

DLF Seeds A/S – Clearance Application

Submission by DLF Seeds A/S on Commerce Commission’s Letter of Issues Dated 3 December 2018

14 December 2018

Introduction and summary

DLF Seeds A/S (**DLF**) refers to the Commerce Commission’s (**Commission’s**) Letter of Issues dated 3 December 2018 in relation to DLF’s application for clearance to acquire the shares in PGG Wrightson Seeds Holdings Limited (**PGW Seeds**). DLF welcomes the opportunity to comment on the Letter of Issues and sets out below its submission in response.

Information that is confidential and/or commercially sensitive to DLF in this response is highlighted in **blue** shading. Information that is generally confidential is highlighted in **grey** shading, the limited information that is confidential to PGW Seeds is highlighted in **green** shading, and information marked by the Commission as confidential in the Letter of Issues is highlighted with **pink** shading.

In summary:

- DLF understands that the Commission’s primary preliminary concerns relate to ryegrass seeds, particularly ryegrass inoculated with endophytes (with the bulk of that being comprised of perennial ryegrass).
- While DLF appreciates that market shares are not conclusive in themselves as to whether an acquisition will have the effect of substantially lessening competition in a market, nonetheless market shares are a useful indicator of the relative importance of a party in a market. The Commission has not referred specifically in the Letter of Issues to the actual level of DLF’s ryegrass market shares.¹ It is important to note that these shares for DLF are []. Using the independent New Zealand Plant Breeding and Research Association (**NZPBRA**) totals for supply of proprietary cultivars sold within New Zealand for 2017,² out of the total supply of ryegrass proprietary cultivars of [], DLF only supplied [] or []. Out of this, perennial ryegrass comprised [] in total, with DLF only supplying [] or [] in 2017. Not all ryegrass (or perennial ryegrass) is inoculated with endophytes, so the actual volumes of ryegrass inoculated with endophytes supplied by DLF will be smaller still.
- The Commission’s preliminary view is that these [] market shares understate the importance of DLF in the market and the future state of competition in the absence of the merger for three main reasons – namely the “*success*” of DLF’s endophyte research and development programme, DLF’s high quality cultivars compared with other “*minor players*”, and because [] and in the absence of the proposed merger [].³ However, []. In particular:

1 Without prejudice to DLF’s view that the relevant product dimension here is ryegrass / tall fescue.

2 As set out at Appendix 7 of DLF’s clearance application.

3 Refer to paras. 21-22 and 29 of the Letter of Issues.

- DLF's endophyte research and development programme is [], and DLF is confident the available budget for its endophyte programme will be [] than other "minor players" such as Cropmark (and also potentially Seed Force through its association with RAGT).⁴ []. Certainly DLF's endophyte programme is significantly [] than that of PGW Seeds and Barenbrug Agriseeds. [].
- []. DLF's only two ryegrass endophytes (Happe and Edge) [],⁵ []

[]. DLF has no endophyte research activities in the Netherlands, and has not had recent successful endophyte production in that country.⁶

- DLF does not have markedly more highly performing cultivars than other "minor players" in the independent 2018 DairyNZ FVI.⁷ Instead DLF is in a very similar position to Cropmark in the 2018 DairyNZ FVI. [].
- It is also incorrect to say that [], and it is unclear to DLF on what basis the Commission has reached this view. On the contrary, []. This is despite the introduction of Happe and Edge endophytes in 2017 and 2016 respectively. This underlines the fact that [].

- Many of the preliminary concerns raised by the Commission in the Letter of Issues (including ryegrass market definition issues, and the relevance of the AR1 and AR37 endophytes) were canvassed extensively by the Commission in its earlier Decision 556 when it granted clearance to Pyne Gould Guinness Limited to merge with Wrightson Limited in 2005 (**Decision 556**).⁸ While the Commission is not bound by previous decisions, it is still required to act consistently. DLF maintains that the approach adopted by the Commission in 2005 was correct, and that factual conditions have not changed since then so as to justify a departure from the Commission's previous approach.

DLF expands on its reasoning above in the submission below. For ease of reference, the submission below adopts the Commission's headings and paragraph numbering in the left

4 <https://www.seedforce.co.nz/ragt-partnership/>

5 [].

6 Contrary to the Commission's preliminary finding at para. 18 of the Letter of Issues where reference is made to DLF's "recent successful endophyte production in the Netherlands".

7 As maintained by the Commission at para. 22 of the Letter of Issues.

8 *Pyne Gould Guinness Limited and Wrightson Limited*, Decision 556, 31 August 2005.

hand margin. DLF has not responded to every statement in the Letter of Issues, but rather has focused below on the issues that are key to the competitive assessment of the transaction. Where DLF has not specifically addressed a particular point in the Letter of Issues, this should not be taken as an indication it agrees with that point.

Documentation provided in support of this submission is listed in the **Schedule** at the end.

Market definition

Relevant product dimension – forage markets

- 10-13. The Commission has advised at para. 13 that it does not seek further information from DLF at this stage in relation to its assessment of tall fescue, brassica/fodder beet, clover and cocksfoot seed markets. As a result DLF has not provided further information in relation to these markets, but is happy to do so in future should the Commission require it.
12. In relation to ryegrass, DLF does not agree that each of perennial, Italian, hybrid and annual ryegrasses are distinct product markets. DLF refers to the Commission's previous assessment of this issue in Decision 556, where the Commission found that:⁹

“from a supply perspective there is a high degree of substitutability between the [ryegrass] seed varieties. Accordingly, the Commission is of the view that a single market encompassing the different varieties of ryegrass is appropriate.”

In Decision 556 the Commission expressly went on to consider whether it was necessary to define separate product markets for ryegrasses that were inoculated with different endophytes, especially in relation to AR1 and AR37 endophytes.¹⁰ However, it decided this was unnecessary.¹¹

DLF submits that the Commission's previous conclusions on ryegrass market definitions in Decision 556 were correct for the reasons outlined by the Commission in that Decision. There has been no significant change in market conditions since 2005 that would justify a different approach now. Further information on this is contained in the geographic dimension discussion below.

That said, DLF does not consider that the precise definition of any ryegrass market/s will have a material impact on the competitive impact of the proposed merger in any event (as the Commission itself has noted at the end of para. 12 of the Letter of Issues).

Relevant product dimension – turf seeds

14. The Commission has advised in para. 40 of the Letter of Issues that it does not seek further information from DLF at this stage in relation to turf seeds. As a result, DLF has not provided further information in relation to the relevant product dimension for turf seeds, but is happy to do so in future should the Commission require it.

⁹ At [172].

¹⁰ At [173]-[174].

¹¹ At [183]-[184].

Relevant geographic dimension

15. DLF agrees with the Commission’s preliminary view that the relevant forage and turf seed markets are national in scope. In relation to ryegrass and tall fescue, DLF remains of the view that these are also national markets.

In the Commission’s previous Decision 556, it found that the relevant seed markets (including ryegrass) were national as:

- seeds could be transported domestically “*at relatively low cost compared to the retail value of the seed*”¹² and so all of New Zealand’s seed companies could operate on a nationwide basis; and
- there was no need to define “*separate regional markets based on the comparative characteristics of different endophytes*” (particularly AR1 and AR37) as “*low transportation costs and the relatively small area affected by the black beetle*” meant that “*any price discrimination between geographic areas would be very difficult to sustain*”.¹³

Nothing has changed factually since the time of Decision 556 to alter that conclusion by the Commission, which DLF maintains was correct at that time and remains correct now.

Indeed, although ryegrass and tall fescue sales vary from region to region, New Zealand’s generally mild climate means that DLF sells its entire seed range throughout the country. For instance, DLF sells Happe and Edge perennial ryegrass in Southland, and details of DLF’s Southland Sales data for 2017/18 are **attached** for the Commission’s information. This is consistent with the current DairyNZ FVI for 2018, which identifies 24 Seven Edge, Base AR37 and Trojan NEA2 as four or five-star cultivars in each of the Upper North Island, Lower North Island, Upper South Island and Lower South Island. DLF is also finding that due to climate change there are now fewer differences in where insects have traditionally been found. For example, while historically black beetle has only been an issue north of Taupo, it is now being found in Taranaki as well.

For these reasons, DLF maintains that competition issues in relation to ryegrass and tall fescue should be assessed on a national basis.

Counterfactual

16. DLF agrees with the Commission’s counterfactual and refers to paras. 81-87 of its clearance application on this issue.

Competition assessment (unilateral effects) – ryegrass seeds

18. The Commission’s preliminary view is that the proposed transaction would result in the amalgamation of “*two of the three main endophyte research and development programmes that have produced endophytes capable of inoculation into commercial ryegrass varieties*”. The Commission also states that DLF’s “*experience and recent successful endophyte production in the Netherlands, []*, are likely to make it well placed to develop new endophytes in the future”.

12 At [269].

13 At [270] to [272].

DLF disagrees with this preliminary assessment by the Commission for the following reasons:

DLF does not have one of the three main endophyte research and development programmes

DLF considers there are at least four market participants with endophyte research and development programmes that are capable of producing endophytes for inoculation into commercial ryegrass varieties. Aside from PGW Seeds and DLF, these are:

- Agriseeds Limited (**Barenbrug Agriseeds**), which is a New Zealand plant breeding and research company owned by the multinational Royal Barenbrug Group headquartered in the Netherlands. Agriseeds has developed and supplies the NEA, NEA2 and NEA4 endophytes.¹⁴ It has been granted plant variety rights for an additional six endophytes (NEA3, NEA6, NEA10, NEA11, NEA21 and NEA23), and has also filed an application for rights over NEA47 in late 2017.¹⁵

[

]. Submission of a cultivar to the ETC is a substantial undertaking and one that tends only to be undertaken when the applicant is sufficiently confident of commercial viability. [

].

Barenbrug Agriseeds' Trojan NEA2 perennial ryegrass features on the DairyNZ FVI in 2018 as a five-star cultivar in all regions of New Zealand. [

].

Agriseeds also has another perennial ryegrass inoculated with its own endophyte, Rohan NEA2, which has a one-star rating in all regions of New Zealand. [

].

Barenbrug Agriseeds has also succeeded in inoculating the AR37 endophyte, which it uses under licence from Grasslanz Technology Limited (**Grasslanz**) (owned by AgResearch Limited), in its Governor perennial ryegrass.

DLF understands that Barenbrug Agriseeds has at least one endophyte scientist at its Darfield breeding station (Colin Eady, Science Manager).¹⁶ Mr Eady recently co-authored a scientific paper on the intake of ergovaline (a toxin) by cows grazing on perennial ryegrass containing endophytes, together with Agriseeds' Agronomists (Jen Corkran and Kris Bailey)¹⁷ and Agriseeds' Pasture Systems Manager (Graham Kerr).¹⁸

In addition to this, Barenbrug Agriseeds appears to have a strong collaboration with Professor German Spangenberg and his team at La Trobe University in Melbourne. Barenbrug Agriseeds has been working with the AgriBio lab (a joint agricultural bioscience research and development venture between La Trobe and the Victorian government) since 2006 to "*discover and develop the next generation of endophytes for NZ pastures*".¹⁹ Dr Spangenberg's work on

14 <https://www.agriseeds.co.nz/endophyte-2/endophyte-options.htm>

15 <https://www.iponz.govt.nz/about-ip/pvr/>

16 <https://www.agriseeds.co.nz/news/ryegrass-virus-research-re-visited.htm>

17 <https://www.agriseeds.co.nz/contact/barenbrug-agriseeds-field-team>

18 <https://www.agriseeds.co.nz/news/latest-release-takes-annual-ryegrass-to-a-new-level.htm>

19 https://www.nzherald.co.nz/the-country/news/article.cfm?c_id=16&objectid=12036333

endophytes is reviewed in the Dairy Futures CRC Final Report of Achievements for 2016.²⁰

Additional details of Barenbrug Agriseeds' 30 year research programme on endophytes are available on its website.²¹

- Cropmark Seeds Limited (**Cropmark**), which is a New Zealand seed operation that is partly owned by Ravensdown Limited. It has developed its own endophyte, U2, which so far it has commercialised in its Barrier festulolium cultivar. DLF assumes Cropmark is also looking to develop U2 for commercialisation in ryegrass as well, and the Commission will be able to confirm that directly with Cropmark. Cropmark has "*an intensive endophyte research and development programme aimed at developing unique new animal-safe endophytes which provide host plants tolerance of a broad spectrum of insect pests*".²² Cropmark states on its website that:²³

"Our plant breeding programme is one of the most extensive, highly innovative and professional breeding programmes being run anywhere in the world. The programme emphasis is on delivering inter-species crosses that capitalise on the best traits of each parent plant species. This enables us to create totally unique pasture varieties that will provide significant performance improvements over traditional alternatives."

Cropmark has been granted plant variety rights in relation to another three endophytes (UNC1, U12 and U13) and has filed applications for plant variety rights in respect of two further endophytes (CM142 and E59).²⁴

Cropmark has also succeeded in inoculating the AR1 endophyte, which it licenses from Grasslanz, into a four-star cultivar, Ultra AR1. More recently, it has inoculated the NEA2 endophyte into another cultivar, Raider NEA2, [

].

Cropmark has two research scientists based at its Darfield site (Tim Gillanders and Greta Brown),²⁵ as well as an Innovations and Technology Development Manager at its head office in Rolleston (Dr Brian Patchett, who completed his PhD on endophyte research).²⁶ Dr Patchett, Mr Gillanders and Ms Brown recently co-authored a scientific paper on endophytes and the Argentine stem weevil.²⁷

- For completeness, DLF also understands that Seed Force is likely to be involved in endophyte research and development through its association with RAGT. Further information about Seed Force and RAGT is contained in DLF's clearance application.

In contrast, DLF's [

20 At p 29.

21 <https://www.agriseeds.co.nz/endophyte-2/nea-endophytes-30-years-of-r-d>

22 <https://www.cropmarkseeds.com/GrubOUT-U2-Endophyte/GrubOUT-U2-Endophyte-Research>

23 Refer to <https://www.cropmarkseeds.com/>

24 <https://www.iponz.govt.nz/about-ip/pvr/>

25 <https://www.cropmarkseeds.com/Contact-Cropmark-Seeds/Cropmark-Seeds-Darfield>

26 <https://www.cropmarkseeds.com/Contact-Cropmark-Seeds/Cropmark-Seeds-New-Zealand;>

<https://researcharchive.lincoln.ac.nz/handle/10182/2397>

27 Barker, Patchett, Gillanders, Brown, Montel and Cameron *Feeding and oviposition by Argentine stem weevil on Epichloe uncinata-infected, loline-containing Festulolium New Zealand Plant Protection* 68: 212-217 (2015).

].

[]:

	[]	[]
[]	[]	[]
[]	[]	[]
[]	[]	[]

The current exchange rate between Danish Krone and the New Zealand dollar is around 1 DKK = 0.2220 NZ\$. Accordingly, this means that in 2017/2018 [] on endophyte research and development. This endophyte research and development amount has been [] from 2016/2017 to the present.

DLF's total annual spend for its entire research and development programme in New Zealand and Australia (including both endophyte and non-endophyte research and development) during the same period was:

	[]
[]	[]
[]	[]
[]	[]

Applying the same conversion rate, this equates to a total spend of between [] per year. This amount has been [] since 2015/2016 to the present.

For these reasons, DLF is confident that its active endophyte research and development programme is []. As such, post-acquisition there would still be at least three active endophyte research and development programmes rather than two as assumed by the Commission in para. 18 (and potentially a further one with Seed Force/RAGT).

DLF is [] to develop new endophytes in the future

The Commission has stated in para. 18 that DLF's "experience and recent successful endophyte production in the Netherlands, [], are likely to make it well placed to develop new endophytes in the future".

DLF has research activities in the Netherlands, namely a breeding station. However, DLF has no endophyte research and development programme in the Netherlands currently, and has never had an endophyte research and development programme in the Netherlands in the past. So there has been no recent successful endophyte production in the Netherlands by DLF. In contrast, Barenbrug Agriseeds

is linked into the Royal Barenbrug Group which is based in the Netherlands.²⁸ Barenbrug Agriseeds may well have had recent success with endophyte production in the Netherlands and, if so, that will act as a constraint on the merged entity in the present case going forward.

It is also incorrect that DLF has a [] for endophytes for the reasons noted above. []].

Various market participants have developed endophyte technology over time almost exclusively for the New Zealand market. However, it is not relevant to the European market (which accounts for a significant part of DLF's business) due to industry codes, farming practices and climatic conditions in that region. In major grass growing countries like the United Kingdom and France, grass cultivars containing endophytes are not accepted by authorities for testing in the official registration trials. []

].

Importantly, in contrast to the active endophyte research and development programmes of Barenbrug Agriseeds and Cropmark (and PGW Seeds), []

].

[]

[]]. It therefore cannot be correct that DLF is [] in the absence of the merger (as maintained by the Commission at para. 18).

19. For the reasons stated above, there will not be a substantial loss of competitive tension for endophyte research and development. In DLF's view, there is little risk that the merged entity would be able to unilaterally increase the price of ryegrass varieties, or slow the pace of development of new endophytes, thereby affecting current and future competition in the production and supply of ryegrass seeds.

Barenbrug Agriseeds and Cropmark both have strong and active endophyte programmes. They, along with Seed Force and Germinal Holdings New Zealand Limited (**Germinal**), also licence endophytes from Grasslanz. Together, these participants will provide a key competitive constraint on the merged entity post-acquisition.

28 Refer to <https://www.agriseeds.co.nz/about/barenbrug-agriseeds>.

Market concentration in the production and supply of ryegrass seeds

20-21. While DLF appreciates that market shares are not conclusive in themselves as to whether an acquisition will have the effect of substantially lessening competition in a market, nonetheless market shares are a useful indicator of the relative importance of a party in a market. It is important to keep in mind that DLF's market shares are []:

- As stated in the clearance application, DLF [] has a [] share of the ryegrass/tall fescue market in New Zealand in 2017 ([]). This compares with the larger estimated ryegrass/tall fescue market shares for 2017 of Barenbrug Agriseeds at [] and Cropmark at [] who will continue to provide an independent constraint on the merged entity post-acquisition;
- Even if proprietary ryegrasses are just considered alone without tall fescue, using the independent NZPBRA totals for supply of proprietary cultivars sold within New Zealand for 2017,²⁹ out of total supply of ryegrass proprietary cultivars of [], DLF only supplied [] or []. In the NZPBRA submission, DLF's festulolium varieties (Perun and Perseus) are included as "Italians" as functionally they perform in a similar manner. If these festulolium varieties are excluded, then DLF only supplied [] of proprietary ryegrass in 2017, comprised of [] for perennial ryegrass and [] of other varieties of ryegrass. This represented a reduction in supply from the 2016 year where DLF supplied [] of ryegrass (excluding festulolium varieties);
- Out of this, perennial ryegrass comprised [] in total using the NZPBRA figures, with DLF only supplying [] in 2017. This compares with [] supplied by DLF in 2016, comprising [] of the total of [] of perennial ryegrass assessed by the NZBPRA for that year. Not all ryegrass (or perennial ryegrass) is inoculated with endophytes, so the actual volumes of ryegrass inoculated with endophytes supplied by DLF will be smaller still.

If DLF's ryegrass endophytes and cultivars had been as successful as the Commission's preliminary assessment would indicate, then DLF's ryegrass market supply volume and shares would surely have increased since 2016/2017 when they were introduced. [].

21. The reason for this [] is that, [] to the Commission's preliminary assessment that DLF has been "*successful in developing novel ryegrass endophytes*" for New Zealand, DLF has [].

DLF currently has two ryegrass endophytes: Happe and Edge. These endophytes were released commercially to the market in New Zealand in the autumn of 2017 and the autumn of 2016 respectively. Happe was originally developed by Advanta Seeds Pacific LLC, but was bought by DLF as part of its acquisition of Advanta Seeds' grass seed unit from Limagrains-Verneuil Holding in 2006. Advanta Seeds Pacific LLC had found and characterised the endophyte, and so after the acquisition DLF focused on further developing it for the specific conditions in New Zealand. Accordingly it is not the case that DLF originally developed Happe through DLF's own endophyte research and development programme.

29 As set out in Appendix 7 of DLF's clearance application.

[], and Happe-
inoculated cultivars do not feature on the DairyNZ FVI for 2018 []. The relevant industry level for endophyte in the seed is 70%, [].

DLF's 24 Seven Edge cultivar has a four or five-star rating on the DairyNZ FVI for 2018, depending on the region in New Zealand. []

].

[]

].

[]

].

[]

].

22. It is also incorrect to say that [], and it is unclear to DLF on what basis the Commission has reached this view. On the contrary, []:

[]	[]
[]	[] ³⁰
[]	[] ³¹

30 Excluding festulolium varieties.

31 Excluding festulolium varieties.

The position is similar for DLF’s proprietary perennial ryegrass sales which have [] since 2016 as set out in the following table:

[]	[]
[]	[]
[]	[]

A spreadsheet showing the breakdown of the sales of DLF’s various perennial ryegrass products over this time period, compared to the total sales of other ryegrasses, is **attached** for the Commission’s information.

It is worth bearing in mind that DLF’s total volume of supply of ryegrass (including perennial ryegrass) has [] since the introduction of the Happe and Edge endophytes in 2017 and 2016 respectively. This underlines the fact that [].

Nor does DLF have markedly more highly performing perennial ryegrass cultivars than other “*minor players*” in the 2018 DairyNZ FVI. Instead DLF is in a very similar position to Cropmark in the 2018 DairyNZ FVI. Looking at each of the four regions on the DairyNZ perennial ryegrass cultivar selector and tallying up the three, four and five-star rated cultivars from “*minor players*” shows that Cropmark has similar performance rankings to DLF:

Company	Upper North	Lower North	Upper South	Lower South	Total
DLF	2	2	2	2	8
Cropmark	2	2	2	2	8
Geminal	0	0	1	0	1

[]:

[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]
[]	[]	[]	[]	[]	[]

[].

For these reasons DLF does not agree with the Commission’s preliminary assessment that in the absence of the proposed merger []

], so there is simply no basis to assess that there will be [] in future.

Endophyte research and development

23-25. DLF agrees that it owns the two most recent novel endophytes that have been inoculated into commercial perennial ryegrass varieties, with Happe being introduced in late 2017 and Edge being introduced in late 2016. However, [

]. However, DLF also notes that Barenbrug Agriseeds has recently released its NEA2 endophyte and Cropmark has succeeded in inoculating its U2 endophyte into a festulolium cultivar.

26. It is worth bearing in mind that a number of participants also licence endophytes, including DLF. [

]. The current expiry date for plant variety rights for both AR37 and NEA2 is 25 July 2028. This means that those parties with licences for endophytes will continue to have the benefit of those licences for a significant period to come.

27-28. DLF disagrees that AR1 has been largely superseded by more recent novel endophytes, and that it is hard for cultivars relying on this endophyte to compete. On the contrary, the DairyNZ FVI for 2018 indicates that all major seed companies still believe the AR1 endophyte works across New Zealand as they all successfully submitted AR1-inoculated cultivars for approval by the ETC of the NZPBRA. Arrow AR1 (Agriseeds) is a five-star variety everywhere except the Upper North Island (where it has a three-star rating). Ultra AR1 (Cropmark) and Ansa AR1 (DLF) are four-star varieties everywhere. Again, focusing on three, four or five-star rated cultivars, the DairyNZ FVI for 2018 ranks seven AR1 cultivars in each of the Upper North Island, Lower North Island and Upper South Island, and six in the Lower South Island.

	Upper North	Lower North	Upper South	Lower South
AR1 cultivars	7	7	7	6
Seed companies	DLF, Cropmark, PGW Seeds, Agriseeds, Agricom	DLF, Cropmark, PGW Seeds, Agriseeds, Agricom	DLF, Cropmark, PGW Seeds, Agriseeds, Agricom, Germinal	DLF, Cropmark, PGW Seeds, Agriseeds, Agricom

This is consistent with the Commission’s view in Decision 556 in 2005, where it concluded variously that:

“...in most instances there was likely to be a high degree of substitutability between the AR1 and AR37 endophyte ryegrasses such that it is appropriate to consider them falling within the same market. Also, based on the uptake figures of AR1 the Commission considers that there is some degree of substitutability between grasses containing other, or no, endophytes.”³² ...

32 Refer to [183] of Decision 556.

“... the Applicants will face strong competition from other industry participants marketing the AR1 endophyte which is known in the market to be a safe and proven product.”³³

“The Commission is also of the view that there is unlikely to be a substantial lessening of competition in respect of the sale of AR37 inoculated grass given, as analysed in the market definition, the degree of competition it will face in the factual scenario from the established incumbent endophyte, AR1.”³⁴

29. For the reasons set out above, DLF does not accept it is a close competitor to PGW Seeds in any market for the production and supply of ryegrass or that it is “*generating competitive tension which may not be replicated by other competitors that have relatively small market shares*”. Looking at the three factual bases relied on by the Commission for this preliminary view, DLF notes in relation to each:

- Endophyte programme: [

].

- High quality cultivars: [

].

- Increasing volume of supply: [].

New entry and expansion

30-32. The Commission states that the time taken to fully develop a new novel endophyte would act as a significant barrier to new entry. However, it would be possible for a new competitor to enter more quickly if it were to licence an existing endophyte (as a number of participants in the New Zealand market already do), or otherwise to purchase the rights to an endophyte that has been found and characterised by another party (like DLF did with Happe). AR1 is available for any supplier to license, and it is still a very efficient endophyte in most regions of New Zealand as set out above (as evidenced by the 2018 DairyNZ FVI rankings referred to earlier). Agriseeds’ NEA endophytes have been licenced to Cropmark, and AR37 has been licensed to Agriseeds.

DLF does not agree with the Commission’s preliminary view that barriers to expansion for the supply of ryegrass are high so that DLF would not be constrained post-merger. This preliminary view by the Commission is contrary to the Commission’s findings in Decision 556 in 2005 where it noted in relation to ryegrass that:

“Quantities of New Zealand produced seed can be fairly readily adjusted over a 12 to 14 month period allowing for the provision of seed to meet increased demand if forecast. In respect of imported seed, tested and proven in the New Zealand market, it is often the case that simply placing an order with the overseas supplier can provide access to large tonnages of seed within four weeks.”³⁵ ...

33 Refer to [402] of Decision 556.

34 Refer to [409] of Decision 556.

35 At [394].

“The Commission is of the view that there is a sufficient degree of existing competition within this market, considering that barriers to expansion are low, such that a substantial lessening of competition is unlikely to result in the factual scenario.”³⁶

Given that both the AR1 and AR37 endophytes were already present at the time of the Commission’s 2005 Decision, DLF does not consider that the factual circumstances have changed between 2005 and the present to justify the Commission reversing its previous conclusion that barriers to expansion are low.

In its clearance application, DLF identified Rouergue Auvergne Gevaudan Tarnais (**RAGT**), Deutsche Saatveredelung AG (**DSV**), and KWS SAAT AG (**KWS**) as the most likely possible new entrants.³⁷ DLF remains of the view that these companies are likely possible new entrants, together with French company Jouffray Drillaud.³⁸

Countervailing power

33. DLF disagrees with the Commission’s preliminary view that customers do not have the ability or the incentive to exercise any countervailing power in a manner that would constrain the merged firm post-merger. This is inconsistent with DLF’s experience.

DLF’s four largest customers for all seed types it sells make up approximately [] of its sales in New Zealand. These customers are []. There are no long-term contracts with these customers – retailers purchase from the price list (with annual rebates based on volume). Retailers tend to buy mainly in spring and autumn, and typically buy weekly, based on the orders they have received from farmers. The retailers are largely a conduit for farmer choice.

Evidence of the constraints exercised by these large customers can be seen in the []

].

Going forward, it is important to stress that post-merger DLF will have no presence in the retail functional level of any market for the sale of ryegrass seeds. DLF is not acquiring the retail business of PGW and is not itself involved in retail sales for ryegrass. This means that PGW itself will also be a major customer of DLF and []. This means that DLF will be more constrained post-acquisition than PGW Seeds currently is, given DLF will have no vertical integration. This is a pro-competitive effect of the merger, in contrast with the situation in 2005 where the Commission still gave clearance in Decision 556 despite

36 At [408].

37 At [221] to [222].

38 Refer to https://www.jouffray-drillaud.com/index-no-flash.php?id_lang=fr.

industry competitors being concerned that the “*combined entity would be of a scale which would enable it to exclude its competitors from its retail arm*”.³⁹

Other issues

AgResearch and PGW Seeds

34. Any concerns that the Commission has in relation to the existing AgResearch (through its subsidiary Grasslanz) and PGW Seeds joint venture regarding endophyte research and development will not be augmented by the proposed merger. The joint venture will remain in the same form going forward. The only effect on the joint venture would be [

]. Existing licence agreements for endophytes that are already in place with third parties will continue unaffected by the merger.

As noted above, the current expiry date for plant variety rights for AR37 is 25 July 2028. This means that Barenbrug Agriseeds as a party to licences for AR37 endophytes will continue to have the benefit of those licences for a significant period to come.

Moreover it will not be the case that post-acquisition the merged entity will have a controlling stake in this joint venture. AgResearch through Grasslanz will continue to be an independent participant. The Commission noted in Decision 556 in 2005 that AgResearch had informed the Commission that:

“... it has an incentive to encourage the uptake of the [AR37] technology by other industry participants as this would in turn increase the value of the total royalties collected”.⁴⁰

The Commission therefore concluded in Decision 556 that “*the merger will not create opportunities for the combined entity to foreclose the possibilities of conducting research and development with AgResearch ...*”.⁴¹ DLF considers that conclusion remains accurate today.

DLF understands that PGW Seeds will provide further information to the Commission on the joint venture relationships.

Industry bodies

- 35-36. The relevant industry body is the NZPBRA. It represents plant breeders, intellectual property owners and managers of proprietary agricultural seed.

Members of NZPBRA are “*seed companies substantially involved in the development and marketing of plant intellectual property on the strength of research proven standards of performance*”⁴² and include Genetic Technologies, PGW Seeds, Agriseeds, Cropmark, DLF, Germinal, Grasslanz, Seed Force, NZ Seed Houses, and Nutritech. There is also one subsidiary member, Agricom (New Zealand).⁴³

The president of NZPBRA is currently Barry McCarter of Genetic Technologies, and the vice president is currently David Green of PGW Seeds.

39 Refer to [406] of Decision 556.

40 Refer to [404] of Decision 556.

41 Refer to [410] of Decision 556.

42 <https://www.nzpbra.org/about-us/>

43 <https://www.nzpbra.org/our-members/>

At any annual general meeting, each primary member (but not subsidiary member) is entitled to one vote. In the event of an equality of votes the chair has a second or casting vote.⁴⁴ At meetings of the Executive Council, at which each member company (but not subsidiary members) has a representative, questions arising are decided by a majority of votes with the chair having a second or casting vote in the event there is no majority.⁴⁵

In practice when two members merge (such as PGW Seeds and Agricom in 2005) one member retains its vote (i.e. PGW Seeds in that case) and the other member becomes a subsidiary member with no voting rights (i.e. Agricom). As a result, there is no aggregation of voting power. This will remain the case following the proposed merger. The combined entity involving DLF, PGW Seeds and Agricom will have one vote only post-merger. So there will be no increased ability for DLF post-merger to influence industry bodies or to hamper the passage of rivals' new novel endophytes to market.

Within the NZPBRA there are a number of scientific committees, including the Forage Technical Committee (**FTC**) and the ETC.

The purpose of the FTC is to manage commercial forage trials. The FTC provides expert advice on technical matters concerning forage and forage utilisation and provides advocacy for forage improvements. Its members currently include Seed Force, Cropmark, DLF, PGW Seeds, Agricom, Grasslanz, Agriseeds, and Germinal. Its chair is currently Alistair Moorhead of Agricom. Decision making at the FTC is by consensus. If consensus cannot be reached, the issue is referred to the Executive Council of NZPBRA which votes on the basis set out above.

The ETC is an industry-run technical committee whose purpose is to review information on endophytes available for supply. The ETC has representatives from independent researchers (AgResearch, Dairy NZ and the seed industry (PGW Seeds, Cropmark, DLF, Agricom, Germinal, Barenbrug Agriseeds). Like the FTC, decision making at the ETC is also by consensus. If consensus cannot be reached, the issue is referred to the Executive Council of NZPBRA.

Given that decisions of the FTC and ETC are by consensus, there will be no increased ability for DLF post-merger to influence these Committees or to hamper the passage of rivals' new novel endophytes to market.

For completeness, the other industry body identified by DLF at para. 165.3 of its clearance application is the New Zealand Grain and Seed Trade Association Incorporated. However, this body does not deal with technical issues and so DLF has not commented on it further for the purposes of this submission.

Competition assessment (coordinated effects) – ryegrass seeds

37-39. The Commission notes that “*to some extent*” the market structure referred to in para. 38 exists now between PGW Seeds and Barenbrug Agriseeds. From DLF's perspective the factors referred to by the Commission in paras. 38.2-38.5 regarding market dynamics post-merger certainly already exist now. In particular:

- PGW Seeds and Barenbrug Agriseeds are already the two largest players in ryegrass seeds in New Zealand;

44 Rules of the New Zealand Plant Breeding and Research Association Incorporated, 17 October 1977 (**NZPBRA Rules**), clause 13(d) and (e).

45 NZPBRA Rules, clause 20(a).

- These two companies operate the two largest endophyte research programmes in New Zealand;
- They are the only two suppliers currently with access to the AR37 endophyte; and
- They regularly meet each other at various industry fora.

None of this existing market structure will change post-merger, and there is going to be no augmented ability for the two main players to coordinate their behaviour (not accepting in any way that these two main players have been coordinating their behaviour to date in any event, or that post-merger there would be any such coordination).

The only change is that post-merger the merged entity and Barenbrug Agriseeds will be two world leaders in forage seeds, as noted by the Commission at para. 38.1. But this is taking into account the position of these parties in markets outside New Zealand, which is obviously outside the scope of the present clearance exercise relating to markets in New Zealand. That said, in any event DLF fully complies with all antitrust requirements in other jurisdictions outside New Zealand and does not coordinate its conduct with competitors.

Turf seeds markets

40. The Commission has advised that it does not seek further information from DLF in relation to turf seeds at this stage. DLF is happy to provide further information if that would assist.

DLF is keen to take up the Commission's offer at para. 5 of the Letter of Issues to meet to discuss the Commission's Letter and this response. We have arranged a meeting with the Commission team for this purpose.

SCHEDULE OF DOCUMENTS PROVIDED

- DairyNZ FVI for 2018
- []
- []
- []
- []
- []
- []
- []