

# The creation of Ferti Supply

Journal nr. 4/0120-0401-0001/FI/LD og LKA

Rådsmødet den 22. februar 2006

## Summary

1. Dansk Landbrugs Grovvarereselskab A.m.b.A. (DLG), AgroDanmark A.m.b.A. (AgroDK) and Yara Danmark A/S (Yara), a Norwegian fertilizer producer, have notified the creation of a joint venture named Ferti Supply, which will take over the notifying parties' fertilizer wholesale activities, i.e. purchase, sale and distribution of fertilizers in Denmark. The joint venture is a merger in the sense of the Danish Competition Act. The case was referred from the European Commission to Denmark under the EC Merger Regulation, cf. Article 4(4).<sup>[1]</sup>

2. Fertilizers are essential for plant growing farmers. Each year more than 950,000 tons are consumed by Danish farmers. Use of fertilizers is subject to strict rules and regulations, determining the maximum amount farmers may spread etc. This has led to a decrease in consumption by approximately 40 % since 1988/89.

3. No significant production, apart from some production of liquid fertilizers, has taken place in Denmark since Kemira closed its production site in 2004. The international manufacturers Kemira and Yara (formerly Norsk Hydro) have kept warehouses and harbour terminals in Denmark. The distribution (wholesale and retail), however, has been handled by regional and national feedingstuff companies, which include fertilizers in their range of products offered to farmers.

4. Access to the distribution system is crucial for suppliers. Fertilizers are consumed within 3 months during spring, and the products are voluminous and heavy to transport. Demand is quite inelastic, i.e. farmers demand the same amount regardless of minor price changes. However, purchasers in all segments of the fertilizer market are quite price-conscious. Fertilizers to the Danish market are imported on ships which can carry 3-5.000 tons and unload their cargo even in minor Danish harbours. In order to reach the farmers it is, however, important to have access to the retail outlets close to the farmers, which are controlled by feedingstuff retailers. DLG, for example, has 140 retail outlets where farmers can pick up their supply during the season.

5. Over the years, the fertilizer market has become increasingly concentrated, both in respect of producers, feedingstuff companies and farmers. Today, Yara and the Finnish company Kemira are among the largest international suppliers [?] in Denmark. Other large producers operating in Denmark are Fertifa [X], Achema [X] and Zuid [X].

6. DLG and AgroDK are both cooperative societies<sup>[2]</sup> operating in the feedingstuff sector (grain, feed, seed, fertilizers and crop protection) with a combined market share of 55-60 % (fertilizers). Their closest competitor at the distribution level is the DLA Agro group with more or less 1/3 of the market. Kemira and DLA Agro have published their plan to create a joint venture similar to Ferti Supply. The next distributor in line is Aarhusegnens Andel which does not have a vertical relationship with any producer. Other – independent – players in wholesale and retail each account for less than 5 %.

**Table 1: The parties' market shares (DK) - the fertilizer year 2004/05**

|                | Production | Wholesale | Retail |
|----------------|------------|-----------|--------|
| Yara           | 15-25      |           |        |
| DLG*           |            | 40-50     | 40-50  |
| AgroDK**       |            | 5-15      |        |
| AgroDK members |            |           | 5-15   |
| Ferti Supply   | 15-25      | 55-60     | 55-60  |

Source: The notifying parties; the DCA's calculations.

\* DLG also sells fertilizers to other retailers not members of DLG.

\*\* AgroDK's members have a larger market share in the retail market than AgroDK in wholesale, among other due to sales directly from DanGødning to the individual members.

7. The parties' rationale for creating Ferti Supply is to realise synergies within the value chain in Denmark, e.g. in the form of scale advantages (joint warehousing and purchasing) and logistic advantages (transportation, sourcing and storage strategies). Ferti Supply will have access to a fine-meshed distribution network, amongst other things by leasing storage facilities owned by DLG and AgroDK throughout Denmark.

8. In connection with the creation of Ferti Supply, the parent companies have entered into supply/distribution agreements with the joint venture. These agreements contain exclusivity and purchase obligations with a duration of 3 years. DLG and AgroDK will purchase fertilizers exclusively from Ferti Supply and Ferti Supply is obliged to purchase at least [X] of its requirement from Yara. At the same time, Ferti Supply will become Yara's sole distributor in Denmark. Amounts not purchased from Yara will be purchased from SweDane, a purchase cooperation owned partly by DLG, which currently purchases fertilizers on behalf of both DLG and AgroDK.<sup>[3]</sup> Favourable pricing mechanisms between Yara and Ferti Supply upstream, and between Ferti Supply and DLG/AgroDK downstream, have also been determined by the parent companies. Ferti Supply's profit will be divided between the parents [...].

9. Market investigations have revealed concerns from all levels of the value chain. The concerns are especially pointed towards access barriers as a result of the merger.

10. The DCA has identified several concerns as a result of the creation of Ferti Supply, which can be summed up to a considerable risk of significant impediment of effective competition, in particular as a result of the creation of Ferti Supply's dominant position and due to the increased vertical integration in the market. This is further supported by the agreed exclusivities for 3 years between Ferti Supply and DLG/AgroDK downstream, creating access foreclosure for other fertilizer producers/competitors to the Danish farmers. For a period of 3 years, competitors can approach 55-60 % of the retail market through Ferti Supply only. Competition to keep prices down may therefore be reduced.

11. The parties have submitted commitments that will abolish the agreed exclusivities downstream and Ferti Supply's long term minimum purchase obligation upstream. In short, the parties have agreed that Ferti Supply before 1 April each year will negotiate one-year-quantity contracts with both Yara and DLG/AgroDK. These one-year-quantity contracts stipulate the purchase obligations of respectively DLG and AgroDK towards Ferti Supply for the coming fertilizer year and, at the same time, the respective purchase and delivery obligations between Ferti Supply and Yara for the same fertilizer year. Ferti Supply may act as Yara's sole distributor that year. The new contracts will expire automatically on 30 June next year giving other producers/wholesalers access to Ferti Supply, DLG and AgroDK and their distribution network. The contracts will follow the typical cycles for fertilizer trading and competitors shall thus have the same opportunity as Yara to approach Ferti Supply, DLG and AgroDK with competitive offers, and neither is bound by any pre-existing, long term purchase obligations. In this way, the Danish fertilizer market will not be locked in. Attractive offers from competitors can, therefore, find their way to Danish retailers and contribute to increase the competitive pressure on retail prices. The framework agreements can be terminated with a notice of 3 months to 30 June.

12. The proposed commitments will, accordingly, meet the competitive concerns identified, and the DCA concludes – on this basis – that the creation of Ferti Supply does not significantly impede effective competition in the Danish fertilizer market, in particular as a result of the creation or strengthening of a dominant position, why it shall be approved; cf. Section 12c(1) and Section 12e(1) of the Danish Competition Act.

#### **Commitments proposed by the notifying parties**

13. The DCA has concluded that the commitments submitted by the notifying parties are sufficient to address the competition concerns raised by the creation of Ferti Supply. The wording of the proposed commitments is:

#### ***"COMMITMENT***

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provided by DLG, Agro Danmark and Yara Danmark A/S ("Yara") (together the "Parties") to the Danish Competition Council in connection with the Parties' formation of the joint venture Ferti Supply:

## **§ 1**

*1.1 The Parties have concluded an agreement on the future formation of a joint venture, Ferti Supply I/S ("Ferti Supply"), to be responsible for the Parties' import, distribution and sale (at wholesale level) of fertilizer on the Danish market ("the Market").*

*The formation of Ferti Supply is a merger within the meaning of the applicable rules on competition. The merger has Community dimension and on 13 July 2005, the Parties filed a form RS to the Commission requesting the Commission to refer the case for review by the Danish Competition Authority. On 1 September 2005, the Commission decided to refer the case and the Parties subsequently notified the Danish Competition Authority of the merger. The notification was declared complete on 20 December 2005.*

*1.2 Conditional upon the Danish Competition Council's approval of the merger without any further conditions, the Parties hereby undertake as follows:*

## **§ 2**

*2.1 The Parties undertake to prepare and execute an addendum to the overall body of agreements (the "Addendum") which leaves out clauses 4.1 and 5.1 of the distribution agreement concluded between Yara and Ferti Supply and clause 5.1 of the identical agreements concluded between Ferti Supply and DLG and Agro Danmark, respectively.*

*2.2 Moreover, the Addendum will include supplementary general provisions which in detail implement the following model and introduce such changes in the body of agreements as are necessary for the implementation.*

*No later than on 1 April prior to the beginning of each fertilizer year, the Parties will negotiate agreements on fertilizer quantities for the next fertilizer year (which year begins on 1 July in the same year and ends on 30 June in the year after). The agreements shall pertain to:*

- the quantities for Yara's sale to and Ferti Supply's purchase of products from Yara ("Yara Products"),*
- the quantities for DLG's and Agro Danmark's purchase of fertilizer ("Products") from Ferti Supply.*

*The one-year agreements imply that DLG and Agro Danmark, respectively, undertake towards Ferti Supply to buy an agreed quantity of Products in the relevant fertilizer year from Ferti Supply, and that Ferti Supply undertakes to buy from Yara and Yara to deliver to Ferti Supply an agreed quantity of Yara Products in the same fertilizer year. The quantity of Yara Products which Ferti Supply undertakes to buy does not necessarily have to equal the quantity of Products which DLG and Agro Danmark collectively undertake to buy from Ferti Supply, as it is presumed that Ferti Supply also buys fertilizer from other suppliers, mainly through SweDane Fertilizer A/S.*

*Through the Parties' entering into the abovementioned one-year agreements Yara commits itself to appoint Ferti Supply as its exclusive distributor of Yara Products on the Market in the relevant fertilizer year. However, Yara shall not be precluded from making passive sales to the Market and Ferti Supply shall always be entitled to purchase fertilizer from other suppliers/manufacturers.*

*It is emphasized that there is correlation between the one-year agreements in as much as the quantity of Products which DLG and Agro Danmark undertake to buy from Ferti Supply in any given fertilizer year plays a role in Yara's decision as to whether Ferti Supply is to be appointed exclusive distributor in that same fertilizer year.*

*If the Parties fail to reach an agreement on the total quantities (i.e. DLG's and Agro Danmark's total purchase of Products from Ferti Supply and Ferti Supply's purchase of Yara Products) prior to a given fertilizer year, the Parties shall be released of their obligations towards each other. Consequently, DLG and Agro Danmark shall not be obliged to buy a certain quantity of Products from Ferti Supply in the relevant fertilizer year and Ferti Supply will not be appointed exclusive distributor of Yara Products in the same fertilizer year. However, the Parties may continue to trade with Ferti Supply during the fertilizer year in question as usual.*

2.3 In consequence of the above changes and the above described model, the Addendum will also include provision(s) – as will the amendments to the body of agreements required for the implementation be effected – allowing each Party (subject to certain conditions) to terminate the co-operation at the beginning of April for expiry at the end of June, if the Parties as of 1 April have failed to reach agreement regarding the total quantities as described in clause 2.2, last paragraph.

If so, [X].

2.4 The deadline for performance of the above commitment is on the earlier of 1 April 2006 or at the time of formation of Ferti Supply.

### § 3

3.1 The Parties have made the above commitment subject to the approval of the Danish Competition Council of the merger. It is also a condition that the Danish Competition Council approves the described model. If such approvals are denied, the Parties shall not be bound by the above commitment.”

14. On condition that the parties fully comply with the proposed commitments, the creation of Ferti Supply will not significantly impede effective competition in the Danish fertilizer markets, in particular as a result of the creation or strengthening of a dominant position.

### Decision

15. The Danish Competition Council approves the creation of the joint venture Ferti Supply I/S between Yara Danmark A/S, Dansk Landbrugs Grovvarereselskab A.m.b.A and AgroDanmark A.m.b.A., on condition that the notifying parties implement the proposed commitments, pursuant to Section 12c(1) and Section 12e(1) of the Danish Competition Act.

### Background

16. In 2004, total turnover in the Danish fertilizer market was DKK 1.4 billion, corresponding to EUR187 million.

17. Market conditions have changed profoundly the past 15 years. Consumption of commercial fertilizers in Denmark has decreased by nearly 40 %, owing primarily to an increased awareness of the environmentally damaging side-effects of fertilizer use, and subsequent restrictions implemented in order to reduce consumption.

18. Companies at all levels of the fertilizer industry have gone through a process of increased consolidation and specialization. Much of the previous overcapacity in the industry has been eliminated. At production level, a significant part of the production has been concentrated within a few international companies with large specialized production facilities. Local distribution has been handed over to feedingstuff companies, which include fertilizers in their product range. Most of these companies are still local/regional, but they are spread over larger geographical areas than before. Some are even national and they often cooperate horizontally in the field of international purchases. The development at the distribution level reflects, to a large extent, the agricultural development, characterised by increased concentration with fewer and larger units, cf. Table 2.

**Table 2: The number of feedingstuff companies and farms in Denmark**

|                        | 1984   | 1989   | 1994   | 1999   | 2004   |
|------------------------|--------|--------|--------|--------|--------|
| Feedingstuff companies | 153    | 105    | 88*    | 55**   | n/a    |
| Farms                  | 95,300 | 81,300 | 69,300 | 57,800 | 45,600 |
| Of this, grain growers | 24,100 | 19,600 | 18,200 | 16,700 | 14,400 |

Source: Statistics Denmark.

\* 1992, \*\* 2001

19. This process has also influenced the Danish market. Superfos sold its feedingstuff activities to DLG in 1994, whereas the fertilizer production facility in Fredericia was bought by the Finnish company Kemira, which entered a long term agreement with DLG lasting until 2001.<sup>[4]</sup> In 2004, Kemira closed down the production plant but kept a warehouse and a sales company, Kemira GrowHow.

20. Yara (formerly Norsk Hydro) had controlling interest in KFK, which was in charge of approximately 20 % of the Danish feedingstuff market, until 2002 where its stocks were sold to a consortium of 8 Danish companies, among others DLG, Hedegaard A/S and Brdr. Ewers A/S. Yara kept – parallel to Kemira – a terminal (including a warehouse) in Randers. There has been no close cooperation between Yara and any large player in the Danish market since then.

21. Since 2004, no production of fertilizers<sup>[5]</sup> has taken place in Denmark. The feedingstuff companies, which to a large extent are organised as farmer co-operatives, have purchased via contracts each year. In order to obtain purchasing discounts, the companies have participated in purchasing groups.<sup>[6]</sup> For the past 5-6 years, two main purchasing groups have handled 85-95 % of the import; one consisting of DLG and their partners handles well over half of the commercial fertilizer supply, and the other consisting of Den Lokale Andel (DLA) handles approximately 1/3 of the supply.

22. Fertilizers are consumed during a short period from March to May, but production takes place in specialised facilities, which are based on twenty-four-hour production throughout the year. Producers only keep very small stocks at their production facilities; rather, they offer buyers lower prices just after the end of the growth season, i.e. in June. Prices then tend to increase month by month until they peak next spring. The fertilizer year runs from 1 July to 30 June the following year.

23. The creation of Ferti Supply will, according to the parties, make it possible to bring about synergies through better planning of purchases and logistics, i.e. a more efficient way of buying and stocking the necessary quantities as close to the end-users (the farmers) as possible.

24. Coincident with the creation of Ferti Supply, Kemira GrowHow and the DLA Group have agreed on setting up a co-operation, named AgrowLine, similar to that of Ferti Supply.<sup>[7]</sup>

### **The parties**

25. **Yara Danmark A/S** is a wholly-owned subsidiary of Yara Holding Danmark A/S, the ultimate owner being Yara International ASA (hereinafter collectively referred to as “Yara”), a Norwegian publicly traded company listed on the Oslo Stock Exchange. Yara is the world’s leading producer and marketer of mineral fertilizer. The core operations, internationally, are production and sale of nitrogen-based fertilizers and related industrial products. Yara also distributes and sells a wide range of phosphate-based and potash-based mineral fertilizers, as well as complex and specialty mineral fertilizer products sourced from third parties. In addition, Yara markets certain industrial gases and nitrogen chemicals that, in general, are co-products of its fertilizer operations. Currently, Yara sells its products to all Danish wholesalers.

26. **Dansk Landbrugs Grovvarereselskab A.m.b.A.** (hereinafter “DLG”), a cooperative society, has its principal place of business in Denmark and has approximately 25,000 Danish farmers as members. DLG is active in both wholesale and retail in the following sectors: 1) production of feed, including feed compounds; 2) purchase and import of raw materials; 3) purchase of crop, including concept and contract production; 4) purchase and sale of crop protection agents and fertilizers, and 5) processing and sales of agricultural lime. In addition, DLG operates in a.o. energy and telecommunications. DLG is participating in a purchase and supply cooperation active at Scandinavian level with regard to fertilizer/crop protection (SweDane). DLG also owns (together with AgroDK) 33 % of DanGødning, which is a producer of liquid fertilizers for farming, gardening and sports areas.

27. **Agro Danmark A.m.b.A.** (hereinafter “AgroDK”), a cooperative society, is a Danish wholesale undertaking which purchases and supplies feedingstuffs, cereal seeds, fertilizers and crop protection products on behalf of its 9 members<sup>[8]</sup>, who are all operating within the Danish retail farming sector. The AgroDK members are obliged to buy a.o. all their supply of fertilizers from AgroDK. Together with DLG, AgroDK takes part in the feedingstuff purchase and supply cooperation SweDane. AgroDK’s members own 55 % of DanGødning.

### **Jurisdiction**

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### **Turnover**

28. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (Yara: EUR 5.15 billion, DLG: EUR 1.8 billion, AgroDK: EUR 42 million). Two have a Community-wide turnover in excess of EUR 250 million (Yara: EUR 2.12 billion, DLG: EUR 1.8 billion, AgroDK: EUR 42 million). DLG and AgroDK achieve more than two-thirds of their aggregate Community-wide turnover in Denmark. The notified transaction therefore has a Community dimension under Art. 1(2) of the EC Merger Regulation<sup>[9]</sup>.

29. Accordingly, the transaction also meets the turnover thresholds in Section 12 of the Danish Competition Act.<sup>[10]</sup>

### **Referral from the Commission**

30. Upon a reasoned submission from the parties pursuant to Article 4(4) of the EC Merger Regulation, the European Commission referred the proposed transaction to the Danish Competition Authority (hereinafter: DCA) for examination and decision in Denmark.<sup>[11]</sup>

## **The concentration**

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### **Joint control**

31. The nature of the concentration is the creation of a joint venture between Yara, DLG and AgroDK named Ferti Supply. Ferti Supply shall act as an independent wholesaler of fertilizers in Denmark.

32. The board of directors of Ferti Supply will consist of [X] members. Yara, DLG and AgroDK will appoint [X] members each. All material decisions, including, but not limited to, appointment and removal of the board of directors and approval of the budget, are to be adopted by unanimity. The board cannot form a quorum unless one representative of each parent is present at the meeting. Ferti Supply's profits shall be divided among the parents [2].

33. Ferti Supply is thus deemed to be jointly controlled by its parent companies.

### **Full function joint venture**

34. Yara, DLG and AgroDK will transfer their logistic activities in the wholesale segment in Denmark to Ferti Supply.

35. Ferti Supply is set up to perform all the functions of an autonomous economic entity, with its own management and sufficient resources, and will act independently in the market on a lasting basis. Ferti Supply shall on its own determine and implement strategies concerning purchase, sale to the wholesale market, pricing policy, marketing and logistic and storage systems, i.e. Ferti Supply shall perform all logistics activities and services for distribution of fertilizer products in Denmark from quay to customer (retailer) and has the title and risk for the fertilizers until delivery.

36. Thus, the proposed concentration concerns the establishment of a full-function joint venture within the meaning of Article 3(4) of the EC Merger Regulation. The transaction is a concentration within the meaning of Article 3(1)b of the EC Merger Regulation.

37. The transaction is also a concentration within the meaning of Section 12a of the Danish Competition Act, which in this respect mirrors the EC Merger Regulation.

## **The rationale behind the creation of Ferti Supply**

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38. The rationale behind the creation of Ferti Supply, according to the parties, is to create synergies within the value chain in Denmark, e.g. in the form of scale advantages (joint warehousing and purchasing) and logistic advantages (transportation, sourcing and storage strategies).

39. Ferti Supply will have access to a fine-meshed distribution network and will be able to plan and coordinate its purchases better, based on prognoses from DLG and AgroDK; it will, among others, be able to negotiate favourable prices because of the considerable quantities that will be purchased; be able to use larger ships and thereby reduce transportation and loading/unloading costs; and have access to more storage facilities scattered throughout the country, which in turn will be more optimally utilized than today.

### Agreements in connection with the creation of Ferti Supply

40. Ferti Supply and Yara will enter into a purchase/distribution agreement (hereinafter the “**Yara Agreement**”). Ferti Supply will be Yara’s exclusive distributor in Denmark of all<sup>[12]</sup> Yara’s products for the first 36 months. During this period, Ferti Supply will have a minimum take-or-pay purchase obligation of [X] of its yearly requirements, purchased at special price called “ARA cost price”<sup>[13]</sup>. Ferti Supply has a right to obtain additional [ ] at “ARA cost price”. The volumes ordered from Yara shall be ordered in good time before each fertilizer year and follow a specific procedure agreed upon between the parties (delivery times, nomination of production capacity and call-off procedures – see more below para 43). Additional amounts from Yara are purchased at market price. For additional supplies, Ferti Supply decides to what extent other sources of supply will be used.

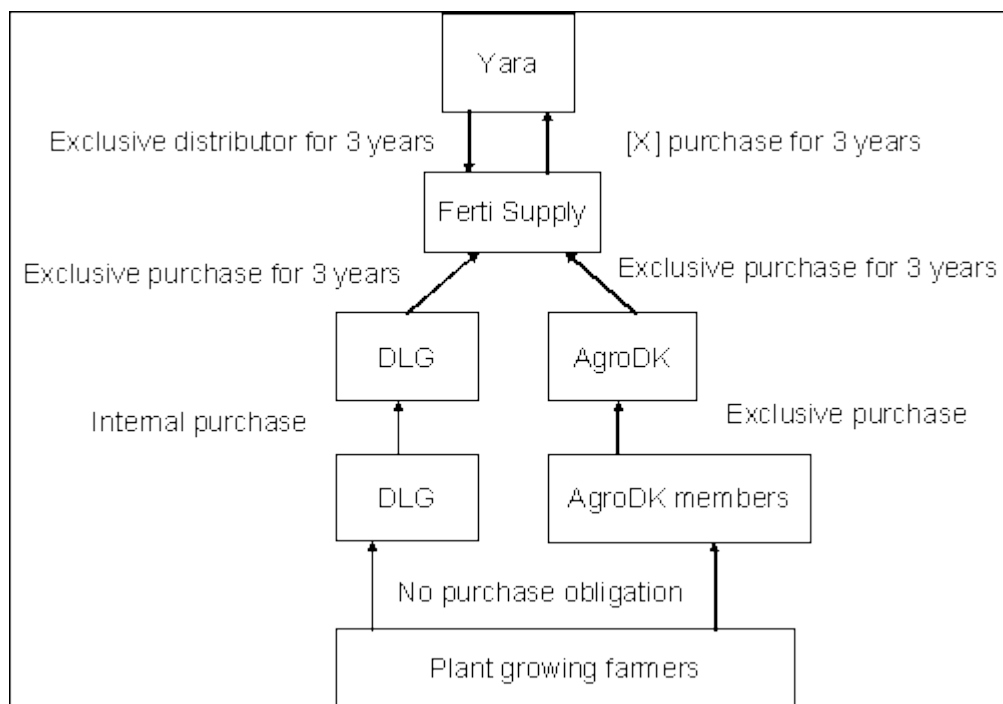
41. After the first 3 years, Ferti Supply will no longer be Yara’s sole distributor in Denmark and will have a right, but no obligation, to buy up to [X] of its requirements [ ] from Yara at “ARA cost price”.

42. Ferti Supply and the purchasing entity SweDane will enter into a purchase agreement (hereinafter the “**SweDane Agreement**”), according to which Ferti Supply may purchase fertilizers via SweDane, except certain products. It is agreed that Ferti Supply and SweDane will act “back-to-back” in the market. SweDane Fertilizer A/S was established by DLG and Svenska Lantmännen (SvL) in 1997 and is jointly owned by them. AgroDK joined the cooperation in July 2000 but holds no shares. The SweDane cooperation functions as a purchasing entity for SvL, DLG and AgroDK, which have purchased via SweDane exclusively. This exclusivity has, until the creation of Ferti Supply, been binding on the parties and it can only be terminated with 12 months notice to 30 June the following year. Because of the creation of Ferti Supply, DLG/AgroDK’s obligation to source exclusively from SweDane will cease to exist and to a certain extent be replaced by Ferti Supply’s possibility to source via SweDane. [ ] The quantities Ferti Supply purchases from SweDane will be determined following a procedure, where Ferti Supply in April each year shall present SweDane with an estimate of Ferti Supply’s purchase of fertilizer through SweDane for the coming fertilizer year. Ferti Supply has, however, no purchase obligation. The price is SweDane’s purchase price plus a fixed contribution pr. ton to cover SweDane’s costs. The agreement is non-terminable for the first 36 months, after which period it can be terminated with a notice of 6 months to a 30 June.

43. Ferti Supply’s purchases will, according to the parties, be organized similarly to the procedures already applied to the SweDane cooperation. The purchasing decisions will be taken by Ferti Supply’s steering committee consisting of [ ]. Typically, DLG and AgroDK make an estimate of the quantities required for the coming year in May. This estimate will be communicated to Ferti Supply, but it will not be binding. On the basis of DLG/AgroDK’s estimates, the steering group will decide which suppliers to approach and how the quantities should be divided amongst the different suppliers. A non-binding estimate will thereafter be negotiated with each supplier, typically in May as well. At the end of each month, the final prices and quantities will be negotiated with the suppliers for delivery the following month.

44. Ferti Supply will also enter into delivery agreements with both DLG and AgroDK (hereinafter the “**DLG and AgroDK Agreements**”), according to which Ferti Supply shall deliver fertilizer products to DLG and AgroDK, respectively. These agreements are also exclusive and non-terminable for DLG and AgroDK for the first 36 months, which means that DLG/AgroDK may not source from other suppliers (including SweDane) during this period. Following the expiry of this period, the obligation to source from Ferti Supply exclusively expires, and the agreements can be terminated with a notice of 6 months to a 30 June. The prices set by Ferti Supply to DLG and AgroDK shall be determined on an ongoing basis by the parties [ ].

### Figure 1: Planned agreements between the parents and Ferti Supply



## Relevant product markets

### Fertilizers

45. Fertilizers are either organic (manure etc.) or mineral (obtained through an industrial process) and are typically added during the growth season, i.e. a few months in spring. The three main nutrients added to the soil, through the use of mineral fertilizers, are: nitrogen (N), phosphorus (P) and potassium (K). These may be added either as straight or compound fertilizers. It is not possible to completely substitute one type with another, as N, P and K fertilizers each satisfy a specific need for plant growth. In Denmark, N is the most important nutrient.

46. Fertilizers exist as liquid or solid fertilizers. The parties submit that there is full substitutability between liquid and solid fertilizers and between different types of solid fertilizers within the main categories.

47. Solid fertilizers are compressed into grains. They are produced via a synthesis of atmospheric nitrogen and hydrogen manufactured from natural gas, fuel oil or coal. Ammonia makes up the basis for production of nitrogen based fertilizers. Liquid fertilizers are more easily and accurately spread in the fields.

### Demand-side substitutability

48. On the demand side, solid commercial fertilizers may to a certain extent be substituted in a number of ways. Fundamentally, liquid fertilizers can substitute solid fertilizers. Also, by using liquid fertilizers it is possible to obtain a more accurate dosing, and it takes shorter time for crops to absorb the nutrients. However, there are also disadvantages attached to using liquid fertilizers, as they are more difficult to handle and somewhat more expensive. First of all, liquid fertilizers make heavier demands on the farmer's storage facilities, as tanks are required for storage. Second of all, liquid and solid fertilizers require different spreading devices. Solid fertilizers require a fertilizer spreader, while liquid fertilizers are applied by use of a sprinkler. This may be the same sprinkler used for the spreading of pesticides. The parties estimate the costs of the required transition to approximately DKK 2,000 (EUR 267) plus 1 hour of work. Today, approximately 5-10 % of fertilizers sold in Denmark are liquid.

49. Besides commercial fertilizers, many farmers use organic fertilizers. Farmers are obliged to dispose of their slurry produce, for instance by adding it to the soil. On a yearly basis, 273,000 tons (ex livestock) of nitrogen is added to the Danish soil through manure. Organic fertilizers are added into the soil during the growth season of the plants to ensure that nutrients are properly absorbed by the plants and do not trickle down through the soil and pollute subsoil water and surrounding water areas.



50. There is limited substitution between organic and mineral fertilizers. A farmer is not likely to substitute from commercial to organic fertilizers just like that. Such substitution requires first of all access to manure etc. and investments in slurry tanks and spreading devices. Availability of manure etc. within a short distance is limited (unless the farmer has livestock, too). Commercial fertilizers also offer advantages with respect to quality and content. For instance, it is necessary to add sulphur to Danish soil, due to decreased emission of sulphur dioxide, especially from power plants. In addition, organic fertilizers do not necessarily consist of the ingredients/blend needed; it is easier to achieve a correct dosage of commercial fertilizers for the proper mix. Thus, even though substitution between the two types of fertilizers is technically possible, there are a number of barriers, which means that a farmer is not likely to substitute between commercial and organic fertilizers in response to small price changes and the two constitute separate product markets.

51. The parties submit that there is full substitution between different kinds of fertilizers within the same category, and that there are no specific properties characterizing one producer's products, which make it unique and non-substitutable. Despite of this, the parties do not exclude the possibility that certain end-users may have preferences for products from one producer instead of the other. According to the parties, the effect of such preferences is, however, reduced as most farmers rely on consultants (independent from the producers), when planning their fertilizer purchases.

### Supply-side substitutability

52. There may be differences in the quality of fertilizers produced in Eastern and Western European countries respectively. Western European products (e.g. from Yara and Kemira) have traditionally been perceived as being of a superior quality. Some types of fertilizer spreaders cannot be used when spreading low quality fertilizers, amongst other things due to the larger amounts of dust that low quality fertilizers contain.

53. It is – on the production level – safe to assume that producers will not switch production in response to a small and permanent change in relative prices without incurring additional significant costs and risks. However, at the same time, producers having the proper ingredients should readily and easily be able to blend two or more straight fertilizers into any compound fertilizer. On wholesale level, producers may supply all products required<sup>[14]</sup>, either from their own production or as “agents”.

### Preliminary conclusion on the relevant products

54. The parties submit that a precise product definition may be left open, as no particular competition concerns arise in relation to any of the possible narrower product market definitions for fertilizers. On this basis, the parties suggest that the term ‘commercial fertilizers’ is used as the collective term for the relevant product market.

55. In previous cases, the definition of the relevant product markets has been left open by the Commission in all but one decision (Kali und Salz<sup>[15]</sup>), where the Commission concluded that straight and compound K fertilizers constituted separate product markets.<sup>[16]</sup>

56. The DCA has previously, in 2002<sup>[17]</sup>, left the market definition(s) open, since alternative market definitions would not affect the assessment. There is no reason to define the fertilizer market more narrowly in the present case, neither with respect to the type of nutrient nor the form of the fertilizers, as a more narrow definition of the product market will not influence the competitive assessment. The parties' market shares within the different groups (N, P and K) do not vary so much as to warrant a different assessment for any of the products, cf. Table 3 below, when assessing Ferti Supply's position in the market.

57. In the present case, the precise relevant product market definition is thus left open, comprising the overall market for commercial fertilizers in the value chain<sup>[18]</sup> from production to consumption, as the assessment would be the same under any alternative market definition.

**Table 3: DLG, AgroDK and Ferti Supply's market shares, 2003/2004**

| Type of fertilizer | Market share - % |        |               |
|--------------------|------------------|--------|---------------|
|                    | DLG              | AgroDK | Ferti Supply* |
| N                  | [x]              | [x]    | [x]           |
| PK                 | [x]              | [x]    | [x]           |
| NPK, NP and NK     | [x]              | [x]    | [x]           |

|                       |              |             |              |
|-----------------------|--------------|-------------|--------------|
| Other single nutrient | [x]          | [x]         | [x]          |
| <b>Total*</b>         | <b>40-50</b> | <b>5-15</b> | <b>55-60</b> |

Source: DLG and AgroDK and statistics from the Danish Plant Directorate.

\* Ferti Supply's market share is pro forma as it did not exist in 2003/2004.

### Consumption in Denmark

58. Danish soil is, as mentioned, characterized by relatively large additions of sulphur being required. However, with respect to N, P and K, Danish soil has no special characteristics, except from legal provisions. The Danish consumption of three of the main nutrients added into the soil, N, P and K, has declined significantly over the past 15 years, as can be seen from Table 4.

59. In total, the use of fertilizers has declined by nearly 40 %, the most significant decrease taking place within the group of P fertilizers. Overall, total consumption of all types of commercial fertilizers in Denmark is 953,000 tons (The N-, P- and K-figures in Table 4 only take account of the amount of pure nutrients, while the total quantity also takes account of the various fillers and binding materials used in fertilizer products).

**Table 4: Consumption of commercial fertilizers in Denmark**

|                | <b>1988/89<br/>(1,000<br/>tons)</b> | <b>2003/04<br/>(1,000<br/>tons)</b> | <b>Change 1988/89-<br/>2003/04<br/>(%)</b> |
|----------------|-------------------------------------|-------------------------------------|--|
| Total quantity | 1,562.7                             | 953.2                               | -39  |
| Of this:       |                                     |                                     |  |
| - N            | 377.0                               | 206.7                               | -45  |
| - P            | 40.2                                | 15.0                                | -63  |
| - K            | 122.8                               | 64.1                                | -48  |

Source: The Danish Plant Directorate.

60. Consumption of fertilizers varies regionally. Regional differences may occur due to differences in the cultivated soil as, for instance, clay can retain larger quantities of nutrients than other types of soil. Furthermore, the amount of livestock in the localities may also cause regional differences in the consumption of fertilizers. In certain locations of Western and Northern Jutland, the concentration of livestock implies that there is no need of additional P or K.

**Table 5: Regional consumption of N, P and K, 2003/04**

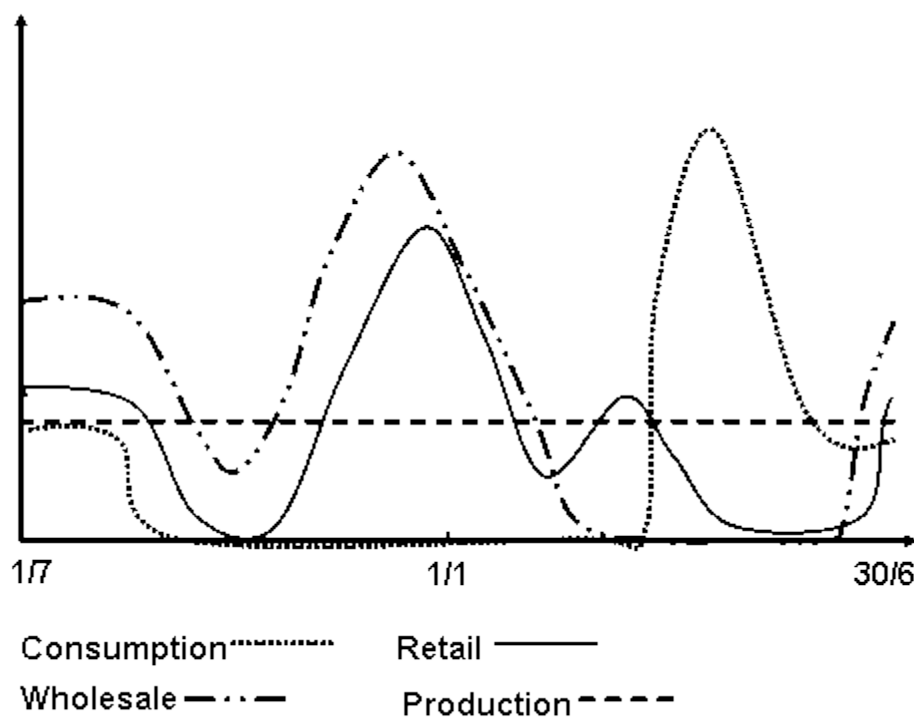
|                              | <b>Tons</b> | <b>Share of<br/>total<br/>%</b> | <b>Kilo/ha</b> | <b>Index DK<br/>average=100</b> |
|------------------------------|-------------|---------------------------------|----------------|---------------------------------|
| Zealand/Lolland-Falster/Moen | 81,391      | 28.5                            | 150            | 139                             |
| Bornholm                     | 3,208       | 1.1                             | 96             | 89                              |
| Funen                        | 25,063      | 8.8                             | 110            | 102                             |
| Northern Jutland             | 55,498      | 19.4                            | 87             | 81                              |
| Western Jutland              | 51,896      | 18.2                            | 106            | 98                              |
| Eastern Jutland              | 46,096      | 16.1                            | 103            | 95                              |
| Southern Jutland             | 22,697      | 7.9                             | 82             | 76                              |

|       |         |     |     |     |
|-------|---------|-----|-----|-----|
| Total | 285,849 | 100 | 108 | 100 |
|-------|---------|-----|-----|-----|

Source: The Danish Plant Directorate.

61. Fertilizers are seasonal products. Typically, producers and purchasers, before the start of the fertilizer year, negotiate yearly volumes; exact amounts and prices are determined on a monthly basis. Production takes place throughout the year at a stable level, cf. Figure 2. Sales to wholesalers peak in September/October [2], while retailers buy most of their fertilizers during October/November. End-users purchase the main part of their fertilizers in December/January [2]. The products are typically delivered at a later point in time when farmers find it most convenient. Consumption takes place from March to 15 May and peaks in April.

Figure 2: The fertilizer cycle



62. The fertilizer cycle may be influenced by (expectations of large) price increases or new distribution methods/storage systems. It is not only prices on fertilizers which may influence the buying cycle. Farmers and retailers may use the same storage capacity for grain and for fertilizers. Thus, often fertilizer cannot be stored until after the harvest has been disposed of.

63. Normally, prices increase throughout the fertilizer year depending on supply/demand and energy prices.<sup>[19]</sup> In the summer, prices are often low as producers try to induce wholesalers to buy their products early on.

64. Fertilizers are traditionally handled in bulk. This requires large storage facilities as different kinds of fertilizers cannot be mixed. The increased use of big bags (bags of 650 or 1,000 kg) in the distribution from wholesale/retail to farmers may, however, change this pattern. As big bags makes storing fertilizers easier, it has become possible for wholesalers, retailers and end-users to purchase the products at an earlier point in time, increasing the possibilities of buying when prices are low. Also, big bags make it possible for farmers to store more types of fertilizers in the same place and save warehouse rent. Today, approximately 30 % of the fertilizers is sold in big bags.

65. The fertilizer market is, according to the parties, not a market characterized by intense product development. Most products are identical to the products that were on the market 70-80 years ago. Innovation is therefore primarily

concentrated around varieties in the physical form of the products. Some producers market special profiling and niche products. The parties submit that such products make up an insignificant part of the total turnover (less than 7 %).

66. Demand for fertilizers changes very little in response to a general price increase, i.e. demand elasticity is low. This is further supported by the fact that the season is very short. However, purchasers in all segments of the fertilizer market are quite price-conscious. Generally, producers, wholesalers and end-users agree that even a price increase of less than 5 % will cause purchasers in all parts of the value chain to change supply

### **Legislation**

67. When consumption of fertilizers has decreased, as shown in Table 4, it is, among other things, due to the use of fertilizers being subject to a number of laws and regulations in Denmark and the EU. Most of these have been introduced and tightened in recent years. Laws and regulations regarding fertilizers are required, because addition of fertilizers may have negative effects on the environment. Often, a share of the nutrients added is not absorbed by the plants and, therefore, trickle down to the subsoil water. High concentrations of some nutrients, nitrogen and phosphorus for instance, may thereby cause environmental problems such as water pollution.

68. Regulation (EC) No 2003/2003<sup>[20]</sup> lays down the rules for fertilizer producers, and how they must ensure identification, traceability and information on the content of the fertilizers through labelling and records of origin.

69. Next, there are rules regarding storage facilities.<sup>[21]</sup> Nitrogen based fertilizers often contain nitrate which generates hazardous gasses when heated. Therefore, it is not allowed to store fertilizers near inflammable materials.

70. A number of Danish laws lay down rules regarding use of fertilizers with the intention of reducing the washout of nitrogen.<sup>[22]</sup> These laws, among other things, clarify how nitrogen quotas are calculated for farmers. Each year farmers are obliged to work out a fertilizer plan. This plan is similar to a budget for the use of nitrogen in the agriculture, and contains a calculation of the amount of nitrogen each farmer is allowed to add to his soil, combined with an estimate of how much nitrogen the farmer expects to use. Typically, farmers receive guidance by agricultural consultants in connection with calculation of nitrogen quotas. If a farmer exceeds his nitrogen quota, a fine, based on the extent of the infringement measured in kg nitrogen and kg nitrogen per hectare, will be imposed.

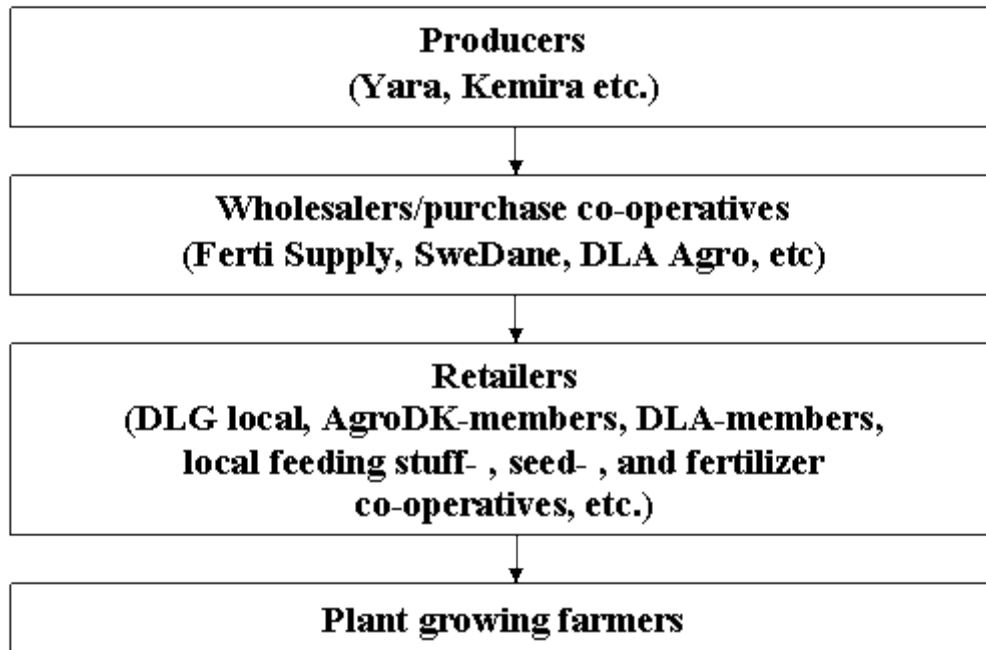
71. In continuation of the fertilizer plan, farmers have been obliged to submit a fertilizer account to the Danish Plant Directorate each year since 1993/94. This account shows whether the farmer has used too much fertilizer on his farm, and it has been introduced as a means to reducing the amount of nitrogen added into the Danish soil.

72. The parties estimate that rules regarding fertilizer planning and accounts do not significantly affect the purchase pattern of end-users; the plans and accounts merely provide the framework within which the farmers operate.

### **The value chain**

73. The production and distribution of fertilizers can be described in three steps (production, wholesale and retail) and in each of these three steps value is added to the products. Up until today, no true wholesale level existed in Denmark and wholesale activities were scattered. SweDane and DLA acted as intermediaries and negotiated with producers on the basis of estimates from retailers. The cargoes were bought by feedingstuff companies (retailers) and stored in their own warehouses. Some companies, notably DLG, sold some fertilizers on a wholesale basis to retailers (mostly members of DLG), but this had no significant extent. The creation of Ferti Supply, however, introduces a significantly specialised wholesale player to the value chain. For the purpose of the present case, the DCA operates with the notion "wholesale level" as if it already exists.

**Figure 3: The value chain**



74. The value chain consists of the production, wholesale and retail segments. Table 6 shows how value is added throughout these three segments until the products reach the farmers.

Table 6: Structure of the fertilizer price

| <b>NPK 21-3-10</b>           | <b>Share of final price</b> |
|------------------------------|-----------------------------|
| Farmers                      | 100 %                       |
| Retail, purchase price       | [X] %                       |
| Ferti Supply, purchase price | [X] %                       |
| Yara's production costs      | [X] %                       |

Source: The parties.

75. Of the final price to the end-users (farmers), [X] % are determined by costs at the production level. The [X] % includes costs of ship transportation to the terminal in Randers and marginal return to Yara.

76. In the wholesale segment, Ferti Supply adds value corresponding to [X] % of the final price. [X] The final [X] % of the value is added in the retail segment through DLG/AgroDK.

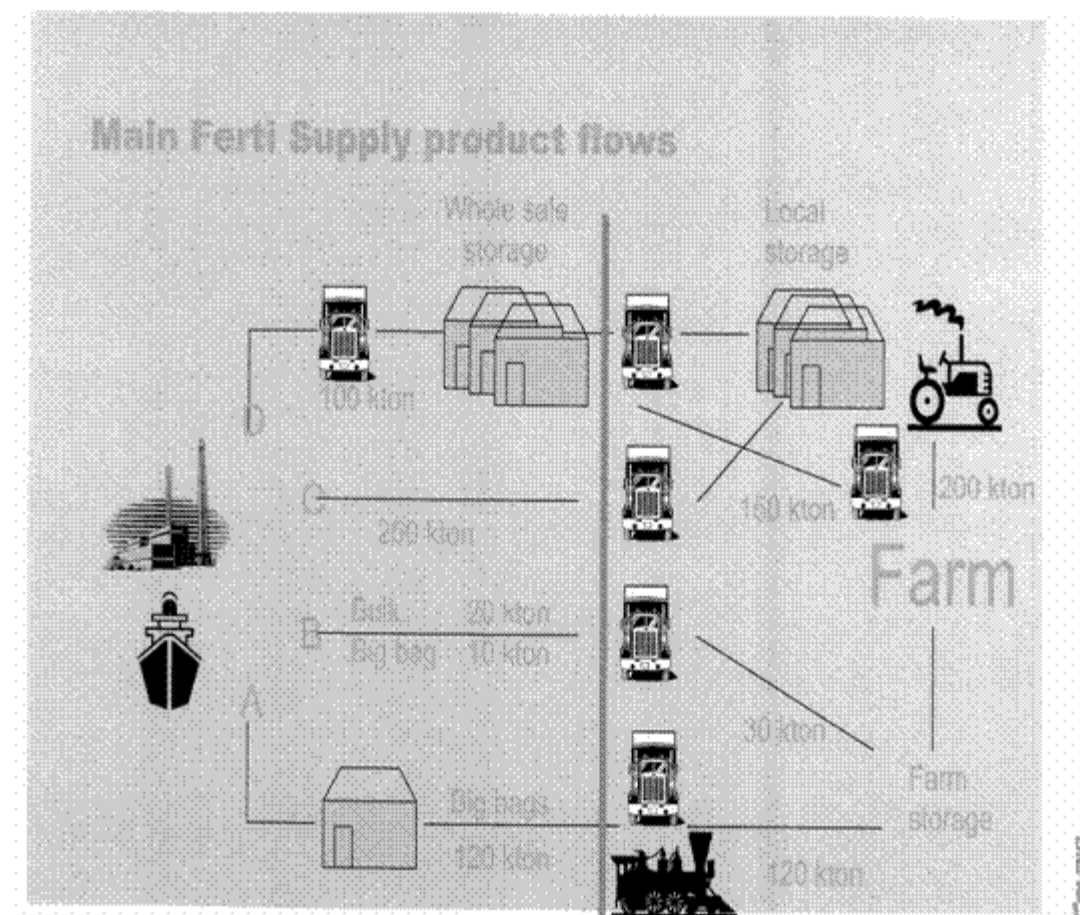
77. Yara's price is, among other things, determined by the price of natural gas, [X], and a supply which is inelastic in the short run.

78. In total, [X] % of the final price is determined domestically. Storage and transportation costs comprise [X] % of the final value of the product. Among other things, the cost of replacing fertilizers in different storage facilities are expected to be reduced, as the joint storage capacity within Ferti Supply is supposed to facilitate more optimal planning.

79. The figures reported in Table 6 must be interpreted with caution, as it may be difficult to identify at which level transportation costs will be reduced. Distribution takes place in a number of ways; cf. Figure 4. Farmers can pick up their

fertilizers shipside, at a wholesale storage facility, retail storage facility, or transportation can be arranged for by the retailer. The price (rebate) paid (obtained) by the farmers will; therefore, to a large extent depend on the chosen form of delivery.

**Figure 4: Distribution channels**



Source: The parties.

## Production

80. The parties submit that the production market is the first step in the value chain and where producers do business with traders and wholesale businesses.

81. On a yearly basis, approximately 142 million tons of N, P and K fertilizers are consumed worldwide. The production of fertilizers is an international market, where producers and their customers may be international or regional companies as well as national companies, depending on the presence of producers in the region. In addition to Yara, other large producers of fertilizers are: Kemira GrowHow Oyj (Finland), Zuid Chemie B.V. (The Netherlands), Fertiva GmbH (Germany), AB "Achema" (Lithuania), ZAK S.A. (Poland) and Helm AG (Germany).

82. No significant production of fertilizers takes place in Denmark. DanGødning has some production in Denmark, but this is primarily liquid fertilizers, and the company has no production of significance in the market relevant in the present case. All fertilizers are therefore either imported by purchasing entities or supplied through producers' local sales entities (Yara's terminal in Randers or Kemira's in Fredericia). The Danish fertilizer market is, according to the parties, very accessible for foreign producers compared to other markets due to the existence of many local harbours, cf. Figure 5.

83. Whereas the same quantity of fertilizers is produced each month, fertilizers are consumed over a three-month period, which makes storing essential. Most producers both have warehouses in combination with their production and outlets in markets where they have stable business.

84. Fertilizers are typically sold in a number of ways, such as year-to-year contracts, on the spot market, short term contracts etc. However, supply on the spot market is quite limited, according to the parties, and the products on this market are often offered off-season (June-August) when storages are filled with grain. The products are sold in a combination of bulk material or bagged material and ship-, train- and truckloads. Typically, a ship only carries one type of fertilizer per shipload. In Denmark, fertilizers are primarily supplied by relatively small ships (3-5,000 tons).

**Figure 5: Danish ports used by the parties today**



Source: The parties.

85. Of the parties, only Yara operates in the production market. In 2004/05, Yara sold approximately [X] tons nitrogen based fertilizers with a value of EUR [X] million, corresponding to DKK [X] million, in Denmark. Almost all Yara's sales in Denmark were made to "wholesalers".

### Wholesale

86. In the wholesale market, wholesalers buy fertilizers from fertilizer producers or traders and sell to retailers and other wholesalers. Given the continuous production and the seasonal consumption, fertilizer producers make use of the services of wholesalers when it comes to storage and distribution.

87. Wholesale companies resell products from their storage facilities, their bagging units or directly from shipside to retail customers. The parties state that value is added on the wholesale level by aggregating purchases from more retailers to attain buying power, storing fertilizers in dedicated wholesale storage facilities during periods when retailers do not have space in their warehouses, bagging fertilizers in big bags (650-1,000 kg) or small bags (25 kg) and transporting fertilizers to the customers.

88. According to the parties, practically no end-users have sufficient storage facilities to purchase and store fertilizers during the off-season. Also, retailer's storage capacity is typically used for other products, such as grain, during harvest. Accordingly, wholesalers will typically store the fertilizer products during the off-season which lasts from June to August or longer.

89. There are a number of purchasing organisations (i.e. mainly retailers cooperating on joint purchase at the wholesale level) operating on the Danish market, for instance SweDane and DLA Agro. These organisations are only engaged in arranging purchases on behalf of their members. Some of the members are acting as sellers in the wholesale market, by adding wholesale service to the physical products sourced through the purchase organisation (storage and packing).

90. In the Danish wholesale market, most transportation of fertilizers from shipside to storage takes place by truck. Fertilizers are relatively heavy and voluminous products, which makes transportation costs significant. Therefore, it is essential to minimize transport distance and the number of transports between storage facilities. When stocking fertilizers out of season, it is thus important to have storage facilities as close to the end-users as possible at one's disposal.

91. Due to transportation costs, the geographical scope of the wholesale market is somewhat limited. According to the parties, a wholesaler typically transports fertilizers by truck within a radius of less than 100 kilometres on average.

92. DLG and AgroDK are both active on the wholesale market for fertilizers with, until now, SweDane Fertilizer organizing their purchases. Table 3 shows volumes (kg) and market shares of the two feedingstuff co-operatives. The largest competitors to DLG and AgroDK in the wholesale market are DLA Agro, Yara and Kemira (direct sales to retailers).

93. Ferti Supply will operate in the wholesale market taking over DLG and AgroDK's wholesale activities, and the company will be the only genuine wholesaler in the Danish market. As mentioned above, wholesale functions have until now been integrated in the different companies on the market. Within the SweDane cooperation, SweDane has handled purchases only, while the other participants have handled the logistical functions themselves. With the creation of Ferti Supply, an independent wholesale segment with its own turnover is created. Ferti Supply will obtain a combined market share of 55-60 % in the Danish wholesale market for fertilizers.

94. Yara's storage facilities, situated at the terminal in Randers and in a warehouse in Grenaa, will be rented or leased by Ferti Supply and so will a number of storage facilities belonging to DLG and AgroDK members. At the terminal, ships are received and fertilizer products are unloaded from the ship onto trucks for further distribution, or they are placed directly in the terminal for storage and possible filling into big bags. The terminal houses equipment for filling fertilizers into big bags of 650 or 1,000 kg.

95. DLG has storage facilities all over Denmark. In addition to these, AgroDK-members have storage facilities, mainly in Jutland but also a few on Funen.<sup>[23]</sup> Accordingly, Ferti Supply has access to storage capacities [ ] throughout the country. In addition to these facilities, Ferti Supply shall search the market for other appropriate storage facilities where relevant. According to the parties, it is the aim of Ferti Supply to have wholesale facilities all over the country. Storage facilities rented by Ferti Supply are equipped with gear for loading and unloading fertilizer products and other relevant equipment.

96. The parties' competitors also have storage facilities throughout the country. It should be kept in mind that it, notwithstanding the regulations in this field, is quite easy to bring new storage capacity into the market and that this is not a scarce resource – the true restraint is rather maintenance and handling of the flow in the storage facilities, which in itself may be quite burdensome and cost demanding. According to the parties, at least 14 of the storage facilities in Jutland (of these 5 belonging to other companies than the parties) have bagging equipment.<sup>[24]</sup>

97. Ferti Supply's conditions of delivery shall be "free on truck" 1) shipside, or 2) wholesale storage facility, according to the purchaser's request. Consequently, Ferti Supply will be in charge of loading the product onto the truck at the agreed place of delivery, whereas the purchaser is responsible for arranging transportation and pays the costs of transportation from wholesale facilities or shipside to own (retail) storage facility or directly to the end-user.

## **Retail**

98. Wholesale services and retail services differ and are, according to the parties, only substitutable to a limited extent. For end-users purchasing large quantities, there may be some overlap as they can directly approach a wholesaler due to large take quantities.

99. Typically, retailers do not possess the same storage and logistics facilities as wholesalers and therefore purchase at a later point in time and much smaller quantities. End-users (farmers) may postpone their purchase of fertilizers while waiting for low prices to come about. Therefore, retailers mostly adjust their purchases according to seasonal demand of the farmers. This demand may vary from year to year depending on climatic circumstances, the chosen crops and the condition of the soil. On average, a retailer's assortment of commercial fertilizers has a range of roughly 20-40 different types of commercial fertilizers.<sup>[25]</sup> This typically makes it advantageous to be member of cooperatives such as DLG, DLA and AgroDK, as it may be difficult for a single retailer to sell a full shipload of each type of fertilizers within the area in which he is active.

100. Retailers add value to fertilizers by arranging transportation to end-users, by arranging credit facilities, by storing products up to and during the consumption period, and by offering farmers a range of products and brands to choose from. End-users pay the transport from retailer's warehouses, but according to the parties, the retailer arranges for pick-up unless



the end-user has chosen to pick up the products himself. It is also quite common that end-users choose to pick up fertilizers at retail storage facilities.

101. Typically, transportation to end-users takes place in bulk by trucks with a grab/crane. According to the parties, this is the case in 40-60 % of the deliveries, depending on the circumstances. In so far as big bags are concerned, 75-80 % of the fertilizers are delivered with unloading included (i.e. by a truck with crane). The services involved with delivery are paid by end-users but made available by retailers. Therefore, sales to Danish farmers require access to a distribution network endowed with a certain amount of trucks and the required loading/unloading equipment.

102. The increased use of big bags has made logistics easier for retailers, as it is possible to deliver big bags directly to customers without having to store the products before delivery.

103. Retailers are mainly located close to the end-users. Their customer knowledge and their customer relationship are of importance to the end-users. Typically, retailers carry a broad product portfolio, including insurance, telephony and energy. Often, trades occur where, for instance, farmer's grain is traded with feed or seed corn. Some retailers also rent out equipment, e.g. fertilizer spreaders, to farmers. It is important for retailers to be positioned close to end-users in order to be able to deliver quickly upon demand. According to the parties, it is common for end-users to pick up their quantities of fertilizers successively from a retail storage facility concurrently with use. The geographical scope of retailers is thus often limited to a relatively small local area, close to their storage facilities. Therefore, the retail segment is composed of a fine-meshed network of local divisions.

104. As the sale of fertilizers is often linked with the sale of other products, it is important for retailers to be active within all the 4 main areas: seeds, raw materials, crop protection and fertilizers. Seeds constitute the largest proportion of these four, whereas fertilizers amount to the smallest proportion; buyers will often choose retailers who are able to supply products from all four areas. Therefore, it is important for a retailer to be able to supply fertilizers, in order not to lose potential seed customers. DLG estimates that approximately [X] % of the company's fertilizer customers also buy their seed from DLG, and that [X] % of the fertilizer customers sell their grain to DLG.

105. Discounts are mainly linked to quantity – up to X % of the price, corresponding to approximately [X] per ton. [2]. Discounts tied to other products are as a principal rule not used.

106. Besides rebates, it is relatively common for farmers to get credit, when purchasing fertilizers. According to the parties, DLG gives credit in connection with approximately [X] of the fertilizer sales, while AgroDK provides credit to approximately [X]. Typically, credits are received in the period from orders are placed to the time of consumption, which is typically a period of 3-5 months. [2].

107. DLG is active in the Danish retail market for fertilizers. AgroDK's members are active in Jutland and on Funen, and members of AgroDK act independently in the retail market. The largest AgroDK members are Hedegaard (Aalborg), Hornsyld Købmandsgaard (Eastern Jutland) and Brdr. Ewers (Southern Jutland). Among the largest competitors to DLG and AgroDK's members on the retail market are the members of DLA, especially: Østsjælland's Andel (domiciled in Karise but with departments on Lolland, Funen and Western Jutland), Nordjysk Andel (Vendsyssel) and KOF & Sydvestjysk Andel (Southern Jutland). Outside these groups are Aarhusegnens Andel and a number of (very) small local companies.

108. As mentioned in paragraph 94, some of DLG and AgroDK's storage facilities are to be leased by Ferti Supply. The remaining storage capacity will still be used as retail storage facilities by AgroDK's members and by DLG for fertilizers and other products.

109. The parties submit that the current retail distribution system, i.e. from wholesale facility to retailer/end-user will not substantially change with the creation of Ferti Supply. However, the parties expect that synergies obtained through the establishing of Ferti Supply will be passed on to retailers.

#### **End-users**

110. The end-users are farmers (plants growers). According to the parties, most farmers are advised by independent consultants, cf. the obligation to submit fertilizer plans and accounts to the Plant Directorate. The consultants suggest which type of fertilizers to purchase. As the consultants have recommended certain products, farmers, according to the parties, from time to time take in offers from different retailers.

111. Farmers do not have storage facilities to buy large quantities directly from fertilizer producers. In Denmark, all fertilizers are primarily bought either from retailers or wholesalers, and according to the parties end-users purchase most of their fertilizers in November/December or later, for delivery when most convenient (often “just-in-time”).

112. According to the parties, a farmer with 100 hectare and no livestock uses 75 tons fertilizers each year, amounting to approximately DKK112,500/EUR 15,000 (corresponding to roughly 15 % of the farmer’s turnover from this farm land).

113. Most farmers are members of feedingstuff co-operatives (a.o. DLG and members of DLA). Farmers belonging to a co-operative are under no obligation to buy fertilizers from their co-operative. However, “Residual payment” is an integrated part of the principle of co-operatives, where the co-operative’s surplus is divided among the members according to their share of the turnover. This may induce farmers to primarily trade with their own co-operative society. On the other hand, there may also be some kind of loyalty towards private companies from farmers who are not members of any co-operative.

#### **Conclusion on the relevant product market(s)**

114. The parties submit that the relevant, affected market is the market for wholesale of commercial fertilizers in Denmark.

115. The DCA agrees (cf. above para 56) that – for the purpose of the present case – the relevant product is commercial fertilizers – including both liquid and solid commercial fertilizers.

116. In the present case, however, an exact definition of the relevant product market is not necessary, as the assessment of the impact of the creation of Ferti Supply would not change significantly according to the market in question whichever definition, wide or narrow.

117. In the opinion of the DCA, the production, wholesale and retail markets for commercial fertilizers cannot be separated; all levels in the value chain are closely linked, and the borderlines between the levels/segments are fluid even though activities in the different levels are distinct, depending on the level in question. It would thus appear necessary to view and assess the entire value chain together, because the undertakings concerned are active in all segments, and because the creation of Ferti Supply will have an effect throughout the whole value chain.

118. The DCA will thus assess the effects of the creation of Ferti Supply on both the fertilizer production, wholesale and retail levels of the value chain.

#### **Relevant geographic market(s)**

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119. The parties state that the *production market* is at least the EEA. Since distance has limited impact on shipping costs and costs of train transportation, the production (and trading) market is not limited to the proximity of the producing units; products will find their way to the consumers (wholesalers/traders), irrespective of geographic distance.

120. The parties submit that both *the wholesale and retail markets* are national. Danish soil is characterized by requiring relatively large amounts of sulphur to be added, and that differentiates the Danish fertilizer market from e.g. the German fertilizer market. Wholesalers are all national companies. Due to the geography of Denmark, only limited volumes are sold from Germany to Denmark and vice versa. Also, the parties submit, hardly any products are sold from wholesalers in Sweden to Denmark due to the cost of transportation across the bridge. Accordingly, a wholesaler needs to be present nationally/locally to compete.

121. It can be argued, that the retail market is even narrower than national, e.g. local covering an approximated distance of less than 100 km from the retailer’s premises. However, the parties’ premises (storage facilities) are spread throughout Denmark as are their competitors, cf. para 95 and 96 above; prices of fertilizers are quite similar throughout Denmark, and the competitive conditions are the same in all over Denmark. This applies regardless of regional variations in consumption, cf. Table 5.

122. In 2002, the DCA concluded that the relevant geographic market was the Danish market for commercial fertilizers.<sup>[26]</sup> No distinctions between wholesale and retail were made.

#### **Conclusion on the relevant geographic market(s)**

123. The exact delimitation of the geographic scope of the production market can be left open. It is not necessary to define the scope more specifically, as no competition concerns arise in this market – regardless of whether it is the EEA, wider or narrower.<sup>[27]</sup>

124. The DCA agrees that the wholesale market is national given that, once the products enter Denmark, no resale to neighbouring countries worth mentioning takes place and vice versa. Ships arrive and unload their whole cargo in one harbour, from where it is distributed to the appropriate storage facilities in the vicinity of the harbour – either at a retailer or a farmer.

125. Considering retail sale, it could be argued that the geographic scope is narrower than national. In the present case it is, however, not necessary to define the market narrower than national, since the assessment would not change significantly depending on the geographic delimitation.

126. The DCA will thus assess the effects of the creation of Ferti Supply in Denmark, where the proposed transaction will have its primary effect.

#### The parties' position in the relevant market(s)

127. Vertically, the parties will have activities on all levels in the value chain. On the production level, Yara has a market share of 15-25 % in both the EEA and Denmark, on the wholesale level Ferti Supply will have a market share of 55-60 %, and on the retail level, DLG has a market share of 40-50 % and AgroDK's members<sup>[28]</sup> have a combined share of 5-15 %, cf. Table 7 below.

128. No competitors<sup>[29]</sup> are vertically integrated in the same way as Yara, DLG and AgroDK. DLA Agro and Kemira have announced a cooperation very similar to that of Ferti Supply, but it has not been materialised as of yet. Until now, most competitors in the fertilizer markets are only active in one level of the value chain, e.g. Kemira in production with a share of 30-40 %, DLA Agro/DLA Agro members in wholesale and retail with a share of 1/3 of each level, and Aarhusegnens Anel with a share of nearly 5 % in both wholesale and retail.

129. Horizontally, the parties have overlapping activities in wholesale which will be transferred to Ferti Supply and effectively in retail, too. In this way, Ferti Supply will obtain a market share of 55-60 % in the wholesale market and preferred access to 55-60 % of the distribution network.

130. The closest competitors to DLG and AgroDK are, as mentioned just above, DLA Agro/DLA Agro members and Aarhusegnens Anel. The closest competitor to Yara is Kemira.

**Table 7: The parties' market shares – fertilizer years 2002/05**

|                 | Production |       |       | Wholesale |       |       | Retail |       |       |
|-----------------|------------|-------|-------|-----------|-------|-------|--------|-------|-------|
| Fertilizer year | 02/03      | 03/04 | 04/05 | 02/03     | 03/04 | 04/05 | 02/03  | 03/04 | 04/05 |
| Yara            | 15-25      | 15-25 | 15-25 |           |       |       |        |       |       |
| DLG             |            |       |       | 40-50     | 40-50 | 40-50 | 40-50  | 40-50 | 40-50 |
| AgroDK          |            |       |       | 5-15      | 5-15  | 5-15  |        |       |       |
| AgroDK          |            |       |       |           |       |       | 5-15   | 5-15  | 5-15  |
| Ferti Supply    | 15-25      | 15-25 | 15-25 | 55-60     | 55-60 | 55-60 | 55-60  | 55-60 | 55-60 |

Source: Parties' estimates and the DCA's compilation.

131. The DCA will assess the overall impact of the vertical integration following the creation of Ferti Supply and its effects – both vertically and horizontally – in the different levels of the value chain.

## Preliminary assessment

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132. The creation of Ferti Supply will significantly increase the degree of vertical integration in the value chain of the Danish fertilizer business. Especially, the producer will be linked more closely to downstream operators than previously (since Yara and Kemira withdrew from Denmark in 2001 and 2004 respectively, cf. para 19).

133. Access to the distribution network is of great importance to all suppliers in the markets. Only very few plant growing farmers pick up fertilizers at shipside; instead they typically approach local retailers. Gaining access to retailers is therefore of paramount importance to fertilizer producers. This access is arranged through the wholesale segment, and this is why producers may gain significant advantages by being integrated with the wholesale segment. This was also recognized in 2002 when the DCA dealt with the feedstuff merger.<sup>[30]</sup>

### Dominance

134. In 2002,<sup>[31]</sup> it was concluded that DLG had a dominant position in the commercial fertilizer market (at the time, no distinctions were made between production/wholesale/retail). Nevertheless, it was concluded that the merger did not restrict competition significantly, as the Danish fertilizer market was considered open, with no barriers to entry, free access to products, and no exclusive agreements between producers and feedingstuff companies existed. The market structure has changed considerably since then, and the players in the market have become increasingly more vertically integrated. Today, following the establishment of Ferti Supply, 55-60 % of the distribution channels will be controlled by Ferti Supply.<sup>[32]</sup>

135. In the period from 2002 to 2005, DLG and AgroDK have been further strengthened. In 2002, DLG had a market share of 40-45 %<sup>[33]</sup> and today, before the creation of Ferti Supply, their share is 40-50 %. In 2002, all wholesalers/retailers had easy access to fertilizers from Kemira's plant in Fredericia. This plant is now closed. In the future, the only competitor capable of exercising any real restraints on the parties will be the Kemira/DLA Agro constellation; all other large players have become dependent on either of the two vertically integrated divisions/co-operations.

136. The pre-existing dominant position of DLG (and AgroDK) downstream in the value chain will be further strengthened as a result of the creation of Ferti Supply.

137. Ferti Supply will in itself, with a market share of 55-60 %, hold a dominant position in the wholesale market.<sup>[34]</sup>

138. Yara, as such, does not possess a dominant position in the production market in the EEA. However, in Denmark, because of the integration of Yara into the value chain, Yara contributes to the strengthening of Ferti Supply's dominant position and a dominant position for the vertically integrated "Yara-Ferti Supply-DLG/AgroDK" throughout the value chain.

### Concerns

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139. The DCA has identified several competition concerns arising from the creation of Ferti Supply:

140. **Access** for competing fertilizer producers/traders to the distribution network is becoming increasingly difficult, as Ferti Supply will control 55-60 % of this network. The restricted access is supported by the **exclusivity** agreed between Yara and Ferti Supply (input foreclosure<sup>[35]</sup>) and the obligation undertaken by both DLG and AgroDK to source **exclusively** from Ferti Supply the first 3 years (customer foreclosure<sup>[36]</sup>). This will diminish the competitive pressure from alternative suppliers, once Ferti Supply is created. Through the exclusivities agreed upon, Yara as well as DLG/AgroDK stand to benefit from Ferti Supply's dominant position in the wholesale market.

141. Because both DLG and AgroDK source from the same channel, there is a significant risk that they will be able to tacitly **coordinate prices**<sup>[37]</sup> downstream to the detriment of end-users. More than [X] % of the retail price already consists of the purchase price from the supplier. This risk is increased due to the fact that DLG and AgroDK for 3 years may not source from other channels but Ferti Supply, which in this way saturates 55-60 % of the market. The price from Ferti Supply to DLG/AgroDK is no market price but fixed according to agreement between the parties (further elaborated below), and this makes it even more difficult to make an assessment of the trade-off between efficiencies and risks implied by the creation of the joint venture, and especially by the incorporated exclusivities. DLG/AgroDK already source from the same channel via the SweDane cooperation, which means that the risk of tacit collusion has existed for a longer period. However, the risk is now increased by Yara's participation in the joint venture and by the parallel establishment of the DLA/Kemira cooperation. As

these two producers become so closely linked to the Danish distribution network, the strength of existing barriers to entry will be significantly increased.

142. Retailers, who are not participating in either Ferti Supply or DLA Agro, will at the same time meet (new) difficulties in their sourcing; without sufficient scale and infrastructure they will not be able to bypass Ferti Supply and secure for themselves competitive prices/rebates from international fertilizer producers. And if/when purchasing from Ferti Supply, they may even have to pay overcharges. Such (smaller) companies do not pose a competitive threat to Ferti Supply, DLG or AgroDK; instead, they risk being pushed out of the market.

143. The identified concerns will be dealt with in more details below.

### **Access to the Danish market**

144. Gaining access to Danish harbours is in itself unproblematic, as the ships used for transporting fertilizers are most often relatively small and therefore capable of calling at most Danish harbours. However, in Denmark, the only way fertilizers flow from producers to end-users is through the already established distribution network, consisting of feedingstuff companies' storage facilities etc. Accordingly, in order to reach local retailers, producers need access to the logistic services of wholesalers. These services include unloading at shipside, bagging fertilizers and transporting them to the appropriate terminal or storage facilities.<sup>[38]</sup> Thus, access to the relevant fertilizer products upstream, and access to the distribution network downstream, is of vital importance to producers, wholesalers and retailers. This is also the rationale behind the creation of Ferti Supply, i.e. creating optimized access for Yara downstream and supply security for DLG and AgroDK upstream, thereby presumably creating synergies at all levels. Ferti Supply will significantly change trade patterns in the Danish fertilizer business.

145. The production market and the wholesale market are closely linked, and with the creation of Ferti Supply it will be even more so. The parties have activities on both levels, and concerns arise, as considerable parts of the logistic services, and thereby access to the retail segment, are shielded. Ferti Supply will be able to control 55-60 % of both the distribution network at wholesale level and of the retail segment. Correspondingly, DLA Agro will control access to 1/3 of the market. The remaining 5-15 % of the market will be divided between Aarhusegnens Andel and a large number of small companies – which may hitherto have purchased from Kemira or Yara directly.

146. Overall, the structural changes occurring from the increased vertical integration of the Danish fertilizer market means that 85-95 % of the market is controlled by two "gatekeepers". Bypassing these gatekeepers will require that competing producers or purchasers set up their own infrastructures (unloading, storage, transportation facilities etc.), and such infrastructures require, according to the DCA's market investigation, a certain scale and scope (approximately a minimum of 100,000 tons and 20-40 products in the portfolio) and underlying logistics.

### **Period with exclusivities**

147. For the first 3 years after the establishment of the joint venture, Ferti Supply has the sole and exclusive right to purchase from Yara and to supply DLG/AgroDK. Thereby, this part of the retail segment is effectively shielded from other producers. As Ferti Supply is obliged to buy minimum [X] of the total purchase from Yara, at least [X] – and probably more – will in this way be reserved for Yara exclusively. Furthermore, the procedures agreed upon concerning Ferti Supply's purchases give Yara a good opportunity to estimate expected sales through Ferti Supply and plan possible additional sales on this background. The shielding of the market is further substantiated by the DLA Agro-Kemira cooperation, as this, according to the knowledge of the DCA, involves exclusivity in the retail segment, too.

148. Farmers' purchases are not tied, but in the past they have bought very limited amounts bypassing the retail segment, even though the possibility thereof has improved after the introduction of big-bags to the market. Big-bags are sold via the traditional distribution channels, where fertilizers are bagged at wholesalers' premises and transported to retailers' and sometimes directly to farmers. The use of big-bags facilitates distribution and optimizes storage possibilities – but it does not seem to have had a significant impact on farmers' purchase patterns, i.e. when it comes to choice of supplier. The possibilities for a supplier to bypass the existing retail segment and supply farmers directly must, therefore, be regarded as poor and they represent no realistic threat.

149. Corresponding to suppliers' problems regarding access to the Danish market, it may become increasingly difficult for retailers to compete if they are not part of the established networks. Full shiploads must be purchased, and as each ship typically carries only one type of fertilizers, a retailer will need to purchase at least 3-5,000 tons of each type of fertilizer.<sup>[39]</sup> In order to carry a full assortment, 20-40 products are required, meaning that an independent importer will need to purchase 100,000 tons of fertilizers. Furthermore, the retailer must be able to sell these products within a distance of less than 100 km from his premises, in order for transportation costs to be reasonable.

150. Also, besides the physical distribution, problems may arise for independent retailers as purchasing at favourable prices traditionally have required planning and ordering in advance. For instance, the SweDane cooperation has yearly budgets and ordering in advance as a precondition.

151. The exclusivity between Ferti Supply and Yara will limit the competitive pressure on the Danish market. Hitherto, Yara has supplied the Danish market with a large and wide assortment of quality products. For the initial 3 years, the exclusivity means that there will be one less producer to compete on the remaining part of the Danish market. Yara is allowed to make passive sales to the Danish market, but this is unlikely to compensate. It is forbidden for Yara to look up customers actively, and attractive offers from Yara will not automatically reach the Danish market without Ferti Supply as the intermediary. Also, the division of Ferti Supply's profits will make it most likely for Yara to benefit Ferti Supply first in the case of attractive offers, as Yara will be reimbursed [a part] of the "rebate" given to Ferti Supply. Yara is under no obligation to supply other Danish customers, and it seems to be a natural assumption that the inclination to supply others will be limited as far as the sales/profits of Ferti Supply can be adversely affected. The competitive pressure from Yara will therefore most likely be manifested through Ferti Supply alone for the first 3 years.

152. For the reasons listed above, the market will be effectively shielded. This is especially the case during the first 3 years, where the exclusivity agreements are in place and where there may be insufficient "free" volumes/customers on the Danish market for other producers to enter the market effectively. Retailers will meet difficulties in obtaining a full assortment when other producers face difficulties with trying to enter the market because of insufficient scale and scope. Inter-brand competition will be restricted as a result of Yara's limited access to other Danish players leading to a risk of higher prices.

After the period with exclusivities

153. After 3 years, Ferti Supply's shielding of the market covers [X] which Ferti Supply can purchase from Yara at a favourable price. Yara is no longer precluded from selling to others than Ferti Supply. It can thus be an advantage for DLG and AgroDK, if they can obtain a good offer directly from producers without purchasing through Ferti Supply, as they will avoid sharing [Z] a potential profit with Yara. This requires DLG and AgroDK to have the necessary capacity and infrastructure at their disposal (which seems likely as they already have access to a fine-meshed retail network).

154. After the initial 3 years, it will still be advantageous for Yara to sell to Ferti Supply in excess of the sales at ARA cost price, as Yara receives [X] of the profit from the joint venture in addition to the sales price. As to other customers in Denmark, Yara will have the same inclination to sell to these as to any other customers on the world market – as long as it is not in conflict with Yara's interests in Ferti Supply. Sales to other customers than Ferti Supply can lead to a pressure on the market shares and prices of DLG/AgroDK, which may affect Yara negatively in two ways. Firstly, Yara will lose possible sales through Ferti Supply. Secondly, a decline in DLG/AgroDK's sales may lead to a decrease in their purchases from Ferti Supply, which leaves a smaller profit for Yara. These circumstances may make Yara cautious of selling to others than Ferti Supply, unless the profit from this is higher. The net effect of this is uncertain. The last possibility is, however, not to be ignored, cf. the following description of the price mechanisms.

155. Few retailers have traded with Yara since KFK was bought out in 2002. Even though some retailers, for instance DLA members, may have a preference for trading with another producer than Yara, who is allied with their largest competitor, and even though they themselves have an alliance with Kemira, it is not likely that they will reject a good offer from Yara.

Market investigation

156. The market investigation has revealed different concerns from the parties' competitors. Their concerns primarily focus on access to the Danish distribution network and security of supply, respectively.

157. From the market investigation it can be seen that other producers used to sell fertilizers to both DLG and AgroDK. In the future, they will only have the opportunity to sell (a lesser amount of) their fertilizer products to DLG/AgroDK via Ferti Supply or directly to farmers. The latter rarely occurs in actual practice, and only very large farmers are capable of purchasing directly from producers. The co-operative structure of Danish agriculture contributes to this. Most farmers will be inclined to purchase from their local retailer/feedingstuff company.

158. The market investigation has also revealed that sales via traders do not account for a very large share of overall purchases and that spot sales are rare, too. When Yara is cut off as an active player in the market, the competitive pressure on the Danish market is lessened, as Yara has, until now, been one of the largest suppliers.

159. Doubts have also been raised as to whether establishing own, parallel distribution channels would be economically viable for new entrants. This has widely been rejected by the producers asked due to the significant costs involved with this, which would not be easily recouped.

160. For other producers, access to the market requires a certain volume. Ship-loads are typically 3-5,000 tons. Compared with the consumption of an average end-user of [X] tons, this requires that producers have access to [X] end-users, provided that these will take their entire requirement from this one producer. This is, however, highly unlikely, first of all because the said producer is only supplying one product per ship and the retailer (and end-user) will need more, different fertilizer products (NPK, PK, NS etc.). Secondly, this scenario also shows that a producer needs to either establish a separate and wide distribution net-work, if he cannot make use of the net-work already in place, or he needs to sell the whole ship-load to one retailer having the appropriate customer-base.

### **Price mechanisms**

161. Demand for fertilizers is inelastic, and it is not likely that demand will increase even if significant price reductions take place<sup>[40]</sup>. Demand is not likely to decrease significantly either, even in the case of increased prices, as plants will still need the same amount of nutrients. This emphasizes the necessity of correct pricing in the fertilizer market.

162. The creation of Ferti Supply will, especially during the first 3 years, be able to influence prices and competition in the Danish market. A reduced competitive pressure, caused by the shielding of the Danish market, may lead to increased prices to farmers. This effect is further strengthened by the parallel vertical integration with Kemira GrowHow in the DLA Agro group.

#### **Ferti Supply's purchase prices**

163. Ferti Supply's purchase price from Yara is identical to the market price; however, Ferti Supply has the right to purchase [X] at ARA cost price, which is a cost price based on the market quotation for natural gas with the addition of an amount covering Yara's production costs. This price must be presumed to give Ferti Supply a clear advantage. Overall, the price gap is negative, i.e. the ARA cost price is typically lower than Yara's market price. [2]. It is not, however, guaranteed that the ARA cost price is always advantageous, cf. that [X] are above the market price. [...]. Ferti Supply must be presumed to be capable of taking advantage of the favourable prices, such that its demand is placed in these periods, especially as most purchases are planned in advance.

164. The favourable prices apply to up to [X] of Ferti Supply's total demand from Yara, as the ARA price can be extended to cover [X]. These conditions remain in force after the expiry of the 3-year purchase obligation.

165. There does not seem to be any reason to believe that Yara's market price to DLG/AgroDK (Ferti Supply), which covers purchases exceeding [X], will deviate significantly from the world market price. Combined, there will be no incentive to agree on a price other than the world market price. Yara will be willing to sell to Ferti Supply at a price higher than or equal to the world market price. The price will not be set lower, as Yara will have no incentive to sell at a lower price to Ferti Supply than the company can obtain elsewhere. This applies even though the division of Ferti Supply's profit will reimburse Yara [X] % of any discount, but [X] % will go to DLG/AgroDK. At the same time, DLG/AgroDK will only be willing to have Ferti Supply purchase at a price lower than or equal to the world market price. If the price is higher than the world market price, Ferti Supply (here: DLG/AgroDK) will have no incentive to purchase [X] % from Yara. Combined, the interests of the parties involved will pull in opposite directions, and the only equilibrium is where the price is set equal to the world market price.

#### **Ferti Supply's sales prices**

166. Prices downstream will be based on continuous negotiations between the parties, as no detailed agreements have been made for the calculations of this price. This price setting covers all of Ferti Supply's sales to DLG and AgroDK who are obliged to place all their fertilizer purchases with Ferti Supply for the first 3 years. After 3 years, this obligation is no longer in force; however, there will still be a strong incentive to place part of the purchases with Ferti Supply, whenever Ferti Supply's purchase price, i.e. the ARA cost price, is favourable.

167. As mentioned, the pricing applied to Ferti Supply's sales will not be based directly on the market price, but will be based on internal guidelines, a so-called "cost plus price". The link between developments in the market and the pricing in Ferti Supply is, therefore, to a certain extent disrupted and replaced by negotiated prices. Thereby, the pressure for setting clear-cut market prices is reduced.

168. Also, fertilizers are typically ordered in advance through a forecasting procedure. The parties have agreed that DLG/AgroDK, as well as Ferti Supply, are to make estimates of the quantities requested from Ferti Supply and Yara respectively, in due time before the beginning of the fertilizer year. This means that the parties will have an incentive to place [X] % of their demand at Ferti Supply/Yara, for which they can obtain a price expectedly below the market price during spring.

169. The price downstream, the cost plus price, must be assumed to be set at a level where it at least covers Ferti Supply's costs. Besides that, the agreement gives only limited guidance for the price setting. Thus, there will be free scope to set the price when costs have been covered. Yara will have an interest in a high price, as it will increase the profit of the joint venture, whereas DLG/AgroDK will have an interest in a low price. They will prefer to obtain a potential profit through their retail outlets. The result hereof is uncertain, especially for the initial 3 years, where both Yara and DLG/AgroDK are tied by the exclusivity agreements with Ferti Supply. This means that the usual marketwise pressure for keeping prices low is set aside for the 55-60 % of the wholesale/retail market covered by the exclusivities. This increases the risk that prices will be higher than market prices. After the initial 3 years, the exclusivities are dissolved, and Yara as well as DLG/AgroDK will be free to benefit from trading directly with other wholesalers/retailers/producers without having to go through Ferti Supply.

170. DLG/AgroDK will, as a result of the cooperation, purchase all their fertilizers jointly and at the same price for the initial 3 years. As their purchase price makes up more than [X] % of the retail price, a significant risk of tacit collusion arises. Such collusion will affect [up to 60] % of the wholesale/retail market, where prices are likely to increase. Parallel to the cooperation between DLG/AgroDK, the other larger player on the market, DLA, will enter into a vertical agreement with Kemira covering approximately 1/3 of the retail market. Besides DLG, AgroDK and DLA, only Aarhusegnens Andel (AaA) is a competitor and this is only the case in Central Jutland. AaA is, however, a small player on the market and is only active locally. After the effectuation of these agreements, the wholesale fertilizer market will therefore be a duopoly. According to economic theory, firms operating on a duopoly/oligopoly market with homogenous goods and entry barriers tend to sustain high prices, as the threat of a vigorous price war deters any temptation to cut prices, i.e. oligopolists will often find it profitable to collude in a non-cooperative manner.<sup>[41]</sup> DLG, AgroDK and DLA will, as actors in an oligopoly market, tend to keep a watchful eye on each other rather than concentrating on keeping prices low.

171. As a consequence of the lack of effective competition in the wholesale segment, price competition will primarily take place in the retail segment. However, this competition may also be impeded by the mechanisms elaborated on below.

DLG/AgroDK's sales prices

172. DLG and members of AgroDK compete with DLA members and other feedingstuff companies on sales to farmers. Retailers offer farmers a wide assortment of products, used in the production activities of the farmers, including electricity, telecommunication etc. Feedingstuff companies have set up a fine-meshed net of retail outlets, which handle the direct contact to farmers. It demands considerable resources to maintain such a fine-meshed net in case it is only used during a small part of the year. Fertilizers are pronouncedly seasonal products, and the same is the case for several other products such as seeds, and to a lesser extent pesticides, purchase of grain and sales of feed, incl. vitamins. The competitive pressure varies from product to product. With keen competition on some of the other products, DLG/AgroDK's retailers may have an incentive to keep fertilizer prices relatively high, and use the gained profit to lower prices on other products (which may constitute a larger part of total turnover, e.g. animal feed). Thereby, the cooperation may enable them to put a squeeze on their competitors, for example within the feedingstuff sector.<sup>[42]</sup>

173. The net result is likely to be higher fertilizer prices to farmers compared to a situation with market competition. Prices may, nevertheless, be somewhat lower than before the creation of Ferti Supply. First, fertilizer prices vary from one year to another. Next, as Ferti Supply takes over distribution, the parties expect optimization of logistic functions and purchasing benefits in the size of approximately [X] %. This should create a profit for Ferti Supply; a profit of which DLG/AgroDK receive [X] %. This should enable them to lower the prices they set to their retailers.

174. In a market characterized by diminutive demand elasticity, barriers to entry and price-conscious purchasers, the price effects of a limitation of competition can be considerable.

#### **Ancillary restraints**

175. The parties submit that the agreements entered into between Ferti Supply and the parent companies do not contain any provisions restricting competition, and if they do, they are directly related and necessary to the creation and implementation of Ferti Supply, i.e. ancillary to the transaction, because they do not go beyond what is necessary and proportionate in order to establish, implement and realise Ferti Supply in the market.

176. The DCA does not agree. The creation of Ferti Supply significantly impedes competition in the Danish fertilizer market(s) with respect to foreclosure and negative price effects, and the so-called ancillary agreements contributes decisively hereto. The present case involves exceptional circumstances (especially the combination of more restraints that individually could have been ancillary, but when combined are not) that are not dealt with by the general guidelines on ancillary restraints.<sup>[43]</sup> The DCA will assess the effect of the restraints outside the normal scope for ancillary restraints.



177. The restraints referred to are (i) the appointment of Ferti Supply as Yara's sole distributor, (ii) the exclusivity provisions agreed between Ferti Supply and DLG and AgroDK respectively, and (iii) Ferti Supply's minimum purchase obligation – all confined to a period of 3 years.

178. The appointment of Ferti Supply as Yara's sole distributor in Denmark goes beyond what is necessary when it is combined with Ferti Supply's obligation to source at least [X] from Yara. The aim is to secure Ferti Supply a supply channel and to protect the joint venture from unfair competition from the parent company, Yara. Supply security is already achieved through the minimum purchase/supply obligation. However, Yara's appointment of Ferti Supply as their sole distributor does not significantly impede competition in Denmark due to Yara's position in the production market.

179. The exclusivity provisions (non-compete clauses) in the DLG and AgroDK agreements go beyond what is necessary; in fact, these are the restraints which create the main customer foreclosure effects. Competitors to Yara (and Ferti Supply) are only able to sell directly to DLG and AgroDK 3 years after the creation of Ferti Supply, in other words: 55-60 % of the market is inaccessible for 3 years. The parties state that the non-compete clauses are put in place so that DLG and AgroDK do not undermine Ferti Supply by way of unfair competition, and so that Ferti Supply is secured a sufficient customer base in the start-up phase. It is not necessary in order to secure a sufficient customer base that DLG and AgroDK are obliged to source all their requirements from Ferti Supply exclusively. Given the general advantage of the ARA cost price, DLG and AgroDK will automatically have an incentive to purchase at least [X] from Ferti Supply. Thus, the obligation goes too far as it completely eliminates the possibility for others to sell to DLG and AgroDK directly for 3 years.

180. In the opinion of the DCA, the only ancillary (necessary and proportional) provision for the establishment and implementation of Ferti Supply in the market is Ferti Supply's obligation to purchase/Yara's obligation to supply [X] tons [?] from Yara/to Ferti Supply. This obligation ensures Ferti Supply security of a certain volume, which can be viewed as ancillary for a start-up period of 3 years.

181. Removing the anti-competitive restraints would still make it possible for Ferti Supply to be implemented successfully in the fertilizer markets.<sup>[44]</sup>

## Preliminary conclusion

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182. According to Danish competition rules, a merger which significantly impedes effective competition, in particular as a result of the creation or strengthening of a dominant position, shall be prohibited.

183. With the creation of Ferti Supply, DLG and AgroDK's (having a combined market share of 55-60 %) pre-existing dominant position on the Danish wholesale and retail markets will be strengthened significantly. The closest competitor is DLA Agro with a share of around 1/3 of the markets and the next competitor has less than 10 %.

184. Especially during the first 3 years after it has been put into effect, the creation of Ferti Supply will impede effective competition significantly. This is due to the fact that the establishment of the joint venture entails a high degree of vertical integration shielding the market significantly from competition. Similarly, retailers will be tied to the vertically integrated unit causing customer foreclosure, which may lead to difficulties for retailers with obtaining products from other producers without having access to the established network.

185. In addition, there is a risk that the potential advantages (synergies) that the new unit brings about are not reflected in lower retail fertilizer prices to end-users. There is a risk of tacit collusion and a likelihood that the parties utilise the profit from Ferti Supply to lower prices on other products already subject to active competition, thereby putting a squeeze on competing companies.

186. Based upon the above, it can thus be concluded that the creation of Ferti Supply will impede effective competition in the Danish fertilizer market(s) significantly, in particular as a result of the strengthening of DLG's (and AgroDK's) dominant position.

## Proposed commitments

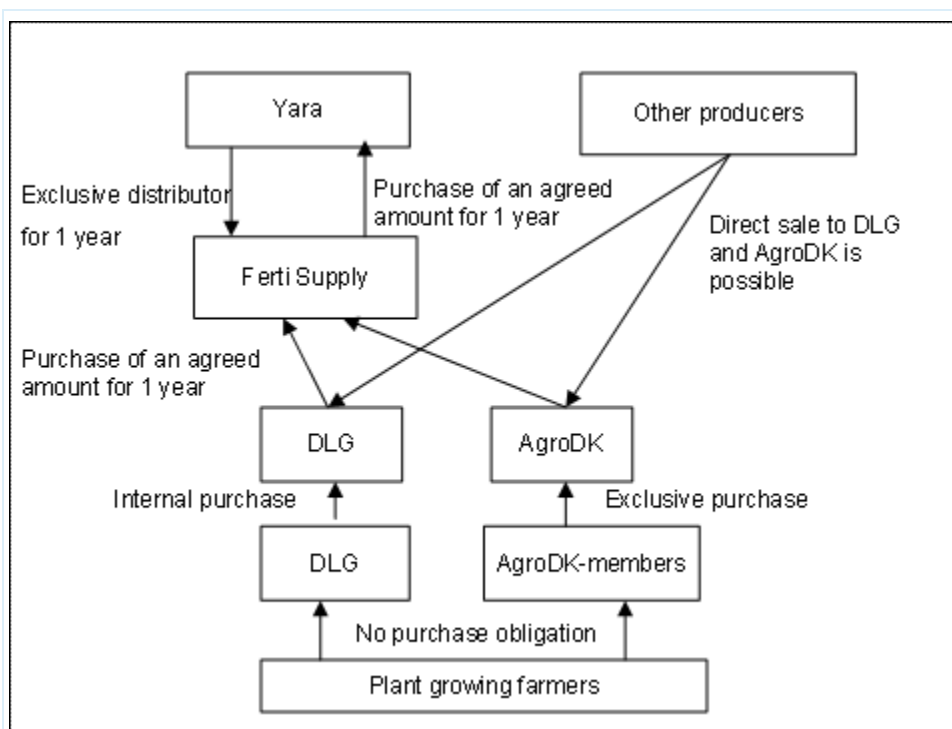
187. The parties have submitted commitments that will abolish the agreed exclusivities downstream and Ferti Supply's long term minimum purchase obligation upstream.

188. In short, the parties have agreed that Ferti Supply before 1 April each year will negotiate one-year-quantity contracts with both Yara and DLG/AgroDK.

189. The one-year-quantity contracts stipulate the purchase obligations of respectively DLG and AgroDK towards Ferti Supply for the coming fertilizer year and, at the same time, the respective purchase and delivery obligations between Ferti Supply and Yara for the same fertilizer year. Ferti Supply may act as Yara's sole distributor that year.

190. The new contracts will expire automatically on 30 June the next year, giving other producers/wholesalers access to Ferti Supply, DLG and AgroDK and their distribution network. The [X] minimum purchase obligation that existed before the proposed commitments has been abolished and replaced by a one-year-quantity agreement. Competitors shall thus have the same opportunity as Yara to approach Ferti Supply, DLG and AgroDK with competitive offers, and neither is bound by any pre-existing, long term minimum purchase obligations. In this way, the Danish fertilizer market will not be locked in. Thus, attractive offers from competitors can find their way to Danish retailers and contribute to increase the competitive pressure on retail prices.

**Figure 6: Agreement structure following the proposed commitments**



#### Final conclusion based on the submitted commitments

191. The proposed commitments will, accordingly, meet the competitive concerns identified, and the DCA concludes – on this basis – that the creation of Ferti Supply does not significantly impede effective competition in the Danish fertilizer market, in particular as a result of the creation or strengthening of a dominant position, why it shall be approved, cf. Section 12c (1) and Section 12e (1) of the Danish Competition Act, on condition that the notifying parties implement the proposed commitments before the creation of Ferti Supply is put into effect.

## Coordinated effects

192. The creation of Ferti Supply does not – as such – have as its object or effect co-ordinating of the competitive behaviour of Yara, DLG and AgroDK, as the parties will transfer all their wholesale fertilizer activities to Ferti Supply. The agreements entered into in connection with the creation of Ferti Supply only concern the relationship between the parties in respect of the fertilizer market(s). They have no effect on the parties' other activities – apart from the possible spill-over effects on the feed market etc., dealt with above, as a direct result of the creation of Ferti Supply.

193. However, given that the creation of Ferti Supply is a creation of a dominant player in the Danish fertilizer market(s) and a strengthening of DLG's (and AgroDK's) already dominant position in the market, cf. para 134-138, it is not necessary to assess the co-ordination effects in the fertilizer market(s), because the creation of Ferti Supply already in itself restricts competition considerably.<sup>[45]</sup>

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[1] Originally, the merger had community dimension and was subject to the European Commission's jurisdiction, but the parties requested the Commission to refer it to the Danish Competition Authority (DCA) for examination and decision.

[2] DLG's members are primarily farmers whereas AgroDK's members are feedingstuff retailers, the largest one being Hedegaard *agro*.

[3] SweDane also purchases for Svenska Lantmännen and will continue to do so in the future. See for more details para 42.

[4] "Dokumentation", 1994, page 349 ff.

[5] Apart from the production in DanGødning which amounts to [X] of the wholesale market.

[6] Court of Justice of the European Communities, case C-250/92, 15 December 1994.

[7] Cf. Press release of 19 January 2006.

[8] The AgroDK members are: Aller-Mølle A/S, Brdr. Ewers A/S, Hedegaard *agro* A/S, Hornsyld Købmandsgaard A/S, J.B. Møller Aps, Landbrugets Storkøb A/S, Møllerup Mølle A/S, Carl Rasmussen & Hempler A/S and Sdr. Dråby Købmandsgård A/S.

[9] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24/1, 29.1.2004.

[10] DKK 3.8 billion corresponds to approximately EUR 500 million, and DKK 300 million to EUR 40 million.

[11] Pursuant to Section 15c of the Danish Competition Act, it has been agreed that the authority deals with the case in English.

[12] Yara has reserved the right to some products, e.g. horticultural products and liquid fertilizers.

[13] See for a definition para 163.

[14] Unless the products are protected by intellectual property rights.

[15] Commission Decision of 21 December 1973 relating to a proceeding under Article 85 of the EEC Treaty (IV/795 – Kali und Salz/Kali Chemie).

[16] In COMP/M.2524 - HYDRO / SQM / ROTEM / JV, where the definition of the product market was left open, the parties submitted that N, P and K fertilizers should be seen as three separate markets segments, as each of them satisfy a specific need for plant growth and are not substitutable with one another.

[17] "Grovvarefusionen", 27 November 2002.

[18] Refer to para 73 below.

[19] Natural gas is used in the production of most nitrogen based fertilizers. Therefore, the price on gas has a great impact on the price of many fertilizers.

[20] Regulation (EC) No 2003/2003 of the European Parliament and of the Council of 13 October 2003 relating to fertilizers.

[21] Bekendtgørelse om klassificering, emballering, mærkning, salg og opbevaring af kemiske stoffer og produkter (nr. 801 af 23. oktober 1997) and bekendtgørelse om nitratholdige gødningsstoffer (of 01/08/85).

[22] Lov nr. 131 af 26. februar 1992 om gødning og jordforbedringsmidler, Lov om jordbrugets anvendelse af gødning og om plantedække nr. 551 af 02/07/2002, Vandmiljøplanen I, II (1987, 1998), etc.

[23] E.g. in Sønderborg, Løgum Kloster, Aller, Hornsyld, Gistrup, Øster Vrå, Møllerup, Sdr. Dråby, Glamsbjerg etc.

[24] Yara (Randers), Kemira (Fredericia), Svane og Gørding, Kongerslev Havekalk, AaA, SAF, DLG (Glæsborg), Vestjysk Andels Foderstofforretning, Hornsyld, Brdr. Ewers, Sandmanden Daugård, Randers Cement, KFK Salt, Brøste Salt and Leca all have the necessary equipment but not all of them bag fertilizers; there is no indication that it would not be possible for all of them to bag fertilizers, if they had the products at hand.

[25] Not including speciality fertilizers and liquid fertilizers. The estimate is based on price lists from members of AgroDK.

[26] Grovvarefusionen, 2002, para. 5.2.7.

[27] In previous Commission decisions, the geographic scope of the production market was at least the EEA.

[28] AgroDK's members are not participating directly in the creation of Ferti Supply, but because of their loyalty obligation towards AgroDK, they are effectively vertically integrated with AgroDK.

[29] The market shares are the notifying parties' estimates.

[30] "Grovvarefusionen", 2002, para 6.2.2 (table 6-11).

[31] Ibid.

[32] Assessed in the light of the newly established cooperation between Kemira and the DLA Agro group, overall 85-95 % of the channels are reserved for DLG, AgroDK and DLA Agro.

[33] Following the take-over of some of KFK's activities. Before that, DLG had a market share of 35-40 %. See Grovvarefusionen, 2002, para 6.2.2 (table 6-11).

[34] The ECJ has recently stated in Case T-210/01, *General Electric v Commission*, para 115: "[...] although the importance of market shares may vary from one market to another, very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (*Hoffmann-La Roche v Commission*, paragraph 101 above, paragraph 41; Case T- 221/95 *Endemol v Commission* [1999] ECR II- 1299, paragraph 134). The Court of Justice held in its judgment in Case C- 62/86 *AKZO v Commission* [1991] ECR I- 3359, paragraph 60, that that was so in the case of a 50% market share".

[35] Input foreclosure occurs when the integrated firm stops supplying competing downstream firms. By locking up a large enough share of buyers, a seller may be able to foreclose rival sellers from the market. The elimination of firms upstream may, in turn, result in input foreclosure for un-integrated firms downstream.

[36] Customer foreclosure occurs when the downstream division of the integrated firm no longer sources supply from independent upstream firms.

[37] In markets characterized by high levels of concentration, enhanced coordination is a real concern. A vertical cooperation, which increases the extent of vertical integration in the market, may contribute to a substantial lessening of competition because of an increase in the effectiveness of monitoring and therefore a reduced incentive to cut prices. See in more details, "The Impact of Vertical and Conglomerate Mergers on Competition", Report for DG Competition, European Commission; report prepared by Jeffrey Church (University of Calgary, Canada).

[38] Both the parties and replies from the DCA's market investigation state that it is very rare that end-users purchase directly from a producer; only very few farmers have the sufficient size to purchase, store and use the volumes required for this.

[39] It is possible to load more than one product per ship but, according to the parties, it rarely takes place.

[40] Due to the legal limit for Danish fertilizer usage.

[41] Cf. Tirole, J (1988): *The Theory of Industrial Organization*, Chapter 6.

[42] For feedingstuff there exists competition from other parties than those involved in fertilizers/seeds. Farmers have (in some parts of Denmark) a significant production of "own blends" where they use their own grain and only buy protein, vitamins etc. from retailers. In other parts of Denmark, for example Southern Jutland, Danish feedingstuff companies meet competition from Germany.

[43] Cf. para 5 of the Commission Notice on restrictions directly related and necessary to concentrations, OJ C 56, 5.3.2005, p. 24.

[44] Ibid. para 13.

[45] Cf. *Konkurrenceloven med kommentarer*, 2001, page 451.