

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

² European Commission Case No COMP/M.4730

SA is a wholesale supplier and a retail seller of fertilizer as it sells to wholesale buyers and blenders and to farmers directly.

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

³ Saudi Arabian Basic Industries Corporation

⁴ Qatar Fertilizer Company

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 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

⁵ Represents a truckload of Urea

concerns raised by the Commission in their Reasons as well as the concerns raised by the applicants.

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 Manoim

30 April 2008

Date

D Lewis and Y Carrim concurring.

Tribunal Researcher:

R Badenhorst

For the merging parties:

Bowman Gilfillan

For the Commission:

V Ngalwana