

***Case No COMP/M.1932 -  
BASF / AMERICAN  
CYANAMID (AHP)***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(2) NON-OPPOSITION  
Date: 30/06/2000

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.06.2000

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PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(2) DECISION

To the notifying party

Dear Sirs,

**Subject: Case No COMP/M.1932 – BASF/American Cyanamid**

Notification of 15 May 2000 pursuant to Article 4 of Council Regulation No 4064/89<sup>1</sup> (hereafter “the Merger Regulation”)

1. On 15 May 2000, the Commission received notification of a proposed concentration by which the undertaking BASF AG (“BASF”) will acquire American Cyanamid Company (“Cyanamid”), the crop protection subsidiary of American Home Products (AHP) acquired by AHP in 1994.<sup>2</sup>

**I. THE PARTIES**

2. BASF is a multinational company operating world-wide whose main activities are the production, distribution and sale of chemicals, health and nutrition products, oil and gas. Its product range includes high value added chemicals, plastics, coatings, dyestuffs, crop protection products, pharmaceuticals, crude oil and gas.
3. Cyanamid is an American company active world-wide in the manufacturing, distribution and sale of agricultural chemical products. These products include a variety of crop protection and pest control products such as herbicides, insecticides and fungicides. Cyanamid is wholly owned by AHP, which is also engaged in the discovery, development, manufacturing and distribution of pharmaceuticals, consumer and animal health care.

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<sup>1</sup> OJ L 395, 30.12.89 p.1; corrigendum OJ L 257 of 21.09.90, p.13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 09.07.97, p.1, corrigendum OJ L 40, 13.02.98, p.17).

<sup>2</sup> See case Nr.IV/M.500 AHP/Cyanamid, Decision of 19 September 1994

## **II. CONCENTRATION**

4. BASF will acquire the shares and assets that constitute Cyanamid's world-wide crop protection business. Therefore, the notified operation constitutes a concentration within the meaning of Art. 3(1) b of the Merger Regulation.

## **III. COMMUNITY DIMENSION**

5. The combined aggregate world-wide turnover in 1999 of the undertakings concerned exceeds EUR 5,000 million (BASF EUR 29,500 million, Cyanamid EUR 1,790 million). The Community-wide turnover of both BASF and Cyanamid exceeds EUR 250 million (BASF EUR 15,800 million, Cyanamid EUR 446 million). Neither BASF nor Cyanamid achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. Therefore, the concentration falls within the scope of the Merger Regulation.

## **IV. COMPETITIVE ASSESSMENT**

6. The merger concerns the economic sector of crop protection chemicals ("crop protection").

### **A. Relevant product markets**

7. Crop protection products protect crops against all manners of damage which might be caused by weeds, insects or fungi. Crop protection products are normally subdivided according to what they are designed to control. The main product groups are the following:
  - fungicides for disease control;
  - herbicides for weed control;
  - insecticides for insect control;
  - soil fumigants
  - nutrients ("trace elements") to overcome deficiency symptoms, e.g. iron deficiency;
  - seed treatment for the protection of seeds and subsequent plants against disease and insects;
  - plant growth regulators;
  - industrial weed control products;
  - non-agricultural insecticides;
  - active substances.
8. The parties are not active in seed treatments and trace elements. They have no overlapping activities in industrial weed control and non-agricultural insecticides

since BASF is not active on these markets. There is also no overlap between the active substances produced by BASF and Cyanamid for sale to third parties. In addition to crop protection products, BASF/Cyanamid will be active also on the seeds markets through BASF's 40% stake in the Swedish seed company Svalöf Weibull.<sup>3</sup> The concentration gives rise to affected markets within the following agrochemical markets: herbicides, fungicides, insecticides, soil fumigants and plant growth regulators.

### **A.1 Herbicides**

9. Herbicides are agents that control weeds. Usually, a first distinction is made between selective herbicides and non-selective herbicides. The latter are effective against many types of plants, including the cultivated crops, which they kill if applied on them. Non-selective herbicides are generally applied to fields in order to clear them of weeds after the harvest of one crop and prior to the sowing of the next. As BASF is not active in non-selective herbicides, there is no competitive overlap in this domain.
10. Selective herbicides, on the other hand, are designed to kill only the weeds, and to leave intact the crop for which they are applied. Clearly, from the viewpoint of the farmer, the type of crop on which a selective herbicide is used, is the most important factor in determining product substitutability.
11. Farmers also consider the particular weed types against which the crop needs protection at a given time. With a few exceptions, the active substances contained in the herbicide product formulations are mainly effective against weeds within one of the two principal categories of weeds: broadleaf weeds and grass (gramineous) weeds. As specific types of plant are mostly affected by mixed "weed populations" comprising both grasses and broadleaf weeds, there is a need for treatments that kill both types of weeds. Two options are then available to the farmer. Either he purchases a number of herbicides with specific selectivities and mixes these in accordance with the types of weeds that appear, or he buys a ready-made product that contains the desired mixture of active substances for grass control and broadleaf weed control.<sup>4</sup>
12. Another important selection criterion for the farmers is the time of application of the product, relative to the emergence of the crop: it is common to distinguish between pre-sowing, pre-emergence and post-emergence herbicides. Pre-sowing herbicides are applied to the soil immediately before the seed is sown. In pre-emergence treatment, the herbicides are applied immediately before germination of the seed, i.e. about eight days after sowing. Post-emergence herbicides are applied to the soil or the plants after germination of the crop.

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<sup>3</sup> See case Nr.IV/M.1420 BASF/Svalöf Weibull, Decision of 03 March 1999.

<sup>4</sup> In the remainder of this decision, a herbicide product that is mainly active against grass weeds will be called a grass weed herbicide or graminicide. A product that is mainly active against broadleaf weeds will be referred to as a broadleaf herbicide. A product that is active against both types of weeds (without being mainly active against grass weeds or against broadleaf weeds) will be referred to as a broad spectrum herbicide.

13. The Commission has concluded in previous decisions that selective herbicides which protect distinct types of crop form part of distinct relevant product markets (see IV/M.1378 Hoechst/Rhône Poulenc (Aventis), points 29 *et seq.*, IV/M.737 Ciba Geigy/Sandoz (Novartis), points 109 *et seq.*; IV/M.392 Hoechst/Schering, points 16 *et seq.*, and IV/M.354 American Cyanamid/Shell, points 11 *et seq.*). On this basis the parties submit in the notification that the relevant product market should be defined according to the specific crop category. The Commission has in the above decisions discussed whether further subdivisions should be made for the purpose of product market definition (for example, on the basis of the spectrum of control or the timing of the application). In the case IV/M.737 Ciba Geigy/Sandoz (Novartis), the Commission did not make such further subdivisions. First, it considered that, in view of the fluid dividing lines between graminicides, broad spectrum herbicides and broadleaf herbicides, it was impossible to draw up a hard-and-fast product market classification. Furthermore, it considered that a breakdown based on the time of application should also be disregarded since, before sowing at least, pre-sowing, pre-emergence and post-emergence herbicides are substitutable as far as the farmer is concerned.
14. The approach adopted in IV/M.737 Ciba Geigy/Sandoz (Novartis), i.e. to define relevant product markets by type of crop, appears to be appropriate as a starting point also in the current merger case. However, in order to allow for a proper understanding of the competitive relationships between the different types of selective herbicides, the following remarks on the issue of product market definition are in order.
15. First, it should be realized that a broadleaf weed herbicide is no substitute for a graminicide, or vice versa. When a farmer is faced with harmful grass weeds in his crop fields, he needs to use herbicides which are capable of controlling these weeds, i.e. he needs either graminicides or broad spectrum herbicides; broadleaf weed herbicides are not active (or, at least, not active enough) against grass weeds. For that reason, from a demand perspective, graminicides and broad spectrum herbicides may be substitutable, but graminicides and broadleaf herbicides are not. The same arguments apply, *mutatis mutandis*, for the control of broadleaf weeds. In fact, to the extent that grass weeds and broadleaf weeds occur together (which is usually the case), graminicides and broadleaf weed herbicides are complementary products. As a consequence, the two types of product are not in competition with each other. It is only through the presence of a sufficiently important segment - in value terms - of broad spectrum herbicides that allow for both grass weed control and broadleaf weed control, that the two complementary market segments may be linked.
16. Second, as for the possible distinction between pre-sowing, pre-emergence and post-emergence herbicides, the following remarks can be made. As the three types of herbicides are all used to treat the same types of weeds and display the same degree of effectiveness, the farmer has, before sowing at least, a certain degree of flexibility in choosing the time of application. However, as time goes by and weed problems occur in the crop fields, pre-sowing herbicides or even pre-emergence herbicides are no longer substitutes for post-emergence herbicides. In this sense, the direction of substitutability is from early application to late application, not vice versa. Most importantly, both the weed pressure and the weed diversity in Europe are increasing, necessitating more complex weed control strategies that require the use of both pre- and post-emergence products. Also in the decision on the timing of the application, therefore, it appears that the relationship between the two main

available products, pre-emergence and post-emergence herbicides, is not always one of substitutability but, rather, one of complementarity.

17. Responses from market participants indicate that a refinement of the broad market definition might be appropriate in the Italian soybean herbicide market where the market participants do not consider that for post-emergence control of grasses broad spectrum herbicides are good substitutes for graminicides<sup>5</sup>. Hence, for soybeans in Italy it could be argued that there also exists a relevant market for post-emergence graminicides. However, for the purpose of the present case, it is not necessary to decide whether such a separate relevant market exists for post-emergence graminicides, given that the result of the competitive assessment turns out to be the same, irrespective of the exact definition chosen.
18. The market investigation has also indicated that in some Member States several herbicides for use in peas and beans are also used for other crops (maize and/or cereals, depending on the Member State). However, there are also in these markets herbicides which are only used in peas & beans. The Commission considers that there is no reason, for the purpose of the present case, to depart from the product market definition suggested by the parties, that is, a market for peas & beans herbicides.
19. Finally, although it is technically speaking feasible to switch production between grass weed herbicides and broadleaf weed herbicides or between pre-emergence and post-emergence herbicides, there is no supply side substitutability between these products. This is related to the existence of patents and the official registration process for crop protection products.

## **A.2 Fungicides**

20. The parties refer to previous decisions<sup>6</sup> where the Commission has considered that a breakdown of fungicides by type of plant is appropriate since the various plants display differing (albeit partly overlapping) disease patterns. On this basis, the parties have identified separate affected product markets for fungicides for each of peas and beans, cereals, fruits, grapes, potatoes and rapeseed. The market investigation has generally confirmed that an assessment of the fungicide sector by crop is an appropriate starting point.
21. It might be argued that within the cereal fungicide market there is a separate product market for fungicides based on strobilurin active substances. In addition to their broad spectrum disease control activity, strobilurin based fungicides (i.e. the formulated products) are reported to be the only products that have, when used on cereals, important yield increasing activities resulting from the so-called “greening

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<sup>5</sup> In soybeans, the pre-emergence treatment provides weed control until the time of crop emergence when the crop canopy closes over the inter-rows. Later sprays are required if there is a failure of the pre-emergence treatment (dry soil conditions, heavy weed pressure, wrong dose rates or choice of herbicide) or to control several specific grass weed problems. In this latter case, a post-emergence graminicide treatment has to be applied, because broadspectrum herbicides do not provide enough control.

<sup>6</sup> IV/M.1378 – Hoechst/Rhône-Poulenc; IV/M.737 – Ciba-Geigy/Sandoz.

effect”<sup>7</sup>. It is, however, for the purposes of this decision, not necessary to decide whether such fungicides constitute a different product market as only BASF and not Cyanamid is active on this market.

22. However, it also results from the market investigation that for fungicides for grapes distinct markets exist for the different grape diseases: downy mildew, powdery mildew and botrytis. Fungicides used to treat each of the diseases are different and specific, with the exception of three active substances (dichlofluanid, thiphanate methyl and azoxystrobin) that have an effect on at least two diseases. However, products containing these active substances as well as all pre-formulated mixtures that are registered for more than one disease account only for about 5% of all grape fungicides. It can, therefore, be concluded that fungicides for each disease threatening grapes, and in particular for downy mildew, powdery mildew and botrytis, constitute different product markets.

### **A.3 Insecticides**

23. Insecticides are products used to control insects that damage cultivated plants. The Commission has found in previous decisions (see IV/M.737 Ciba Geigy/Sandoz (Novartis), points 116 *et seq.*) that a breakdown of insecticides by type of plant rather than by insects is appropriate in general. The main reason is that there is only one plant-specific insect that affects a major crop, namely the cornborer affecting maize. For all other main crops a variety of insects infests the plant. Therefore, most insecticides combat a range of insects.
24. However, in *Hoechst/Rhône-Poulenc* (point 36), the Commission indicated that a further breakdown seems to be appropriate, in particular with regard to crops such as potatoes and sugar beets. Some of the potato or beet insecticides solely treat nematodes and soil insects within the soil and are applied by bringing them on or into the soil. These products are called nematicides. Other products are designed to protect potato or beet plants against lice and other foliar insects and are applied to the leaves by spraying. These products are called foliar insecticides. The two different kinds of products are based on different active substances, are applied in different ways and are not substitutable for each other.
25. Another differentiation could be envisaged between sucking and chewing insects. Chewing pests such as caterpillars damage crops by eating them up, whereas sucking pests such as aphids transmit viral diseases and reduce thereby crop quality. However, this describes rather the way of feeding than the mode of action of insecticides. In any event, the question of whether such a breakdown is appropriate can be left open in this case, since it would not materially change the competitive assessment.
26. Therefore, for the purpose of this decision, the relevant market for insecticides is defined by type of crop and subdivided into foliar and soil insecticides.

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<sup>7</sup> This greening effect will give the cereal a longer period to increase the weight of the grain and thus the total yield.

#### **A.4 Soil Fumigants**

27. Soil fumigants are products used to prepare and clean up soils which have been used for intensive crop production. When the same land has been used intensively for growing crops continuously over a period of time it is necessary, even though crops may have been rotated, to treat the soil with a soil fumigant to “sterilise” the soil. By this process all remaining pests (insects) and diseases are removed. Therefore, soil fumigants are not pure insecticides and constitute, for the purpose of this decision, a separate relevant product market.

#### **A.5 Plant growth regulators**

28. Plant growth regulators are agrochemicals that inhibit, stimulate or modify plant growth and development. They have different modes of action, depending on their chemical class. One of their most important effects is the inhibition of vegetative growth of crops. As indicated in *Ciba-Geigy/Sandoz* (point 123) and confirmed by the market investigation, growth regulators for individual crop types form separate relevant markets.

#### **B. Relevant geographic markets**

29. The parties submit that the markets for formulated products and growth regulators become increasingly EEA-wide. As support for their position, the parties argue that numerous large, international manufacturers are present throughout the EEA and that Council Directive 91/414/EEC<sup>8</sup> has harmonised national regulations laying down requirements for the registration of crop protection products. Moreover, according to the parties, transport costs are low, corresponding to 1% of total costs. Finally, the parties claim that there has been a noticeable trend of convergence of prices between Member States, not the least because of parallel imports.
30. However, there are still many factors which point towards the existence of national markets.<sup>9</sup> Firstly, as concerns Council Directive 91/414, the full effects of the Directive are still not felt. For the moment only about a dozen active ingredients have been registered at the European level (Annex I). The approximately 800 other active substances on the market are not yet covered by the Community wide system. Therefore, the national registration systems are still the important step for companies.
31. Parallel imports are still hampered by the fact that a product has to be registered by the national authorities before farmers in that Member State can use the product. Even if the exact same product is available in another Member State, farmers or companies are typically not allowed to buy a product in another Member State and use it in his home country without asking permission from his national authorities and obtaining a registration which is costly and time consuming. Lastly, market shares and prices still differ widely between Member States. Therefore, for the

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<sup>8</sup> Council Directive of 15.07.1991 concerning the placing of plant protection products on the market, OJ L230, 19.8.1991, p.1.

<sup>9</sup> See also cases M.737 *Ciba-Geigy/Sandoz* at para.128 and M.1376 *Hoechst/Rhône-Poulenc*, at para.48



purpose of the assessment of this case, the markets for formulated products and growth regulators must be considered national in scope.

### **C. Assessment**

32. The market share calculations submitted by the parties are based on the Agrowin databases, in some cases adjusted by the notifying parties. Competitors were asked to provide comparable data.

#### **C.1 Herbicides**

##### **Maize herbicides**

33. The European maize herbicide sector is a large sector with sales accounting for EUR 326 million. In the EEA, it is the second most important herbicide sector, after the one for herbicides in cereal crops. The parties will become the third largest player accounting for [12-17%] of total sales, after Novartis [25-30]%, AstraZeneca [15-20]% and ahead of Aventis [10-15]%. The transaction gives rise to three affected markets, Belgium, Germany and Luxemburg.
34. The market for maize herbicides in Belgium is worth about EUR 9 million. In this market, the parties would have a combined market share of [15-25%] (BASF [15-25%], Cyanamid [<5%]). A combined market share of [15-25%] for BASF/Cyanamid does not give rise to competition concerns.
35. The German market for maize herbicides is the second largest in Europe (worth EUR 85 million). In this market, the parties would have a combined market share of [20-30%] (BASF [15-25%], Cyanamid [5-10%])<sup>10</sup>. Again, the market position of the merging companies does not give rise to competition concerns.
36. In the Luxemburg market (worth EUR 1 million), the parties will have a combined market share of [25-35%] (BASF [20-30%], Cyanamid [<5%]). This will give the parties the lead in this market, ahead of AstraZeneca (20%), Novartis (18%) and Aventis (5%). The combined market share [25-35%] is not such as to conclude that a dominant position is likely. Neither is the parties' position in any of the respective segments (grass control, broadleaf weed control, pre-emergence control, post-emergence control). In addition, Cyanamid adds only a small percentage to BASF's market share, suggesting that in this market the market structure will not materially change as a result of the proposed merger operation. It seems, therefore, that the new combination will face substantial competition from the other companies in this market.
37. In conclusion, the proposed concentration does not raise competition concerns with regard to the affected markets in maize herbicides.

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<sup>10</sup> BASF derives [5-15%] market share from its distribution of Motivell, a product based on the ISK active substance nicosulfuron. At present, BASF is the sole distributor for ISK in Germany for this product. BASF also distributes Cyanamid's Stomp and Stentan products (both based on pendimethalin), accounting for [<5%] market share.

## **Vegetable herbicides**

38. The European vegetable herbicide markets account for sales of about EUR 120 million. The parties will have a combined share of [5-15%] (BASF [<10%], Cyanamid [<10%]), whereas Aventis has [15-20%], AstraZeneca [10-15%] and Novartis [5-10%]. The transaction gives rise to four affected markets, Austria, the Netherlands, the United Kingdom and Belgium.
39. The market shares that the new entity will hold in Austria [15-25%], the Netherlands [15-25%] and the United Kingdom [25-30%] do not give rise to competition concerns. In the Belgian market (accounting for EUR 2 million), the parties would have a combined market share of [30-40%] (BASF [15-25%], Cyanamid [10-20%]). While the competition in Belgium is somewhat dispersed, it is unlikely that the new combination will obtain a dominant position. BASF's main products on these markets are bentazone, cycloxydim (in onions) and metazachlor (in leeks and cabbage). Both metazachlor and bentazone are nowadays off-patent and subject to generic competition. Therefore, attempts to increase prices anti-competitively are unlikely to be profitable, given that customers have sufficient alternatives in the form of generic products. The proposed concentration therefore does not raise competition concerns in herbicides for vegetable crops.

## **Cereal herbicides**

40. The cereal herbicides sector is, in value terms, the most important one for selective herbicides. In 1999, the EEA-wide turnover in cereal herbicides was ca. EUR 800 million. The EEA-wide combined share of the parties' sales would account for around [10-15%], less than Aventis (after the partial divestiture of its IPU based products<sup>11</sup>) and comparable with Novartis [10-15%]. The transaction gives rise to four affected markets: Austria, Germany, Luxemburg and Sweden.
41. In view of the moderate market shares in Luxemburg [10-20%], Sweden [10-20%] and Germany [10-20%], the merger operation does not give rise to competition concerns in these markets. In Austria, the parties have submitted in their notification to control a market share of [40-50%] (BASF [20-30%], Cyanamid [20-30%]), of which 22% was accounted for by the distribution of third party products by Cyanamid. This market share will, however, quickly go down, given that Aventis has terminated the distribution contract with Cyanamid by which the latter could sell Aventis' product Aniten (effective of 1 January 2001). This product accounts for about 16% market share. The combined market share of the parties, adjusted for this development, is [25-35%] and is not such as to conclude that a dominant position is likely. Neither does the parties' position in any of the respective segments (grass control, broadleaf weed control, pre-emergence control, post-emergence control) give particular cause for concern. Finally, one of the parties' main products in this market, bentazone, is already subject to generic

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<sup>11</sup> For the creation of Aventis in 1999, the merging firms (Rhône-Poulenc and Hoechst) have committed to give a license to another producer for their IPU active ingredient (IV/M.1378 Hoechst/Rhône Poulenc (Aventis), point 31).

competition. In conclusion, the proposed concentration does not give rise to competition concerns with regard to cereal herbicides.

### **Peas & beans herbicides**

42. The European markets for herbicides for the protection of peas and beans account for sales of about EUR 60 million. The transaction gives rise to seven affected markets: France, Belgium, the United Kingdom, Germany, Austria, Denmark and Sweden.
43. In the large French market (EUR 25 million), the parties would have a combined market share of [25-35%] (BASF [15-20%], Cyanamid [10-15%]), a market share that does not give rise to particular concern from a competition point of view. Neither is the parties' position in any of the respective segments (grass control, broadleaf weed control, pre-emergence control, post-emergence control) such as to raise competition concerns.
44. In the Belgian market (EUR 2 million), the parties would have a combined market share of [25-35%] (BASF [25-35%], Cyanamid [<5%]), a market share that does not raise particular concerns from a competition point of view. Neither does the parties' position in any of the respective segments indicate competition problems.
45. In the German market (EUR 9 million), the parties would have a combined market share of [60-70%] (BASF [40-50%], Cyanamid [15-25%]). While, generally speaking, such a market share would be sufficient to raise serious doubts as to the compatibility of the operation with the common market, there are particular circumstances which make that this is not the case for the market under consideration. The main reason for this conclusion is that in Germany each of the parties' products for peas and beans is also used in other crops, indeed, they are primarily used for these other crops. The fact that the same active substances are used in several crops means that it is difficult for the parties to price discriminate towards growers of a particular crop.
46. Cyanamid's only product for peas and beans in Germany is pendimethalin, marketed under the brand name Stomp. In Germany, however, pendimethalin is mostly used as a cereal herbicide: about two-thirds of the sales of pendimethalin stem from the use on this crop. One-quarter of sales stems from the use on maize and only one-tenth of the sales is derived from the use on peas and beans. As a consequence, pendimethalin is basically priced according to the competitive conditions in the cereal herbicides market and, to a lesser extent, to the maize herbicides market. The situation is similar for BASF's product in this market, bentazone (marketed under the brand name Basagran): about half of the sales of bentazone in Germany stem from the use on maize crops, a third from the use on cereal crops and only one-tenth from the use on peas and beans. As a consequence, bentazone is basically priced according to the competitive conditions in the maize herbicides market and the cereal herbicides market.
47. As the main markets/applications for Cyanamid's pendimethalin and BASF's bentazone are the much larger cereal herbicides and maize herbicides markets and as these markets are competitive, it would not be profitable to try to introduce a price rise for pendimethalin or bentazone in order to target the (minor) peas and beans market. Moreover, the parties have no pipeline products for the German

market. Hence, the high market share in peas and beans does not raise competition concerns.

48. In the Danish market (EUR 3 million), the parties would have a combined market share of 80% (BASF [50-60%], Cyanamid [20-30%]). While, again, such a market share would normally be sufficient to raise serious doubts as to the compatibility of the operation with the common market, this turns out not be the case for the market under consideration. Like in Germany, the sales of each of the parties' products for peas and beans in Denmark (pendimethalin for Cyanamid and bentazone for BASF) are almost entirely derived from their use on other crops, notably cereal crops and maize crops. Given that the markets for cereal herbicides and maize herbicides are competitive, the merged entity will have no incentive to raise prices on these products, despite the high combined market share in the market for herbicides for peas and beans. Moreover, the parties have no pipeline products for the Danish market. Hence, the proposed concentration does not raise competition concerns on the market for peas & beans herbicides in Denmark.
49. In the United Kingdom, the market for herbicides for the protection of peas and beans is worth EUR 10 million. As a result of the concentration, the parties would have a combined market share of [50-60%] (BASF [30-40%], Cyanamid [20-30%]). In contrast to the German or Danish markets, BASF's sales of bentazone products in the United Kingdom stem largely from the use on peas and beans, rather than from the use on other crops. Also in contrast to the mentioned countries, Cyanamid in the United Kingdom not only sells pendimethalin-based products, but also products based on the active substance cyanazine (marketed under the trade names Fortrol and Bullet). The sales of these latter products are for the most part attributable to the peas and beans herbicides market. Hence, in the United Kingdom, the merged entity would have incentives to take advantage of the high combined market share by raising the price of bentazone products or cyanazine products (or both). For the United Kingdom, therefore, the conclusion must be that the proposed concentration raises serious doubts as to the compatibility of the proposed concentration with the common market on the market for peas & beans herbicides.
50. In the Austrian market (EUR 2 million), the parties would have a combined market share of [60-70%] (BASF [20-30%], Cyanamid [35-45%]). While in Austria, both bentazone and pendimethalin are primarily priced towards other crops (maize), Cyanamid does sell cyanazine products (marketed under the name Bladex), the sales of which are for the most part attributable to the peas and beans herbicides market. Hence, in Austria the United Kingdom, the merged entity would have incentives to take advantage of the high combined market share by raising the price of cyanazine products. For Austria, therefore, the conclusion must be that the proposed concentration raises serious doubts as to the compatibility of the proposed concentration with the common market on the market for peas & beans herbicides.
51. In Sweden, the market for herbicides for the protection of peas and beans is worth EUR 2 million. As a result of the concentration, the parties would have a combined market share of [>80%] (BASF [75-80%], Cyanamid [10-15%]). Like in United Kingdom, BASF's sales of bentazone products in Sweden stem largely from the use on peas and beans, rather than from the use on other crops. Also, Cyanamid's only peas & beans herbicide in Sweden is cyanazine (marketed under the trade name Bladex), the sales of which are for the most part attributable to the peas and beans

herbicides market. Hence, in Sweden, the merged entity would have clear incentives to take advantage of the high combined market share by raising the price of either the bentazone products or the cyanazine products (or both). The conclusion must be that the proposed concentration raises serious doubts as to the compatibility of the proposed concentration with the common market on the market for peas & beans herbicides in Sweden.

### **Rapeseed herbicides**

52. The European rapeseed herbicide markets account for sales of about EUR 200 million. In this sector BASF is the clear leader with a share of about [40-50%], Novartis has [15-20%], Aventis [10-15%] and AstraZeneca [5-10%]. Cyanamid is only a minor player in this sector. The transaction gives rise to three affected markets, the United Kingdom, Germany and Sweden.
53. In the United Kingdom (market sales EUR 10 million), the parties will have a combined market share of [30-40%] (BASF [30-40%, Cyanamid [<5%]]). In the German market (worth EUR 78 million) the parties will have a combined market share of [60-70%] (BASF [60-70%], Cyanamid [5%]). In Sweden (market sales EUR 3 million), the parties will have a combined market share of [70-80%] (BASF [65-75%], Cyanamid [>5%]). In all three countries, Cyanamid adds only a very small percentage to BASF's market share, suggesting that in these markets the market structure will hardly change as a result of the proposed merger operation. Furthermore, Cyanamid does not have pipeline products which might lead to a stronger competitive position in the future. Therefore, the concentration does not raise competition concerns on the three affected markets for rapeseed herbicides.

### **Pasture land herbicides**

54. The only affected market for pasture land herbicides is the Irish market (market value EUR 5 million), where the parties would obtain a [30-40%] market share (BASF [20-30% and Cyanamid [5-15%]]). Other players in this market are Dow (11%), Monsanto (10%) and Aventis (8%).
55. Herbicides for pasture land are mainly low cost commodity products, based on old chemistry (phenoxies), the main use for which is in the much larger and competitive cereal market. Therefore, it is unlikely that the combined market position in pasture land herbicides would make it profitable for the parties to raise the prices of their products. Therefore, the concentration does not appear to lead to the creation of a dominant position in the Irish market for pasture land herbicides.

### **Soybean herbicides**

56. The only affected national market is Italy (total sales in 1999 EUR 28 million) where the parties would have a combined market share of [40-50%] (BASF [15-25%], Cyanamid [20-30%]) of the overall soybean herbicides market. The other main players are AstraZeneca with 16%, Novartis with 12% and Aventis with 8%.
57. BASF's main products are Basagran (active ingredient bentazone), Blazer (active ingredient acifluorfen), and Stratos (active ingredient cycloxydim). Cyanamid's main products are Overtop (active ingredient imazethapyr) and Stomp (active ingredient pendimethalin). The parties submit that the overlap between these

various products is limited since they belong to different segments. They do admit that there is some overlap in the post-emergence segment between Overtop, Basagran and Blazer. They claim, however, that even this overlap is limited: On the one hand, Overtop is used for early post-emergence broad spectrum grass and broadleaf weed control. On the other hand Basagran and Blazer are only used in post-emergence for foliar broadleaf weed control.

58. The market investigation has confirmed that Stratos is not considered to be directly competing with the other products. Rather, Stratos is one of the so-called post-emergence graminicides which form a well-defined separate group of products which may well form a separate product market. There are several other such products present for use on soybeans in Italy (Aventis' Targa, Dow's Gallant, Novartis' Agil and AstraZeneca's Fusilade). Cyanamid has no post-emergence graminicide. If post-emergence graminicides, which account for 25% of the overall soybean herbicides market, were to be considered a separate product market, there would therefore be no overlap on this market where BASF's Stratos only has [20-30%]. The market share of the parties in the remainder of the soybean herbicides market would be [50-60%].
59. Market participants are of the opinion that Overtop, Basagran and Blazer offer competing solutions to the same problems. Overtop is the single most important soybean herbicide on the Italian market taking by itself [20-30%]. Cyanamid's other main product, Stomp, had only a share of [<5%] (Cyanamid in total had [20-30%]). Basagran and Blazer together had [10-15%] of the total market, while Stratos adds another [5-10%].
60. After Overtop, the most important soybean herbicide on the Italian market is AstraZeneca's product Twinex which has 9% of the total market. Twinex is a mixture of the active ingredients bentazone (BASF) and fomesafen (AstraZeneca). Actually, the trademark Twinex is owned, but not used, by BASF which has instead allowed AstraZeneca to use it for its formulation in Italy. BASF therefore controls part of the cost base of Twinex. AstraZeneca also has a product, Flex, which is a "straight" product based on fomesafen. Flex has a market share of less than 1%. Market participants have argued that the presence of Twinex in the market restricts the sales of Basagran which is "straight" bentazone.
61. The parties have argued that Novartis' new product, Dynam (based on oxasulfuron) will become a key product on the Italian soybean herbicide market. The market investigation has confirmed that Dynam is a promising product which may soon take the second place in the market instead of Twinex. However, also Cyanamid has plans to register in Italy in 2001/2002 a soybean herbicide based on a new active ingredient, imazamox.
62. For all the above reasons, the Commission considers that the proposed concentration raises serious doubts as to the compatibility of the proposed concentration with the common market on the Italian market for soybean herbicides.

## **C.2 Fungicides**

63. According to the parties, there are [...] affected markets. The German markets for fungicides to treat potatoes, rapeseed and peas and beans will not be considered

further as the parties combined market share for 1999 is below 30% and other companies either have a higher market share (Bayer on the rapeseed and peas and beans market) or a similar market share (AstraZeneca on the potato market).

### **Cereal fungicides**

64. The parties consider that there are affected cereal fungicide markets in five countries: [10-20%] market share in Spain ([10-20%] BASF + [<5%] Cyanamid), [30-40%] market share in Germany ([30-40%] BASF + [<5%] Cyanamid), [30-40%] in France ([30-40%] BASF + [<5%] Cyanamid), [40-50%] in Luxemburg ([40-50%] BASF + [<5%] Cyanamid) and [50-60%] in Belgium ([45-55%] BASF + [<5%] Cyanamid).
65. As can be noted from the above figures, the increment in market share resulting from the merger is minimal. In fact, all of Cyanamid's sales result from an active substance of the triazole chemical class, metconazole (brand name Caramba). BASF is one of the leading cereal fungicide producers with active substances of the three main chemical classes: strobilurins, triazoles and morpholins.
66. The Commission considers that the notified operation does not raise serious doubts as to its compatibility with the common market on any of the above cereal fungicide markets in view of the existence of strong competitors that are also expected to launch new products with important sales potential. This is especially the case for AstraZeneca whose existing strobilurin active substance (azoxystrobin) has not yet reached its peak sales. AstraZeneca is expected to launch a new strobilurin (picoxystrobin) in the near future. Also Novartis is currently launching cereal fungicides based on its strobilurin (trifloxystrobin).
67. Some competitors have raised concerns stemming from the merger on the cereal fungicide markets. The concerns relate to the possibility for the merged entity to develop pre-mixed formulations based on each other's complementary active substances and the development of new active substances. In this respect, reference is made to two new strobilurin active substances being developed by BASF and a new substance in development with Cyanamid that is particularly active against powdery mildew, one of the main cereal diseases.
68. However, the new BASF strobilurins will be brought to the market after the launch of the strobilurins by Novartis and AstraZeneca. In the meantime, it is generally expected that BASF's current strobilurin based fungicides will further lose market share in view of the development of powdery mildew resistance.
69. The new Cyanamid substance is expected to reach the market at the earliest in 2004. This seems to be too late to take into account for the competitive assessment of the merger. Bringing a product to the market in 2004 means that the registration file has to be submitted at the latest in 2002. This implies that between now and the submission of the registration file, several tests still have to be completed. In this respect, the Commission is aware of fungicide development projects that had to be stopped because of the negative results of some of the tests at this relative late stage of product development. There is, therefore, a considerable risk that the active substance might never reach the market.

70. The Commission, therefore, considers that the concerns expressed by some competitors are not warranted and that the proposed concentration does not raise competition concerns on the cereal fungicides markets.

### **Fungicides for powdery mildew, downy mildew and botrytis in grapes**

71. In the notification, the parties indicated that the relevant market concerned the overall grape fungicides market. On that basis, the parties considered that Germany and Luxemburg constitute affected markets with the parties having a total market share of [40-50%] and [35-45%] respectively.
72. The parties' product portfolio only shows an overlap with regard to fungicides treating downy mildew. The only countries where the parties achieve a combined market share in excess of 35% on the downy mildew market are Germany and Austria.
73. In Germany, the parties estimate to have a share of [50-60%] (BASF [10-20%] + Cyanamid [30-40%]) of the market valued to account for around EUR 13 million. The parties' estimates for the market shares of their competitors are: Novartis 18%, Aventis 9% and Bayer 6%. Although the competitors estimate that the overall market is somewhat smaller, they have confirmed the market share estimates of the parties. BASF expects to bring one new product to the market in 2002. This product is expected to replace gradually its existing product. The competitors have indicated that they will launch, in total, more than five new products on the market in this time frame. Although the projected market shares of these new products are substantial, the merged entity does not consider that this will be at the expense of its sales as it projects to maintain its current market share. There are, therefore, serious doubts as to the compatibility of the notified operation with the common market with regard to the German market for fungicides to treat downy mildew on grapes.
74. The parties estimate to account for [30-40%] (BASF [10-20%] + Cyanamid [20-30%]) of the Austrian downy mildew for grapes market valued to account for around EUR 4.5 million. The parties estimate that the most important competitor is Bayer with 15% market share. The competitors have confirmed that the overall market size is broadly in line with the parties' estimate. However, they consider that the merged entity would be above 40%. Cyanamid's product based on dimethomorph is registered in Austria in 2000. In addition, BASF will also launch a new product that, just as in Germany, should replace the sales of its current product. It results from the market investigation that also on the Austrian market more than five new products will be launched by competitors before 2003. The market share projections for these new competitors' products are less than those predicted for Germany. On the other hand, the parties' projections indicate that their market share will decrease to around [25-35%] in 2003. Therefore, the Commission considers that there are no competition concerns on this market.

### **Fruit fungicides**

75. The parties consider that there are affected fruit fungicide markets in seven countries: [10-20%] in the Netherlands (BASF [5-10%] + Cyanamid [5-10%]), [20-30%] in Belgium (BASF [10-20%] + Cyanamid [5-15%]), [20-30%] in Italy (BASF [10-20%] + Cyanamid [10-20%]), [20-30%] in Sweden (BASF [10-20%] +



Cyanamid [10-20%]), [30-40%] in Austria (BASF [10-20%] + Cyanamid [20-30%]), [35-45%] in the United Kingdom (BASF [0-5%] + Cyanamid [30-40%]) and [35-45%] in Germany (BASF [20-30%] + Cyanamid [10-20%]). According to the parties' estimates, Bayer would have a similar or higher market share in the Netherlands, Belgium and Sweden. This is confirmed by the market investigation. There are therefore no competition concerns on these three markets.

76. It results from the market investigation that the merged entity's market share in Italy, the largest market of the above, is below its own estimates. Hence, there are no competition concerns.
77. According to the parties, the UK market accounts for total sales of around EUR 12.8 million. The parties estimate to account for a [35-45%] market share and the nearest competitors are AstraZeneca (20%), Novartis (16%) – proposed to be merged into Syngenta - , followed by Aventis with 13%. BASF is developing a new product (a combination consisting of a mixture of its new strobilurin active substance (BAS 500F) with another new molecule [...]). This product will, however, not be launched before 2003/4. On the other hand, Novartis is planning to introduce its new strobilurin (Trifloxystrobin) in the UK fruit market in the immediate future and expects to obtain a market share with this product alone of over 10% by 2003. The market investigation also indicates that the parties' current market share is below their own estimate. The Commission considers that there are no competition concerns on this market because of the relatively small market share increment ([0-5%]), the market share of the competitors, in particular that of AstraZeneca and Novartis, the launch of a promising new product by Novartis and the fact that the market investigation has not confirmed the parties' estimates for their own market share.
78. According to the parties, the Austrian market is the smallest with estimated total sales of around EUR 2 million. The parties estimate to account for a [30-40%] market share and their nearest competitors are Bayer with 7%, Aventis with 5% and Novartis with 4%. The market investigation confirms the estimated overall size of the market. In view of the small size of the market, few competitors were in a position to provide data for their sales. On the Austrian market, Novartis will introduce shortly its new strobilurin for which it forecasts a substantial market share by 2003. However, the parties will become the clear market leader with, as only company, a complete portfolio of specialised and general products for the two main diseases in fruit (powdery mildew and scab). Furthermore, they will be several times larger than their nearest competitors. There are, therefore, serious doubts as to the compatibility of the notified operation with the common market with regard to the Austrian fruit fungicide market.
79. According to the parties, the German market accounts for total sales of around EUR 8.2 million. The parties estimate to account for [35-45%] and the nearest competitors are Bayer (19%), Novartis (12%), Aventis (11%) and Dupont (5%). It appears from the market investigation that the total size of the German market is somewhat higher and that the market share of the merged entity would be around 40%. However, the market share of the merged entity is not likely to suffer considerably from the introduction of Novartis' new strobilurin as Novartis forecasts a market share of considerably below 10% for this product by 2003. There are, therefore, serious doubts as to the compatibility of the notified concentration with the common market.

### C.3 Insecticides

80. BASF is not active in soil insecticides. Therefore, overlaps only occur in foliar insecticides which are for the majority of crops the more important market. According to the Commission's investigations, there are 6 affected markets. The parties' market shares in these markets are listed below:

1999	Market Size in Mio. €	BASF	Cyanamid	Combined
<b>Cereal Insecticides</b>				
Germany	6	[<5]	[10-20]	[15-25]
<b>Peas and beans</b>				
Germany	1	[<5]	[10-20]	[15-25]
<b>Potatoes</b>				
Germany	4.3	[<5]	[25-35]	[30-40]
<b>Tomatoes</b>				
Italy	5.2	[<5]	[20-30]	[20-30]
<b>Beets Insecticides</b>				
Denmark	0.2	[5-15]	[20-30]	[30-40]
<b>Grapes</b>				
France	45	[<5]	[20-30]	[20-30]

81. As can be seen from the above table, the parties achieve only in two of the affected markets market shares above 30%. The parties will have their highest market share in the German market for potato insecticides ([30-40%]). However, BASF adds only [less than 5%] to Cyanamid's market share of [25-35%]. In all these markets strong international competitors such as Bayer, Aventis, Du Pont and AstraZeneca will remain after the merger. Therefore, it seems unlikely that the present concentration will give rise to competition concerns with regard to insecticides.

### C.4 Soil Fumigants

82. The parties sell one product each. BASF's product is dazomet (trade name Basamid), Cyanamid sells dichloropropene (trade name Nematrap). Both products are off-patent. In Belgium the parties would have [30-40%] of the market (BASF [10-20%], Cyanamid [15-25%]), followed by Aventis with 17% (1999 figures). The parties lost 7% of this market over the last 3 years. In the Netherlands, the parties would rank second with a combined market share of [20-30%] (BASF [0-10%], Cyanamid [10-20%]), behind the market leader Dow (37%). Therefore, the proposed concentration does not raise competition concerns on these two markets.

### C.5 Plant growth regulators

83. The market for plant growth regulators for cereals in the EEA accounts for approximately EUR 110 million. Apart from the merging parties the only other major research based players in these markets are Novartis and Aventis. There are, however, several generic manufacturers on the market, since most of the products are off-patent. The parties' products overlap in Belgium, France, Ireland and the UK.

84. The parties claim that there is no risk of dominance in any of the affected markets since their products compete in two different segments and no meaningful overlap occurs. While Cyanamid is only active in the innovative segment BASF achieves the majority of its sales in the traditional segment. BASF's main product is the Terpal brand family based on chlorid mixtures. In France, however, BASF has also some minor sales in the innovative segment stemming from the distribution of a third party product Medax (prohexadione).
85. However, this market segmentation was not confirmed by the market test. The products attributed by the parties to the innovative segment are either mixtures of PGRs with another pesticide such as Cyanamid's Cycocel and Mondium (active ingredients chlormequat and imazaquin), or newer products, in particular Moddus by Novartis. These products have a better performance or allow the realisation of farming economies since less applications within a given season are necessary. These products, therefore, command higher prices, but, according to the majority of market participants, do not belong to a different product market.
86. The parties also maintained that Moddus is the new "gold standard" in this market, achieving significant growth rates. However, Moddus did not perform well in all of the affected markets. It has been stagnant or even suffered from a decline in sales and market shares in some of these markets, as will be shown below.
87. Lastly, the parties are of the opinion, that the transaction does not bring about any change of the status quo, since Cyanamid sources the active ingredient of its PGR from BASF. Therefore, BASF already today controls Cyanamid's market share. However, the active ingredient chlormequat is also offered by several generic suppliers and could be sourced from those. Cyanamid is selling its PGR as a mixture with a herbicide under a well established brand name which gives it considerable freedom as to the price and marketing. As the parties say themselves, this product has additional value for the farmers for which they are willing to pay a higher price. Therefore, BASF as the supplier of one of the two ingredients, which is available from other parties as well, cannot be said to have control over Cyanamid's market share.
88. The largest of these markets is the French market with total sales of EUR 49 million where the parties would become the clear market leader with a [40-50%] market share in 1999 (BASF [20-30%], Cyanamid [10-20%]). Novartis had 35% of the sales, while Aventis accounted for 19% of the market. However, Novartis was actually confronted with a decline in market share sales of more than 10% from 1997 to 1999, whereas the parties were able to increase their market share from 30% to [40-50%] over the same period. Therefore, the Commission has serious doubts as to the compatibility of the proposed transaction with the common market as concerns the market for PGRs in cereals in France.
89. In the United Kingdom total sales were worth EUR 21 million in 1999. The parties would command a [30-40%] market share (BASF [10-20%], Cyanamid [10-20%]), followed by Syngenta with 18% and Aventis with 7%. The market share of the parties has been more or less stable at around 30% since 1997 ([25-35%] in 1997, [25-35%] in 1998). Therefore, the proposed concentration does not raise competition concerns on this market.

90. In Belgium, sales were EUR 2 million in 1999. BASF and Cyanamid had [25-35%] of that market (BASF [10-20%], Cyanamid [10-20%]). The market leader is Novartis which accounted for 38% while Aventis had around 10%. There are three generic suppliers on that market (Nufarm, Barclay and UCB), which sell a PGR based on the same active ingredient as the BASF product. These three players accounted for 18% of the market. Novartis was able to gain considerable market shares over the past 3 years (9% in 1997, 23% in 1998). Therefore, the proposed concentration does not raise competition concerns on this market.
91. Lastly, the parties would have [50-60%] of the Irish market in 1999 (BASF [45-55%] Cyanamid [0-10%]) which had total sales of about EUR 0.725 million. Aventis ranked second with 27%, followed by Novartis with 14%. The parties would become the undisputed market leader more than twice as big as the nearest competitor. Moreover, while Novartis could not increase sales of its product from 1998 (first full year after registration) to 1999 both parties to the merger could. Therefore, the Commission has serious doubts as to the compatibility of the proposed transaction with the common market as concerns the market for PGRs in cereals in Ireland.
92. For the above reasons, the proposed concentration raises serious doubts as to the compatibility of the proposed concentration with the common market on the markets for plant growth regulators in Ireland and France.

## **V. COMMITMENTS SUBMITTED BY THE PARTIES**

93. The full text of the commitments is provided in Annex 1, which forms an integral part of this decision.

### **Herbicides**

94. In order to remove the serious doubts on the markets for peas & beans herbicides in the United Kingdom, Austria and Sweden, the parties have committed to an EEA-wide divestment of the whole of Cyanamid's business based on cyanazine (straight or in mixtures) for use in all crops.
95. This proposal would lead to a reduction in market share of [15-20%] in the United Kingdom to [below 40%], almost eliminating the overlap stemming from Cyanamid. Cyanamid's remaining product, accounting for [0-10%] of the market, is pendimethalin, which is priced to the cereal herbicides market. In Austria, the parties' market share will be reduced by [25-30%] towards [35-45%], leaving the parties with a portfolio based on bentazone and pendimethalin, which are, in Austria, priced to the maize herbicides market. Finally, in Sweden, the commitments would lead to a reduction in market share of [10-15%], completely eliminating the overlap stemming from Cyanamid. The undertaking therefore solves the competition concerns on the markets for herbicides for peas and beans in the United Kingdom, Austria and Sweden.
96. In order to remove the serious doubts on the Italian market for soybean herbicides the parties have committed to grant an irrevocable license to use and sell the active ingredient imazethapyr (including the right to use the brand name Overtop) for application as a herbicide for soybeans in Italy for the duration of the registration.

The parties will provide the respective licensee upon its request with a letter of access to BASF's database for imazethapyr for the exclusive purpose of the licensee's obtaining any re-registration of imazethapyr for use on soybeans in Italy if the parties chose not to re-register itself. If BASF were to register imazamox as a herbicide for soybeans in Italy instead of or in addition to imazethapyr, it would also grant an irrevocable exclusive license to use and sell imazamox or mixtures containing imazamox as a herbicide for soybeans in Italy.

97. Overtop is by far Cyanamid's most important product in the Italian market for soybean herbicides, Cyanamid's remaining products having a combined share of less than 5%. Without Overtop the combined market share of the parties will be [15-25%]. The undertaking therefore solves the competition concerns on the Italian market for soybean herbicides.

### **Fungicides**

98. In order to remove the serious doubts on the German and Austrian fruit fungicide markets, the parties have committed to grant an irrevocable licence to use and sell Kresoxim-methyl (BASF's existing strobilurin), including the right to use the brand name Discus, for application as a fungicide for fruits for Germany and Austria. The sales of Discus accounted in 1999 for some [15-20%] of the market in Germany and for some [10-15%] in Austria. As a result of this commitment, the merged entity would have a pro-forma market share of [20-30%] and [20-30%] respectively. Therefore, the undertaking solves the competition problem on the German and Austrian fruit fungicide markets.
99. In order to remove the serious doubts on the German market for downy mildew in grapes, the parties have committed to grant an irrevocable license to use and sell the mixture of Dithianon/Cymoxanil (including the right to use the brand name Aktuan) for application as a fungicide for grapes in Germany. The sales of Aktuan account for a [15-20%] market share in 1999, bringing down the pro forma market share of the merged entity to [25-35%]. As such, this commitment represents a higher market share than the BASF products pre-merger. It also results that the [15-20%] market share that the product is projected to account for in 2003 is still above the projected market share of the (pre-merger) BASF products for 2003 ([10-15%]). Therefore, the undertaking solves the competition problem on the German market for fungicides to treat downy mildew on grapes.

### **Plant Growth Regulators**

100. In order to remove the serious doubts on the French and Irish markets for plant growth regulators for cereals, the parties have offered an irrevocable licence to use and sell a) a mixture of chlormequatchloride and mepiquatchloride, including the right to use the brand name Cyter and b) a mixture of ethefon and mepiquatchloride, including the right to use the brand name Terpal in France. This will almost completely eliminate the overlap in the French market and bring down the market share of the parties to below 30% (1999). As concerns the Irish market, the parties have offered an irrevocable licence to use and sell a mixture of ethefon and mepiquatchloride, including the right to use the brand name Terpal in Ireland. This commitment eliminates the overlap on that market. These two undertakings, therefore, solve the competition concerns for PGRs for cereals in France and Ireland.

## **VI. CONCLUSION**

101. The Commission concludes that the undertakings are sufficient to address the competition concerns raised by this concentration. Accordingly, subject to the commitments proposed by the notifying parties, it decides not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Articles 6(1)(b) and 6(2) of Council Regulation (EEC) No 4064/89.

For the Commission,

**BASF AG/AMERICAN CYANAMID (AHP) - case COMP /M.1932**

**PROPOSED COMMITMENTS**

Pursuant to Article 6(2) of Council Regulation (EEC) No 4064/89 (as amended; "the Regulation"), BASF AG ("BASF") will comply with the commitments set out below (together the "Commitments Package") given in the context of the proposed acquisition by BASF and/or some of its Affiliates of American Cyanamid's ("Cyanamid") crop protection business, in order to take account of potential concerns raised by the European Commission as regards anti-competitive effects of the proposed concentration in relation to the markets referred to below. For the purposes of the Commitments Package, references as to "BASF" and "Cyanamid" shall include BASF's and Cyanamid's affiliates.

The Commitments Package shall take effect on receipt of the European Commission's decision declaring the notified acquisition compatible with the Common Market pursuant to Article 6(1)(b) of the Regulation ("the Decision") and is subject to that acquisition having been closed.

**1. Herbicides based on Cyanazine**

BASF will divest the whole of Cyanamid's business based on Cyanazine and mixtures containing Cyanazine (including Bullet) for use in all crops in all EEA countries. This would comprise all stocks of finished product and active substances, customer lists, all related intellectual property rights (in particular patent rights, if any, and trade names), the assignment of all toll manufacturing agreements to the extent possible, all applicable registration rights and the pertinent documentation and data, it being understood that the buyer would be responsible at its cost for all re-registrations. For the avoidance of doubt, BASF shall not be required to re-register Cyanazine in the EEA, however BASF will notify Cyanazine for re-registration by 01 September 2000 in order to allow the purchaser to continue the re-registration process.

**2. Herbicides, Soybeans, Italy**

BASF will grant an irrevocable exclusive license to use and sell Imazethapyr (including the right to use the brand name Overtop) for application as a herbicide for soybeans in Italy for the duration of its registration and will provide the respective licensee upon its request with a letter of access to BASF's database for Imazethapyr for the exclusive purpose of the licensee's (at the licensee's own cost) obtaining any re-registrations of Imazethapyr for use on soybeans in Italy if BASF chose not to re-register itself; such license shall be extended to mixtures containing Imazethapyr that BASF might develop for soybeans in Italy within five years from the Decision. If BASF were to register Imazamox as a herbicide for soybeans in Italy in lieu of or in addition to Imazethapyr, it

would also grant an irrevocable exclusive license to use and sell Imazamox as a herbicide for soybeans in Italy; such license shall be extended to mixtures containing Imazamox that BASF might develop for soybeans in Italy within five years from the Decision.

**3. *Fungicides, Fruits, Germany***

BASF will grant an irrevocable exclusive license to use and sell Kresoxim-methyl (including the right to use the brand name Discus) for application as a fungicide for fruits for Germany for the duration of its registration and BASF will provide the respective licensee upon its request with a letter of access to BASF's database for Kresoxim-methyl for the exclusive purpose of the licensee's (at the licensee's own cost) obtaining any re-registrations of Kresoxim-methyl for use on fruits in Germany if BASF chose not to re-register itself; such license shall be extended to mixtures containing Kresoxim-methyl that BASF might develop for fruits for Germany within five years from the Decision.

**4. *Fungicides, Fruits, Austria***

BASF will grant an irrevocable exclusive license to use and sell Kresoxim-methyl (including the right to use the brand name Discus) for application as a fungicide for fruits in Austria for the duration of its registration and BASF will provide the respective licensee upon its request with a letter of access to BASF's database for Kresoxim-methyl for the exclusive purpose of the licensee's (at the licensee's own cost) obtaining any re-registrations of Kresoxim-methyl for use on fruits in Austria if BASF chose not to re-register itself; such license shall be extended to mixtures containing Kresoxim-methyl that BASF might develop for fruits for Austria within five years from the Decision.

**5. *Fungicides, Grapes, Germany***

BASF will grant an irrevocable exclusive license to use and sell the mixture of Dithianon/Cymoxanil (including the right to use the brand name Aktuan) for application as a fungicide for grapes in Germany for the duration of its registration and BASF will provide the respective licensee upon its request with a letter of access to BASF's database for Dithianon for the exclusive purpose of the licensee's (at the licensee's own cost) obtaining any re-registrations of the mixture of Dithianon/Cymoxanil for use on grapes in Germany if BASF chose not to re-register itself. BASF will, upon request of the respective licensee, use its best efforts to transfer the benefit of the supply arrangement for Cymoxanil to the licensee.

**6. *PGRs, Cereals, France***

BASF will grant an irrevocable exclusive license to use and sell (a) a mixture of Chlormequatchloride and Mepiquatchloride (including the right to use the brand name Cyter) and (b) a mixture of Etephon and Mepiquatchloride (including the right to use the brand name Terpal), both for application as a PGR for cereals in France for the duration of their respective registrations and BASF will provide the respective licensee upon its



request with a letter of access to BASF's database for mixture of Chlormequatchloride and Mepiquatchloride for the exclusive purpose of the licensee's (at the licensee's own cost) obtaining any re-registrations of mixture of Chlormequatchloride and Mepiquatchloride or Ethefon and Mepiquatchloride for use on cereals in France if BASF chose not to re-register itself. BASF will, upon request of the respective licensee, use its best efforts to transfer the benefit of the supply arrangement for Ethefon to the licensee.

**7. PGRs, Cereals, Ireland**

BASF will grant an irrevocable exclusive license to use and sell a mixture of Ethefon and Mepiquatchloride (including the right to use the brand name Terpal ) for application as a PGR for cereals in Ireland for the duration of its registration and BASF will provide the respective licensee upon its request with a letter of access to BASF's database for Mepiquatchloride for the exclusive purpose of the licensee's (at the licensee's own cost) obtaining any re-registrations of a mixture of Ethefon and Mepiquatchloride for use on cereals in Ireland if BASF chose not to re-register itself. BASF will, upon request of the respective licensee, use its best efforts to transfer the benefit of the supply arrangement for Ethefon to the licensee.

8. The grant of the license rights referred to in paragraphs 2 to 7 shall include the option of the licensee to be supplied by BASF or a third party with the respective product or active ingredient or to formulate the respective product itself, provided that the quality meets the requirements of registrations based on BASF data, and will thus be designed to ensure that the licensee will be a viable competitor in the relevant markets. Supply by BASF shall be subject to BASF's continuing the production of the respective active ingredient or product, it being understood, however, that BASF will give adequate advance notice to the respective licensee before discontinuing production so as to allow such licensee to build up sufficient stocks or obtain alternative sources of supply. Supply by BASF shall be at cost plus an adequate handling charge; BASF and the respective licensee will agree upon a method to establish and control such cost.
9. BASF shall, as soon as practicable and in any event within two weeks from the date of receipt of the Decision appoint an independent and experienced trustee or trustees (the "Trustee"), such as an investment bank, accounting firm or management consultant, subject to the approval by the European Commission (such approval not to be unreasonably withheld), to perform the functions set out below. An envisaged Trustee is not automatically excluded for lack of independence because of the mere fact that either or both of BASF and Cyanamid have or had a commercial relationship with such Trustee. BASF's proposal for approval will document and justify the "independence and experience" as indicated above, it will contain a description of the Trustee together with a copy of all relevant CVs of the proposed senior personnel to be involved in the implementation of the Commitments Package as well as a draft mandate. BASF shall amend the draft if the European Commission so requests and when the mandate is signed, BASF may make no further modification to the mandate without the approval of the European Commission. At the request of the Trustee, the European Commission may require the amendment of the mandate if it is shown that it does not permit the Trustee to carry out the tasks given to it. If BASF fails to substantially respect the Commitments Package, the European Commission may supplement the Trustee's task, in order to provide the Trustee with every possibility of ensuring that the Commitments Package is respected.

10. The Trustee has the responsibility to verify the implementation of the Commitments Package subject to the principles and objectives set out below. As part of such mandate the Trustee shall provide to the European Commission, with a simultaneous copy of a non-confidential version of the report to BASF, a written report every two months concerning the monitoring of the negotiations relating to the effecting of the Commitments Package. Such reports shall be provided in English within 10 working days from the end of every two month period following the Trustee's appointment or at such other time(s) or time periods as the European Commission may specify, and which shall cover the developments of the previous two-month period.
11. BASF shall provide the Trustee with all such assistance and information, including copies of all relevant documents, as the Trustee may reasonably require in carrying out its mandate. BASF shall, if required by the Trustee, make available to the Trustee an office on its premises. BASF shall hold regular meetings with the Trustee, according to a timetable agreed between them, in order to provide the Trustee, either orally or in document form, with all information necessary for the completion of his task.
12. In the event that the transactions contemplated under sections 1 to 7 above have not been made within [...] after the Decision, BASF will give the Trustee an irrevocable mandate to do so under the best possible terms, within a period of another [...]. The European Commission may, upon BASF's request showing good cause, extend the relevant periods referred to in the preceding sentence. Such a request shall be made not later than one month prior to the expiry of the [...] term. BASF will provide the Trustee with all reasonable assistance and information necessary therefor, and shall be kept informed by the Trustee of all respective negotiations.
13. The Trustee shall inform the European Commission when a prospective purchaser/licensee has been identified in order to obtain approval of such purchaser/licensee by the European Commission pursuant to the provisions of paragraph 21 below.
14. BASF shall have complied with the Commitments Package if within the relevant period set out in paragraph 12 it has entered into binding agreements (subject to the closing of the notified concentration) in relation to the undertakings set out in paragraphs 1 to 7 with a third party approved by the European Commission. These binding agreements shall be completed in a time period to be agreed with the purchaser/licensee, but in any case not later than [ ] after having received the European Commission's approval for the identity of the purchaser/licensee.
15. The Trustee will cease to perform its duties after the satisfaction of the undertakings set out in paragraphs 1 to 7 above (however, disregarding the five year periods referred to in paragraphs 2 to 4 above relating to future mixtures that BASF might develop) and the approval of the respective purchaser/licensees by the European Commission and the purchase/license agreements being completed.
16. The European Commission may require the reappointment of the Trustee if subsequently it appears to the European Commission that a relevant part of the Commitments Package might not have been fully and properly implemented, provided that:
  - (i) a beneficiary of any of the undertakings in the Commitments Package (a "Relevant Beneficiary") has first discussed any concerns with BASF and BASF and the Relevant Beneficiary have tried within a period of one month to resolve such concerns in good faith;
  - (ii) where such good faith discussions have failed, the Relevant Beneficiary has first submitted to the European Commission a reasoned explanation in writing why it

considers the relevant part of the Commitments Package not to have been properly implemented;

- (iii) the European Commission has considered carefully the Relevant Beneficiary's written explanation, has fully discussed the position with BASF (who shall be supplied with a non-confidential copy of the written explanation and who shall have been given the opportunity to submit a written response to the written explanation within ten working days) and the European Commission has concluded that the relevant part of the Commitments Package might not have been fully and properly implemented;
- (iv) any such reappointment takes place within one calendar year from the date of original discharge of the Trustee; and
- (v) for the avoidance of doubt, any reappointment shall be for the purposes of ensuring that the relevant part of the Commitments Package is fully and properly implemented only and shall not be permitted for any other purpose.

As soon as the relevant part of the Commitments Package has been implemented to the satisfaction of the Trustee and the European Commission, the Trustee shall be discharged immediately.

**17.** In order to enhance the commercial viability of the Commitments Package to prospective Relevant Beneficiaries, BASF:

- (a) acknowledges that certain employees may, by operation of law, transfer to the Relevant Beneficiary;
- (b) undertakes to furnish to the Trustee a list of employees currently employed by either BASF or Cyanamid as the case may be who it considers to have key expertise relating to the areas subject to the Commitments Package (the "List of Employees");
- (c) acknowledges that the Trustee, who shall not be entitled to disclose the List of Employees to any Relevant Beneficiary without the prior consent in writing of BASF shall, in the execution of its duties as Trustee, assess the reasonable needs of each Relevant Beneficiary to require access to key employees of BASF and shall indicate to BASF which of the employees included in the List of Employees are required to assist the Relevant Beneficiary to ensure the proper fulfilment of the relevant part of the Commitments Package (the "Relevant Employees");
- (d) shall, if the Trustee reasonably requests, provide to the Trustee details of other employees, who are not included in the List of Employees, but who the Trustee believes, having considered the reasonable needs of the Relevant Beneficiary, should also be Relevant Employees;
- (e) shall grant to the Relevant Beneficiary reasonable access to the Relevant Employees for a period of one year from the date of execution of the relevant part of the Commitments Package and shall procure that the Relevant Employees

assist the Relevant Beneficiary in the implementation of the agreements forming the relevant part of the Commitments Package;

- 18.** Following the date of the Decision, BASF will manage any business to be divested with the aim to preserve the full economic and competitive value of that business until the date of divestiture, in accordance with good commercial practices, and in the best interest of the business. In particular, BASF undertakes not to carry out any act upon its own authority which may have a significant impact on the economic value, the management or the competitiveness of that business until the date of divestiture. BASF also undertakes not to carry out upon its own authority any act which may be of such a nature as to alter the nature or the scope of activity of that business, or the industrial or commercial strategy or the investment policy of the business. Resources that are sufficient based on past experience shall be made available for that business to develop until the divestiture, based on the approved strategic and (annual) business plans.
- 19.** BASF recognises that, for a proposed Relevant Beneficiary to meet with the European Commission's approval, such Relevant Beneficiary shall be a viable existing or prospective competitor independent of BASF possessing the financial resources and proven expertise enabling it to use the relevant portion of the Commitments Package to be an active competitive force. Furthermore, the implementation of the Commitments Package does not threaten to create a dominant position on the market investigated by the European Commission or on any other market.
- 20.** BASF shall inform all companies which they consider suitable potential Relevant Beneficiaries according to the principles set out above and that are possibly interested in all or part of the Commitments Package in an objective and fair manner and in co-operation with the Trustee unless these companies are obviously not interested.
- 21.** BASF or the Trustee shall promptly inform the European Commission in writing of the identity of any person who is negotiating with a view to become a prospective Relevant Beneficiary of a portion or portions of the Commitments Package (subject to the consent of such prospective Relevant Beneficiary and subject to the European Commission agreeing to keep confidential all such information received). The European Commission shall indicate in writing if it considers any such beneficiary to be unsuitable within ten working days of having been informed by BASF or the Trustee.
- 22.** When BASF and the prospective Relevant Beneficiary have or are about to reach a binding agreement in relation to the relevant portion of the Commitments Package, BASF or the Trustee will submit a fully documented and reasoned proposal enabling the European Commission to verify that the criteria above with regard to the identity of the prospective Relevant Beneficiary are fulfilled and that the agreement is consistent with the relevant part of the Commitments Package. BASF will inform the proposed Relevant Beneficiary that the European Commission has the right to contact them for an interview at the European Commission's premises and that the European Commission may ask all relevant information from the proposed Relevant Beneficiary to ensure that they fulfil the criteria indicated above.
- 23.** The European Commission shall use reasonable endeavours to communicate in writing its approval or non-approval of BASF's or the Trustee's proposal pursuant to paragraph 22 above within 10 working days of receipt of that proposal. In case the European Commission has not approved BASF's or the Trustee's proposal within the above time

period, the exceeding time period shall not count towards the period referred to in paragraph 12 above. In the case of a plurality of offers from prospective Relevant Beneficiaries to which the European Commission does not object, BASF shall be free to accept any offer or to select the offer they consider best.

BASF Aktiengesellschaft