

**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**

**Notice of proposal to release undertakings given under  
section 82 of the Enterprise Act 2002**

**Provisional decision**

Published: 9 November 2010

The Competition Commission has excluded from this published version of the provisional decision information which the Group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [X]. Non-sensitive alternative wording is also indicated in square brackets.

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## 1. Introduction and Summary

### **Background**

- 1.1 In July 2007, the Competition Commission's (CC's) report (the 2007 report)<sup>1</sup> was published on the anticipated joint venture (the JV) between Kemira GrowHow Oyj (Kemira) and Terra Industries Inc (Terra).
- 1.2 The CC concluded that the JV constituted a relevant merger situation which might be expected to result in a substantial lessening of competition (SLC) in the market for nitric acid (of 58 to 60 per cent concentration), aqueous ammonia and anhydrous ammonia ('the relevant process chemicals') and in order to remedy this SLC, required Kemira to divest its business relating to these process chemicals.
- 1.3 The CC concluded that the merger might be expected to result in an SLC in the market for the supply of carbon dioxide (CO<sub>2</sub>) to distributors in the UK as a result of unilateral effects, and that in the absence of remedies this was expected to result in higher ex-works prices for CO<sub>2</sub> in the UK.<sup>2</sup> Terra had already informed the CC that it intended to close one of its CO<sub>2</sub>-producing plants (at Severnside), and the CC concluded that this SLC could be remedied by accepting suitable undertakings as regards the contract between Kemira and Air Liquide UK Limited, at Kemira's CO<sub>2</sub> liquefaction facility at Ince.
- 1.4 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. A copy of the undertakings is available on the CC's website,<sup>3</sup> and the key provisions relating to CO<sub>2</sub> are set out in the appendix. On

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<sup>1</sup>Kemira GrowHow Oyj and Terra Industries Inc merger inquiry: a report on the anticipated joint venture between Kemira GrowHow Oyj and Terra Industries Inc, CC, 11 July 2007.

<sup>2</sup>2007 report, paragraph 10.74.

<sup>3</sup>[www.competition-commission.org.uk/inquiries/ref2007/kemira/pdf/final\\_undertakings.pdf](http://www.competition-commission.org.uk/inquiries/ref2007/kemira/pdf/final_undertakings.pdf).

14 September 2007 the JV was completed, creating GrowHow UK Limited (GrowHow UK).

- 1.5 The Office of Fair Trading (OFT) has a duty to consider whether, by reason of any changes of circumstance, existing undertakings are no longer appropriate and either the relevant parties can be released from undertakings or the undertakings need to be varied or superseded.<sup>4</sup> If the OFT concludes that change may be required to existing undertakings, it provides advice to the CC regarding the changes of circumstance. It is then for the CC to decide whether the existing undertakings are no longer appropriate, and, if so, whether they should be superseded, varied or released. A memorandum of understanding (MoU) between the CC and the OFT sets out the process for review of undertakings and orders under the Enterprise Act 2002 (the Act).
- 1.6 On 10 July 2009, GrowHow UK submitted a request to the OFT that there had been a change of circumstances and that the parties should be released from paragraphs 7 to 11 of the undertakings.
- 1.7 On 18 November 2009, the OFT sent its formal advice and recommendation to the CC. The OFT will publish this advice alongside this provisional decision.

### ***Our provisional decision***

- 1.8 We provisionally find that there has been a change of circumstances for the purposes of section 92(2)(b) of the Enterprise Act 2002 (the Act) in the form of the sale to Azelis UK Limited (Azelis) of the carbon dioxide (CO<sub>2</sub>) liquefaction plant at Billingham and the acquisition of Kemira by Yara International ASA (Yara).

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<sup>4</sup>[Section 92\(2\)\(b\) Enterprise Act 2002.](#)

- 1.9 As a result of the change in circumstances, the parties should be released from the obligations in paragraph 7 of the Undertakings.
- 1.10 Notwithstanding the change of circumstances, the obligations in paragraphs 8 to 10 of the Undertakings should remain in force.
- 1.11 Paragraph 11 of the Undertakings no longer has practical effect; for the avoidance of doubt and good administrative practice, the CC proposes to release this paragraph of the undertakings.

### ***Next steps***

- 1.12 Any representations in relation to this provisional decision should be made by 30 November 2010 and sent to: T J Oyler, Remedies Manager, Competition Commission, Victoria House, Southampton Row, London WC1B 4AD, or email: [tim.oyler@cc.gsi.gov.uk](mailto:tim.oyler@cc.gsi.gov.uk).
- 1.13 Following this consultation period, we will issue a final decision accompanied, if applicable, by draft revised undertakings. Subject to further representations, these draft revised undertakings will incorporate the proposed variations set out in the final decision. The draft revised undertakings will be consulted upon for 15 days, as contemplated in Schedule 10 of the Act, then amended, if appropriate and accepted.

## **2. Background**

### ***The 2007 report***

- 2.1 In 2007, the CC considered the anticipated JV (GrowHow UK) between Kemira GrowHow Oyj, Kemira GrowHow UK Limited and Terra Industries Inc (jointly, the parties). The transaction consisted in the merger of the parties' UK fertilizer businesses, including the production and sale of by-products and intermediate

products for the manufacture of fertilizers. The parties overlapped in the production and sale of certain types of fertilizers, nitric acid, ammonia and raw CO<sub>2</sub>, which is a by-product of ammonia manufacture.

- 2.2 The CC published its report on 11 July 2007. In relation to CO<sub>2</sub>, the CC found that to be commercially usable the raw CO<sub>2</sub> had to be purified and liquefied and that the ammonia production process, as operated by the parties, was one of the most effective sources of CO<sub>2</sub>, resulting in relatively low purification costs. As a result, the parties had a very high share of the market for the supply of CO<sub>2</sub> to distributors in the UK.
- 2.3 Prior to the merger, CO<sub>2</sub> was liquefied by Terra at two plants located at Severnside and Billingham, and Terra was active in the wholesale supply of liquid CO<sub>2</sub>; Kemira sold raw CO<sub>2</sub> produced at its Ince plant exclusively to Air Liquide and liquefied this CO<sub>2</sub> under a long-term contract with Air Liquide in a plant owned by Air Liquide on the Ince site.<sup>5</sup>
- 2.4 The CC concluded that the merger might be expected to result in an SLC in the market for the supply of CO<sub>2</sub> to distributors in the UK as a result of unilateral effects, and that in the absence of remedies this was expected to result in higher ex-works prices for CO<sub>2</sub> in the UK.<sup>6</sup>
- 2.5 The CC considered a number of remedies to this SLC, including divestiture, price control and prohibition.<sup>7</sup> It concluded that any price control remedy was likely to be ineffective, and that prohibition would be disproportionate. It considered the divestiture of Terra's CO<sub>2</sub> liquefaction facilities as a remedy, and although it considered that

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<sup>5</sup>Air Liquide leases the land on which its liquefaction plant stands from Kemira.

<sup>6</sup>2007 report, paragraph 10.74.

<sup>7</sup>2007 report paragraphs 15.68 to 15.104

this remedy would be effective, it also found that it would be more restrictive and have a higher cost than a remedy which would strengthen the contract between Kemira and Air Liquide at Ince (the Ince Agreement). To this end, the CC sought undertakings from the parties in relation to certain aspects of the contract.

2.6 The Undertakings included the following provisions:

- (a) not to terminate the contract, except for due cause and subject to OFT approval (paragraph 8);
- (b) to renew the lease under equivalent terms and conditions to those currently in force (paragraph 8);
- (c) to give Air Liquide access to CO<sub>2</sub> up to the annual capacity of the plant (paragraph 9);
- (d) to allow Air Liquide to demand up to the maximum amount of liquid CO<sub>2</sub> that can be produced by the liquefaction plant on a daily basis, within the plant's annual capacity limit (paragraph 10);
- (e) to put in place measures preventing the communication of commercial information relating to CO<sub>2</sub> produced at Ince, including, in particular, information relating to offtake, costs and pricing, to personnel involved in commercial negotiations in relation to CO<sub>2</sub> produced at Billingham and Severnside, and vice versa (paragraph 7). The JV undertook to draw up guidelines to give effect to the above—these were to continue until the Billingham plant was divested and the Severnside plant had closed; and
- (f) to offer new terms in relation to specific aspects of the operating, management, maintenance and supply agreement which defined its contractual relationship with Air Liquide (paragraph 11). This paragraph was intended to facilitate negotiation of the contract and had a limited duration of three months.

2.7 The Undertakings to this effect were accepted on 11 September 2007, and the JV was completed on 14 September 2007.

### ***Acquisition of Kemira***

2.8 Independently from the formation of the JV, on 18 July 2007 Yara announced its intention to acquire sole control of Kemira. Yara produced CO<sub>2</sub> in Continental Europe, imported liquid CO<sub>2</sub> into the UK, and was also involved in the wholesaling and distribution of CO<sub>2</sub> in the UK.

2.9 The Yara/Kemira transaction fell under the exclusive jurisdiction of the European Commission. The 2007 report made reference to this difference in jurisdiction, but said that from the point of view of the CC's inquiry, the transaction would have no effect on any of the markets it examined 'unless and until merger clearances have been obtained'.<sup>8</sup> The CC decided to draw the attention of the European Commission to its final report and findings.

2.10 The European Commission investigated the transaction<sup>9</sup> and found that it would lead to a significant impediment of effective competition on the markets for the supply of liquid CO<sub>2</sub> to distributors and the supply of liquid CO<sub>2</sub> to end-users in the UK.

2.11 By way of a remedy, Yara offered to procure the divestment of Terra's liquefaction plant at Billingham, to procure that the JV enter into an agreement for the supply of raw CO<sub>2</sub> with the purchaser of the liquefaction plant, with a possible additional agreement for the JV to manage and operate the liquefaction plant on behalf of the purchaser. The Billingham facility was sold to Azelis in fulfilment of these commitments on 1 June 2008.

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<sup>8</sup>2007 report, paragraph 5.9.

<sup>9</sup>Case no COMP/M.4730 Yara/Kemira GrowHow.

2.12 The European Commission accepted this remedy and the transaction was cleared subject to phase 1 commitments on 21 September 2007, shortly after the publication of the CC's report and the formation of the JV.

### ***Yara's contract with Azelis***

2.13 Yara has a supply agreement with Azelis for liquid CO<sub>2</sub> from Billingham originally signed on 22 December 2003. Following commitments given by Yara to the European Commission in 2007, the agreement was amended in May 2008 as part of the sale of the CO<sub>2</sub> business to Azelis. This contract has been taken on by Azelis and runs until the end of [REDACTED]. The key feature of this contract is that Azelis has an obligation to supply up to [REDACTED] tonnes of liquid CO<sub>2</sub> to Yara each year ([REDACTED]), but Yara has no obligation to take any of this volume. [REDACTED] Yara therefore has a call option over approximately [REDACTED] per cent of Azelis's production capacity at Billingham.

2.14 In addition, Yara has a further supply agreement with Azelis (originally dated 31 December 2001 and amended in May 2008), giving Yara an option to purchase up to [REDACTED] tonnes per month from Billingham. Azelis told us [REDACTED].

### ***Closure of Severnside plant***

2.15 The Severnside facility formerly owned by Terra was closed permanently by GrowHow UK on 31 January 2008. This closure had been contemplated in the merger plans considered at the time of the original inquiry.

### ***Other market developments***

2.16 Since the 2007 report, Air Products has closed its ammonia plant and associated CO<sub>2</sub> liquefaction facility. Yara has also opened a large liquefaction facility at the site of a bioethanol plant at Wilton which is owned by a third party (Ensus). In October

2010, Air Liquide announced its intention to open a liquefaction facility at Wisington in partnership with British Sugar.

- 2.17 On 15 February 2010, Yara announced that it intended to acquire Terra. Because of the potential scrutiny of this merger by the European Commission, and the significant impact on the UK market for CO<sub>2</sub> should it proceed, we considered that it would not be reasonably practicable to continue with the review. As a result, on 11 March 2010 the CC announced its decision to suspend the review until the uncertainties surrounding GrowHow UK were resolved.
- 2.18 On 15 April 2010, CF Industries Incorporated, a US-based fertilizer company, acquired Terra. After receiving additional information, the CC announced the resumption of the review on 8 June 2010.

### ***Legal framework***

- 2.19 The Act provides the CC with the power to vary, supersede or release an undertaking given to it either on direct application or acting on the advice of the OFT that by reason of a change of circumstances it is necessary to make a change to undertakings.<sup>10</sup>
- 2.20 The procedure for reviews of CC undertakings (and orders) is set out in an MoU<sup>11</sup> between the CC and the OFT agreed in February 2009. The agreed procedure provides that, first, the OFT will consider as required by the Act whether there has been a 'change of circumstances', and second, if there has been, what action should be taken. It will then submit its report and recommendation to the CC. The CC will

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<sup>10</sup>The Act, sections 82(5) and 92. In practice, the CC does not deal with direct applications because of the procedure agreed in the Memorandum of Understanding between the CC and the OFT (see paragraph 2.20).

<sup>11</sup>[www.competition-commission.org.uk/about\\_us/our\\_organisation/workstreams/pdf/mou\\_between\\_of\\_t\\_and\\_cc.pdf](http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/pdf/mou_between_of_t_and_cc.pdf).

then assess the OFT's report and recommendation and make its own determination on what action to take in the light of the OFT's advice.

- 2.21 The CC in carrying out its review of the undertakings has to consider the change of circumstances mentioned by the parties' applications and the OFT's advice, and take into account the developments in the relevant market that have occurred since the Undertakings were accepted. In this, it does not seek to review the original decision and remedies on the basis of the evidence then available.

### 3. **GrowHow UK's request for review of undertakings**

- 3.1 On 10 July 2009, GrowHow UK submitted a request to the OFT for a release from paragraphs 7 to 11 of the undertaking. This effectively represented a complete release from the undertakings relating to CO<sub>2</sub>.
- 3.2 GrowHow UK argued that the changes of circumstances were that:
- (a) as a result of the closure of the Severnside facility and the sale of the Billingham facility to Azelis, the CO<sub>2</sub> liquefaction operations formerly owned by Terra and transferred to GrowHow UK as part of the merger were respectively terminated and ceased to be under the control of GrowHow UK; and
  - (b) as a result of (a) above, GrowHow UK had exited from the market for the supply of liquid CO<sub>2</sub> in the UK.
- 3.3 GrowHow UK argued that as a result of the changes of circumstances the SLC identified by the CC in the 2007 report had been removed and that it should be released from the Undertakings.
- 3.4 GrowHow UK also argued that the cost of compliance with the undertakings, in particular paragraph 7 regarding confidentiality, was placing an unnecessary burden on

its business, and that the existence of the Undertakings in relation to the Ince Agreement [✂].

### ***GrowHow UK's evidence to the OFT***

- 3.5 In this section we summarize GrowHow UK's evidence to the OFT in four sections:
- (a) jurisdictional issues and the relationship between the Undertakings and the European Commission's remedy;
  - (b) paragraphs 8 to 10 of the Undertakings;
  - (c) paragraph 7 of the Undertakings; and
  - (d) paragraph 11 of the Undertakings.

#### *Jurisdictional issues*

- 3.6 GrowHow UK submitted that the SLC in the 2007 report in relation to CO<sub>2</sub> derived solely from the competitive overlap between CO<sub>2</sub> production at Billingham and Ince, and the changed incentive that the overlap would give the JV in relation to the Ince Agreement. It also submitted that the CO<sub>2</sub> undertakings were designed solely to deal with this SLC, and that the CC left out of its analysis the identification (and remedy) of any possible SLC arising from Yara's acquisition of Kemira, since the transaction was subject to the exclusive jurisdiction of the European Commission and UK competition law cannot be applied to any aspect of the transaction.
- 3.7 GrowHow UK noted that the OFT's advice to the CC suggested that the CC could take account of Yara's joint control of GrowHow UK, its access to new UK liquid CO<sub>2</sub> production capacity, and the impact that these factors might have on GrowHow UK's incentives under the Ince agreement, upon the basis that this resulted in or changed essentially the same underlying SLC as that found by the CC in the Kemira/Terra merger. GrowHow UK commented that any notion that the SLCs resulting from the Kemira/Terra merger and the Yara/Kemira merger might be similar must be rejected

since the SLCs resulted from quite different mergers and involved different parties, control structures and market dynamics. It continued that a specific SLC could not be retained or modified or used to remedy a different SLC arising from a different merger situation which was assessed by the European Commission, and that the European Commission must have been fully capable of assessing the actual and potential impact of the Yara/Kemira merger on the UK CO<sub>2</sub> market.

- 3.8 In short, GrowHow UK stated that the review must be confined to competition issues deriving from the Kemira/Terra merger and not extend to any SLC deriving from the Yara/Kemira merger.

#### *Paragraphs 8 to 10 of the Undertakings*

- 3.9 GrowHow UK made three arguments in favour of releasing paragraphs 8 to 10 of the Undertakings. It cited the section of the 2007 report where the CC said that 'the JV ... would have the opportunity to raise its ex-works prices for liquid CO<sub>2</sub> at Billingham and Severnside'.<sup>12</sup> It argued that the SLC identified by the CC applied to the market for the supply of liquid CO<sub>2</sub>, and that as a result of the closure of the Severnside facility and the divestment of the Billingham facility it was no longer present in the market and no longer had the ability to control ex-works prices of liquid CO<sub>2</sub>.
- 3.10 It also said that the CC's willingness to consider the divestment of Billingham as an acceptable remedy, in its final report, showed that the subsequent exit of GrowHow UK from Billingham meant that any additional behavioural remedy was not necessary. Finally, it said that because the Confidentiality Policy Guidelines (the Guidelines) were of limited duration, and had provision for termination if GrowHow UK divested Billingham and closed Severnside, this was evidence that the CC had

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<sup>12</sup>2007 report, paragraph 10.65.

contemplated that the CO<sub>2</sub> obligations should cease once the relevant events had taken place.

#### *Paragraph 7 of the Undertakings*

3.11 GrowHow UK said that it should be released from paragraph 7 of the Undertakings because it was no longer present in the supply of liquid CO<sub>2</sub>. It argued that it now met the conditions of the duration clause in the Guidelines, which stated that 'These Guidelines ... shall continue in force until such time as ... the JV has divested the CO<sub>2</sub> liquefaction plant at Billingham and has also permanently ceased production of raw CO<sub>2</sub> at Severnside'.<sup>13</sup>

#### *Paragraph 11 of the Undertakings*

3.12 GrowHow UK said that paragraph 11 of the Undertakings had expired, and that it should be released as a matter of good administration.

#### ***Air Liquide's views on the request***

3.13 Air Liquide accepted that the review of the Undertakings should not seek to remedy the effects of the Yara acquisition. However, it argued that the OFT and the CC should have regard to the changes of circumstances involving Yara even though, in its view, the review and any decision not to release or vary the undertakings need not depend on these circumstances.

3.14 Air Liquide said that in reality GrowHow UK was still present in the market for the supply of liquid CO<sub>2</sub> as it operated the liquefaction plants at Ince and Billingham. It

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<sup>13</sup>Confidentiality Policy Guidelines, Clause 2.

argued that as a result of GrowHow UK's continued operation, the SLC identified by the CC had not changed in any way.<sup>14</sup>

3.15 It also argued that the fact that the CC's market definition included the supply of raw CO<sub>2</sub> to Air Liquide at Ince should mean that it would also include the supply of raw CO<sub>2</sub> to Azelis at Billingham.<sup>15</sup>

3.16 Air Liquide characterized the Yara transaction as being an additional factor that highlighted the persistence of the SLC identified by the CC. It noted Yara's presence in the supply of liquid CO<sub>2</sub> to distributors through its call option on [REDACTED] per cent of Azelis's capacity and its import of CO<sub>2</sub> into the UK. It submitted that, when viewed as part of the wider Yara corporate group, GrowHow UK was still present in the liquid CO<sub>2</sub> market.<sup>16</sup>

3.17 In October 2010, Air Liquide announced that it was investing €10 million in partnership with British Sugar to commission a new CO<sub>2</sub> liquefaction facility at Wisington. Planning permission has been obtained, and the plant is scheduled to become operational in the middle of 2011, will have a nameplate capacity of approximately 70,000 tonnes a year [REDACTED].

3.18 Air Liquide argued that the effect of the entry of new capacity at Wisington would be to replace the capacity lost by the closure of Air Products' liquefaction facility in 2009 (which post-dated the Undertakings and increased the JV's share of supply), from which Air Liquide was supplied with up to [REDACTED] tonnes of liquid CO<sub>2</sub> under a 'take-or-pay' arrangement.

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<sup>14</sup>OFT advice, paragraph 108.

<sup>15</sup>OFT advice, paragraph 120.

<sup>16</sup>OFT advice, paragraph 135.

- 3.19 With regard to paragraph 7 of the Undertakings, Air Liquide argued that the confidentiality obligations were still needed in order to maintain Air Liquide's negotiating position relating to purchases of liquid CO<sub>2</sub> from Billingham.<sup>17</sup> It also argued that because the prohibition in paragraph 7.1 of the Undertakings referred to 'production', and that this word had been added to the Undertakings after consultation, that the CC intended the Undertaking to remain in force provided GrowHow UK was still involved in the production of liquid CO<sub>2</sub>, which it was as it operated the Billingham plant on behalf of Azelis.<sup>18</sup>
- 3.20 Air Liquide accepted that the Guidelines had terminated, but said that paragraph 7 of the Undertakings should remain notwithstanding the termination of the Guidelines. Its reasons for this were that in any conflict between the two, the Undertakings should prevail, that the Undertakings would have remained in force if the Guidelines had not come into force, and that the undertakings were effective and enforceable during the three-month period while the Guidelines were being negotiated.<sup>19</sup>
- 3.21 With regard to paragraph 11 of the Undertakings, Air Liquide agreed that, on its face, this paragraph had expired, but noted that GrowHow UK had not complied with its obligations to enter into a new lease with Air Liquide at Ince within the three-month period, as required by paragraph 8.2 of the Undertakings, but had subsequently done so in January 2010.

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<sup>17</sup>OFT advice, paragraphs 153–154.

<sup>18</sup>OFT advice, paragraphs 155–156.

<sup>19</sup>OFT advice, paragraphs 156–158.

3.22 Air Liquide also submitted that as a result of the Yara acquisition and Yara's acquisition of liquid CO<sub>2</sub> capacity arising from the new liquefaction plant at Wilton, the Undertakings not only needed to be maintained, but also to be strengthened.<sup>20</sup>

### ***The OFT's advice to the CC***

3.23 The OFT identified two events which represented a change of circumstances. These were the exit of GrowHow UK from the supply of liquid CO<sub>2</sub> in the UK (through the closure of its Severnside plant and the divestment of its Billingham plant), and the Yara acquisition.

### ***The Yara acquisition and jurisdiction issues***

3.24 The OFT noted GrowHow UK's view that the review process in relation to the Undertakings must be set against the background of the adverse effects originally identified by the CC.<sup>21</sup> It also noted GrowHow UK's view that the review must be confined to competition issues deriving from the Kemira/Terra JV and not extend to CO<sub>2</sub> competition issues deriving from the Yara acquisition.<sup>22</sup>

3.25 The OFT said it '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'.<sup>23</sup>

3.26 It also advised that if the Yara acquisition were to result in a new and different SLC, then this was not relevant for the CC as it was not something which could be addressed by the CC's undertakings. If the Yara acquisition were to result in, or change, an SLC 'that is of a similar nature to that created by the Kemira/Terra

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<sup>20</sup>OFT advice, paragraph 175.

<sup>21</sup>OFT advice, paragraph 56.

<sup>22</sup>OFT advice, paragraph 57.

<sup>23</sup>OFT advice, paragraph 63.

transaction', then '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 this review'.<sup>24</sup>

### *Paragraphs 8 to 10 of the Undertakings*

3.27 The OFT accepted that the presence of the JV in the market for the supply of liquid CO<sub>2</sub> was 'clearly relevant' to the CC's SLC. This was also evidenced by the presence of paragraph 7 of the Undertakings.<sup>25</sup>

3.28 However, it did not believe that the basis for the CC's unilateral effects finding arose solely on the basis of GrowHow UK's presence in the liquid CO<sub>2</sub> market, but that the SLC arose 'primarily in relation to the concentration created at the raw CO<sub>2</sub> level'.<sup>26</sup>

3.29 With regard to GrowHow UK's argument that the CC's view of the divestment of Billingham was a suitable alternative remedy (see paragraph 3.10), it was of the view that the sale of the Billingham plant to Azelis was not 'the full implementation of the alternative divestiture remedy', as additional behavioural undertakings would have been sought by the CC. The OFT took this to mean that these undertakings would be required to ensure that there was no exploitation of market power in the supply of raw CO<sub>2</sub> suitable for liquefaction.

3.30 With regard to the limited duration of the Guidelines, it considered that 'there is no evidentiary support that can be gleaned from the stated limited duration of the

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<sup>24</sup>OFT advice, paragraph 63.

<sup>25</sup>OFT advice, paragraph 78.

<sup>26</sup>OFT advice, paragraph 79.

Confidentiality Policy Guidelines as regards Paragraphs 8 to 10 of the Undertakings'.<sup>27</sup>

- 3.31 The OFT also considered Air Liquide's arguments against release. It noted that the CC did not consider that a requirement for GrowHow UK to continue to operate the Billingham plant would prevent the divestment of Billingham from being an effective remedy. From this, it concluded that it was not the operation of the liquefaction plant which gave rise to the SLC, but rather the 'financial interest in the downstream supply of liquid CO<sub>2</sub>',<sup>28</sup> and that it did not believe GrowHow UK's operation of Billingham justified the continued operation of paragraphs 8 to 10 of the Undertakings.<sup>29</sup>
- 3.32 The OFT noted the CC's finding that GrowHow UK 'would have the opportunity ... to raise its ex-works prices for liquid CO<sub>2</sub> at Billingham and Severnside'<sup>30</sup> and considered whether this SLC related to the supply of raw and/or liquid CO<sub>2</sub>. It cited paragraph 10.35 of the CC's report, which defined the market as 'the supply of CO<sub>2</sub> to distributors within the UK. This includes the supply by Kemira of raw CO<sub>2</sub> to Air Liquide at Ince and supplies to distributors through the import terminals operated by Yara'.<sup>31</sup> It considered that the SLC was based on the creation of market power in relation to raw CO<sub>2</sub>, 'notwithstanding that the manifestation of that market power would (when the joint venture was present in the supply of liquid CO<sub>2</sub>) have been felt downstream'.<sup>32</sup>
- 3.33 The OFT concluded that the change of circumstances (the closure of Severnside and divestment of Billingham) had not removed the basis for the SLC arising in respect of

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<sup>27</sup>OFT advice, paragraph 99.

<sup>28</sup>OFT advice, paragraph 111.

<sup>29</sup>OFT advice, paragraph 112.

<sup>30</sup>2007 report, paragraph 10.65.

<sup>31</sup>2007 report, paragraph 10.35.

<sup>32</sup>OFT advice, paragraph 128.

raw CO<sub>2</sub>, and that this conclusion held irrespective of the change of ownership of Kemira.

3.34 The OFT also considered the effect of the Yara acquisition and Air Liquide's submission that GrowHow UK remained active in the supply of liquid CO<sub>2</sub>. It found that it could not dismiss the possibility that GrowHow UK's future behaviour could be changed given the fact that Yara was active in the supply of liquid CO<sub>2</sub>,<sup>33</sup> and that this could give rise to 'fundamentally the same SLC identified by the CC in its report ... albeit that it involves a different entity [Yara]'.

3.35 However, the OFT did not conclude on this issue because of its previous conclusion (reported in paragraph 3.33 above) that paragraphs 8 to 10 should not be released regardless of the Yara acquisition.

#### *Paragraph 7 of the Undertakings*

3.36 The OFT agreed with the parties that the Guidelines had terminated, and accepted Air Liquide's view that paragraph 7 of the Undertakings took precedence over the Guidelines. It also noted that absent the Guidelines there was still a restriction within GrowHow UK relating to the exchange of information between Ince and Billingham.<sup>34</sup>

3.37 The OFT said that the effect of paragraph 7.1 was now to erect an information exchange barrier between GrowHow UK and two of its customers (Air Liquide at Ince and Azelis at Billingham). The OFT considered that there was no justification for this barrier now that GrowHow UK was no longer present in the supply of liquid CO<sub>2</sub>, and that there was no need to erect an information barrier in order to maintain Air Liquide's negotiating position (as it had argued) because GrowHow UK was no longer present in the sale of liquid CO<sub>2</sub>.

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<sup>33</sup>OFT advice, paragraph 146.

<sup>34</sup>OFT advice, paragraph 162.

3.38 The OFT said further that it believed that the CC deliberately approved the limited duration of the Guidelines because the information requirements in paragraph 7.1 of the Undertakings (to which the Guidelines gave effect) were no longer required when the relationship between Air Liquide and GrowHow UK concerning the supply and purchase of liquid CO<sub>2</sub> was removed. It considered a possible explanation for the different expiry dates of the Undertakings and the Guidelines but concluded that ‘whatever the correct explanation’, there remained no ongoing justification for paragraph 7.1 of the Undertakings.<sup>35</sup>

3.39 In conclusion, the OFT considered that the closure of Severnside and the divestment of Billingham were a change of circumstances as a result of which paragraph 7 of the Undertakings was no longer applicable and that GrowHow UK should be released from it.

#### *Paragraph 11 of the Undertakings*

3.40 The OFT noted that paragraph 11 of the Undertakings had expired, and that whether or not GrowHow UK had complied with its obligations regarding the new lease (as required by paragraph 8.2), this did not impact on the ongoing operation of paragraph 11. It concluded that, for reasons of good administrative practice and for the avoidance of doubt only, GrowHow UK should be released from this paragraph.

#### *The OFT’s conclusions*

3.41 In its advice, which is published at the same time as this provisional decision, the OFT recommended that:

- (a) as a result of the change of circumstances, the parties should be released from paragraph 7 of the undertakings;

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<sup>35</sup>OFT advice, paragraph 167.

(b) notwithstanding the change of circumstances, the obligations in paragraphs 8 to 10 of the Undertakings should remain in force; and

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

#### 4. **Our assessment of whether the change of circumstances requires us to vary the Undertakings**

4.1 As described in paragraphs 2.19 to 2.21, we are required to consider whether, as a result of any change of circumstances identified by the OFT in its advice, the Undertakings are no longer appropriate and either GrowHow UK can be released from them or they should be varied or superseded.

4.2 We reviewed and considered the OFT's advice carefully, and also examined the parties' submissions to the OFT. In addition, we sought further evidence, submitting an information request to GrowHow UK and holding meetings or conference calls with Azelis, Air Liquide and the European Commission team that assessed the acquisition of Kemira by Yara in 2007.

4.3 As described in paragraph 3.23, the OFT identified in its advice a relevant change of circumstances in the form of the closure of the Severnside plant, the sale to Azelis of the carbon dioxide liquefaction plant, and the acquisition of Kemira by Yara.<sup>36</sup>

4.4 We note that the closure of the Severnside plant had been contemplated in the merger plans between Kemira and Terra, and the effects of the closure on competition were considered in the 2007 report. We also note that the closure has the effect

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<sup>36</sup>OFT advice, paragraph 2.

of reducing the number of sources of raw CO<sub>2</sub>, and so is not likely to support a variation or suspension of the Undertakings as requested by GrowHow UK.

4.5 We therefore do not consider that the closure of the Severnside plant as a change in circumstances is relevant to the variation or suspension of the Undertakings.

4.6 To assess whether we are satisfied that there has been a change of circumstances which requires us to vary the Undertakings, we first examine in this section the position of the Yara acquisition with regard to our consideration of the current competition issues in the markets for CO<sub>2</sub>.

4.7 Next, we examine the request for variation in three parts:

(a) paragraphs 8 to 10 of the Undertakings, relating to the Air Liquide agreement;

(b) paragraph 7 of the Undertakings, relating to confidentiality; and

(c) paragraph 11 of the Undertakings, relating to negotiation of the Air Liquide agreement.

### ***The Yara acquisition and its status for our review***

4.8 We reviewed the OFT's advice and other evidence and considered the status of the Yara acquisition for our review of the Undertakings.

4.9 In paragraph 148 of its Advice, the OFT raises the issue (but does not give its view) on whether the review should take account of the fact that Yara has a presence in the supply of liquid CO<sub>2</sub> (and, according to the OFT, 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.

- 4.10 GrowHow UK submitted that, contrary to the OFT's analysis, the CC should take no account of Yara's ownership of GrowHow or its new liquid CO<sub>2</sub> capacity in the UK (see paragraphs 3.6 to 3.8 above).
- 4.11 In other words, GrowHow UK submitted that the CC had no jurisdiction to retain or modify the Undertakings which were designed to address an SLC deriving from the Kemira/Terra merger in order to address a different SLC deriving from a different merger (Yara's takeover of Kemira) which fell under the European Commission's exclusive jurisdiction.
- 4.12 The reason why GrowHow UK has applied to be released from the undertakings is because of changes in circumstances as set out in paragraph 3.2 above. It follows that the CC has to have regard to what those changes in circumstances are, and to decide whether the outcomes, which the Undertakings are intended to remedy, would still exist.
- 4.13 These changes in factual circumstances have arisen in part because of a merger (Yara/Kemira) which needed notification to and clearance from the European Commission and a remedy (divestment by GrowHow of the Billingham plant) required as a result of that merger.
- 4.14 However, there is a difference between the CC considering whether, by reason of a change in circumstances (including changes arising from an EU merger), an undertaking given to remedy an SLC is no longer appropriate, and the CC purporting to vary an undertaking, given to remedy an SLC, in order to remedy perceived anti-competitive outcomes of an EU merger. Clearly, we cannot do the latter.

4.15 Thus, although GrowHow UK argued strongly that the CC had no jurisdiction to consider ‘concerns ... in relation to GrowHow’s new/changed incentives towards Air Liquide at Ince ... [which] derive solely and directly from Yara’s acquisition of Kemira’, we consider that this claim is overstated. We need to look at the factual and economic matrix as it is now in so far as this has a bearing on the SLC that was identified and the remedies accepted by the CC: this therefore includes Yara’s acquisition of Kemira and the consequential divestment of the liquefaction facility at Billingham by GrowHow. We recognize that we cannot consider any competition issues arising solely from Yara’s acquisition of Kemira as this was cleared, subject to undertakings, by the European Commission.

4.16 We do not propose to take a decision which runs counter to a decision on the same matter adopted by the European Commission. We are satisfied that we are able to consider the effects of the change of circumstances in this review,<sup>37</sup> and that this does not (as claimed by GrowHow):

in practice mean that the CC was not assessing the effects of the merger that created the joint venture GrowHow and which lies within its jurisdiction but a different merger (and its competitive effects) (Yara/Kemira) which lies outside of the CC’s jurisdiction and within the EC Commission’s exclusive jurisdiction.

4.17 We consider that the two transactions—the Kemira/Terra JV and the Yara/Kemira merger—and the decisions in each of these transactions were considered in sequence, notwithstanding the overlap of parties and the markets under consideration. We believe that, in principle, in considering whether remedies for a merger situation should be retained, we should properly have regard to the effects in the relevant market of a subsequent merger—even if that merger was considered in

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<sup>37</sup> *Inntrepreneur Pub Company (CPC) v Crehan* [2007] 1AC333.

another jurisdiction and remedies were put in place in the expectation of addressing competition concerns raised by the merger. Thus the fact that Yara acquired Kemira appears to introduce an element which is potentially relevant to our consideration of whether it is appropriate to retain undertakings given to remedy the original SLC.

#### *Conclusion on jurisdiction issues*

4.18 We consider that, when reviewing the Undertakings, the Yara acquisition and its potential actual effects should not be excluded from our consideration. Furthermore, we consider that we can properly have regard to the economic consequences arising from Yara's changed role as regards GrowHow when reviewing whether the Undertakings should be varied or released, so long as the focus of the review continues to be on GrowHow UK and the SLC identified by the CC in the 2007 report.

#### ***Paragraphs 8 to 10 of the Undertakings***

4.19 We considered the OFT's advice relating to paragraphs 8 to 10 of the Undertakings. We also sought further evidence from GrowHow UK, Air Liquide, Azelis and the team from the European Commission which had dealt with the Yara acquisition.

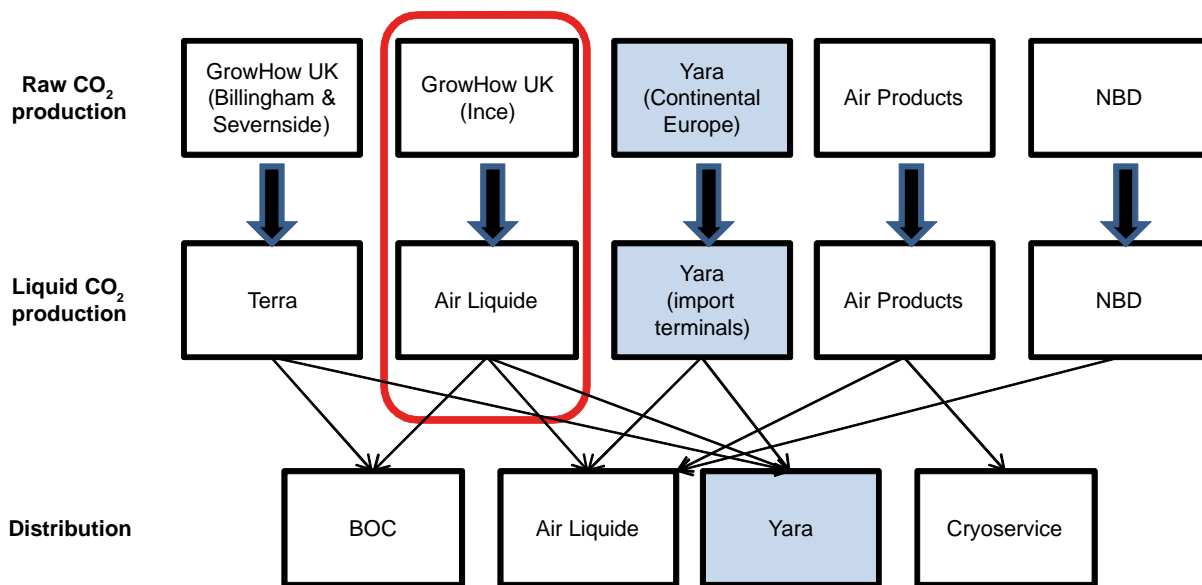
#### *Changes in the market since the 2007 report*

4.20 As set out in the background section, there have been a number of recent developments in the market. Figure 1 shows the liquid CO<sub>2</sub> supply chain following the merger and in 2010.

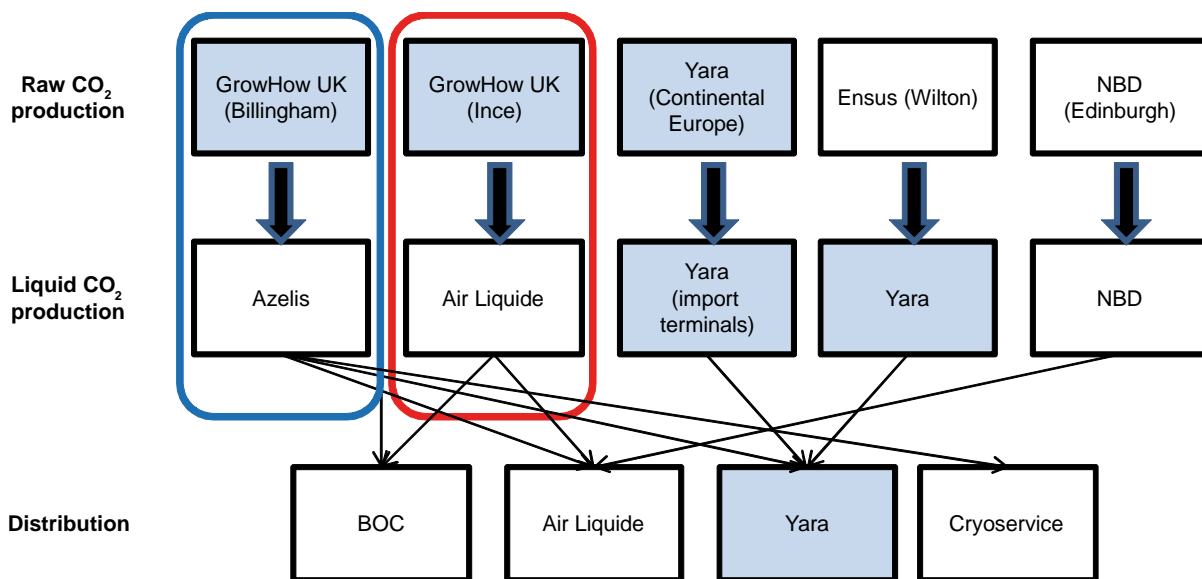
FIGURE 1

Liquid CO<sub>2</sub> supply chain in 2007 and 2010

(a) 2007 post-merger position



(b) 2010 current situation



- European Commission remedy—contract controlling maintenance, supply and price increases until 2018
- CC remedy—undertakings protecting Air Liquide’s lease, and controlling maintenance, supply and price increases
- Entities jointly or wholly controlled by Yara

Source: CC, the parties.

- 4.21 Currently, there are three main sources of the raw CO<sub>2</sub>: the ammonia plants at Ince and Billingham which are owned by the JV, and the bioethanol plant at Wilton which is owned by Ensus. At present, all three are contractually bound to deliver raw CO<sub>2</sub> for liquefaction to the parties that own or rent the liquefaction facilities at these plants, namely Azelis at Billingham, Air Liquide at Ince and Yara at Wilton.
- 4.22 At the time of the CC's original inquiry in 2007, the JV estimated that total UK retail sales of liquid CO<sub>2</sub> had fallen from around 450,000 tonnes a year in 2002 to around 400,000 tonnes a year in 2006. In response to our information request, the JV told us that it was not able to provide an updated figure as it was no longer active in the supply of liquid CO<sub>2</sub>. On the basis of our discussions with Azelis and Air Liquide, it appears that there has been little, if any, growth in this market. Based on the information we received from Air Liquide and Azelis, we estimate that the sales in 2010 will be around 400,000 tonnes.
- 4.23 Following Yara's investment at Ensus' plant at Wilton, total UK liquefaction capacity (excluding Yara's import facilities) stands at around 620,000 tonnes a year. This is well in excess of both the current and anticipated future demand given market trends, although we note that demand for CO<sub>2</sub> is subject to significant seasonal fluctuations such that excess capacity may be significantly lower during particular periods of the year. At present, Yara controls [redacted] per cent of the UK capacity through its new liquefaction facility at Wilton and the call option it has on the output from the Billingham liquefaction plant which is operated by the JV on behalf of Azelis (this is discussed in paragraph 4.35 below).

#### *Theories of harm following the change in circumstances*

- 4.24 The original SLC was based around a unilateral effects theory of harm. The 2007 report said that:

We expect that the JV, as contracts come up for renewal, would have the opportunity to raise its ex-works prices for liquid CO<sub>2</sub> at Billingham and Severnside. At Ince the JV could use the threat of termination of the contract to raise the price of raw CO<sub>2</sub> or to curtail output in order to maximise 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.<sup>38</sup>

4.25 The finding in the original report is that there are two actions that may arise at Ince which give rise to unilateral effects. The first is the threat of termination of the contract to raise the price of raw CO<sub>2</sub>, and the second is the curtailing of supply of raw CO<sub>2</sub> to maximize sales from GrowHow UK's other plants as Air Liquide sought alternative supplies.

4.26 The SLC is, therefore, based on three theories of harm:

- (a) the opportunity for GrowHow UK to raise its ex-works prices for CO<sub>2</sub> at Billingham and Severnside;
- (b) the curtailing of supply of raw CO<sub>2</sub> at Ince to maximize sales of liquid CO<sub>2</sub> from GrowHow UK's other UK plants; and
- (c) the threat of termination of the contract with Air Liquide at Ince to raise the price of raw CO<sub>2</sub>.

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<sup>38</sup>2007 report, paragraph 10.65.

*Theory of harm (a): raising ex-works prices at GrowHow UK plants*

- 4.27 We note that the JV is no longer active in the supply of liquid CO<sub>2</sub> following the divestiture of the Billingham liquefaction facility to Azelis.
- 4.28 However, in its advice to the CC, the OFT considered a variant of this theory of harm according to which the JV may increase the price of raw CO<sub>2</sub> to Azelis at Billingham which, in turn, may result in higher prices to distributors of liquid CO<sub>2</sub> downstream.<sup>39</sup>
- 4.29 In its response to the OFT's findings, GrowHow pointed out that the terms of the Billingham agreement, which was signed for an initial term of [X] years, [X], oblige it to make raw CO<sub>2</sub> available to Azelis, and control increases in the price of raw CO<sub>2</sub>. This information was confirmed by Azelis.
- 4.30 As a result of this contract, we do not consider there to be any ability for GrowHow UK to exercise market power at the Billingham plant which could result in higher prices downstream.

*Theory of harm (b): curtailing of supply at Ince*

- 4.31 Following Azelis's acquisition of the Billingham facility, GrowHow UK is no longer active in the supply of liquid CO<sub>2</sub>. Therefore this theory of harm can now only apply to raw CO<sub>2</sub>. One of the conditions necessary for this theory of harm to hold would be that the contribution margin for raw CO<sub>2</sub> at Billingham would have to be greater than the margin at Ince. GrowHow UK provided us with information that showed that the contribution margin at [X] is [X] than at [X]. We have also been told that there is very little surplus capacity at [X].

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<sup>39</sup>OFT advice, paragraph 116.

4.32 As a result, we do not consider that GrowHow UK has an incentive to curtail production at Ince in order to increase sales at Billingham.

*Theory of harm (c): threat of termination of Ince contract*

4.33 We therefore turn to the final theory of harm based on the unilateral effects that were identified in the original inquiry as giving rise to an SLC, namely that the JV may threaten to terminate the contract at Ince in order to force Air Liquide to accept a higher price for raw CO<sub>2</sub>. Air Liquide sought to clarify this hypothesis by arguing that if the JV was released from the Undertakings imposed by the CC, the JV would have every incentive to threaten to terminate the Operating and Maintenance Agreement if Air Liquide did not agree to an increase in the £[redacted] per tonne price for raw CO<sub>2</sub> that Kemira had accepted as a condition for approval of the JV.<sup>40</sup>

4.34 We next considered the ability of Air Liquide to find alternative sources of liquid CO<sub>2</sub> to defeat any price rise imposed by GrowHow UK at Ince. As a result of its acquisition of Kemira, Yara now owns 50 per cent of GrowHow UK, giving it joint control.

*Existing sources of liquid CO<sub>2</sub> from ammonia*

4.35 The only supplier of liquid CO<sub>2</sub> produced from ammonia which, in theory, has sufficient capacity to meet demand from Air Liquide in the absence of Ince supply is Azelis. However, Azelis told us that it was contractually bound to make available to Yara [redacted] tonnes of liquid CO<sub>2</sub> a year, but Yara had no obligation to take any of this volume. This accounted for [redacted] per cent of the nameplate capacity at the Billingham plant.<sup>41</sup> Azelis told us that Yara's call option, given the existing contracts, effectively precluded it from substantially increasing its supply to either existing or potential customers.

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<sup>40</sup>Before the merger, the price had been £[redacted].

<sup>41</sup>We were told by Azelis that its contract with Yara runs up to [redacted].

4.36 This is illustrated in Table 1 which shows the forecast sales for 2010 at the Billingham plant by Azelis.

TABLE 1 Liquid CO<sub>2</sub> commitments and capacity at the Billingham plant

<i>Forecast sales commitments 2010</i>	
<i>'000 tonnes</i>	
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
Total	[REDACTED]
Capacity	[REDACTED]
Spare capacity	[REDACTED]

Source: Azelis.

4.37 In 2010, [REDACTED]. However, we do not believe that other distributors can rely on securing surplus volume and this constrains the onward sale by other distributors since end-customers typically require secure supplies and may specify volume commitments in purchase contracts.

4.38 In 2009, Air Liquide sourced [REDACTED] tonnes of liquid CO<sub>2</sub> at Ince. Air Liquide noted that 2009 had been an exceptional year due to a long-term outage; in previous years Ince had operated at nearly full capacity, and Air Liquide expected it to do so in the future for as long as it remained operational. Therefore, the spare capacity at the Billingham plant ([REDACTED] tonnes) is well below Air Liquide's needs. Furthermore, Azelis also told us that demand for liquid CO<sub>2</sub> was highly seasonal and that the more relevant metric for assessing the relationship between demand and capacity was monthly rather than annual production. On that measure, the Billingham plant already effectively operates with commitments approximately covering full capacity for several months of the year given its contractual obligation to Yara. Azelis commented that in the peak month of 2009 it was unable to meet demand for additional volumes from Air Liquide.

4.39 We note that although the 2007 report stated that ‘a divestment of Terra’s CO<sub>2</sub> liquefaction facilities combined with suitable behavioural undertakings would nevertheless constitute an effective remedy’,<sup>42</sup> we consider that Yara’s call option undermines the effectiveness of this remedy. In addition, the analysis in the report was undertaken prior to the clearance of Yara’s acquisition of Kemira and therefore the statement in the report cannot be considered applicable to current circumstances.

*Liquid CO<sub>2</sub> from imports and bioethanol plants*

4.40 In the original inquiry the CC considered the extent to which the JV may be constrained by Yara which, at the time, imported liquid CO<sub>2</sub> using specialist ships and import facilities. In the report the CC did not consider that this source of CO<sub>2</sub> provided an effective competitive constraint. Since then, Yara has also gained joint control of GrowHow UK, as noted in paragraph 2.8 above, which may limit its incentive to provide an effective constraint.

4.41 As described above, Yara has recently installed liquefaction facilities at the Ensus bioethanol plant at Wilton. We were told by the JV and Yara that this facility was capable of producing around [REDACTED] tonnes of liquid CO<sub>2</sub> a year.

4.42 In our view, the extent to which Yara, through its supply of liquid CO<sub>2</sub> from Wilton, may impose a competitive constraint on the pricing of raw CO<sub>2</sub> by the JV at Ince is questionable. The estimated costs of liquefying CO<sub>2</sub> at the Ensus plant are somewhat higher than the costs to Air Liquide of liquefying CO<sub>2</sub> at Ince. Specifically, we were told by Yara that the estimated cost of production (based on the output of [REDACTED] tonnes) at the Ensus plant is approximately £[REDACTED] per tonne ([REDACTED]). This is [REDACTED] per cent higher than the costs of supplying liquid CO<sub>2</sub> at Ince (currently £[REDACTED] a tonne, including the cost of the raw CO<sub>2</sub>).

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<sup>42</sup>2007 report, paragraph 15.90.

4.43 [REDACTED]

4.44 In conclusion, we do not consider that Air Liquide would have access to sufficient quantities of liquid CO<sub>2</sub> from existing sources that would enable it to defeat a price increase arising from the threat of termination of the contract at Ince.

#### *Entry*

4.45 We were told by several parties that the demand for liquid CO<sub>2</sub> had been static or even declining in recent years with little prospect for further growth in the future. The JV attributed this to falling demand for liquid CO<sub>2</sub> from the nuclear industry and efficiency improvements in the manufacture of carbonated drinks.<sup>43</sup> Azelis told us that demand for liquid CO<sub>2</sub> in the food and beverage sector had also declined as a result of the demand shift from carbonated drinks to still drinks and mineral water.<sup>44</sup>

4.46 Against this background, we note that more capacity has been created by Yara's investment in its new CO<sub>2</sub> facility at Wilton. That facility alone is capable of supplying [REDACTED] per cent of the estimated liquid CO<sub>2</sub> sales in 2010. As set out in paragraph 4.22 above, the total liquefaction capacity is approximately 620,000 tonnes. This is some 40 per cent higher than the current sales (approximately 400,000 tonnes).

4.47 We were also told that the development of any new facility at a bioethanol site would be a lengthy and costly process. Azelis and Air Liquide told us that Yara invested £18–£23 million in the development of its liquefaction plant at Wilton. Air Liquide told us in February 2010 that although there were a number of new bioethanol plants in the UK, none of these plants, other than the Ensus plant, currently had the equipment or permission to liquefy the raw CO<sub>2</sub>.

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<sup>43</sup>JV response to the CC's information request.

<sup>44</sup>Conference call meeting with Azelis on 12 February 2010.

4.48 At the time of the original inquiry, there were two small liquefaction plants owned by third parties—North British Distillery (NBD) and Air Products. Air Products' ammonia plant has recently closed down (see paragraphs 2.16 and 3.18). NBD told the CC during the original inquiry that it did not vent significant quantities of CO<sub>2</sub>, and that its output at the time—around [redacted] tonnes a year—was all that could be produced at its site. On the basis of the information available to us, we consider it unlikely that any of the existing sources of ammonia could be exploited by installing additional capture and liquefaction equipment.

4.49 Since the implementation of the Undertakings, there has been new capacity added by Yara at Wilton, although as noted above, Yara's investment in GrowHow UK may be expected to limit its effectiveness as a competitive constraint. It is proposed that Air Liquide will have access to additional capacity from a facility at the British Sugar bioethanol plant at Wissington later in 2011. The timing and impact of supplies from this new facility are subject to uncertainty. We also note Air Liquide's view that these supplies effectively replaced Air Liquide's source of supplies lost from the closure of Air Products' liquefaction facility in 2009.

4.50 Considering all the above evidence, at present we are unable to conclude that entry would provide a sufficient constraint to the threat of closure at Ince, which paragraphs 8 to 10 of the Undertakings are designed to protect.

#### *Divestiture of Billingham as an alternative remedy*

4.51 GrowHow UK argued that the CC's consideration of the sale of the liquefaction plant at Billingham (taking account also of the closure of the Severnside plant) as a remedy to the SLC in its report indicated that the sale of the plant to Azelis as a result of the remedy to the European Commission Yara/Kemira case meant that the Undertakings were no longer required. This argument was rejected by the OFT which

argued, based on its reading of the CC report in the original inquiry, that the European Commission remedy did not include the 'behavioural undertaking' which would have been required by the CC and hence that there the two were not equivalent.<sup>45</sup>

4.52 GrowHow UK disagreed with the OFT's reading of the CC report. It argued that the only 'behavioural' remedies mentioned by the CC in its original report were, first, volume and price commitments in relation to the supply of raw CO<sub>2</sub> and secondly, an operating and maintenance agreement. It pointed out that both of these were in place at Billingham as part of the undertaking it gave to the European Commission. GrowHow UK noted the CC's conclusion that 'whilst the pool of suitable potential purchasers would be likely to be very small, a divestment of Terra's CO<sub>2</sub> liquefaction facilities combined with suitable behavioural undertakings would nevertheless constitute an effective remedy'.<sup>46</sup> As a result, according to GrowHow UK, the CC's consideration and approval of the Billingham divestment remedy provided 'cogent evidence that an actual disposal of the Billingham CO<sub>2</sub> business upon exactly the terms contemplated by the CC (and implemented by the EC Commission) would indeed address fully the SLC and remove the need for the Undertakings'.<sup>47</sup>

4.53 Leaving aside the interpretation of the original report, we are not convinced by GrowHow UK's argument for the following reasons. First, the Commission envisaged that any sale of Billingham would be accompanied by behavioural restrictions, and did not envisage that if there were such a sale a call option would be granted to an undertaking in the position of Yara. The grant of that option is relevant to our assessment of the continuing relevance of the Undertakings. On one approach, the fact that the European Commission did not see fit to impose restrictions to prevent the option

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<sup>45</sup>OFT advice, paragraph 92.

<sup>46</sup>2007 report, paragraph 15.90.

<sup>47</sup>GrowHow UK's comments on the OFT's advice, paragraph 4.7.

granted to Azelis can be explained by the presence of the Undertakings and the security they provide to Air Liquide at Ince. It is also relevant that Yara now owns 50 per cent of GrowHow UK. In our view, the fact that more than [X] of the output at Billingham is effectively under the control of one of the two owners of GrowHow UK impedes the ability of Azelis to act as a constraint on GrowHow UK.

4.54 Furthermore, as Azelis pointed out to the OFT,<sup>48</sup> the possibility existed that Yara might also exert influence over the prices at which Azelis supplied CO<sub>2</sub> to its other customers. If Yara were to limit its uptake of CO<sub>2</sub> from Billingham while reserving its call option, Azelis would ultimately have to cover the fixed costs of CO<sub>2</sub> production by raising its sales prices to its other customers.

4.55 More generally, there has been further concentration in the market after our original inquiry, following Yara's acquisition of Kemira, which, in our view, undermines further the divestiture of Billingham as an effective remedy.

### ***Conclusion on paragraphs 8 to 10 of the Undertakings***

4.56 Taking all of the above into account, our view is that, absent the Undertakings, GrowHow UK continues to have both the ability and the incentive to increase the price of raw CO<sub>2</sub> to Air Liquide at Ince along the lines considered by the CC to be an SLC in the original inquiry. This finding stands irrespective of the fact that Kemira is now owned by Yara. As a result, we consider that paragraphs 8 to 10 of the Undertakings should remain in force.

### ***Paragraph 7 of the Undertakings***

4.57 We have considered the parties' arguments and the OFT's advice regarding paragraph 7 of the Undertakings. We note the mismatch in duration between the

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<sup>48</sup>OFT advice, paragraph 187.

Undertakings and the Guidelines, and the current situation whereby the Undertakings remain in force but the Guidelines have expired.

- 4.58 In order to decide whether this paragraph should be released, we must understand its purpose, and specifically whether it is intended solely to protect Air Liquide's position in negotiating the purchase of liquid CO<sub>2</sub> from Billingham, or whether the protection is wider.
- 4.59 We note Air Liquide's point that paragraph 7 of the Undertakings should remain notwithstanding the termination of the Guidelines and that the Undertakings had been in effect during the period before the Guidelines were approved. We agree that the termination of the Guidelines should not automatically mean that paragraph 7 no longer applies, and have therefore considered the need for paragraph 7 in the light of the actual changes of circumstances submitted to us.
- 4.60 The Guidelines were drawn up and submitted by GrowHow UK and approved by the CC as part of the remedies process in the original merger inquiry. While the Undertakings were signed in September 2007, shortly before the announcement of the European Commission's decision in the Yara/Kemira merger, the Guidelines were submitted and approved in December 2007, by which time the CC was aware of the undertaking given by Yara to procure the divestment of Billingham.
- 4.61 It is clear to us that, in accepting the clause which terminated the Guidelines on the closure of Severnside and divestment of Billingham, the CC did not see a need for a detailed undertaking on confidentiality once GrowHow UK was no longer present in the sale of liquid CO<sub>2</sub>. The Undertakings were accepted by the CC before the announcement of the conditional clearance of the Yara/Kemira transaction and the

proposed divestment of Billingham, giving it no reason to limit the duration of paragraph 7.

- 4.62 Evidence for the CC's view that paragraph 7 was necessary only because of GrowHow UK's position as a seller of liquid CO<sub>2</sub> can also be found in the discussion of remedies in the 2007 report. In it, the CC says, 'In addition, we consider that ... Chinese walls would be necessary, as the JV and Air Liquide both sell CO<sub>2</sub> to distributors and are therefore direct competitors; and to maintain Air Liquide's negotiating position in relation to its purchases of CO<sub>2</sub> from Terra.'<sup>49</sup>
- 4.63 We also note Air Liquide's argument that the insertion of the word 'production' into paragraph 7 of the Undertakings, and the continued presence by GrowHow UK in the production of liquid CO<sub>2</sub> at Ince and Billingham, means that paragraph 7 should still apply, notwithstanding the divestment of Billingham to Azelis. We do not consider that it necessarily follows that the CC's inclusion of production within the functions covered by paragraph 7 was indicative of a wider scope, and that it is conceivable that it was included in order to make the remedy sufficiently comprehensive. It is also unclear how the sharing of production information would weaken Air Liquide's position given that it negotiates with Azelis for liquid CO<sub>2</sub> at Billingham.
- 4.64 In conclusion, we concur with the OFT's view that there is no ongoing justification for paragraph 7 of the Undertakings, and consider that as a result of a change in circumstances arising from the divestment of Billingham and consequent exit of GrowHow UK from the supply of liquid CO<sub>2</sub>, GrowHow UK should be released from paragraph 7 of the Undertakings.

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<sup>49</sup>2007 report, paragraph 15.80.

***Paragraph 11 of the Undertakings***

4.65 We agree with the OFT's advice that this paragraph was time limited and has now expired. Consequently, for reasons of administrative good practice and for the avoidance of any doubt, we propose to release GrowHow UK from paragraph 11 of the Undertakings.