance with its commitment made on 11 April 2006, ensure that the businesses acquired pursuant to the derogation are 'ring fenced' from the EEA businesses of Dyno Nobel, such that no information about the EEA businesses is passed from the entities still held by the Seller to the entities being acquired pursuant to the derogation.
59. In order to ensure that the implementation steps taken under the derogation remain reversible and do not impede on the exercise of the Commission's powers under the EC Merger Regulation, the derogation is made subject to the condition that Orica does not make any changes to the corporate structure of the entities acquired pursuant to the derogation, nor dismiss any of the management of those entities or make any similar changes that would hinder restoration of the *status quo ante*; however, exercise by a joint venture partner of its pre-emption right does not constitute a breach of this condition.

60. Furthermore, for the same purpose the derogation is made subject to the obligation that, should the Commission take a decision pursuant to Article 8(3) of the EC Merger Regulation, Orica
- (a) takes all reasonably practicable steps (including requesting any necessary consents) to transfer the entities acquired pursuant to the derogation back to the seller, and
  - (b) offers to the customers served under the contracts novated to Orica pursuant to the derogation to assign or otherwise transfer the contract to the seller.

## V. CONCLUSION

61. Based on the above considerations, the Commission has decided to grant Orica a derogation from the obligation imposed by Article 7(1) of the EC Merger Regulation in accordance with and to the extent specified in Orica's amended derogation request of 4 April 2006 as referred to more in detail in paragraph 7 of this decision and subject to full compliance with the conditions and obligations laid down in paragraphs 58 to 60 of the present decision. This decision is adopted in application of Article 7(3) of the EC Merger Regulation.

For the Commission,  
*(signed)*  
Neelie KROES  
Member of the Commission