

COMPETITION TRIBUNAL OF SOUTH AFRICA**Case No: 133/AM/Dec07**

In the matter between:

Yara International ASA

First Applicant

Kemira Growhow OYJ

Second Applicant

and

The Competition Commission of South Africa

Respondent

Panel : D Lewis (Presiding Member), Y Carrim (Tribunal Member) and N Manoim (Tribunal Member)

Heard on : 02 April 2008

Order issued on : 02 April 2008

Reasons issued on : 30 April 2008

Reasons for Decision

Introduction

- [1] On 14 December 2007 the merging parties, Yara International ASA and Kemira Growhow OYJ ("the applicants"), filed an application in terms of section 16(1)(a) of the Competition Act requesting the Tribunal to reconsider an intermediate transaction that was approved by the Competition Commission on 3 December 2007 subject to certain conditions.
- [2] The Commission, in approving the transaction, had ordered the merged entity to continue making urea available to small purchasers and existing GrowHow urea customers on terms that are non-discriminatory for a period of five

years.¹ In the event of urea shortages the merged entity had to reduce supply pro-rata to each customer and its subsidiaries.

[3] The applicants requested the Tribunal to reconsider the Commission's order. They argued that it was unreasonable and impractical because the conditions applied to an unlimited amount of urea that had to be supplied to a legally uncertain category of purchasers. They also disagreed with the Commission's narrow definition of the relevant market, defined as urea, and said that the Commission had erred in determining that:

- i. There are substantial barriers to importing urea into South Africa,
- ii. Alternative suppliers have capacity constraints,
- iii. The merger will remove a company that was growing in the supply of urea in South Africa, and
- iv. That customers of the merging parties will be left with a lack of alternative sources of supply

[4] Subsequent to filing the application the applicants and the Commission met on 19 March 2008 to discuss the Commission's conditions. At this meeting the Commission and the applicants agreed to revise the conditions in order to address some of the concerns raised by the merging parties in their application.

[5] We had initially set the matter down for hearing on 26 March 2008 but postponed it to 2 April 2008 after the applicants indicated that they wanted to reconsider their legal position in light of the agreement reached with the Commission. On 1 April 2008 the applicants in an email indicated to the Tribunal that although they did not agree with the Commission's definition of the relevant market they would, in the interest of finalizing the matter, not raise the issues set out in paragraph 3 above at the hearing and that they now only requested the Tribunal to approve the merger subject to the conditions set out in an undertaking agreed with the Commission.

¹ *Smaller purchasers* are defined by the Commission as purchasers of urea in South Africa whose annual requirements at the time of the request for supply do not exceed 12000 tons per annum. Existing GrowHow Customers are defined as any pre-merger purchasers of urea from GrowHow during 2006 or 2007.

- [6] At the hearing, on 2 April 2008, the Commission and the applicants thus requested the Tribunal to approve the transaction in terms of section 16(2)(b) subject to the revised conditions agreed by them.
- [7] In deciding whether to approve the transaction we considered whether the new set of conditions did in fact address the Commission's concerns raised in its Reasons for the Decision. Our reasons for approving the amended order, attached as Annexure A, follow below.

The transaction and parties

- [8] Yara International ASA ("Yara"), which is registered in Norway, is acquiring Kemira GrowHow Oyj ("GrowHow"), a company registered in Finland. The transaction was filed with the European Commission and subsequently, on 21 September 2007, approved subject to certain conditions.² Both the acquiring and target firms have operations in South Africa and are thus required, in terms of the Act, to also file the merger with the Competition Commission. The transaction was classified as an intermediate transaction in South Africa.
- [9] Yara has three operating companies in South Africa, Yara South Africa (Pty) Ltd ("Yara SA"), Yara Western Cape (Pty) Ltd and Fermentech (Pty) Ltd. GrowHow controls the following operations in South Africa: Kemira Phosphates (Pty) Ltd, trading as KK Animal Nutrition and GrowHow Speciality Fertilizers, and Kynoch Feeds (Pty) Ltd which is a dormant company.
- [10] Yara is involved in the production, distribution and sale of fertilizers and nitrogen-based chemicals while GrowHow mainly focuses on the production and sale of animal feed phosphates and to a lesser extent also produces some fertilizer. The fertilizers that both Yara and Kemira produce and supply are nitrogen containing fertilizers (N fertilizers), phosphorus containing fertilizers (P fertilizers) and potassium containing fertilizers (K fertilizers). Yara SA is a wholesale supplier and a retail seller of fertilizer as it sells to wholesale buyers and blenders and to farmers directly.

² European Commission Case No COMP/M.4730

- [11] GrowHow has in the past supplied smaller purchasers of urea that had previously been refused by Yara and its main competitors.
- [12] According to the merging parties the transaction will create opportunities to achieve cost savings and efficiencies that would enable the merged entity to continue to compete strongly in the international market, particularly against fertilizer producers established in countries with low gas feedstock costs.

Do the revised conditions address the Commission's concerns?

- [13] The Commission indicated that the conditions are intended to ensure that the merger does not substantially prevent or lessen competition in the supply of urea in South Africa. To that end the Commission has ensured that customers of GrowHow, specifically smaller purchasers of Urea, are not left without a supplier post the merger.
- [14] Urea is imported from SABIC³ and QAFCO⁴ and is not manufactured locally. According to the Commission barriers to importing Urea are enormous.
- [15] The Commission found that it is almost impossible for smaller purchasers to import urea because the smallest viable shipment size that suppliers are prepared to ship to South Africa range from 12000 to 12 500 tonnes (constituting one ship-load) while smaller purchasers mostly require between 35 to 5000 tonnes annually. To import the minimum viable shipment one needs a considerable capital outlay of between R35 million to R40 million, which small purchasers can't afford. Some agents did indicate to the Commission that they were prepared to supply smaller purchasers if they club together to import as a group.
- [16] South African agents are contractually prohibited from sourcing Urea from any source other than SABIC and QAFCO. Smaller purchasers who require small volumes, i.e. less than 12000 tonnes, also battle to import urea, because the larger importers such as Yara, Sasol Nitro and Omnia who have supply agreements with the suppliers in Saudi Arabia and Qatar, usually take up all the available cargo space. Apart from the huge deposit and shipping

³ Saudi Arabian Basic Industries Corporation


⁴ Qatar Fertilizer Company

cost, buying through an agent may also take as long as 2 to 3 months, before the urea is delivered. This is because urea is a scarce product globally. Also supply is dependant on the availability of ships.

- [17] In order to assist small players in importing urea the new conditions will apply for a two year period as the Commission considers this a sufficient time to enable small importers to come together and to arrange themselves into a buyers block. Should they not be able to do this within two years the condition allows for the Tribunal to revise the conditions on good cause shown.
- [18] As mentioned earlier GrowHow supplies a number of small purchasers of urea. In order to maintain the *status quo* post the transaction the parties have agreed that the merged entity will make available 20% in 2008 and 22% in 2009 of its aggregated imported urea to qualifying customers of GrowHow and Yara. These include customers that bought urea from GrowHow in 2007, but excluding Yara customers, as well as purchasers of urea in South Africa who have registered with and confirmed to the merged entity that their annual requirements of urea are greater than the minimum volume of 35 tonnes⁵ but do not exceed 5000 tonnes per annum. These percentages are based on the combined sales by Yara and GrowHow from 2004 to 2007 and the 2009 figure allows for a 2% growth. Customers importing less than 35 tonnes per annum can source from other suppliers such as Profert, Omnia and Sasol Nitro.
- [19] The condition also allows for new customers to buy from the merged entity if their volumes are within the qualifying range of tonnes when they register with the merged entity.
- [20] In light of the above we found that the new set of conditions did address the concerns raised by the Commission in their Reasons as well as the concerns raised by the applicants.

⁵ Represents a truckload of Urea

[21] We also requested that the smaller purchasers be informed directly, where the identities of such customers are known, as well as in the press that they must register with the merged entity before the end of April 2008.



N Mandim
D Lewis and Y Carrim concurring.

30 April 2008
Date

Tribunal Researcher: R Badenhorst
For the merging parties: Bowman Gilfillan
For the Commission: V Ngalwana

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(Tribunal Member)

Heard on : 2 April 2008

Order Issued : 2 April 2008

ORDER

The merger between the parties in this matter is approved in terms of section 16(2) (b) of the Act subject to the following conditions:

UNDERTAKING PROVIDED TO THE COMPETITION COMMISSION ("COMMISSION") IN RESPECT OF THE SUPPLY OF UREA

A. For a period of two years from the date of the Tribunal's Order in respect of this undertaking, Yara's South African subsidiaries ("Yara SA") will comply with the following undertaking:

1. Yara SA shall make available the 'Qualifying Amount' of urea for sale to 'Qualifying Customers' on the terms and conditions set out below.

2. *Qualifying Amount* for the purposes of this undertaking means:

2.1. For the year ending 31 December 2008, 20% (twenty percent) of the aggregate volume of urea imported to South Africa by Yara SA and Kemira Phosphates (Proprietary) Limited ("GrowHow SA") during the year ended 31 December 2007;

- 2.2. For the year ending 31 December 2009, 22% (twenty two percent) of the aggregate volume of urea imported by Yara SA and GrowHow SA during the year ended 31 December 2007; and
 - 2.3. For the relevant portion of the year ending 31 December 2010, one quarter of the Qualifying Amount applicable to the year ending 31 December 2009.
3. *Qualifying Customers* for the purposes of this undertaking means:
- 3.1. any purchaser of urea from GrowHow SA during the calendar year ended 31 December 2007 being those purchasers set out in Schedule 1; and/or
 - 3.2. purchasers of urea in South Africa who have registered with and confirmed to Yara SA in accordance with clauses 4 and 5, that their annual requirements of urea are greater than 35 tonnes per annum but do not exceed 5 000 tonnes per annum; but excluding any purchaser that has purchased urea solely from Yara SA during the calendar year ended 31 December 2007

Registration

- 4.1 By 30 April 2008, any purchaser who wishes to register as a Qualifying Customer shall furnish Yara SA with a notification that the purchaser qualifies as a Qualifying Customer for the calendar year ended 31 December 2008.
- 4.2 By 31 January 2009, any purchaser who wishes to register as a Qualifying Customer shall furnish Yara SA with a notification that the purchaser qualifies as a Qualifying Customer for the calendar year ended 31 December 2009.
- 4.3 By 30 November 2009, any purchaser who wishes to register as a Qualifying Customer shall furnish Yara SA with a notification that the purchaser qualifies as a Qualifying Customer for the relevant portion of the calendar year ended 31 December 2010.
- 4.4 Such notification can be sent to Yara SA by telefax number 011 513 0031 or by email to the following email address: josef.keltjens@yara.com, marked for the attention of Josef Keltjens, to be received by no later than 17h00 on the last date of the period concerned.

Ordering Process

- 5.1 The Qualifying Customers shall:

- 5.1.1 by 30 April 2008 furnish their confirmed written orders for deliveries of urea in the period ending 30 June 2008;
 - 5.1.2 by 30 June 2008 furnish their confirmed written orders for deliveries of urea in the period ending 30 September 2008;
 - 5.1.3 by 30 September 2008 furnish their confirmed written orders for deliveries of urea in the period ending 31 December 2008;
 - 5.1.4 by 31 December 2008 furnish their confirmed written orders for deliveries of urea in the period ending 31 March 2009;
 - 5.1.5 by 31 March 2009, furnish their confirmed written orders for deliveries of urea in the period ending 30 June 2009;
 - 5.1.6 by 30 June 2009 furnish their confirmed written orders for deliveries of urea in the period ending 30 September 2009;
 - 5.1.7 by 30 September 2009 furnish their confirmed written orders for deliveries of urea in the period ending 31 December 2009; and
 - 5.1.8 by 31 December 2009 furnish their confirmed written orders for deliveries of urea in the period for the relevant portion of the calendar year ended 31 December 2010.
 - 5.1.9 specify their urea requirements (prilled or granular urea) in their written orders, provided that a minimum order size shall be 35 tonnes and all orders shall be in multiples of 35 tonnes.
- 6 For each 3 (three) month period referred to paragraph 5, Yara SA shall not be obliged to accept orders for more than 25 (twenty five) percent of the Qualifying Amount for the calendar year in which that period falls ("Relevant Percentage"). To the extent that orders placed exceed the Relevant Percentage, Yara SA shall be entitled to satisfy the orders placed on a "first come first serve" basis. To the extent that orders placed during any of the relevant order periods specified in paragraph 5 fall short of the Relevant Percentage, Yara SA's obligation for that period shall be limited to the Relevant Percentage and any surplus may be supplied by Yara SA to any other purchaser.

Terms and Conditions of Supply

- 7.1 Yara SA will supply specific orders from Qualifying Customers subject to Yara SA's standard terms and conditions of sale, provided that Yara SA shall not, in its processing and assessment of orders and supply of urea, discriminate in relation to price, quantity, quality, turnaround times and other related respects between Qualifying Customers on the one hand, and equivalent transactions with other customers of Yara SA on the other. Provided further that where a distributor is used to supply urea for the purposes of this undertaking, Yara SA shall use all reasonable endeavours to ensure that no discrimination in these respects occurs between Qualifying Customers on the one hand, and equivalent transactions with other customers of Yara SA on the other.
- 7.2.1 Yara SA undertakes to continue to supply urea to those of its customers, who prior to this transaction, were direct competitors to GrowHow downstream, on terms no less favourable than they enjoyed during the year ended 31 December 2007, and subject to Yara SA's usual terms and conditions; Provided that "customers" in this paragraph does not include large direct and/or indirect importers of urea i.e. customers that have imported a full shipload of urea (being 12 500 tonnes) during the year ended 31 December 2007.
- 7.2.2 For the avoidance of doubt, given that the price of urea fluctuates in accordance with market conditions and the exchange rate, this clause is not intended to fix a price and will not oblige Yara SA to supply urea to these customers at the same price at which it was supplied to them in the year ended 31 December 2007.
- 8 Yara SA shall be entitled to fulfil its obligations in terms of this undertaking either directly to Qualifying Customers or through Yara SA's appointed agents or distributors.
- 9 In the event that the Commission has reasonable grounds to believe that the conditions herein are not being complied with, the Commission may request Yara SA to furnish to it the following reports and documents in writing, on 14 (fourteen) days' prior written notice:
- 9.1 a report signed by a responsible person indicating the Qualifying Customers, the orders placed by such Qualifying Customers in terms of this undertaking, the volumes of urea supplied and the prices at which urea has been supplied in terms of this undertaking;
- 9.2 documents indicating the volumes of urea and the prices at which such urea has been supplied in terms of this undertaking; and

9.3 an independent auditor's certificate confirming the correctness of, or qualifying, as the case may be, any information provided (for such period as may be specified by the Commission in its request).

10 As soon as reasonably practicable following the Tribunal's Order in respect of this undertaking, Yara SA shall cause the terms of this undertaking to be:

10.1 published in Farmers' Weekly, Landbou and Weekblad;

10.2 to be sent to those purchasers set out in Schedule 1.

11 The Tribunal may, on good cause shown, and on notice given to the other party, lift, revise or amend these conditions upon being approached either by the Commission or by the merging parties.



D Lewis

2 April 2008

Date

Concurring: **Y. Carrim and N Manoim**