COMPETITION COMMISSION REPORT ON THE ANTICIPATED JOINT VENTURE BETWEEN KEMIRA GROWHOW OYJ AND TERRA INDUSTRIES INC

OFT RECOMMENDATION ON REQUEST FOR RELEASE FROM THE UNDERTAKINGS GIVEN TO THE COMPETITION COMMISSION BY KEMIRA GROWHOW OYJ, KEMIRA GROWHOW HOLDINGS LIMITED, KEMIRA GROWHOW UK LIMITED, TERRA INDUSTRIES INC. AND TERRA NITROGEN (UK) LIMITED PURSUANT TO SECTION 82 OF THE ENTERPRISE ACT 2002

18 November 2009

INTRODUCTION AND EXECUTIVE SUMMARY

1. In this submission I advise under section 92(2) Enterprise Act 2002 (the Act), on a request of 10 July 2009 from GrowHow UK Limited (GrowHow UK) for release from certain obligations in the undertakings accepted by the Competition Commission (the CC) on 11 September 2007 (the Undertakings).

2. For the reasons explained in detail below, I recommend that, in terms of key points:

   - there has been a change of circumstances for the purposes of section 92(2)(b) of the Act in the form of the closure of the Severnside plant, the sale to Azelis UK Limited (Azelis) of the carbon dioxide (CO2) liquefaction plant at Billingham and the acquisition of Kemira GrowHow Oyj (Kemira) by Yara International ASA (Yara)

   - as a result of the change of circumstances, the parties should be released from the obligations in paragraph 7 of the Undertakings

   - notwithstanding the change of circumstances, the obligations in paragraphs 8 to 10 of the Undertakings should remain in force, and

- paragraph 11 of the Undertakings is no longer in force; for the avoidance of doubt and good administrative practice, the CC should confirm this by releasing the parties from it.

TIMING

3. GrowHow UK initially submitted a request to the OFT on 18 September 2008 for the OFT to review and recommend its release from paragraphs 7 to 11 inclusive of the Undertakings. The OFT issued an invitation to comment on this basis on 10 October 2008.

4. Subsequently, the OFT announced on 11 February 2009 that it had been informed by GrowHow UK that it wished to modify its request to seek release solely from paragraphs 7 and 11 of the Undertakings and the OFT issued a second invitation to comment on this basis on 11 February 2009.

5. Subsequently, by letter dated 5 June 2009, GrowHow UK requested that the OFT return to the original full review of the Undertakings (that is, paragraphs 7 to 11 inclusive). The OFT therefore issued a third invitation to comment on 11 June 2009.

6. The OFT has consulted with a number of interested third parties during the course of its review.

7. There are no statutory or administrative timetables in force for reviews of undertakings.

JURISDICTION

8. Section 92(2) of the Act provides that the OFT shall, in particular, from time to time consider —

   (a) whether an enforcement undertaking or enforcement order has been or is being complied with

   (b) whether, by reason of any change of circumstances, an enforcement undertaking is no longer appropriate and — (i) one or more of the parties to it can be released from it; or (ii) it needs to be varied or to be superseded by a new enforcement undertaking, and

   (c) whether, by reason of any change of circumstances, an enforcement order is no longer appropriate and needs to be varied or revoked.

9. Section 92(3)(a) of the Act provides that the OFT shall give the CC such advice as it considers appropriate in relation to any possible variation or release by the CC of an enforcement undertaking accepted by it.

10. It is, however, for the CC to determine whether to act upon that advice and, if appropriate, to release the parties from the obligations under the Undertakings

BACKGROUND

Summary of the Kemira/Terra joint venture and the CC report

11. On 26 January 2007, the OFT referred the anticipated joint venture between Kemira and Terra Industries Inc (Terra) (jointly, the Parties) which would create GrowHow UK to the CC for investigation and report under section 33 of the Act.

12. The creation of GrowHow UK would merge the greater part of the UK businesses of Terra and Kemira, both of whom are fertilizer production businesses, and also producers of chemical products.

13. The Parties overlapped in the production and sale of ammonium nitrate, ammonium nitrate sulphate, complex fertilizers, nitric acid, ammonia and raw CO2. A by-product of ammonia manufacture, raw CO2 can be liquefied and sold on for a variety of end uses, such as the carbonation of soft drinks.

14. Terra had facilities from which raw CO2 was produced at Billingham and Severnside; Kemira had one at Ince.

15. The CC concluded that the anticipated joint venture between Kemira and Terra may be expected to result in a substantial lessening of competition (SLC) in each of the markets for CO2, nitric acid (of 58 to 60 per cent concentration), aqueous ammonia and anhydrous ammonia.

16. In order to remedy the SLC in relation to nitric acid of 58 to 60 per cent concentration, aqueous ammonia and anhydrous ammonia, Kemira was required to divest its business relating to these chemicals.

17. The CC found that the anticipated joint venture may be expected to result in an SLC in relation to the supply of CO2 to distributors within the UK, it concluded that there were two effective remedies (other than prohibition of the merger):

    - modification of the existing contract between Kemira and Air Liquide UK Limited (Air Liquide) at Ince, or

    - the sale of one of Terra's liquefaction facilities.

18. The CC decided that obtaining suitably detailed commitments in relation to the contract between Kemira and Air Liquide at Ince would impose the least cost and would be less restrictive than a divestment of one of Terra's liquefaction facilities ([-]). It therefore concluded that a remedy centred on the contract between Air Liquide and Kemira at Ince would be more reasonable and practicable.

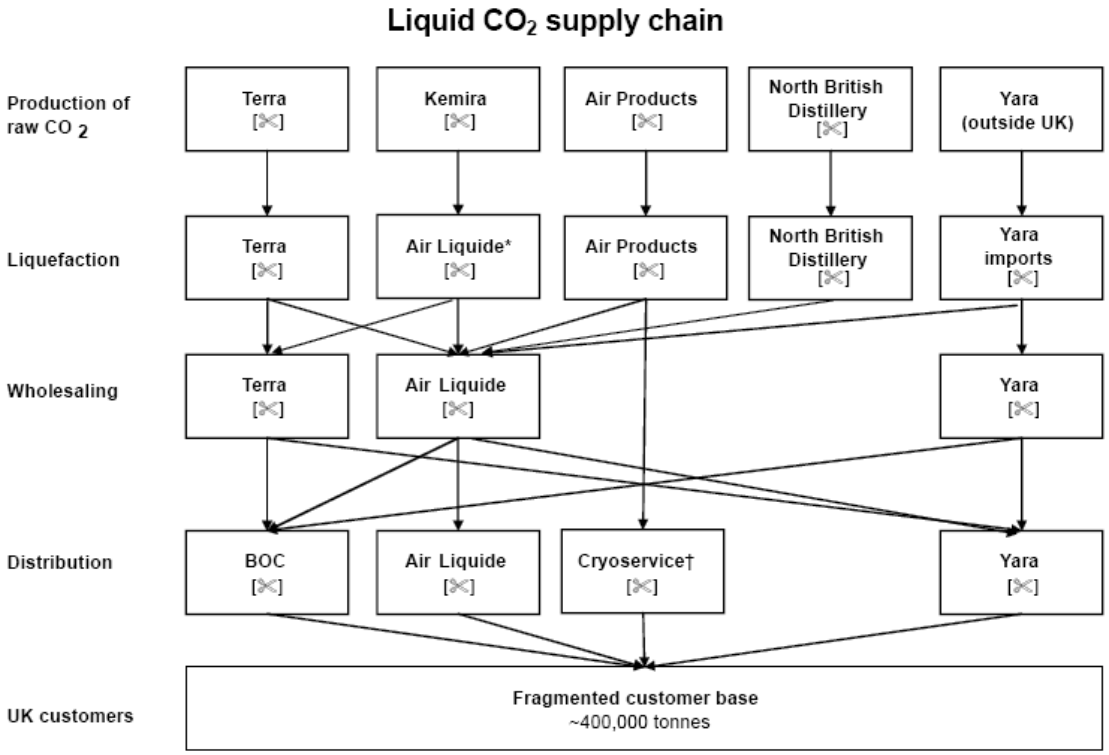
19. The CC published its report into the anticipated joint venture between Kemira and Terra on 11 July 2007 (the Report).

20. On 11 September 2007, the CC accepted undertakings (the Undertakings) given by Kemira, Kemira GrowHow Holdings Limited, Kemira GrowHow UK Limited, Terra and Terra Nitrogen (UK) Limited.

21. The joint venture was completed on 14 September 2007.

The CC's findings in relation to CO2

22. The CC provided an illustration of the liquid CO2 supply chain at the time of the Kemira/Terra joint venture in Figure 8 of its published Report, reproduced below.



*Plant at Ince owned by Air Liquide and operated by Kemira.
†[✂]
Source: Companies' historic purchase and sales records; CC analysis.

23. The CC found that the Parties overlapped in the production of raw CO2 gas suitable for purification and liquefaction. Terra liquefied its own gas for onward sale to distributors, whereas Kemira supplied raw CO2 gas exclusively to Air Liquide which then liquefied it and marketed it onward.[1] There are three principal gas distributors in the UK (Yara, which also imports its own liquid CO2, Air Liquide and BOC), which collect liquid CO2 from liquefaction plants and distribute this to final consumers.

24. The CC noted that CO2 is a by-product of the production of ammonia. To be commercially usable, this raw CO2 must be purified and liquefied. It may also be solidified; solid CO2 is known as dry ice. Raw CO2 that is not processed is vented into the atmosphere. In the UK, the CC found that

[1] Although Kemira operates and maintains the Ince liquefaction facility on behalf of Air Liquide.

liquid CO2 was recovered from ammonia production at the three plants owned by the parties (that is, Severnside, Billingham and Ince). It was also produced by two other companies: Air Products, a producer of specialist gases, and North British Distillery, a whisky producer.

25. The CC concluded that the relevant market comprised the supply of CO2 to distributors within the UK. The CC specified that this included the supply by Kemira of (raw) CO2 to Air Liquide at Ince and supplies (of liquid CO2) to distributors through the import terminals operated by Yara.

26. The CC found that GrowHow UK would have a high combined share of the supply of raw CO2 which could be liquefied. The loss of Ince as an independent alternative source of supply to Terra's facilities at Severnside and Billingham could alter the negotiating position of the major distributors with Terra.

27. The CC rejected the parties' argument that GrowHow UK would be constrained by the existing contract between Kemira and Air Liquide at Ince and that GrowHow UK would have no incentive to reduce the output of CO2 at Ince as sales of raw CO2 formed an important contribution to the fixed costs of operating the Ince plant. Although the CC acknowledged that sales of raw CO2 from Ince are an important contribution to the fixed costs of operating the Ince facility, and that Kemira as a separate entity would have no incentive to restrict output, it considered that the incentives on GrowHow UK would be different from those which had faced Kemira as a separate entity. Pre-merger, an increase in CO2 output at Ince would have resulted in increased profits for Kemira. However, GrowHow UK would be expected to seek to maximize the profitability of its CO2 business as a whole and so would have regard to any potential sales losses at Billingham and Severnside that may result from an increase in output at Ince. Further, the existing contract allowed Terra to seek increases in its CO2 prices at Billingham and Severnside or to terminate contracts under certain circumstances. Kemira, on the other hand, could seek to increase its prices at Ince for raw CO2.

28. The CC's reasoning in relation to unilateral effects is important in this context, and is set out in full below.

> '10.65 The parties are by far the largest producers of raw CO2 suitable and available for liquefaction within the UK, and the proposed JV would gain a large share of supply and a significant increment. We expect that the JV, as contracts come up for renewal, would have the

opportunity to raise its ex-works prices for liquid CO2 at Billingham and Severnside. At Ince the JV could use the threat of termination of the contract to raise the price of raw CO2 or to curtail output in order to maximize sales from its other plants. The parties' existing competitors within the UK are capacity constrained in the absence of significant investment and their ability to react to increased prices by raising output is limited. As a result, the loss of rivalry between the parties may also have the potential to result in an increase in ex-works prices at other sites.

10.66 Whilst it is feasible that new liquefaction capacity may be added at future bioethanol plants, or [□□], we consider that the costs of entry are such that there would need to be a significant increase in ex-works prices of CO2 in order to make the addition of new liquefaction capacity profitable. We therefore do not consider that the JV would be constrained by the potential for entry or expansion. In addition, as distributors would have few alternatives to the JV, we do not consider that the JV would be constrained by buyer power.

...

10.74 We conclude that the formation of the JV may be expected to result in an SLC in the market for the supply of CO2 to distributors in the UK as a result of unilateral effects. In the absence of remedies, this is expected to result in higher ex-works prices for CO2 in the UK.'

29. The CC concluded that there was insufficient evidence that the proposed joint venture would result in coordinated effects in the market for the supply of CO2 in the UK.

The remedy required by the CC in relation to CO2

30. The CC considered four different remedies in relation to CO2:

- a remedy focused on the contract between Kemira and Air Liquide
- a divestment remedy
- price control remedies, and
- prohibition.

31. A price control remedy was ruled out as ineffective; prohibition was ruled out as disproportionate. That left a remedy focused on the contract

between Kemira and Air Liquide and a divestment remedy. Given the importance of these published parts of the CC's Report, they are quoted below.

'Remedy focused on the contract between Kemira and Air Liquide

15.68 We considered whether a remedy that would focus on the contract between Kemira and Air Liquide could be effective. By ensuring that CO2 from the Ince site reaches the market in a broadly similar way and on broadly similar terms as before the JV, such a remedy could ensure that the incentives facing the JV would be broadly the same as Terra's incentives before the merger. In particular, the JV would face no greater incentives to restrict supply or raise prices than Terra did before the merger. It would be necessary to ensure that the JV could not terminate the contract or exercise any discretion under the contract in such a way as to take advantage of the new situation. As indicated in our Notice of possible remedies, this would require the following changes to the contractual arrangements between Kemira (and subsequently the JV) and Air Liquide:

(a) increasing the duration of the existing contract on comparable terms and conditions, and

(b) ensuring that where there was scope in the contract for Air Liquide to vary its off-take by agreement with Kemira, the JV would be unable to withhold agreement.

...

15.77 We considered first Air Liquide's argument (paragraph 15.98(c)) that it was necessary to protect Air Liquide from the risk that Ince would close. In our view, this is not appropriate for the following reasons:

(a) The evidence we had received did not suggest that the JV would result in an increase in general in the risk of closure of Ince [].

(b) A decision by the JV to close Ince would be most unlikely to be driven by any aspect of the CO2 market or the loss of competition in CO2, which is a waste product of ammonia production. It would be much more likely to be driven by the need to rationalize the UK production base in the event of increased competition from imports of fertilizers.

(c) The possibility of the closure of Ince was already present when the contract between Air Liquide and Kemira was signed in 1997 and has been present ever since.

15.78 We also do not consider it necessary for the contract to provide an increased level of compensation to Air Liquide for supply disruption in order to remedy any adverse effects resulting from the SLC. In general, fertilizer producers have strong incentives to operate ammonia plants continuously and loss of competition in the CO2 market is unlikely to have an effect on these incentives. We considered whether the creation of the JV itself would make it more likely that supply disruption at Ince would occur by, for example, giving opportunities to stop production at Ince whilst maintaining it at other sites. Based on the evidence that we have received [], we do not consider that supply disruption would be any more likely as a result of the JV []. In addition, we note that such an argument is related to an effect of the formation of the JV but not to the SLC related to CO2.

15.79 We accept, however, that Air Liquide would have sought to renegotiate the compensation term referred to in paragraph 15.69(c) absent the JV, especially as the level of compensation had not been indexed for inflation in the original contract.

15.80 In addition, we consider that:

(a) Absent the JV, Air Liquide and Kemira would, in all likelihood, have initiated a renegotiation of the price of raw CO2. We do not believe that Kemira would have had any incentive to accept a lower price ahead of the [] renewal date or that Air Liquide's negotiating position would have allowed it to secure such an agreement.

(b) Chinese walls would be necessary, as the JV and Air Liquide both sell CO2 to distributors and are therefore direct competitors; and to maintain Air Liquide's negotiating position in relation to its purchases of CO2 from Terra.

(c) Kemira's proposal in relation to fixed costs addresses the issue identified by Air Liquide and should be part of this remedy.

15.81 Regarding the points made by the two companies in paragraphs 15.74 and 15.75, we consider that in the absence of the JV Air Liquide would have continued in a contractual arrangement with

Kemira at Ince. We recognize that if the JV increased the price of the CO2 it supplies to distributors, the risk in the downstream market identified by these two third parties will exist, but to the extent that the remedy preserves the pre-JV situation, we consider that such a risk will not worsen as a result of the JV. We consider that such a risk is to a large extent inherent in the way that the downstream market is structured and the result of the strategies and investment decisions made by the different businesses over the years. We consider, however, that a requirement for Chinese walls would limit such a risk.

Divestiture remedy

15.82 We also considered whether a divestiture remedy relating to CO2 would be possible and effective. There is no stand-alone facility dedicated to the production of raw CO2. Raw CO2 is a by-product of the production of ammonia, a building block of fertilizer production. A divestment of either party's assets involved in the production of raw CO2 would also require the divestment of assets used in the production of ammonia which would extend far beyond the area of competitive overlap and would not be, in our view, proportionate to the SLC identified.

15.83 One company, [], considered that one practical remedy could be the divestiture of one of Terra's existing CO2 liquefaction plants, coupled with the adjoining ammonia production facility or a guaranteed supply of raw CO2 from an ammonia plant. This company was unsure about the way a supply agreement for raw CO2 would need to be structured in order to be effective, but considered that, if this difficulty could be overcome, such a remedy would be effective. However, at this stage this company did not wish to become involved in ammonia production and neither the acquisition of an ammonia plant, nor a CO2 liquefaction plant, would be attractive to it.

15.84 The divestiture of the CO2 liquefaction plant at Ince would not be possible, since this plant is owned by Air Liquide.

15.85 We therefore considered in more detail whether a divestment remedy consisting of any of Terra's liquefaction plants supported by a contract for the supply of raw CO2 from the adjacent ammonia production facility could be effective. []

15.86 Since the purchaser would rely on the supply of raw CO2 from Terra, for the remedy to be effective, Terra would be required to give supply and price commitments in relation to the supply of raw CO2. In addition, for health and safety reasons, Terra would have to operate the plant on the purchaser's behalf. Therefore commitments relating to various aspects of the operation of the liquefaction plant would also need to be given. We noted that, since such arrangements already existed at Ince between Kemira and Air Liquide, designing an effective Divestiture Package and supply agreement should be possible.

15.87 The greatest risk of this remedy option relates to the availability of suitable potential purchasers. Such a business may only be attractive to distributors of industrial gases, as access to a distribution infrastructure would be necessary to make the acquisition of the liquefaction plant a viable business opportunity. Air Liquide, Air Products and Yara each supply CO2 and, given the size of Terra's CO2 liquefaction facilities, acquisition by any of these purchasers may give rise to a relevant merger situation. Without wishing to prejudge the outcome of any OFT inquiry, there is a risk that an acquisition by any of these companies would give rise to competition concerns.

15.88 BOC, on the other hand, does not currently supply CO2 to distributors and its acquisition of the CO2 plant would not appear to give rise to a relevant merger situation.

15.89 One company ([]) argued that since the only likely purchaser would be a distributor of liquid CO2, its incentives to supply other distributors would be different from those of Terra. While we acknowledged this view, the fact that the OFT would not have jurisdiction to review an acquisition of Terra's liquefaction facilities by BOC suggests that such a transaction would not give rise to potential competition concerns.

15.90 We therefore conclude that, whilst the pool of suitable potential purchasers would be likely to be very small, a divestment of Terra's CO2 liquefaction facilities combined with suitable behavioural undertakings would nevertheless constitute an effective remedy to the SLC found in relation to the supply of CO2 to distributors within the UK.

15.91 However, this remedy would be more restrictive and would impose a higher cost than suitably detailed commitments in relation to the contract between Kemira and Air Liquide at Ince because:

(a) In the absence of the JV, the continuation of the contract between Air Liquide and Kemira would have been likely, as CO2 revenues contribute towards Kemira's fixed costs. A remedy consisting of the extension and tightening of this contract appears likely to have the least impact in the distribution market, as it continues an arrangement which has been negotiated in a competitive market.

(b) There would be difficulties in quantifying the costs of selling Terra's liquefaction facilities and setting up the supply contract between the potential purchaser and Terra. Obtaining undertakings from the JV in relation to the contract at Ince would be relatively simple and inexpensive.

(c) [□]

(d) [□]

(e) The very limited number of potential purchasers would be likely to result in a particularly low offer for Terra's liquefaction facilities.'

32. Ultimately, the CC concluded as follows in relation to the CO2 remedy.

'15.108 We will seek undertakings from the parties in relation to the following aspects of the contract between Kemira and Air Liquide:

(a) not to terminate the contract, except for due cause and subject to OFT approval

(b) to give Air Liquide access to CO2 up to the annual capacity of the plant

(c) to allow Air Liquide to demand up to the maximum amount of liquid CO2 that can be produced by the liquefaction plant on a daily basis, within the plant's annual capacity limit

(d) to renew the lease under equivalent terms and conditions to those currently in force, and

(e) to put in place measures preventing the communication of commercial information relating to CO2 produced at Ince, including, in particular, information relating to offtake, costs and pricing, to personnel involved in commercial negotiations in relation to CO2 produced at Billingham and Severnside, and vice versa. Measures should also be put in place to ensure compliance with these obligations and periodic compliance statements provided to the OFT.

15.109 We will also require that the undertakings set out in the preceding paragraph be in place before the JV can proceed.

15.110 In addition, we conclude that Kemira should be required to offer to Air Liquide new terms in respect of the price of raw CO2, and increased compensation for supply disruption reflecting inflationary cost increases, both of which were likely to have been renegotiated absent the JV, and should also offer Air Liquide a periodic audit and indexation of fixed costs at Ince.

15.111 We conclude that the JV should be allowed to proceed only when Kemira has made Air Liquide an offer of proposed changes to the contract which the CC considers reasonable and provided that Kemira gives an undertaking to the CC to keep that offer open for a period of three months. Air Liquide will be free to accept the offer in whole or in part, but any element of the offer not accepted after three months will lapse.

15.112 In assessing whether Kemira's offer to Air Liquide is reasonable, we will have regard to prevailing market conditions (including the wholesale price of CO2 at the time of the negotiation) and we will take account of Air Liquide's views on the offer made.'

33. It was on the above basis that the Undertakings – and in particular paragraphs 7 to 11 of the Undertakings that relate to the SLC in CO2 – were required.

Paragraphs 7 to 11 of the Undertakings

34. The CC's requirement for remedies in relation to CO2 were reflected in paragraphs 7 to 11 of the Undertakings.

- Paragraph 7 concerns confidential information. Paragraph 7.1 required that confidential information regarding the production,

marketing and/or sale of CO2 produced at Ince (including the liquefaction plant) is not accessible or made available to personnel involved in the production, marketing and/or sale of liquid CO2 produced at Terra's CO2 liquefaction plants at Billingham and Severnside, and vice versa. Paragraph 7.3 required that guidelines be drawn up by the Parties and approved by the CC setting out the specific measures that will be put in place in order to give effect to the undertaking in paragraph 7.1. Confidentiality Policy Guidelines were subsequently approved; they provided in paragraph 2 that they would continue in force until the joint venture had divested the CO2 liquefaction plant at Billingham and has also permanently ceased production of raw CO2 at Severnside.

- Paragraph 8 concerns termination of the operating, maintenance and supply agreement between Kemira and Air Liquide at Ince. Paragraphs 8.1 and 8.5 required that the parties could not terminate the agreement except for due course and with prior OFT approval. Paragraph 8.2 required that the Parties use all reasonable endeavours to enter into and complete any new lease agreement of the liquefaction plant site at Ince with Air Liquide.

- Paragraph 9 concerns annual volume forecasts. Paragraph 9.1 required the Parties to accept from Air Liquide orders pursuant to the Kemira/Air Liquide contract, provided such orders did not exceed the maximum capacity of the CO2 liquefaction plant at Ince.

- Paragraph 10 concerns the delivery schedule. Specifically, the Parties were obliged to accept the maximum daily amount of CO2 produced given the capacity of the liquefaction plant at Ince.

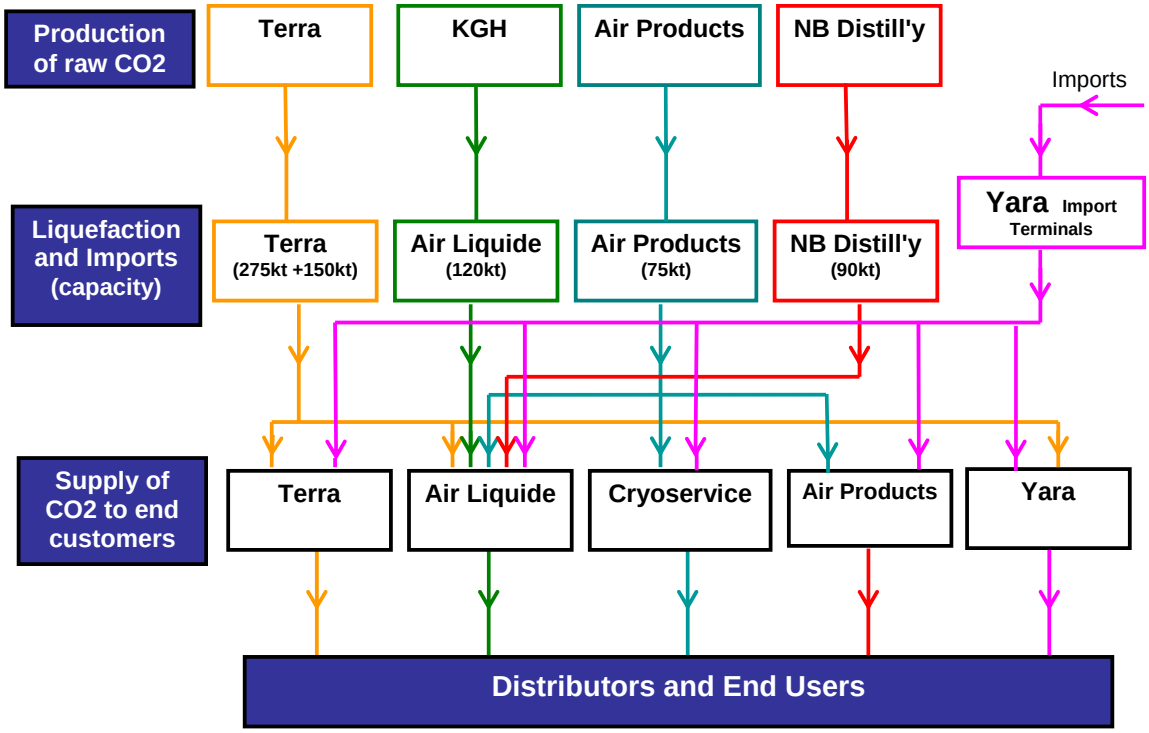
- Paragraph 11 concerns an offer to amend the operating, maintenance and supply agreement with Air Liquide. Paragraph 11.1 requires that Kemira undertakes to agree with Air Liquide to amend their operating, maintenance and supply agreement in accordance with previously proposed terms. Paragraph 11.1 states that this undertaking would continue in force for a period of three calendar months from 11 September 2007. The revised operating, management, maintenance and supply agreement was agreed on 11 December 2007.

The European Commission's decision in Yara / Kemira

35. Independently from the Kemira / Terra joint venture, on 18 July 2007, Yara announced a public bid for Kemira.

36. The Yara bid for Kemira was subject to the approval of the European Commission. It was notified on 2 August 2007 and was cleared subject to phase I commitments on 21 September 2007 (the European Commission decision), that is 10 days after the Undertakings were accepted by the CC and six days after the Kemira / Terra joint venture was completed.[2]

37. The European Commission's description at paragraph 160 of the liquid CO2 supply chain in the UK is represented in this context as follows.



38. The European Commission found that the proposed Yara/Kemira transaction would lead to a significant impediment of effective competition on the markets for supply of liquid CO2 to distributors and on the markets for the supply of liquid CO2 to end-users in the UK. In reaching this conclusion the

[2] Case No COMP/M.4730 Yara/Kemira GrowHow.

European Commission took into account the Kemira/Terra JV that had just completed.

39. The European Commission was concerned in particular that:

> '... post-transaction the merged entity will be able to control the supplies of liquid CO2 to the other distributors and their costs and, would therefore, be able to foreclose their access to liquid CO2. At the same time, the parties would have the incentives to foreclose, given that this would allow them to limit their competitors' position in, or to exclude them from, the downstream retail market for the supply of liquid CO2, thus increasing the combined entity's sales and allowing it to increase its prices in this segment and thereby more than compensate any losses derived from not selling to other distributors' (paragraph 175 of the European Commission decision).

40. To resolve its concerns, Yara offered to procure the divestment of Terra's liquefaction plant at Billingham (unusual since Terra was not itself a party to the Yara/Kemira transaction under consideration but obviously was a joint venture partner with Kemira in the UK). Yara also offered to procure that the joint venture, GrowHow UK, enter into an agreement for the supply of raw CO2 with the buyer of the liquefaction facility and, upon request of the purchaser, that an agreement be reached for the operation and management of the liquefaction plant by GrowHow UK on the purchaser's behalf. Yara committed that, in the event of a permanent closure of the fertilizer plant, it would ensure the supply of liquid CO2 from alternative sources or it would procure that GrowHow UK construct an additional liquefaction unit at the plant in Severnside (see paragraph 179 of the European Commission decision).

41. The European Commission regarded this as a satisfactory remedy on the basis that the divestment of the Billingham liquefaction plant would make available a significant amount of capacity to third parties, who, given such significant extra capacity, would be also able to increase the plant's current sales of liquid CO2 and, therefore, exercise an effective competitive constraint on the parties. The European Commission noted that: 'at the same time, the divestment would remove the parties' overlap (in terms of sales) on the segment of sale of liquid CO2 to distributors' (paragraph 180 of the European Commission decision).

SUMMARY OF GROWHOW UK'S CASE FOR REVIEW OF THE UNDERTAKINGS

42. On 10 July 2009, GrowHow UK submitted a finalised request for the release from paragraphs 7 to 11 of the Undertaking, that is, effectively asking for a complete release of the CC's remedy in so far as it related to CO2.

43. GrowHow UK argued that there had been a change of circumstances such that the Undertakings are, insofar as they concern CO2, no longer necessary. The changes of circumstances are more particularly that:

    - part of the CO2 activity of Terra contributed to GrowHow UK now no longer operates (due to the permanent closure on 31 January 2008 of Terra's former Severnside facility), and

    - the remainder of Terra's CO2 activity contributed to GrowHow UK (operated at Terra's Billingham facility) was sold (albeit that it is still operated by Terra) to an independent third party (Azelis) on 1 June 2008 pursuant to a phase I remedy accepted under the EC Merger Regulation (ECMR) by the European Commission (see paragraphs 40 and 41 above).

44. GrowHow UK argued that the substantive competition concern in relation to CO2 identified by the CC was an SLC in the market for the supply of liquid CO2 to distributors in the UK. This resulted from the overlap between the CO2 business contributed by Terra and the CO2 business contributed by Kemira. GrowHow UK further argued that the changes of circumstance identified above entirely removed GrowHow UK from the supply of liquid CO2 in the UK and it followed that the substantive competition concern identified by the CC had been removed and that the parties could be released from the Undertakings insofar as they relate to CO2.

45. GrowHow UK argued that the cost of compliance with the Undertakings – and in particular the administrative costs of complying with paragraph 7 of the Undertakings and the Confidentiality Policy Guidelines – was placing an unnecessary burden on the business and that it was this cost that motivated its application for release.

46. GrowHow UK argued that the question that the OFT (and CC) must consider is whether the Undertakings were still needed to deal with the adverse effects which they were designed to remedy (that is, those arising out of the joint venture between Kemira and Terra, as analysed by the CC).

It stated that the OFT could not now consider issues arising out of the acquisition of Kemira by Yara since such issues, by definition, lay outside the underlying CC report and the SLC that the Undertakings in relation to CO2 were designed to deal with.

RELATIONSHIP BETWEEN THE UNDERTAKINGS AND THE EUROPEAN COMMISSION'S REMEDY

47. The temporal proximity between the CC's investigation of the Terra/Kemira joint venture and the European Commission's investigation of the Yara/Kemira merger potentially complicate the relationship between the two investigations and the remedies designed to address the competition concerns addressed by each transaction.

48. The CC's Report discusses the Yara bid for Kemira and makes clear that, whilst it was fully aware of it, the CC did not take account of this in its findings or its remedies:

> '5.9 At a late stage in our inquiry we received notice of the proposal from Yara International ASA (Yara) to acquire sole control over Kemira. We decided that it was neither necessary nor appropriate for us to reopen our provisional findings to take this proposed transaction into account. Yara's tender offer for the shares of Kemira forms part of a concentration having an EC dimension and so falls to be reviewed under the EC Merger Regulation, and the transaction as a whole is subject to the exclusive jurisdiction of the European Commission. The two mergers are therefore not being considered under the same regime. We were not in a position to make an assessment of how the European Commission might approach the merger and we could not therefore pre-judge what its view of the acquisition might be. From the point of view of our inquiry, the proposed acquisition could have no material bearing on the CC's assessment as it would have no effect on any of the markets we have examined unless and until merger clearances have been obtained. We decided, however, that we would draw the attention of the European Commission to our final report and its findings'.

49. As emphasised by GrowHow UK in its submissions to the OFT, the CC's Report is therefore clear that any competition issues arising out of the Yara/Kemira transaction would be dealt with by the European Commission. Indeed, the CC would not have had jurisdiction to seek to remedy concerns

created by the Yara/Kemira bid given that this fell for review under the ECMR.

50. The European Commission clearly states in its decision that it was aware of the CC Report and of the remedies that had been accepted. One of the parties' arguments, as reported in the European Commission decision, was that:

> 'GrowHow's[3] only customer is Air Liquid [sic] which is supplied with a long term contract, which (if the joint venture proceeds) can be modified only under the supervision of the UK Competition Commission, pursuant to the commitments GrowHow has offered to the Competition Commission' (paragraph 164 of the European Commission decision).

Further the European Commission reported that one of the concerns identified by third parties was that:

> 'Yara and Terra/GrowHow are supplying several companies active in the distribution of liquid CO2. Therefore the existence of the raw CO2 supply agreement between Kemira GrowHow and Air Liquide at Ince, monitored by the UK Competition Commission, is not sufficient to exclude competition concerns on the level of supply of liquid CO2' (paragraph 169 of the European Commission decision).

51. The European Commission does not state categorically in its decision whether or not it relied on, or in some lesser sense presupposed, the existence (and ongoing effectiveness) of the remedies determined by the CC in its own findings and decision on remedies.

52. GrowHow UK made the following points in relation to the European Commission's decision.

- First, that neither the European Commission's assessment of remedies nor the remedies text as signed refers to the CC's Undertakings.
- Second, that the European Commission remedy did not refer to or deal with the Air Liquide/Kemira contract at Ince.
- Third, that the European Commission remedy did not include an ongoing / long-term confidentiality ring-fencing between the joint

[3] Kemira is referenced throughout the European Commission decision as 'GrowHow'.

venture's CO2 activities at Billingham and Ince and Yara (other than standard 'boiler plate' provisions in relation to the divested business at Billingham).

- Fourth, that it is clear from the market testing of the remedies that the European Commission saw no need for ring-fencing between the joint venture and Yara.
- Fifth, that the provisions addressing the flow of confidential information between the Billingham business and Yara were simply designed to protect the viability of the disposed business, and were not designed as behavioural ring-fencing (in contrast to the Undertakings, which limited exchanges of information between Ince and Billingham).

53. GrowHow UK therefore argued that the European Commission remedy in relation to the Yara/Kemira transaction, in so far as CO2 in the UK was concerned, was simply the divestment of the Billingham liquefaction plant. In GrowHow UK's view, the European Commission did not require any additional remedies relating to the ring-fencing or protection of data relating to CO2 activities at Ince.

54. More generally, GrowHow UK argued strongly that, in determining whether there was a change of circumstances such that paragraphs 7 to 11 of the Undertakings were no longer appropriate, the OFT should not seek to supplement or bolster the European Commission's remedy, in relation to the Yara/Kemira merger. GrowHow UK stated:

> 'the question which the OFT must consider is whether the Undertakings are still needed to deal with the adverse effects which they were designed to remedy (that is, those arising out of the joint venture between Kemira and Terra, as analysed by the CC). The OFT cannot now consider issues arising out of the acquisition of Kemira by Yara since such issues, by definition, lay outside the underlying CC report and the SL*C* that the Undertakings in relation to CO2 were designed to deal with.'

55. GrowHow UK pointed to the wording of the Memorandum of Understanding between the OFT and the CC on the variation and termination of merger, monopoly and market undertakings and orders under the Fair Trading Act 1973 and the Act (the MOU):

'In considering variation and termination of remedies, the OFT will consider first whether there has been a change of circumstances and second, if there has, what action should be taken. The precise nature of the change in circumstances will be entirely dependent upon the individual factual circumstances of a particular undertaking or order. However if it is to lead to a recommendation to vary or terminate, the change in circumstances must be such that the undertaking or order is no longer appropriate in dealing with **the adverse effects which it was designed to remedy**. This might be, for example, where market circumstances have evolved such that the adverse effects which the undertaking or order was designed to address no longer exist or where a party that is party to the undertaking or subject to the order has ceased to exist or ceased to own the relevant business (paragraph 6, emphasis added by GrowHow UK).

56. GrowHow UK emphasised the significance of the phrase 'which it was designed to remedy'. GrowHow UK stated that this phrase makes it clear that the review process in relation to the Undertakings must be set against the background of the adverse effects originally identified by the CC.

57. GrowHow UK stated that, normally, an applicant, and the OFT / CC, would need to consider an application for review of undertakings in the context of a full market review, taking account of all changes in market circumstances since the date of application of the relevant undertakings. However, in the current case, it argued that this is not possible, since the CC's analysis and conclusions are limited to a particular factual context (and the SLC arising out of it), namely the competitive overlap between GrowHow UK's erstwhile liquid CO2 interests at Billingham/Severnside and those of Air Liquide at Ince. GrowHow UK argued that this factual context cannot extend to a consideration of the antitrust consequences/issues deriving from the Yara/Kemira transaction (including in relation to CO2) since, as accepted by the CC at the time, the European Commission had exclusive jurisdiction over that transaction and has reached a decision (including a remedy) in relation to it. As a result, GrowHow UK believed that the review of the CC's CO2 Undertakings, and the 'changes in circumstance' that must be taken into account, must be confined to matters which are relevant to the particular set of market circumstances that fell (and continue to fall) within the OFT/CC's regulatory jurisdiction, namely CO2 competition issues deriving from the Terra/Kemira joint venture (but not extending to CO2 competition issues deriving from the Yara/Kemira acquisition).

58. Air Liquide accepted the proposition that the purpose of the Undertakings is to remedy the merger effects of the creation of GrowHow UK, not the effects of the Yara/Kemira transaction. It also accepted that any remedy offered to the European Commission for the purpose of addressing issues in the Yara/Kemira case does not in itself justify the continued operation of the CC Undertakings if the basis for them has been removed by a relevant change of circumstances.

59. However, in relation to the European Commission remedy, Air Liquide argued the OFT and CC should have regard to the changes of circumstance involving Yara, even though the OFT's recommendation and the CC's decision regarding the review of the Undertakings need not – in Air Liquide's view – depend on such considerations.

60. The OFT notes that the purpose of the CC's power to accept final undertakings from parties under section 82 of the Act and pursuant to section 41(2) of the Act is to remedy, mitigate or prevent the SLC concerned and any adverse effects which have resulted, or may be expected to result, from it. This is limited to the SLC resulting from the merger under investigation and over which the CC has jurisdiction, and does not extend to seeking to remedy any lessening of competition caused by a different merger.

61. It follows from this that the OFT believes that it would not be appropriate for the Undertakings to be retained exclusively on the basis of an argument that they form a backdrop to, or are a part of, the remedies devised by the European Commission in relation to the adverse effects resulting from the Yara/Kemira transaction.

62. However, neither does it follow for these purposes that the Yara / Kemira transaction, and the remedies resulting from it, are irrelevant in this context.

    - First, it is clear that GrowHow UK itself is relying on the result of the European Commission remedy (that is, the divestment of the Billingham plant) as one of the relevant changes of circumstances.

    - Second, the acquisition of Kemira by Yara is itself clearly a potential change of circumstances.

    - Third, when considering the currently prevailing market structure and any argument that the SLC identified by the CC in its Report

would no longer have effect – the OFT and the CC cannot ignore the fact that the Yara/Kemira merger has occurred.

63. The OFT believes that the Yara/Kemira transaction may therefore be relevant for the CC in making its determination, but only insofar as it relates to the question whether the SLC identified by the CC that arises as a result of the Kemira/Terra transaction still persists. To the extent that the Yara/Kemira transaction itself results in a new and different SLC, then it is clear that this is not relevant for the CC given that this is not something which can properly be addressed by the CC's Undertakings. To the extent that the Yara/Kemira transaction results in, or changes, an SLC that is of a similar nature to that created by the Kemira/Terra transaction, the OFT considers that a careful assessment is warranted as to how issues of causation impact on the CC's jurisdictional remit in determining the relevance of the Yara/Kemira transaction in its review.

EVIDENCE OF A CHANGE OF CIRCUMSTANCES

64. Section 92(2)(b) of the Act is clear that the basis on which a release may be sought must be because a change of circumstances means that the Undertakings (in whole or in part) are no longer appropriate.

65. GrowHow UK's argument is that the relevant change of circumstances that means that the Undertakings are no longer appropriate in so far as they relate to CO2 is that the joint venture business is no longer present in the liquid CO2 market. This is because Terra has closed down the Severnside plant[4] and has divested – in accordance with the European Commission remedies in Yara/Kemira – the liquefaction plant at Billingham.

66. The OFT believes that the exit of GrowHow UK from the supply of liquid CO2 is a change of circumstances that could potentially be such as to warrant variation or release of the Undertakings.

67. The OFT therefore considers below whether this change of circumstances is sufficient such that it is appropriate to release in whole or in part the Undertakings in so far as they relate to CO2 (that is, paragraphs 7 to 11 of the Undertakings).

68. Air Liquide, and several other third parties, also regarded the acquisition of Kemira by Yara as a change of circumstances that should be taken into

[4] GrowHow UK accepted, and the OFT agrees, that it may be somewhat moot to describe the Severnside closure independently as a 'change of circumstance' since the closure of the site was always contemplated in the merger plans.

account. The OFT agrees that the Yara/Kemira transaction should also be regarded as a change of circumstance. However, the OFT notes that the extent to which the acquisition of Kemira by Yara is relevant (see paragraph 61 above) is limited to determining whether the SLC identified by the Kemira/Terra merger still exists.

PARAGRAPHS 8 TO 10 OF THE UNDERTAKINGS

69. The OFT has considered first whether the changes of circumstances outlined above mean that the obligations in paragraphs 8 to 10 of the Undertakings are no longer appropriate. Paragraphs 8 to 10 are the key part of the Undertakings in so far as they relate to CO2, essentially covering Air Liquide's contractual position at the Ince liquefaction plant.[5]

70. The OFT first considers the arguments – including those put forward by GrowHow UK in its submissions – as to why paragraphs 8 to 10 of the Undertakings are no longer appropriate given the changes of circumstances. The OFT then examines the arguments – including those put forward by third parties, including Air Liquide – as to why paragraphs 8 to 10 of the Undertakings remain appropriate.

Arguments in favour of releasing paragraphs 8 to 10 of the Undertakings

71. There are three bases on which it is possible to argue that the exit of GrowHow UK from the liquid CO2 market (that is, as a result of the closure of Severnside and the sale of the Billingham liquefaction plant) means that paragraphs 8 to 10 of the Undertakings are no longer required.

    - The first is to argue that the CC's unilateral effects finding in the Report was premised on the presence of the joint venture in the **liquid** CO2 market.

    - The second is to consider that the CC's willingness to approve the divestment of Billingham as an acceptable remedy demonstrates that exit of the joint venture from the liquid CO2 market means the remedy is no longer necessary.

    - The third is to infer that the duration of the Confidentiality Policy Guidelines is evidence that the CC itself contemplated (albeit after the acceptance of the Undertakings) that the CO2 obligations (in a

[5] The OFT considers separately in later sections whether paragraph 7 (the confidentiality obligation) and paragraph 11 (the operation, maintenance and supply agreement) are appropriate.

wider sense) should cease once the joint venture was no longer active in downstream liquid CO2 sales.

72. Each of the above arguments is examined below.

The CC's unilateral effects finding in its Report

73. GrowHow UK argued that the substantive competition concern in relation to CO2 identified by the CC was an SLC in the market for the supply of liquid CO2 to distributors in the UK resulting from an overlap between the CO2 business contributed by Terra and the CO2 business contributed by Kemira to the joint venture.

74. It is clear that the CC considered that the impact of the unilateral effect might be felt in relation to the supply of liquid CO2. Paragraph 10.65 of its unilateral effects analysis refers to the CC's expectation that 'the JV, as contracts come up for renewal, would have the opportunity to raise its ex-works prices for liquid CO2 at Billingham and Severnside.' As a result of the divestment of the Billingham liquefaction plant and the closure of Severnside, GrowHow UK argued that it would no longer have the ability to raise ex-works prices for liquid CO2 at Billingham and Severnside, as envisaged by the CC. Azelis now controls ex-works pricing at Billingham given that it owns the Billingham liquefaction plant and the Severnside plant has now closed.

75. GrowHow UK also considered the theory of harm posited by the CC at Ince, where the CC was concerned that the joint venture could use the threat of termination of the contract with Air Liquide to raise the price of raw CO2 or to curtail output in order to maximize sales from its other plants.

- In relation to sales of liquid CO2, GrowHow UK argued that it would not gain from liquid CO2 sales displaced from Air Liquide at Ince (given that it is Azelis that benefits from sales from Billingham). GrowHow UK would therefore no longer have the incentives that the CC considered it would have at the time of the formation of the joint venture insofar as increasing the price of liquid CO2 at Billingham was concerned.

- In relation to sales of raw CO2, GrowHow UK stated that at the time of the formation of the joint venture there was no contestable market for raw CO2. GrowHow UK argued that Air Liquide was committed to Ince for supplies of raw CO2 and could not exploit any rivalry with Billingham, where Terra had built its own liquefaction plant for its

own exclusive use. GrowHow UK argued that the divestment of the Billingham CO2 business and liquefaction facility to Azelis means that the raw CO2 supply at Billingham remains in practice unavailable to Air Liquide, in exactly the same way as before the joint venture (when it was owned and used exclusively by Terra). From the perspective of the joint venture, GrowHow UK argued that its relationship with Air Liquide at Ince in relation to raw CO2 supply is exactly the same as it was before the creation of the joint venture: Air Liquide has committed to Ince (though it could move to a new / untapped raw CO2 source); the position between the parties is 'balanced' in the sense that each party needs the other.[6]

76. GrowHow UK also addressed the supplemental concern identified in paragraph 10.65 of the Report, namely that because the parties' existing competitors within the UK were capacity constrained, the loss of rivalry between the parties may also have the potential to result in an increase in ex-works prices at other sites. GrowHow UK argued that this concern no longer arose given that it was no longer active (following the closure of Severnside and the sale of the liquefaction plant at Billingham) in the sale of liquid CO2.

77. Finally, paragraph 15.80(b) of the Report, dealing with remedies, describes GrowHow and Air Liquide as being 'direct competitors'. Now that GrowHow UK is no longer active in the sale of liquid CO2 to distributors, this statement would no longer hold true.

78. The OFT accepts that the presence of the joint venture in the downstream liquid CO2 supply was clearly relevant to the CC's expectation of how the SLC it had identified might materialise. Further, the presence of the joint venture in the supply of liquid CO2 is relevant in terms of the need for paragraph 7 of the Undertakings (see paragraphs 150 below).

79. However, the OFT does not believe that the basis for the CC's unilateral effects SLC finding arises solely on the basis of GrowHow UK's presence in the supply of liquid CO2. The OFT sets out in paragraphs 113 to 128 below the arguments why the CC's SLC finding arises primarily in relation to the concentration created at the raw CO2 level.

[6] GrowHow also addressed the argument that the joint venture might seek to restrict raw CO2 sales at Ince with the aim of increasing raw sales to Azelis at Billingham. This is considered in paragraph 123 below.

The approval of the sale of the liquefaction plant at Billingham as a divestment

80. Arguably, there is support for the view that the closure of Severnside and the sale of the Billingham liquefaction plant justifies the release from the undertakings in the fact that the CC itself considered the sale of the Billingham liquefaction plant as a suitable remedy at the time of the publication of its Report.

81. To the extent that the CC did regard the divestment of the Billingham liquefaction plant – in the way that has actually occurred to Azelis as a result of the remedy to the European Commission's Yara / Kemira case – as a suitable alternative remedy, then there appears good justification for arguing that this change of circumstances should justify release of the CO2 part of the Undertakings in their entirety.

82. Paragraph 15.90 of the Report states that:

> 'We therefore conclude that, whilst the pool of suitable potential purchasers would be likely to be very small, a divestment of Terra's CO2 liquefaction facilities combined with suitable behavioural undertakings would nevertheless constitute an effective remedy to the SLC found in relation to the supply of CO2 to distributors within the UK.'

83. Paragraph 15.86 of the Report gives further details about the practical implications of a sale of the Billingham liquefaction plant.

> 'Since the purchaser would rely on the supply of raw CO2 from Terra, for the remedy to be effective, Terra would be required to give supply and price commitments in relation to the supply of raw CO2. In addition, for health and safety reasons, Terra would have to operate the plant on the purchaser's behalf. Therefore commitments relating to various aspects of the operation of the liquefaction plant would also need to be given. We noted that, since such arrangements already existed at Ince between Kemira and Air Liquide, designing an effective Divestiture Package and supply agreement should be possible.'

84. It is clear from paragraph 15.86 that, when judging a divestment of Billingham liquefaction plant to be an effective remedy, the CC accepted that 'Terra would have to operate the plant on the purchaser's behalf'. The fact that GrowHow UK operates the liquefaction plant on behalf of Azelis should therefore not be seen as a reason why, at least in the CC's view at the time of the Report, this remedy should not have been effective.

85. However, paragraph 15.90 does refer to the need for 'suitable behavioural undertakings'. There are no behavioural undertakings attached to the operation of the Azelis plant beyond the need to ensure that Yara (as the acquirer of Kemira) does not receive confidential information relating to the divested business.[7] The question is therefore whether the CC envisaged behavioural undertakings in the form of formal regulatory commitments to it, or merely a contractual commitment.

86. GrowHow UK argued that the 'behavioural undertakings' that the CC had in contemplation were a raw CO2 supply agreement and an operation and maintenance arrangement, pursuant to both of which the joint venture would operate the CO2 liquefaction plant on behalf of the purchaser in view of its integration within the fertilizer plant and the impracticality of having different site operators. It is notable that paragraph 15.86 refers to such arrangements as 'already existing' at Ince between Kemira and Air Liquide.

87. GrowHow UK commented that the CC did not contemplate any specific barriers to the flow of CO2 information within the joint venture when considering this alternative remedy.

88. GrowHow UK therefore argued that the CC found that the remedy that was in fact subsequently accepted by the European Commission from Yara, and which has now been implemented, without additional measures, would solve the issues identified by the CC in relation to CO2.

89. Air Liquide's view was that the divestment of the Billingham liquefaction plant would necessarily have had to have been on terms containing 'suitable behavioural undertakings'. Air Liquide stated that there is no way of knowing what such undertakings would have been as they are not set out in the CC's Report. However, Air Liquide stated that it believed that part of such a remedy would necessarily have had to have included confidentiality provisions similar to those set out in (paragraph 7 of) the Undertakings and the Confidentiality Policy Guidelines and, had this possible remedy been fully explored, Air Liquide would have made that point.

90. The OFT considers that the CC's reference to 'behavioural undertakings' refers to ongoing safeguards of the type the CC required in relation to the Kemira/Air Liquide contract at Ince.

[7] This 'ring-fencing' obligation is found in paragraph 41 of the commitments given to the European Commission by Yara.

91. In this respect, it is relevant to note that the Parties argued before the CC that Kemira was already constrained by the existing contract between Kemira and Air Liquide (paragraph 10.41 of the Report). The CC, however, considered that there was scope for Kemira to affect the output level beyond the minimum requirement specified in the Kemira/Air Liquide contract, and in any event that, over a longer timescale, the contract for the operation of the Ince plant could be terminated unilaterally by Kemira (paragraph 10.42 of the Report). It is therefore clear that the CC did not regard the existing contract that was already in place between Kemira and Air Liquide at Ince as sufficient to prevent anti-competitive effects from arising.

92. The fact that the Billingham liquefaction plant has been sold to Azelis is therefore not, in the OFT's view, the full implementation of the alternative divestiture remedy considered by the CC in the Report. Specifically, the OFT believes that the divestment of Billingham would necessarily have had to have been accompanied by suitable behavioural undertakings safeguarding Azelis' position vis-à-vis GrowHow UK, which have not been included in the European Commission commitment.

The limited duration of the Confidentiality Policy Guidelines

93. The OFT has considered further the extent to which the limited duration of the Confidentiality Policy Guidelines[8] approved by the CC pursuant to paragraph 7.3 of the Undertakings is evidence that the general need for the CO2 obligations (including paragraphs 8 to 10) no longer exists.

94. The Confidentiality Policy Guidelines have as their clause 2 (Duration) that:

> 'These Guidelines shall be applicable from the date that they are approved by the Competition Commission and shall continue in force until such time as either (i) the JV has divested the CO2 liquefaction plant at Billingham and has also permanently ceased production of raw CO2 at Severnside; or (ii) following an application by the Parties, the OFT notifies the Parties in writing that the Guidelines are no longer necessary. During this period, Growhow agrees to apply the Guidelines in good faith.'

95. The recital to the Confidentiality Policy Guidelines states that 'These guidelines give effect to paragraph 7.1 of the undertakings given by the

[8] Available at: www.competition-commission.org.uk/inquiries/ref2007/kemira/pdf/confidentiality_policy_guidelines.pdf.

Parties under section 82 of the Enterprise Act 2002 for the purpose of remedying the SLC and the adverse effects identified in the Competition Commission's final report into the proposed Kemira GrowHow/Terra JV'.

96. Air Liquide stated that the interrelationship between the Confidentiality Policy Guidelines and the Undertakings was relevant only insofar as paragraph 7 of the Undertakings, on the basis that the Guidelines only address confidentiality and have no impact on other aspects of the Undertakings.

97. The OFT fully accepts that the Confidentiality Policy Guidelines are only **directly** relevant in relation to paragraph 7 of the Undertakings. The relationship between paragraph 7 of the Undertakings and the Confidentiality Policy Guidelines – in so far as this is limited to paragraph 7 only – is discussed in paragraphs 150ff.

98. However, the question in this context is whether the duration of the Confidentiality Policy Guidelines (given that they were agreed some time after the Undertakings) is **indirectly** informative as to whether or not the divestment of the Billingham liquefaction plant now means that the remainder of the CO2 Undertakings are (or are not) required. In other words, do they have a wider significance in terms of indicating that the need for the CO2 obligations in the Undertakings more generally should cease to have effect when the joint venture was no longer active in the supply of liquid CO2?

99. The OFT does not believe in this context that the duration of the Confidentiality Policy Guidelines provides meaningful support for a view that paragraphs 8 to 10 of the Undertakings are no longer required. This is primarily because – in particular given that the Confidentiality Policy Guidelines relate only to paragraph 7 – such evidence is merely inferential and is indirect in nature. In any event, the OFT believes that it is entirely plausible that paragraph 7 of the Undertakings may no longer be appropriate, but that paragraphs 8 to 10 of the Undertakings may remain necessary. Ultimately, therefore, the OFT considers that there is no evidentiary support that can be gleaned from the stated limited duration of the Confidentiality Policy Guidelines as regards paragraphs 8 to 10 of the Undertakings.

Conclusion on arguments in favour of releasing paragraphs 8 to 10 of the Undertakings

100. The three strands considered above ultimately form part of a single proposition – namely that the SLC was found on the basis of GrowHow UK's presence in the downstream liquid CO2 market, and that once that is removed, the basis for the SLC falls away; the CC recognised this when it regarded the divestment of Billingham as an effective alternative remedy and made this even more explicit when – after the implications for the joint venture of the European Commission decision had become clear – it limited the duration of the Confidentiality Policy Guidelines.

101. The OFT is not persuaded by this view for the reasons given above. It does not believe that the SLC identified by the CC relied necessarily on GrowHow UK's presence in the supply of liquid CO2. For this reason, even if the Billingham liquefaction plant were to be sold as a divestment remedy, 'behavioural undertakings' (to protect the purchaser's contractual position) would have been required. To the extent that the duration of the Confidentiality Guidelines is evidence, this is probative in relation to paragraph 7, but not paragraphs 8 to 10.

102. The OFT therefore proceeds to examine the arguments against releasing paragraphs 8 to 10 of the Undertakings.

Arguments against releasing paragraphs 8 to 10 of the Undertakings

103. A number of third parties, most notably Air Liquide, argued that the closure of Severnside and the sale of the Billingham liquefaction plant should not be regarded as a change of circumstance justifying release of the Undertakings.

104. The arguments against regarding the closure of Severnside and the sale of the Billingham liquefaction plant as a suitable change of circumstances can be broken down into those arguments based solely on the position of GrowHow UK (that is, excluding the fact that Yara has acquired Kemira) – and those arguments based wholly or partly on the fact that Yara has acquired Kemira.

105. Although this division might appear arbitrary given that Yara has in fact acquired Kemira, it is useful given the jurisdictional complexities referred to in paragraph 47 above. If the CC considers that the need for paragraphs 8 to 10 of the Undertakings remains (even without regarding any impact from the Yara / Kemira transaction) then any conclusions on the extent to which

the Yara / Kemira transaction can or cannot be taken into account become, in the OFT's view, less important.

- Arguments not dependent with the Yara/Kemira transaction.
    - GrowHow UK remains present in the market for supply of liquid CO2 to distributors through its operation of the liquefaction plants at Ince and Billingham.
    - The SLC identified by the CC results from the parties' market power in the supply of raw CO2.
- Arguments dependent on the Yara/Kemira transaction, namely that as part of the wider Yara group, GrowHow UK remains active in the market for the supply of liquid CO2 to distributors and as the owner of a new plant producing CO2,[9] Yara would have an incentive to withhold supply of CO2 to Air Liquide and Azelis.

106. Each of the above arguments is examined below.

The joint venture remains present in the market for supply of liquid CO2 to distributors through its operation of the liquefaction plants at Ince and Billingham

107. The first basis on which it could be said that the change of circumstance does not mean that it is appropriate to release GrowHow UK from paragraphs 8 to 10 of the Undertakings is that the change of circumstances has not in fact resulted in the exit of GrowHow UK from the supply of liquid CO2.

108. Air Liquide argued that GrowHow UK is in reality still present in the sale of liquid CO2 to distributors as it operates the liquefaction plant at Ince on behalf of Air Liquide and the liquefaction plant at Billingham on behalf of Azelis. Air Liquide considered that, as GrowHow UK liquefies raw CO2 on behalf of both Air Liquide and Azelis, the SLC identified by the CC has not changed in any way as a result of the sale of the Billingham liquefaction plant to Azelis. Air Liquide stated that it accepts that the position would be somewhat different if GrowHow UK no longer operated the liquefaction

[9] GrowHow stated that Yara is due to open in 2009 a UK-sited liquid CO2 production facility with a capacity of approximately 250 ktpa at an ethanol plant to be operated by Ensus on Teeside.

plant, in that whilst the SLC identified by the CC would still persist, it would potentially manifest itself in a different way.[10]

109. As GrowHow UK remains actively involved in the supply of raw CO2 to the liquefaction plants, and the operation and maintenance of the plants on the ground, Air Liquide argues that it is not realistic to regard GrowHow UK as having exited the market for the supply of liquid CO2 to distributors.

110. GrowHow UK's view is that, whilst it operated the Billingham plant on behalf of Azelis, it was in no way responsible for the pricing of the liquid CO2 to customers, nor did it have any awareness of who was purchasing from the plant.

111. The OFT notes that the CC did not consider that any requirement on GrowHow UK to continue operating the liquefaction plant at Billingham would prevent the divestment of Billingham from being an effective remedy to the SLC identified.[11] From this, it would reasonably follow that the operation and maintenance of the liquefaction plant does not, in itself, give rise to the SLC concerns identified in the CC's Report. Rather, it is the financial interest in the downstream supply of liquid CO2 that is the driver in terms of the divestment.

112. The OFT therefore believes that the fact that GrowHow UK remains active in the operation and maintenance of the liquefaction plants should not be treated as being equivalent to ownership of the plant in terms of the incentives identified in the CC Report. The OFT therefore does not believe that this fact justifies the continued operation of paragraphs 8 to 10 of the Undertakings.

The SLC identified by the CC results from the Parties' market power in the supply of raw CO2

113. The second basis against releasing the undertakings despite the closure of Severnside and the sale of the Billingham liquefaction plant focuses on the nature of the SLC that the CC expected to result from the merger and which the Undertakings were designed to prevent.

---

[10] Air Liquide stated that if Azelis operated the liquefaction plant, it might obviate the need for paragraph 7 of the Undertakings, but not the other provisions in paragraphs 8 to 10.

[11] The CC stated in paragraph 15.86 of its Report that '*in addition, for health and safety reasons, Terra would have to operate the plant on the purchaser's behalf*'. Air Liquide noted that the commitments given to DG COMP by Yara were to divest the Billingham liquefaction plant, but left open the question whether the plant would be operated by the joint venture or by the purchaser.

114. Paragraph 73 above sets out the basis for an argument that the SLC was predicated on the existence of the joint venture in the downstream sale of liquid CO2 to distributors.[12]

115. However, a different interpretation of the CC's Report is that the SLC resulted from the market power created by the concentration of the Parties' supply of raw CO2. In other words, it derived from the Parties' control over a high combined share of suitable raw CO2 and arose from potential internalisation of competitive constraints between the CO2 supply chains supplied by Terra and Kemira respectively.

116. In terms of economic effect, although the divestment of the Billingham liquefaction plant (and the closure of Severnside) moves the point of external sale further up the Terra-sourced supply chain, it could be considered that it does not entirely remove the scope for the internalisation brought about by the merger. In this respect, the unilateral effect concern remains. Sales lost as a result of GrowHow UK restricting output at Ince would still be (partially) recouped at Billingham, albeit indirectly via higher sales through Azelis.

117. Arguably it would still be expected that this effect would feed through to supply of CO2 to distributors (even if Azelis is not defined as such) including Air Liquide and Azelis's distributor customers.

118. There is considerable support in the CC's Report for viewing the SLC as one resulting from the Parties' strength in raw CO2.

- Paragraph 10.43 of the CC's Report stated that: '10.43 Tables 19 and 20 show that the proposed JV would result in a high combined share of the supply of raw CO2 which can currently be liquefied ([]) per cent by volume and [] per cent by capacity) and a large increment ([]) per cent by volume and [] per cent by capacity).'

- Paragraph 10.65 (the central paragraph on the unilateral effects concerns) states that: 'The parties are by far the largest producers of raw CO2 suitable and available for liquefaction within the UK, and the proposed JV would gain a large share of supply and a significant increment.'

[12] There was no question that the SLC resulted from an overlap in relation to the supply of liquid CO2 given that Kemira was not active in the sale of liquid CO2 at the time of the merger.

- Paragraph 15.80(a) (on remedies) states: 'Absent the JV, Air Liquide and Kemira would, in all likelihood, have initiated a renegotiation of the price of raw CO2. We do not believe that Kemira would have had any incentive to accept a lower price ahead of the [] renewal date or that Air Liquide's negotiating position would have allowed it to secure such an agreement.

119. Paragraph 10.35 defined the market as the supply of CO2 to distributors in the UK. This included the supply by Kemira of (raw) CO2 to Air Liquide at Ince and supplies to distributors (of liquid CO2) through the import terminals operated by Yara. It may be that the supply of raw CO2 was not defined as a market in itself by the CC – notwithstanding that this is where the merger effects originated – given that raw CO2 must necessarily be liquefied on site before it is effectively tradable.

120. Air Liquide argued that the fact that the CC defined the market as including the supply by Kemira of CO2 to Air Liquide at Ince should mean that it would also include, now, the supply by GrowHow UK to Azelis at Billingham. In other words, the supply by the joint venture to Azelis at Billingham falls within the market in which the CC identified that an SLC would arise.

121. An alternative explanation for the CC's approach to market definition may have been that Terra did not sell any raw CO2 to third parties. However, any market power attributable to GrowHow UK at the level of production of raw CO2 is now relevant given that GrowHow UK has exited the market for the supply of liquid CO2 to distributors.

122. In substantive terms, GrowHow UK argued that it would have no incentive to restrict output of CO2 (on the basis that this is a waste product resulting from ammonia production). However, the OFT does not regard this argument as decisive: a monopolist will generally have an incentive to restrict output and raise price compared to a duopoly (even for a product with no alternative value, that is, a waste product).

123. GrowHow UK also argued that it would have no reason to 'favour' one customer over another (that is, Azelis over Air Liquide or vice versa). GrowHow UK characterised as wholly unrealistic an argument that it might seek to restrict raw CO2 sales to Air Liquide at Ince with the aim of increasing raw CO2 sales to Azelis at Billingham.

- First, it argued that this was dependent on Azelis finding sufficient new customers of liquid CO2 such that it would need to increase its take of raw CO2; this was far from clear given that that Azelis is a wholesaler of CO2, not a retailer, and that it would have to compete with far more established players (such as Yara, BOC and Air Liquide) if it sought to enter at retail level.

- Second, GrowHow UK argued that Azelis is actually expected to experience a reduced demand for its liquid CO2 when Yara's new UK CO2 production site comes on-stream.[13]

- Third, there remains the prospect that, if GrowHow UK were to restrict raw CO2 supplies at Ince, Air Liquide could source raw CO2 from another source.[14]

124. However, a theory of harm based on the merger's creation of market power in raw CO2 is not based on any incentive of GrowHow UK to 'favour' one of its downstream customers for raw CO2 supply over the other. Following release from paragraphs 8 to 10 of the Undertakings, GrowHow UK may have an incentive to raise raw CO2 prices at both Ince and Billingham.

125. Removal of the undertakings in relation to the Air Liquide contract at Ince would potentially enable a price increase to be implemented with respect to both Ince and Azelis (whereas pre-merger a price rise by Kemira at Ince could be defeated by (end) customer switching to Terra and hence output expansion at the Billingham plant). The concern is therefore not about favouring one customer or another; it is simply that having contractual protection through the undertakings in relation to at least one of the customers (that is, either Air Liquide or the purchaser of the Billingham liquefaction plant) serves to protect others customers in the downstream liquid CO2 market.

126. By giving Air Liquide control over the volume produced at Ince and a controlled input price, the CC remedy effectively allowed Air Liquide to retain its ability to discipline the price of output from Billingham. In this way, the remedy that relates to Ince also serves to protect Azelis from a price increase by the joint venture (as this would prove unprofitable). Paragraph 15.68 of the Report therefore described a remedy focused on the contract between Kemira and Air Liquide as 'ensuring that CO2 from the

[13] Yara has historically bought ca. 150ktpa of liquid CO2 a year from Billingham.
[14] GrowHow stated that Air Liquide's liquefaction plant at Ince is movable and could, if necessary, be re-sited at an alternative source of raw CO2.

Ince site reaches the market in a broadly similar way and on broadly similar terms as before the JV [so that] such a remedy could ensure that the incentives facing the JV would be broadly the same as Terra's incentives before the merger'.

127. This would explain why the CC considered that any remedy based on the sale of the Billingham liquefaction plant would need to be accompanied by suitable 'behavioural undertakings' (as stated in paragraph 15.90 of the Report). In other words, the OFT believes that the CC envisaged in paragraph 15.90 that behavioural undertakings would be required from GrowHow UK in relation to the Billingham plant similar to those that the CC actually obtained from it in relation to the Ince plant. The choice was therefore not behavioural undertakings at Ince or a sale of Billingham; rather, behavioural undertakings would be required – to ensure that there was no exploitation of market power in relation to the supply of raw CO2 suitable for liquefaction – under any eventuality.

128. The OFT therefore considers that the concern identified by the CC arising from the Kemira/Terra joint venture may be viewed as being based on the creation of market power in relation to raw CO2. This is the case notwithstanding that the manifestation of that market power would (when the joint venture was present in the supply of liquid CO2) have been felt downstream.

129. To this extent, the merger might now have been described in some senses akin to a diagonal merger (in that there was a horizontal concern arising in relation to raw CO2 and also a vertical concern arising from the fact that GrowHow UK was present in the downstream supply of liquid CO2).

130. The OFT considers that the change of circumstance (in the form of the closure of Severnside and the sale of the Billingham liquefaction plant) has not removed the basis for the SLC arising in respect of raw CO2. As a result, the OFT believes that the need for paragraphs 8 to 10 of the Undertakings remains. This conclusion stands without taking into account the fact that Kemira is now owned by Yara.

131. The additional change of circumstance that could have been relevant in this context is the additional volume expected to be produced from a new liquefaction plant at Wilton (Teeside) (see paragraph 136 below). To the extent that this had been volume in the hands of an independent third party, this could have been sufficient to counterbalance the raw CO2 power enjoyed by GrowHow UK. However, given that it is Yara that will benefit

from this additional volume, and that Yara is not independent from GrowHow UK, this change of circumstance does not relieve the need for paragraphs 8 to 10 of the Undertakings to remain.

As part of the wider Yara group, GrowHow UK remains active in the market for the supply of liquid CO2 to distributors (including with a new plant producing CO2)

132. Air Liquide submitted that, in accordance with the view outlined in paragraph 130 above, the SLC identified by the CC still persists following the sale of the Billingham liquefaction plant such that a decision for the continued need for the Undertakings can be reached without reference to subsequent events involving Yara.[15] In other words, Air Liquide considered that the OFT's current review of the Undertakings has no bearing on, and need not be affected by, the decision reached by the European Commission in Yara / Kemira.

133. However, Air Liquide characterised the impact of the Yara/Kemira transaction as being an additional factor serving to highlight why the SLC identified by the CC still persists and therefore why the Undertakings need to be maintained. Air Liquide submitted that the OFT and CC should have regard to the changes of circumstance involving Yara even though the OFT's recommendation and the CC's decision regarding the review of the Undertakings need not depend on such considerations.

134. Air Liquide's view is based on the fact that the Yara/Kemira transaction meant that GrowHow UK was now controlled by Yara, and Yara was already present in the supply of liquid CO2 to distributors in two ways.

- First, Yara purchases liquid CO2 from Azelis for supply to distributors (and has a contractual right to call for 150,000 tonnes per year, equivalent to 60 per cent of Azelis' capacity).
- Second, Yara controls imports of CO2 into the UK.

135. For these reasons, Air Liquide submitted that it was not correct to state, following the Yara/Kemira transaction, that GrowHow UK (when viewed as part of the wider Yara group) was no longer present in the liquid CO2 market. In this respect, the competition concerns identified by the CC when the joint venture was present in the supply of liquid CO2 – that is, unilateral

[15] Air Liquide considered that the Undertakings should relate to Yara as well as GrowHow because the SLC would persist in the market that included the supply by Kemira of CO2 to Air Liquide at Ince and supplies to distributors through the import terminals operated by Yara.

effects in the market for the supply of liquid CO2 to distributors – persisted, albeit changed in that it was Kemira's parent, Yara, that was present in the supply of liquid CO2 rather than Terra.

136. Air Liquide submitted that the OFT should also take into account, as an additional change of circumstance relevant in this respect, the fact that Yara will in the future benefit from volumes produced from a new liquefaction plant at Wilton (Teeside). The anticipated capacity of CO2 to be produced from this liquefaction plant is 250,000 tonnes, comparing to an existing total output of [-] tonnes from Ince and 170,000 tonnes from Billingham. The significance of this additional capacity from the Wilton liquefaction plant means that Yara would have an incentive to withhold the supply of raw CO2 from Air Liquide at Ince and from Azelis at Billingham.

137. Air Liquide argued that these changes of circumstance involving Yara at least reinforce the need for the Undertakings and should in fact be used as necessary to vary the Undertakings and / or the Confidentiality Policy Guidelines to ensure that the conditions of competition for the supply of liquid CO2 to distributors in the UK are properly protected (see paragraphs 170 below).

138. Air Liquide also argued that Yara falls within the scope of the Undertakings on the basis that Yara is an affiliate of the joint venture Parties[16] and paragraph 7.6 of the Undertakings makes reference to affiliates being covered in the compliance report:

> '7.6 The JV Parties undertake to supply the OFT with an annual statement to confirm whether the JV Parties, their subsidiaries and affiliates have fully complied with each of their obligations under these Undertakings, such statement to be received on each anniversary of the Commencement Date, or the next working day.'

139. Air Liquide argued that Yara's being an affiliate meant that it is a party 'whose compliance with the Undertakings is required under paragraph 7.6'.[17]

[16] The Undertakings provide that two parties are affiliates if they are under common control for the purposes of section 26 of the Act. Given that Yara owns 50 per cent of the JV, it is an affiliate of the joint venture.

[17] The OFT notes, however, that although paragraph 7.6 of the Undertakings (which is a reporting obligation) does cover affiliates, the only positive obligation contained in the Undertakings in relation to affiliates is in paragraph 4 ('Continued separation'). The OFT does not therefore accept that there are positive obligations as regards affiliates in relation to the CO2 part of the undertakings.

140. GrowHow UK considered and responded to the suggestion that the fact that it was now jointly controlled by Yara meant that Yara's presence in the liquid CO2 market could not be ignored and should be taken into account in assessing whether the justification for the Undertakings remained. It considered that this argument was not persuasive for three principal reasons.

141. First, GrowHow UK argued that any concern based on Yara having an incentive to advantage its own liquid CO2 interests over those of Air Liquide (and, by extension, the raw CO2 interests of the joint venture) fell outside the mischief that was caused by the Kemira/Terra joint venture that the CC's Undertakings were designed to prevent. In other words, GrowHow UK considered that taking account of changed incentives as a result of Yara's own capacity fell jurisdictionally outside the scope of the Undertakings and the review of the Undertakings (see paragraph 57 above).

142. Second, GrowHow UK argued that it was misleading simply to 'aggregate' it with the wider Yara group by which it was jointly controlled. Rather, it was important to take proper account of the actual relationship between the joint venture and its parents and of the fact that Terra also held a 50 per cent interest in the joint venture.

- Each of Yara and Terra had 50 per cent of the joint venture's supervisory board, with three directors each, and no casting vote. The supervisory board can therefore not be obliged to act in a particular way (say, reducing volume of CO2 produced, or raising prices to customers) without the consent of both parents.

- There was no reason why Terra would have any incentive to agree to a strategy that would benefit its joint venture partner (Yara) at the expense of the JV's profits, and therefore its own economic interests.

- The joint venture was managed at 'arm's length' from the supervisory board, with the CEO of the joint venture not being a member of the supervisory board.

143. Third, Yara was present in the liquid CO2 market in the UK (through its imports) at the time of the Kemira acquisition, and the new plant that it intends to open will simply represent a quantitative increase, rather than a qualitative change, in its presence. The European Commission took into account Yara's presence, and would have been conscious of the possibility

that it might increase, but regarded the sale of the Billingham liquefaction plant as satisfactory to address this.

144. Air Liquide accepted that, strictly speaking, Terra would have no interest in sacrificing GrowHow UK's profits for the benefit of Kemira's parent company, Yara. However, Air Liquide cautioned that there was nothing preventing the joint venture parents from agreeing some form of side payment, or other indirect compensatory payment, from Yara to Terra if the overall effect of reducing raw CO2 supply or increasing prices would be profitable.

145. In support of the proposition that the OFT should not rely on Terra having separate interests from that of the joint venture, Air Liquide pointed out that:

- Terra's consent was apparently obtained for the sale of the Billingham liquefaction plant, notwithstanding that this was a forced sale (for which the value of the asset could have been lower than on the open market) and Terra was not a party to the Yara / Kemira merger under consideration
- Kemira and Terra's interests would have become more closely aligned following the sale of the Billingham liquefaction plant, and
- Terra appeared to have accepted temporary closures of both the Ince and Billingham plants even though ammonia facilities wholly owned by Yara on the Continent have continued to operate.

146. Notwithstanding the fact that GrowHow UK is jointly controlled by Terra, and that Terra would be expected to exercise control in its own interest, the OFT has not been able to dismiss the possibility that GrowHow UK's future behaviour could be changed given the fact that one of its two parents, Yara, was itself active in the supply of liquid CO2. The likelihood of such a change may increase when Yara gains control on additional CO2 volumes as a result of the opening of the new liquefaction plant at Wilton (Teeside).

147. The OFT considers it credible that the adverse effects of an SLC could be felt in relation to the supply of liquid CO2 to distributors if paragraphs 8 to 10 of the Undertakings were released, and that such adverse effects might result from the actions of Yara given its own position in the supply of liquid CO2.

148. It is possible to characterise this as being fundamentally the same SLC identified by the CC in its Report – a unilateral effect arising in the market for the supply of liquid CO2 to distributors – albeit that it involves an additional entity (Yara, as one parent of GrowHow UK). However, whether the CC is willing to take account of the fact that Yara has a presence in the supply of liquid CO2 (and is expected to become stronger in the future) when determining whether or not to release GrowHow UK from paragraphs 8 to 10 of the Undertakings will depend on its view of the issues discussed in paragraphs 47 to 63 above. The OFT has not had to conclude on this issue because of its view in paragraph 130 above (that is, that GrowHow UK should not be released from paragraphs 8 to 10 regardless of the fact that Yara has acquired Kemira)..

Conclusion on releasing paragraphs 8 to 10 of the Undertakings

149. The OFT does not believe that GrowHow UK should be released from paragraphs 8 to 10 of the Undertakings. This is because the closure of Severnside and the sale of the Billingham liquefaction plant have not removed the basis for the SLC arising in respect of raw CO2. This conclusion stands without taking into account the fact that Kemira is now owned by Yara. However, arguably the original SLC identified by the CC would now be aggravated by the fact that Yara, which is itself present in the supply of liquid CO2, has acquired Kemira.

PARAGRAPH 7 OF THE UNDERTAKINGS

150. This section examines the need for paragraph 7 of the Undertakings, which provides for confidentiality obligations between Ince and Billingham.

Arguments in favour of the release of Paragraph 7

151. GrowHow UK argued that it should be released from paragraph 7 of the Undertakings for the reasons given above, namely that as a result of the closure of its Severnside plant and the sale of the Billingham liquefaction plant, it was no longer present in the supply of liquid CO2.

152. GrowHow UK pointed to the duration of the Confidentiality Policy Guidelines. Paragraph 2 stated that they would continue in force until GrowHow UK had divested the CO2 liquefaction plant at Billingham and had also permanently ceased production of raw CO2 at Severnside. Growhow UK argued that the duration clause of the Confidentiality Policy Guidelines was evidence that the confidentiality obligation in paragraph 7 of the Undertakings was no longer required.

Arguments in favour of the retention of Paragraph 7

153. Air Liquide stated that at the time of the merger it was concerned that the obligations in paragraph 7 be included because the contract gave Kemira detailed information about Air Liquide's costs and, if GrowHow UK proceeded, not only would GrowHow UK be the dominant supplier of liquid CO2 to distributors in the UK, but it would have detailed information regarding the cost base of one of its major customers. Air Liquide believed that this information could be used to the detriment of Air Liquide and CO2 customers more widely.

154. Air Liquide pointed to paragraph 15.80(b) of the CC Report that explains the justification for the confidentiality provisions in paragraph 7 of the Undertakings. The CC stated that: 'Chinese walls would be necessary, as the JV and Air Liquide both sell CO2 to distributors **and** are therefore direct competitors; and to maintain Air Liquide's negotiating position in relation to its purchases of CO2 from Terra' (emphasis added). Air Liquide stated that the argument that the Chinese walls were necessary only because both Terra and Air Liquide sold liquid CO2 to distributors is incorrect: the Chinese walls were necessary also to maintain Air Liquide's negotiating position relating to purchases of liquid CO2 from Billingham. This rationale, according to Air Liquide, remains.

155. Air Liquide further argued that the history of the wording of paragraph 7 of the Undertakings made it clear that the confidentiality obligation was necessary – notwithstanding the divestment of the Billingham liquefaction plant to Azelis – given that the joint venture continues to operate the plant on behalf of Azelis.

- In the undertakings published for consultation on 2 August 2007, the prohibition in paragraph 7.1 was such that: 'Confidential Information regarding CO2 production at the Ammonia Plant is not accessible or made available to personnel involved in the marketing and sale of CO2 produced at Terra's CO2 liquefaction plants at Billingham and Severnside, and that Confidential Information regarding CO2 produced at Billingham or Severnside is not accessible or made available to personnel involved in the marketing and sale of CO2 produced at the Ammonia Plant.'

- In the Undertakings accepted on 11 September 2007, the prohibition in paragraph 7.1 became that: 'confidential information regarding the marketing and/or sale of CO2 produced at the Ammonia Plant and

Liquid CO2 production at the CO2 Liquefaction Plant is not accessible or made available to personnel involved in the **production**, marketing and/or sale of Liquid CO2 produced at Terra's CO2 liquefaction plants at Billingham and Severnside, and that confidential information regarding the production, marketing and/or sale of Liquid CO2 produced at Billingham or Severnside is not accessible or made available to personnel involved in the marketing and/or sale of CO2 produced at the Ammonia Plant or to personnel involved in the production of Liquid CO2 at the CO2 Liquefaction Plant' (emphasis added).

156. Air Liquide argued that the insertion of the word 'production' meant that the CC intended that the Undertakings indisputably be still in force as GrowHow UK still is involved in the production of CO2 at Billingham, albeit on behalf of Azelis under an operating and maintenance agreement. Air Liquide therefore believed that the amendment made from the draft to the final Undertakings was to address the SLC that would still persist after the sale of the Billingham liquefaction plant.

157. Air Liquide considered the relationship between paragraph 7 of the Undertakings and the Confidentiality Policy Guidelines and argued strongly that paragraph 7 survived independently notwithstanding the termination of the Confidentiality Policy Guidelines for the following reasons.

- First, Air Liquide's view was that there is a 'mismatch' between the Undertakings and the Confidentiality Policy Guidelines. The Undertakings take precedence over the Confidentiality Policy Guidelines, such that if there is a conflict between them, the former should prevail. Paragraph 2.2 of the Undertakings are clear that they remain in force 'until such time as they are varied, released or superseded under the Act'.

- Second, Air Liquide considered that any attempt to interpret the Undertakings, or the need for the Undertakings, by reference to the Confidentiality Policy Guidelines would be an attempt to 'reverse engineer' the Undertakings. Air Liquide stressed that the key point was whether the need for the Undertakings persisted, not what the CC's expectations were at the time. In particular, Air Liquide considered that the expectations of the CC at the time of the Confidentiality Policy Guidelines was not informative of the CC's

expectations at the time of agreement of the Report and the Undertakings.

- Third, the Undertakings would have remained in force even if the Guidelines had never been drafted or come into force. In Air Liquide's words, 'the Guidelines only establish a framework to enable the JV to ensure compliance with the obligation under paragraph 7.1 of the Undertakings (see paragraph 15.108(e) of the CC's report). ... In other words the Guidelines do no more than set out the day-to-day practicalities associated with the JV's obligation to comply with paragraph 7.1 of the Undertakings'.

- Fourth, the fact that the Undertakings can remain valid and effective is illustrated by the fact that paragraphs 7.1 and 7.2 of the Undertakings became effective and enforceable on 11 September 2007, whereas the Confidentiality Policy Guidelines did not become effective until 20 December 2007. It cannot have been intended that paragraphs 7.1 and 7.2 should not be regarded as in force pending the approval of the Confidentiality Policy Guidelines. Equally, Air Liquide therefore argued there is no reason why they should not continue to be valid after the Guidelines have fallen away.

158. Air Liquide pointed out that – to the extent that it were considered that there remained a need for the confidentiality obligation in paragraph 7 of the Undertakings – the ring-fencing obligations in DG COMP's Yara/Kemira remedy relate only to ring-fencing between Yara and the Billingham liquefaction plant, and did not impose any obligation as between Yara and Ince (in the way that paragraph 7 of the Undertakings does). Furthermore, Air Liquide stated that the European Commission's ring-fencing provisions relate only to the structural aspects of DG COMP's remedy (and in this respect are 'standard') and do not relate to behavioural aspects; in Air Liquide's view any necessary ring-fencing obligations relating to behavioural aspects of the European Commission remedy were covered by the Undertakings of which the European Commission was aware.

Conclusion on releasing paragraph 7 of the Undertakings

159. All parties, including the OFT, accept that the Confidentiality Policy Guidelines have terminated in accordance with paragraph 2. The question to be considered is what are the consequent implications for paragraph 7 of the Undertakings more generally.

160. The OFT fully accepts Air Liquide's view that, as a legal matter, paragraph 7 of the Undertakings take precedence over the Confidentiality Policy Guidelines (that is, such that the obligations in paragraph 7 can survive even though the Confidentiality Policy Guidelines have terminated).

161. Paragraph 7.1 (the operative obligation concerning confidentiality) states that:

> 'The JV Parties shall use all reasonable endeavours to ensure that confidential information regarding the marketing and/or sale of CO2 produced at the Ammonia Plant and Liquid CO2 production at the CO2 Liquefaction Plant is not accessible or made available to personnel involved in the production, marketing and/or sale of Liquid CO2 produced at Terra's CO2 liquefaction plants at Billingham and Severnside, and that confidential information regarding the production, marketing and/or sale of Liquid CO2 produced at Billingham or Severnside is not accessible or made available to personnel involved in the marketing and/or sale of CO2 produced at the Ammonia Plant or to personnel involved in the production of Liquid CO2 at the CO2 Liquefaction Plant.'

162. It is important to be clear that – absent the Confidentiality Policy Guidelines – the restriction applies within GrowHow UK itself to prevent information from being exchanged between Ince and Billingham. That obligation continues with respect to particular personnel at Billingham notwithstanding the sale of the liquefaction plant because certain GrowHow UK employees are involved in the production of liquid CO2 at Billingham through GrowHow UK's operation of the liquefaction plant on Azelis' behalf.

163. The net effect of paragraph 7.1 now, then, is the obligation to erect an information exchange barrier within a company (GrowHow UK) in respect of its operations with regard to two of its customers (Air Liquide at Ince and Azelis at Billingham). The OFT considers that there is no justification for this now that GrowHow UK is no longer active in the supply of liquid CO2 on its own account: with regard to Grow How UK itself, there is now no incentive for it to disadvantage one or other of its downstream customers. Further, there is no separate, additional justification for erecting information barriers within GrowHow UK in order 'to maintain Air Liquide's negotiating position relating to purchases of liquid CO2' from Billingham once the Billingham liquefaction plant had been sold to an independent third party (Azelis) such that GrowHow UK was no longer present in the sale of liquid CO2.

164. The OFT believes that the CC deliberately approved the limited duration of the Confidentiality Policy Guidelines because the information requirements in paragraph 7.1 of the Undertakings (to which the Confidential Policy Guidelines 'gave effect') were no longer required when the vertical relationship between the Parties was removed.

165. The OFT considers it credible that the Confidentiality Policy Guidelines were expressly limited to apply only until closure of Severnside and sale of Billingham liquefaction plant – in a way that paragraph 7 of the Undertakings was not –because the Undertakings were accepted on 11 September 2007, before announcement of the European Commission's decision in Yara / Kemira on 21 September 2007. By contrast, the Confidentiality Policy Guidelines were approved much later, on 20 December 2007, by which time the European Commission decision had been announced and it was publicly known that GrowHow UK would – in fact – sell the Billingham liquefaction plant.[18] On this reasoning, it was possible to reflect the significance of the closure of the Severnside plant and sale of Billingham plant only in the Confidentiality Policy Guidelines.

166. The OFT accepts, however, that this explanation for the discrepancy between the stated durations of paragraph 7 of the Undertakings and the Confidentiality Policy Guidelines can itself be challenged. Air Liquide queried why the CC would not simply have waited for another ten days before finalising the Undertakings (given that the timetable for the European Commission phase one timetable was publicly known), particularly given that two months had already elapsed since publication of the CC's Report.[19] Further, Air Liquide queried why the Parties would not have wished to delay giving the Undertakings in order to allow them to reflect the intended closure of Severnside and the divestment of the Billingham liquefaction plant.[20]

---

[18] Air Liquide noted that at the time of approval of the Guidelines, the European Commission remedy had not been implemented and therefore it was unknown whether the purchaser of the Billingham liquefaction plant would operate the plant itself, or would require GrowHow to do so. However, arguably this is irrelevant given that the CC accepted in paragraph 15.86 of the Report that the divestment of Billingham would be part of a satisfactory remedy even knowing that – for health and safety reasons, in the CC's view – GrowHow UK would continue to operate the plant on the purchaser's behalf (see paragraph 84).

[19] One response to this is that the CC could not have known whether acceptable phase one commitments would be agreed or whether the case would be taken into phase two.

[20] It is obviously possible that by 11 September 2007 both the parties and the CC were anxious to go ahead and finalise the Undertakings and did not wish to delay finalisation to open discussions about the potential impact on the Undertakings of any remedies that might emerge from the European Commission's review of the Yara/Kemira transaction. This would be in particular because the CC had stated that the Yara/Kemira transaction review was proceeding

167. Ultimately, however, whatever the correct explanation as to why the Confidentiality Policy Guidelines were time limited in a way that paragraph 7 of the Undertakings was not, there still remains, in the OFT's view, no ongoing justification for paragraph 7.1 of the Undertakings in its present form.

168. The OFT notes that, at least on its face, paragraph 7.1 of the Undertakings does not prevent confidential information from either Ince or Billingham from being passed on by GrowHow UK to its parent or affiliate companies, including to Yara.

169. The OFT therefore considers that the closure of Severnside and the divestment of the Billingham liquefaction plant are a change of circumstance as a result of which paragraph 7 of the Undertakings (at least in its current form) is no longer appropriate and that GrowHow UK should be released from it.

Air Liquide comment that the Undertakings need to be strengthened

170. Air Liquide pointed out in its submissions to the OFT that, according to the MOU between the OFT and the CC:

> 'Where a review takes place following an application by the parties subject to the remedy, the OFT's recommendation is not confined to either approval or denial of the application. The OFT can recommend the CC to take action not envisaged in the application. For example, an application for release from undertakings might lead the OFT to recommend the CC to vary or retain rather than terminate them' (paragraph 17 of the MOU).

171. Air Liquide focused specifically on the need for strengthening of the Undertakings as regards paragraph 7.1 and the detailed confidentiality obligations.

172. Air Liquide argued that the OFT's current review of the Undertakings provided an appropriate opportunity to recommend to the CC that the Confidentiality Policy Guidelines be amended to remove the anomaly of the different durations specified to apply to them and to Paragraph 7 of the Undertakings.

---

entirely independently from its own review of Kemira / Terra joint venture (see paragraph 5.9 of the Report).

173. Air Liquide pointed specifically to paragraphs 7.6, 7.7 and 7.8 of the Undertakings, none of which were specified to be dependent on (or linked to) the Confidentiality Policy Guidelines:

> '7.6 The JV Parties undertake to supply the OFT with an annual statement to confirm whether the JV Parties, their subsidiaries and affiliates have fully complied with each of their obligations under these Undertakings, such statement to be received on each anniversary of the Commencement Date, or the next working day.
>
> 7.7 The JV Parties undertake to comply with any written request for information which the OFT may reasonably make from time to time.
>
> 7.8 The JV Parties undertake to comply with such reasonable written directions as the OFT may from time to time give to take such steps within the competence of the JV Parties as are necessary for the purpose of securing compliance with or the carrying out of these Undertakings.'

174. Air Liquide noted that, in the context of the paragraph 7.6 obligation on the Parties, and the OFT's ability to ask for information under paragraph 7.7, the OFT could effectively check to see whether the parties were 'complying' with the measures previously stated in the Confidentiality Policy Guidelines. Further, the OFT would, in Air Liquide's view, be entitled to make directions under paragraph 7.8 that were previously specified in the Confidentiality Policy Guidelines. For these reasons, Air Liquide did not believe that the voluntary nature of the provision of the Undertakings impeded the OFT in practical term from being able to require ongoing adherence to measures that were previously specified in detail in the Confidentiality Policy Guidelines.

175. Air Liquide considered that the change of circumstances – Yara acquiring Kemira and Yara's forthcoming acquisition of significant new liquid CO2 capacity as a result of the new liquefaction plant at Wilton (Teeside) – meant that the SLC identified by the CC and the Undertakings required in respect of GrowHow UK needed not only to be maintained, but also to be strengthened. In this context, Air Liquide argued that it would be unreasonable to take into account changes of circumstances that are beneficial to the parties but to disregard changes of circumstances that are not beneficial to the parties.

176. The OFT notes that the CC has the power to vary or supersede a final undertaking pursuant to section 82(2) of the Act. However, such variation would require the agreement of the parties (that is, including GrowHow UK) in the form of willingness to provide further undertakings. The OFT has not considered with GrowHow UK whether it would be willing to agree a variation to paragraph 7 that would strengthen the Undertakings given to the CC.

177. However, to the extent that GrowHow UK would be willing to provide varied undertakings, the OFT considers that it remains to be determined whether, as a jurisdictional matter, it is appropriate to seek to extend the Undertakings as a result of the Yara/Kemira transaction, taking account of the considerations set out in paragraph 63 above. For example, the CC would need to consider whether extending the reach of paragraph 7 of the Undertakings so as to erect an information exchange barrier between GrowHow UK and Yara could still be said to be remedying competition concerns created by the Kemira/Terra transaction.[21]

PARAGRAPH 11 OF THE UNDERTAKINGS

178. Paragraph 11 of the Undertakings was the only one of the obligations in paragraphs 7 to 11 of the Undertakings that was – at least on the face of the Undertakings[22] - expressly time limited.

179. Paragraph 11.1 and 11.2 of the Undertakings stated that:

> '11.1 Subject to the agreement of AL, Kemira undertakes to amend the AL Agreement in accordance with the terms set out in the Proposal to AL dated 5 July 2007, and in this regard to negotiate with AL reasonably and in good faith. This undertaking shall continue in force for a period of three calendar months from the Commencement Date [11 September 2007] ....
>
> 11.2 Should AL not agree to accept the Proposal to AL, and effect the amendments to the AL Agreement accordingly, within the three month period provided for in paragraph 11.1 above, Kemira shall be released from the undertaking in paragraph 11.1 in respect of those aspects of

[21] The OFT has not considered issues of enforcement of the Undertakings discussed in paragraphs 174 to 176 in the context of this advice to the CC about release or variation of the Undertakings.
[22] Paragraph 7.1 was arguably time limited, depending on the implication of the duration clause in the Confidentiality Policy Guidelines and its relationship with paragraph 7.1 of the Undertakings (see paragraphs 159ff above).

the Proposal to AL that are not accepted by AL. For the avoidance of doubt, to the extent that AL has not indicated its acceptance or non-acceptance of any terms of the Proposal to AL within such three-month period, such term/terms will be deemed as not accepted by AL.'

180. GrowHow UK's view was that paragraph 11 of the Undertakings had expired in accordance with the terms on its face and that it was no longer operative. The request to have this obligation released or removed from the Undertakings was therefore a matter of good administration more than anything else.

181. Air Liquide agreed that, on its face, paragraph 11 of the Undertakings had expired. However, it cautioned that the OFT should not advise the release of GrowHow UK from the obligation in paragraph 11 too quickly. Specifically, Air Liquide claimed that GrowHow UK had not complied with its obligations to enter into a new lease with Air Liquide in relation to the Ince site (as required by paragraph 8.2 of the Undertakings).

182. The OFT did not find that there was evidence that GrowHow UK had not fulfilled its obligations in respect of the paragraph 8.2 of the Undertakings. However, in any event, the OFT believes that – regardless of whether or not GrowHow UK has complied with the obligation at paragraph 8.2 of the Undertakings – this does not impact on the ongoing operation of paragraph 11 of the Undertakings.

183. For this reason, the OFT considers that , for reasons of good administrative practice and the avoidance of any doubt only, GrowHow UK should be released from paragraph 11 of the Undertakings.

THIRD PARTY COMMENTS

184. Air Liquide was strongly opposed to the release of any part of paragraphs 7 to 11 of the Undertakings. Its views have been discussed at length above.

185. Azelis also submitted to the OFT that its strong view was that the perceived threat of an SLC arising from the joint venture remains, and has been strengthened following the acquisition of Kemira by Yara. Azelis argued that Yara would:

- control all the liquid CO2 from Ince via an exclusive deal with Air Liquide (by which the OFT understands that Kemira sells all its raw

CO2 at Ince to Air Liquide and operates the liquefaction plant on Air Liquide's behalf)

- [-]
- would remain as the sole importer of CO2.

186. Azelis therefore described Yara as its dominant customer, and therefore as being dominant in the liquid CO2 market, either by direct sale or by sales of product via Air Liquide and BOC.

187. Azelis's concern was that, if Yara chose not to exercise its call option over the CO2 from Azelis' Billingham liquefaction plant as a result of its new Wilton (Teeside) plant, (and if Azelis could not, when marketing to others, be certain of this) Azelis would be forced to increase prices to other customers (presumably since the smaller volumes would have to cover the same fixed costs), potentially threatening the viability of the Billingham liquefaction plant.

188. Azelis therefore considered that the closure of Severnside and the acquisition by Azelis of the Billingham liquefaction plant had not led to an increase in competition in the UK for the supply of CO2, and that the Undertakings should remain. Azelis commented that, since the CC's Report, the position of Yara – and thus of GrowHow UK – had strengthened considerably in the CO2 market.

189. Azelis considered that the Undertakings should remain and that they should be varied to [-].

190. For the reasons given in paragraphs 47 to 63 above, the OFT considers it doubtful that Azelis' arguments for retention of the Undertakings may be taken into account given that they rest so strongly on the position of Yara. In particular, Azelis' predominant concern – that Yara enjoys a strong position in the market for the supply of liquid CO2 – arises squarely from the Yara / Kemira transaction rather than from the Kemira/Terra joint venture.

191. Furthermore, the OFT notes that Azelis did not make any specific arguments in relation to paragraphs 7 and 11 of the Undertakings, that are in any event the sole obligations in the Undertakings that the OFT recommends should be released.

192. The OFT also received comments from BOC, who acquire liquid CO2 from Azelis at Billingham, from Air Liquide at Ince and from Yara's imports. BOC was strongly of the view that the Undertakings remained essential to ensure adequate competition in the manufacture and distribution of liquid CO2 in the UK.

193. BOC focused on Yara's position, pointing out that Yara could put pressure on GrowHow UK to terminate the Air Liquide contract at Ince or to raise prices to Air Liquide. BOC considered there was scope for co-ordinated effects between GrowHow UK and Yara.

194. BOC argued that the acquisition of Kemira by Yara was within the contemplation of the CC and the Parties at the time of acceptance of the Undertakings, such that this factor should be taken account of by the OFT.

195. BOC was concerned that Yara would gain access to commercial information, that would allow it to surmise selling prices, of both Azelis at Billingham and Air Liquide at Ince in the absence of paragraph 7 of the Undertakings. Yara could use this information to undermine Azelis and/or Air Liquide, or to collude with them. This in turn would affect BOC's own position.

196. BOC believed that in the absence of the Undertakings, GrowHow UK would be able to increase price to Air Liquide to a level just below that it could obtain from Azelis or Yara, and that Yara and GrowHow UK could co-ordinate over this. [-]

197. The OFT considers that, for the reasons given in paragraphs 47 to 63 above, it is doubtful whether BOC's arguments for retention of the Undertakings may be taken into account given that they rest so strongly on the position of Yara.

198. BOC did comment specifically on the need for the confidentiality obligations in paragraph 7 of the Undertakings. However, BOC's view was that paragraph 7 of the Undertakings prevented Yara from gaining access to the operating costs of Azelis at Billingham and Air Liquide at Ince. For the reasons given in paragraph 168 above, the OFT does not share this view and does not see paragraph 7.1 as preventing the flow of confidential information up to Yara as an ultimate parent of GrowHow UK.

199. BOC did not comment specifically on paragraph 11 of the Undertakings.

ASSESSMENT

200. GrowHow UK requested that it be released from paragraphs 7 to 11 of the Undertakings as a result of the fact that it had closed its Severnside plant and had sold its Billingham liquefaction plant to a third party, Azelis. This change of circumstances, GrowHow UK argued, meant that it was no longer present in the supply of liquid CO2 such that the basis for the SLC identified by the CC in its Report no longer existed.

201. The OFT considers that the exit of GrowHow UK from the supply of liquid CO2 is a change of circumstances that could potentially be such as to warrant variation or release of the Undertakings.

202. The OFT considers that the acquisition of Kemira by Yara is also a change of circumstance, but that it is relevant for the CC in making its determination only in so far as it relates to the question whether the SLC identified by the CC that arises as a result of the Kemira/Terra transaction still persists. The OFT considers that the Yara/Kemira transaction is not relevant insofar as it itself results in a new and different SLC. This is not something which can properly be addressed by the CC's Undertakings.

203. The OFT does not believe that GrowHow UK should be released from paragraphs 8 to 10 of the Undertakings. This is because the closure of Severnside and the sale of the Billingham liquefaction plant have not removed the basis for the SLC arising in respect of raw CO2. This conclusion stands without taking into account the fact that Kemira is now owned by Yara. However, arguably the original SLC identified by the CC would now be aggravated by the fact that Yara, which is itself present in the supply of liquid CO2, has acquired Kemira.

204. The OFT considers that as a result of the change of circumstance that Severnside has closed and the Billingham liquefaction plant has been sold, paragraph 7 of the Undertakings is no longer appropriate and GrowHow UK should be released from it.

205. Paragraph 11 of the Undertakings has already expired. The OFT considers that, for reasons of good administrative practice and the avoidance of any doubt only, GrowHow UK should be released from paragraph 11 of the Undertakings.

RECOMMENDATION

206. For the reasons explained in detail above, I recommend that:

- there has been a change of circumstances for the purposes of section 92(2)(b) of the Act in the form of the closure of the Severnside plant, the sale to Azelis of the CO2 liquefaction plant at Billingham and the acquisition of Kemira by Yara
- as a result of the change of circumstances, GrowHow UK should be released from the obligations in paragraph 7 of the Undertakings
- notwithstanding the change of circumstances, the obligations in paragraphs 8 to 10 of the Undertakings should remain in force, and
- paragraph 11 of the Undertakings is no longer in force; for the avoidance of doubt and good administrative practices, the CC should confirm this by releasing the parties from it.

Amelia Fletcher
OFT Senior Director of Mergers