

## 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**

Respondent

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Panel : D Lewis (Tribunal Member); Y Carrim (Tribunal Member) and N.Manoim  
(Tribunal Member)

Heard on : 2 April 2008

Order Issued : 2 April 2008

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### ORDER

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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](mailto: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.

  
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**D Lewis**

**2 April 2008**

**Date**

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

\* \* \* Memory TX Result Report ( 2. Apr. 2008 15:26 ) \* \* \*

1) Competition Tribunal  
2)

Date/Time: 2. Apr. 2008 15:17

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02 April 2008

Tamara Dini  
Bowman Gilfillan  
Fax: 021 480 3294Legal Services  
Competition Commission  
Fax: 44283Yara International ASA and Kemira Growhow OYJ  
Case no.: 133/AM/Dac07

Attached please find the order in the above matter.

Kind regards

Tebogo Mputle

CC: M Ratselisususu 44287