

REFERENCE RELATING TO THE ANTICIPATED JOINT VENTURE BETWEEN KEMIRA GROWHOW OYJ AND TERRA INDUSTRIES INC

Notice of possible remedies under Rule 11 of the Competition Commission Rules of Procedure

Introduction

1. On 26 January 2007 the Office of Fair Trading (OFT) in exercise of its duty under section 33 of the Enterprise Act (the Act) referred to the Competition Commission (CC) for investigation and report the anticipated joint venture (JV) between Kemira Growhow Oyj (Kemira Growhow) and Terra Industries Inc (Terra Industries).
2. In its provisional findings on the reference notified to Kemira Growhow and Terra Industries (the main parties) on 4 May 2007, the CC inquiry group (the Group) concluded provisionally: (i) that the joint venture would result in the creation of a relevant merger situation; and (ii) that the creation of that situation may be expected to result in a substantial lessening of competition (SLC) in each of the markets for carbon dioxide, nitric acid of 58 to 60 per cent concentration, aqueous ammonia and anhydrous ammonia, in the UK. The Group expects that the joint venture will lead to prices being higher than would otherwise be the case in each of the above markets.
3. This notice sets out the actions which the Group considers might be taken by the CC, including any recommendations it might make for action on the part of others, for the purpose of remedying the SLCs and any resulting adverse effects identified in the provisional findings and invites comments on possible remedies (see note).

Criteria

4. In choosing appropriate remedial action, the Group 'shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it'.¹ When deciding on an appropriate remedy, the Group will consider the effectiveness of different possible remedies and their associated costs and will have regard to the principle of proportionality. Between two remedies that the Group considers equally effective, it will choose that which imposes the least cost or that is least restrictive.

Possible remedies on which views are sought

5. The Group is of the view that prohibiting the JV would be an effective remedy to each of the identified SLCs. Notwithstanding this, the Group invites views on the following remedies and whether they would address the expected SLCs effectively, either alone or in combination.

Divestiture

6. The Group invites views on a possible divestiture remedy in respect of the assets and operations of Kemira Growhow associated with the sale and distribution of nitric acid of 58 to 60 per cent concentration, anhydrous ammonia and aqueous ammonia.

¹Section 35 (4) of the Enterprise Act.

7. It is envisaged that a possible divestiture package could involve the following elements of Kemira Growthow's Ince facility:
- a long-term lease of the outloading facilities and storage tanks at Ince, which would be operated by the JV on the purchaser's behalf;
 - long-term supply agreements for nitric acid of 58 to 60 per cent concentration, anhydrous ammonia and aqueous ammonia with the JV, under which the purchaser would have the ability to vary the volume of product it would buy from the JV;
 - customer lists and other records relating to customers in the UK for nitric acid of 58 to 60 per cent concentration, anhydrous ammonia and aqueous ammonia;
 - other relevant records, written materials and intellectual property rights;
 - access to appropriate know-how;
 - the transfer of all existing contracts with customers and distributors for the supply of nitric acid of 58 to 60 per cent concentration, anhydrous ammonia and aqueous ammonia;
 - a commitment for a defined period not to solicit the personnel and customers transferred to the purchaser; and
 - to the extent legally transferable, all UK governmental licences, permits, authorizations and registrations relating to the divestiture package.
8. It is envisaged that the basis of prices paid for the products by the purchaser under the long-term supply agreements may comprise:
- a standing charge consisting of the purchaser's contribution to the fixed costs of operating the Ince plant, which would be payable regardless of the volumes purchased from the JV; and
 - a variable cost element based on the price of natural gas and other variable costs.
9. In identifying a divestment package, the CC would normally seek to identify the smallest operating unit of a business that contains all relevant operations pertinent to the area of the competitive overlap and that can compete successfully on a stand-alone basis. The Group is concerned to ensure the viability of any divestiture package and invites views on the following issues:
- whether the above package is of sufficient scale to be viable and, if not, what additional assets or other requirements would need to be included;
 - the impact of the ongoing links with the JV on the ability of the purchaser to compete effectively with the JV in the relevant markets and what measures could be taken to mitigate any risks identified;
 - whether the divestment of a similar package comprising Terra Industries' Billingham outloading facilities and customer contracts would be more effective; and

- whether the relevant assets and operations should be sold as a whole to one purchaser or whether the divestiture of individual packages, each relating to one or more of the above products, to separate purchasers would be more effective.
10. The Group also invites views on possible suitable purchasers for any divestiture package. In general, as described in the CC's guidance on divestiture remedies,² the CC takes the view that a suitable purchaser should be independent of the main parties, should have the resources, expertise and incentive to maintain and develop the divested operation as a viable and active competitor, and would not be likely to create competition concerns as a result of the divestiture.
 11. Further, the Group will consider whether it is appropriate to prohibit the combination of the UK businesses retained by the main parties until an appropriate divestiture package or appropriate packages have been divested to one or several suitable purchasers.

Contractual commitments in relation to carbon dioxide

12. This possible remedy would modify certain provisions of the contract currently in place between Kemira and Air Liquide in relation to the supply of raw carbon dioxide and the operation of the liquefaction plant at Ince.
13. The Group is considering which aspects of the contractual arrangement should be extended and is seeking views on the effectiveness of the following measures:
 - extending the duration of the existing contract on comparable terms and conditions; and
 - enhancing Air Liquide's ability to increase its use of the present liquefaction capacity at Ince.
14. The Group is considering what would be an effective duration for the contract.

Price control mechanisms

15. Given the adverse effects resulting from each of the SLCs identified in the provisional findings as expected to result from the JV, price controls would be a possible remedy. The Group has some concerns about such remedies, in particular:
 - their effectiveness in achieving appropriate price levels, particularly as prices are typically negotiated and differ between customers;
 - the complexity of each such remedy, the market distortions it may create and the possible difficulty of monitoring compliance and enforcement generally; and
 - the length of time each remedy may need to remain in place to continue addressing the relevant SLC.
16. However, notwithstanding these concerns, the Group invites views on the following issues in relation to each of the supply of nitric acid of 58 to 60 per cent concentration, anhydrous ammonia, aqueous ammonia and carbon dioxide:

²Application of divestiture remedies in merger inquiries: Competition Commission Guidelines, CC8, December 2004, paragraphs 4.1 to 4.3.

- which prices should be controlled;
- the appropriate base price for each control;
- whether the price of anhydrous ammonia and nitric acid of 58 to 60 per cent concentration should be indexed to the price of natural gas and other raw materials;
- any supplementary obligations (such as supply commitments) that may be needed to ensure the effectiveness of such price controls;
- how compliance with any price controls should be effectively monitored; in particular, views are invited on whether an independent third party monitor, paid for by the JV, would be necessary in order to ensure effective compliance monitoring; and
- whether and under what conditions such price control mechanisms may be modified or ended.

Other measures

17. The Group would, of course, be willing to consider any other practicable remedies³—structural or behavioural—that the main parties or any interested third parties propose in order to address each expected SLC and any resulting adverse effects.

Relevant customer benefits

18. The Group will also have regard to the effects of any remedial action on any relevant customer benefits within the meaning of section 30 of the Act arising from the joint venture. Such benefits might comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods or services. A benefit is only a relevant customer benefit if the CC believes that: (a) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.
19. The Group welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits.

Next steps

20. The main parties are requested to provide any views in writing, including any practical alternative remedies they wish the Group to consider, by 18 **May 2007** (see note).

³See *Merger References, Competition Commission Guidelines, CC2*, paragraphs 4.17 to 4.21, for a discussion of possible types of remedies.

21. A copy of this notice will be posted on the CC website. Other interested parties are requested to provide any views in writing, including any other practical remedies they wish the Group to consider, by 18 **May 2007**.



Robert Turgoose
Group Chairman
4 May 2007

Note: This notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the provisional findings notified to the main parties on 4 May 2007. The main parties have until 25 May 2007 to respond to the provisional findings published on 4 May 2007. In the light of any responses by the main parties, or by other interested or affected third parties, the Group's findings may alter, in which case the Group may consider other possible remedies, if appropriate.