



EUROPEAN COMMISSION  
DG Competition

***Case M.8435 - FMC /  
DUPONT DIVESTMENT  
BUSINESS***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 6(1)(b) in conjunction with Art 6(2)  
Date: 27/07/2017

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## EUROPEAN COMMISSION

Brussels, 27.7.2017  
C(2017) 5441 final

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

**To the notifying party**

**Subject: Case M.8435 – FMC/DuPont Divestment Business  
Commission decision pursuant to Article 6(1)(b) in conjunction with  
Article 6(2) of Council Regulation No 139/2004<sup>1</sup> and Article 57 of the  
Agreement on the European Economic Area<sup>2</sup>**

Dear Sir or Madam,

- (1) On 8 June 2017, the European Commission (the 'Commission') received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking FMC Corporation ('FMC' or the 'Notifying Party', USA) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of parts of the undertaking E.I. du Pont de Nemours and Company ('DuPont', USA) (the 'Divestment Business') (the 'Transaction').<sup>3</sup> **FMC** and the **Divestment Business** are designated hereinafter as the "Parties", whilst the undertaking resulting from the Transaction is referred to as the 'merged entity'.
- (2) By decision of 27 March 2017, adopted in application of Article 8(2) of the Merger Regulation, the Commission declared the notified concentration between The Dow Chemical Company ('Dow') and DuPont within the meaning of Article 3(1)(a) of the Merger Regulation compatible with the internal market and

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

<sup>2</sup> OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

<sup>3</sup> Publication in the Official Journal of the European Union No C 194, 17.6.2017, p. 50.

the EEA Agreement,<sup>4</sup> subject to full compliance with the commitments annexed to that decision (the 'Commitments').

- (3) The present Transaction forms part of an asset purchase and sale agreement, entered into between DuPont and FMC on 31 March 2017 (the 'PSA'), which provides for the acquisition by FMC of certain DuPont activities in order to comply with the above-mentioned Commitments.

## **1. THE PARTIES**

- (4) **FMC** is a US-headquartered global specialty chemicals company that is active in the agricultural, industrial, and consumer businesses.
- (5) The **Divestment Business** comprises the majority of DuPont's global insecticide and herbicide activities, as well as its crop protection R&D activities. It also includes an exclusive licence for the supply of picoxystrobin, a fungicide active ingredient ('AI'), to be used for rice applications in the EEA.

## **2. THE CONCENTRATION**

- (6) The Transaction consists of the acquisition of sole control by FMC over the Divestment Business, which will be implemented by closing of the PSA. As part of the consideration for the sale of the Divestment Business, FMC will transfer its health and nutrition business to DuPont. This transaction is being examined by the Commission in Case M.8440 as a separate transaction.<sup>5</sup>
- (7) The Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

## **3. UNION DIMENSION**

- (1) The Transaction does not have a Union dimension within the meaning of Article 1 of the Merger Regulation as it does not meet the thresholds of Article 1(2) or Article 1(3).
- (2) However, on 18 April 2017, the Parties informed the Commission by means of a reasoned submission that the concentration would be notifiable in Austria, Cyprus, Germany, Ireland and Spain and would fulfil a number of further criteria for its referral to the Commission. In particular, the referral to the Commission would avoid multiple national filings, thereby increasing administrative efficiency. On that basis, under Article 4(5) of the Merger Regulation, the Parties requested the Commission to examine the Transaction. None of the Member States competent to examine the Transaction under the respective national laws expressed their disagreement within 15 working days of receiving the reasoned submission.

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<sup>4</sup> Case M.7932 Dow/DuPont (2017).

<sup>5</sup> Case M.8440 DuPont/FMC (Health and Nutrition Business); publication in the OJ No C 189, 15.6.2017, p. 52.

- (3) Therefore, the concentration is deemed to have a Union dimension pursuant to Article 4(5) of the Merger Regulation.

#### **4. RELEVANT MARKETS**

- (4) In the EEA, the Parties overlap in the sale of crop protection products and in particular, in the sale of selective herbicides and insecticides, as well as in the supply of AIs for formulated products.<sup>6</sup>

##### **4.1. Market definition**

- (5) In past cases, the Commission found that the relevant product markets for crop protection products can be defined on the basis of crop/pest combinations where each such combination constitutes a separate relevant product market. Moreover the Commission found that, for herbicides, further distinctions can be made depending on the time of application of the relevant crop protection products and that, for insecticides, distinctions can be made based on the way of application.<sup>7</sup>
- (6) On this basis, the Commission found that the relevant product markets for selective herbicides can be segmented by crop, weeds targeted and timing of their application.<sup>8</sup> For insecticides, it found that the relevant product markets can be segmented by crop, soil or foliar application and pest.<sup>9</sup> For fungicides, it found that each crop/disease combination constitutes a separate relevant market.<sup>10</sup>
- (7) As to the relevant geographic markets for crop protection products, in past cases the Commission found that they are national in scope mainly because authorisation for crop protection products is still regulated at the national level and each Member State remains responsible for maintaining specific national data requirements.<sup>11</sup>
- (8) The majority of respondents to the market investigation have confirmed the relevance of these market definitions for the present case.<sup>12</sup>
- (9) Therefore, for the purposes of the present case, the Commission will assess crop protection markets at the national level on the basis of crop/pest combinations as well as time of application for herbicides and way of application for insecticides.

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<sup>6</sup> The supply of AIs to third parties will not be further discussed in this decision because the Parties are only active to a very limited extent in this business and for each of the AIs that they supply to third parties in the EEA the Parties hold a limited share and there appear to be a significant number of alternative suppliers.

<sup>7</sup> Case M.7932 Dow/DuPont (2017) and Case M.7962 ChemChina/Syngenta (2017).

<sup>8</sup> Ibidem.

<sup>9</sup> Ibidem.

<sup>10</sup> Ibidem.

<sup>11</sup> Ibidem.

<sup>12</sup> Questionnaire to customers, questions 4 and 5 and questionnaire to competitors, questions 6 and 7.

## 4.2. Industry background

### 4.2.1. Crop protection products

- (10) Crop protection products, also known as pesticides, are used in agriculture in order to protect a crop from other biological organisms (pests) that can negatively affect the crop development either by attacking it or by competing with it for resources. The main categories of crop protection products are herbicides (to fight weeds), insecticides (to fight insects), fungicides (to fight fungi causing diseases).
- (11) The key components of crop protection products are AIs which produce the desired biological effect (that is, killing the pest or making it inoffensive).
- (12) A formulated product as sold to distributors and farmers is composed of one or more AIs mixed with inactive ingredients such as solvents, fillers, and adjuvants. These ingredients aim at making the AIs more stable, effective, safer, or easier to apply.
- (13) Crop protection products have properties that can endanger human or animal health or the environment since their AIs are essentially aimed at impacting certain animals, vegetation, or fungi. In the EEA, the approval and commercialisation of AIs and formulated crop protection products is mainly governed by Regulation (EC) No 1107/2009 ("Regulation 1107").<sup>13</sup>
- (14) Before an AI can be used in crop protection products sold to farmers in the EEA the AI must have been approved by the Commission, upon the advice of the European Food Safety Authority ("EFSA"). Second, the crop protection product incorporating the AI (alone or as part of a mixture of the AI with other AIs and co-formulants) must have been authorised by the competent authority in the Member State(s) where it will be sold.
- (15) Although a farmer may have only a few specific crop/pest needs, AIs and formulated products typically have activity on several pests for a given crop, and often also on several crops (sometimes affecting different, but biologically related, pests). A large number of finished products are therefore available on the market, including numerous mixtures of several AIs with a high level of differentiation and segmentation to address specific farmer needs.
- (16) Consequently, the closeness of competition between different formulated products within a given product market is the result of a range of factors, including similarity in terms of AIs and effectiveness as well as overall spectrum and price.

### 4.2.2. Overview of the different categories of companies active in crop protection

- (17) A number of players are active in the sale of crop protection products, with different size and business models.

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<sup>13</sup> Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ L 309, 24.11.2009, p. 1.

#### 4.2.2.1.R&D players

- (18) Four companies are large integrated crop protection players globally, characterised by their scale and their activities at all stages of the value chain (namely discovery, development, mixture/formulation and commercialisation) through large R&D budgets and operations for crop protection. These are Syngenta, Bayer, BASF, and Dow/DuPont (hereafter also referred to as the "global R&D-integrated players").<sup>14</sup>
- (19) Sales by these R&D-integrated players account for around 70% of the total EEA crop protection market and 78% of the global crop protection market, and these companies are seen as the top players in crop protection.
- (20) A number of other companies are active in the development, but not the discovery, of new AIs. In particular, FMC is a player which used to be active in the discovery of new AIs. However it exited active discovery approximately ten years ago. Since then FMC launched only few products containing AIs discovered by other companies.
- (21) A number of other small or mid-sized companies, mostly from Japan, have R&D operations, including discovery of new AIs, but do not compete on the same scale as global R&D-integrated players through global registration and route to market capabilities. In particular, the Japanese crop protection companies tend to focus on the Japanese market, including relevant products for rice and fruits and vegetables, insecticides and fungicides. They typically do not have a large scale presence in Europe but sometimes cooperate with the global R&D-integrated players, as well as with generic companies including via some shareholding links.
- (22) In consequence, only a handful of companies are active in R&D in a given segment at the global level and have the ability to develop and market new molecules and products across geographies that can have a significant commercial impact.

#### 4.2.2.2.Generic players

- (23) On the other hand, there are a number of companies which are generic players which focus on crop protection products that are no longer subject to patent protection. Generic players may have sizeable revenues, the largest being Adama. None of these, however, has substantially moved to or remained active in the discovery of AIs. Their activities are largely dependent on access to AIs originally developed by R&D players.
- (24) "Generic" players differ to some extent in business model and activities, with some selling "commodity-like" off-patent AIs, while others such as Adama and FMC develop new AIs discovered by other players and create innovations by mixing off-patent AIs.
- (25) As regards downstream sales of crop protection products, the generics' share has been overall stable in recent years.

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<sup>14</sup> Following completion of the Transaction FMC would become the fifth large integrated crop protection company active in the discovery of new AIs.

### 4.2.3. *Main industry trends*

#### 4.2.3.1. Consolidation

- (26) Historically, the R&D part of the crop protection industry has gone through different waves of consolidation.
- (27) Consolidation also took place in the generic part of the industry in recent years. In 2014 and 2015, Platform Specialty Products Corporation acquired Chemtura AgroSolutions, the Agriphar Group and Arysta LifeScience Limited to form a vertically integrated agrochemical company. In 2014, FMC acquired Cheminova. Finally, in 2011, Sumitomo Chemical Corp increased its shareholding in Nufarm Limited to 21.7%.
- (28) Further consolidation is happening in the market currently, with notably the Dow/DuPont and ChemChina/Syngenta transactions, and the proposed acquisition of Monsanto by Bayer.
- (29) In consequence, in many relevant product markets only a handful of significant players are present.

#### 4.2.3.2. Disappearance of AIs and decreasing innovation

- (30) In recent years a number of older AIs disappeared from the EEA market due to stricter regulatory requirements, which also contributed to a sharp rise in R&D costs for crop protection.
- (31) However, while regulatory costs have increased, expenditure on R&D as a percentage of revenues has decreased over the last twenty years. Moreover, innovation output has decreased in the crop protection industry.
- (32) There has also been in recent years a shift in geographical focus, with less emphasis on Europe and more on the rest of the world, notably emerging markets.
- (33) Meanwhile, limited solutions are available for so-called "orphan" crops or minor uses because companies focus on major global crops such as maize, wheat, rice.
- (34) In consequence, AIs which are older but have good regulatory and effectiveness profile can be very successful commercially, and in fact be quite profitable, even several years after patent protection has expired.

## **5. COMPETITIVE ASSESSMENT**

### **5.1. Legal Framework**

- (35) Under Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a proposed concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position. For example, with regard to non-coordinated anticompetitive effects that could derive from a concentration, a merger may entail horizontal effects where the undertakings concerned are actual or potential competitors in one or more of the relevant

markets concerned. In that case, the Commission appraises horizontal effects in accordance with the guidance set out in the Horizontal Merger Guidelines.<sup>15</sup>

## 5.2. Methodology for the assessment

- (36) For the present review, the Commission's competitive assessment focuses on the narrowest segmentation for which data is available, that is, crop/pest combinations.<sup>16</sup>
- (37) The market share data is based on the last year available, in most cases this is 2015, but it is earlier for some markets. For the relevant crop/pest combinations, the Commission has identified a total of 18 horizontally affected markets.<sup>17</sup> However, in two markets, there is no longer an overlap between the Parties because FMC recently stopped its activities there.<sup>18</sup> Since FMC's decision to exit those two markets was unconnected to the Transaction and they are no longer affected markets, the Commission has not included them in its competition assessment below.
- (38) For the purposes of this case, and in line with its most recent precedent in the agrochemical industry, the Commission has defined a set of criteria to identify preliminarily affected markets where the Transaction does not raise serious doubts as to its compatibility with the internal market.<sup>19</sup>
- (39) This set of criteria identifies markets where the levels of concentration preceding the Transaction and the increases in such concentration levels brought about by the Transaction make it possible to conclude that it is unlikely that the Transaction would significantly impede effective competition. These markets include the following:
- (a) Markets in which the HHI<sup>20</sup> post-merger is below 1000; According to the Horizontal merger Guidelines, such markets normally do not require extensive analysis;<sup>21</sup>
  - (b) Markets in which the HHI post-merger between 1000 and 2000 and delta below 250, provided that the Parties' combined share is below 50%;<sup>22</sup> or

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<sup>15</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6-25 ("Horizontal Merger Guidelines").

<sup>16</sup> For herbicides, the weed grouping is the broad pest category (i.e. broadleaf, graminicide or cross-spectrum) and for insecticides, it is the type of insect family (i.e. chewing or sucking insects).

<sup>17</sup> Markets in which the Parties' combined share is 20% or higher.

<sup>18</sup> These two markets are: broadleaf grassland herbicides in France and post-emergence broadleaf sunflower herbicides in Bulgaria.

<sup>19</sup> See Case M.7962 ChemChina/Syngenta (2017).

<sup>20</sup> As set out in paragraph 16 of the Commission's Horizontal Merger Guidelines, the Commission often considers the Herfindahl-Hirschmann Index (HHI) to measure the level of concentration in the market. The HHI is calculated by summing the squares of the individual market shares of all firms in the market.

<sup>21</sup> Commission's Horizontal Merger Guidelines, paragraph 19.

<sup>22</sup> Commission's Horizontal Merger Guidelines, paragraph 20.



- (c) Markets in which the HHI post-merger is above 2000 and delta is below 150, again provided that the Parties' combined share is below 50%.<sup>23</sup>
- (40) The Horizontal Merger Guidelines however provide that, under special circumstances, a Transaction may still raise competition concerns despite fulfilling the criteria listed in b) and c) above. The markets for which the Commission has not found any special circumstance, and for which it has therefore concluded that the Transaction would not significantly impede effective competition, have been reviewed separately for each crop protection product section concerned, as it follows below.
- (41) The markets satisfying this set of criteria, and for which the Commission has concluded that the Transaction does not raise serious doubts as to its compatibility with the internal market, have been assessed separately for each of the concerned herbicides and insecticides sections, as indicated below.

### **5.3. Herbicides**

#### *5.3.1. Markets that do not raise serious doubts*

##### **A. France – beets – post-emergence broadleaf herbicides**

- (42) In the market for post-emergence broadleaf herbicides for beets in France, the Parties have a combined market share of [20-30]% (Divestment Business: [20-30]%, FMC: [0-5]%). The increment resulting from the Transaction is less than [0-5]%. The market is not concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150]. Further, it follows from the market investigation that the Transaction does not reveal any competition concerns arising in this market.
- (43) Therefore, in view of the foregoing and in light of the results of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for post-emergence broadleaf beets herbicides in France.

##### **B. Romania – cereals – post-emergence broadleaf herbicides**

- (44) In the market for post-emergence broadleaf herbicides for cereals in Romania, the Parties have a combined market share of [20-30]% (Divestment Business: [20-30]%, FMC: [0-5]%). The increment resulting from the Transaction is [0-5]%. The market is not concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150]. Further, it follows from the market investigation that the Transaction does not reveal any competition concerns arising in this market.
- (45) Therefore, in view of the foregoing and in light of the results of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for post-emergence broadleaf cereal herbicides in Romania.

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<sup>23</sup> Commission's Horizontal Merger Guidelines, paragraph 20.

### 5.3.2. *Markets that raise serious doubts*

- (46) From its review, the Commission considers that FMC is an important and close competitor to the Divestment Business's cereal broadleaf herbicide sulfonylurea ('SU') portfolio in France, Germany, Hungary, Spain, Sweden, and the United Kingdom. This is for the following reasons.
- (47) First, the Commission considers that FMC is the main generic competitor for the Divestment Business's SU portfolio with its own SU offering and with florasulam, a post-emergence cereal broadleaf herbicide. While certain of the SUs are also marketed by other suppliers, FMC and the Divestment Business are the two players offering the broader choice of SU formulations and mixtures in key post-emergence cereal broadleaf herbicide markets. Moreover, the Divestment Business's internal documents show that it considers FMC a key threat and constraint for its SU business. [...].<sup>24</sup> [...].<sup>25</sup>
- (48) [...].<sup>26</sup>
- (49) This is confirmed by a majority of respondents to the market investigation indicating that indeed FMC's and the Divestment Business's SU portfolio are close competitors.<sup>27</sup>
- (50) Second, the Commission finds that in countries where FMC and the Divestment Business offer products based on the same AI, FMC's products are often sold at a price significantly lower than those of the Divestment Business.<sup>28</sup> [...]. Therefore, the Commission considers that the pricing constraints exercised by FMC on the Divestment Business's SUs are, in certain instances, material.
- (51) Third, the Commission understands that FMC competes with the Divestment Business's portfolio not only with its own SU offering but also with florasulam, a post-emergence cereal broadleaf herbicide which is a close competitor to the SUs.<sup>29</sup> FMC is the main generic supplier of florasulam in the EEA.<sup>30</sup> It follows that the part of FMC's portfolio which is an important and close competitor to the Divestment Business's cereal broadleaf herbicide SU portfolio consists in FMC's SU portfolio and florasulam.
- (52) Fourth, the Commission finds that while the Notifying Party argues that it expects that the cereal broadleaf herbicide portfolios of FMC and the Divestment Business in the EEA will be significantly impacted by the launch of new products by their competitors [...], this contention is not supported by the internal documents of the Parties. [...].<sup>31</sup> [...].<sup>32</sup> [...].<sup>33</sup> Therefore, contrary to what the

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24 [...].

25 [...].

26 [...].

27 Questionnaire to customers, question 7 and questionnaire to competitors question 9.

28 COMP M.8435\_FMC\_DUPONT\_DIVESTMENT\_BUSINESS\_RFI 4 RESPONSE\_22 JUNE 2017.

29 Questionnaire to customers, question 10. See also Case M.7932 Dow/DuPont (2017).

30 COMP M.8435\_FMC\_DUPONT\_DIVESTMENT\_BUSINESS\_RFI 4 RESPONSE\_FMC ATTACHMENT A.

31 [...].

Notifying Party argues, it is unlikely that the sales of SUs will decrease in the short- to mid-term.

- (53) In view of the foregoing, the Commission considers that the removal of FMC as an independent competitor to the Divestment Business would materially reduce price competition in national markets in which SUs represent a significant share of sales for cereal broadleaf herbicides and thus an important family of products for cereal farmers. On this basis and in light of the results of the market investigation, the Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market for the sale of post-emergence cereal broadleaf herbicides in France, Germany, Hungary, Spain, Sweden, and the United Kingdom. Each of these markets is assessed individually below.

#### **A. France– cereals – post-emergence broadleaf herbicides**

- (54) The Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market for the sale of post-emergence cereal broadleaf herbicides in France. This is for the following reasons.
- (55) First, post-Transaction the Parties would be the second largest supplier with a combined share of [20-30]% (FMC: [0-5]%, the Divestment Business: [10-20]%). The largest player in this segment is Dow/DuPont ([40-50]%) followed by Sumitomo ([5-10]%) and Syngenta/Adama ([5-10]%).
- (56) Second, FMC is the second largest generic player in this segment and, as discussed above, an important and close competitor for the Divestment Business's SU portfolio in France.
- (57) Third, the Divestment Business's main products in this segment are SU formulations and mixtures, including a metsulfuron-methyl/tribenuron-methyl mixture, a metsulfuron/tribenuron mixture, a carfentrazone-ethyl/metsulfuron-methyl mixture, a thifensulfuron formulation. In France, FMC sells a broad range of products containing SUs, including a metsulfuron-methyl/thifensulfuron-methyl mixture, a metsulfuron-methyl formulation, and a tribenuron-methyl formulation. In addition, FMC sells florasulam formulations as well a florasulam mixture which as discussed above are close competitors to the Divestment Business's SU portfolio.

#### **B. Germany– cereals – post-emergence broadleaf herbicides**

- (58) The Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market for the sale of post-emergence cereal broadleaf herbicides in Germany. This is for the following reasons.
- (59) First, post-Transaction the Parties would be the second largest supplier with a combined share of [30-40]% (FMC: [0-5]%, the Divestment Business: [20-30]%). The largest player in this segment is Dow/DuPont ([30-40]%) followed by BASF ([10-20]%) and Nufarm ([5-10]%).

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32 [...].

33 [...].

- (60) Second, the market is concentrated: the HHI level post-Transaction would be [ $>2000$ ] with a delta of [ $>150$ ].
- (61) Third, FMC is the second largest generic player in this segment and, as discussed above, an important and close competitor for the Divestment Business's SU portfolio in Germany.
- (62) Fourth, the Divestment Business's main products in this segment are SU formulations and mixtures, including a tribenuron-methyl formulation, a flupyrsulfuron-methyl formulation, and a carfentrazone-ethyl/metsulfuron-methyl mixture. In Germany, FMC sells a metsulfuron-methyl/diflufenican mixture as well as a florasulam formulation which as discussed above is a close competitor to the Divestment Business's SU portfolio.

### **C. Hungary– cereals – post-emergence broadleaf herbicides**

- (63) The Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market for the sale of post-emergence cereal broadleaf herbicides in Hungary. This is for the following reasons.
- (64) First, post-Transaction the Parties would be the largest supplier with a combined share of [30-40]% (FMC: [0-5]%, the Divestment Business: [20-30]%), followed by Bayer ([20-30]%), Dow/DuPont ([10-20]%), and Syngenta/Adama ([5-10]%).
- (65) Second, the market is concentrated: the HHI level post-Transaction would be [ $>2000$ ] with a delta of [ $>150$ ].
- (66) Third, FMC is the largest generic player in this segment and, as discussed above, an important and close competitor for the Divestment Business's SU portfolio in Hungary.
- (67) Fourth, the Divestment Business's main products in this segment are SU formulations and mixtures, including a tribenuron formulation, a thifensulfuron formulation and thifensulfuron/tribenuron formulations. In Hungary, FMC also sells SU-based mixtures and formulations, including a tribenuron-methyl formulation and a thifensulfuron-methyl/tribenuron-methyl formulation.

### **D. Spain– cereals – post-emergence broadleaf herbicides**

- (68) The Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market for the sale of post-emergence cereal broadleaf herbicides in Spain. This is for the following reasons.
- (69) First, post-Transaction the Parties would be the largest supplier with a combined share of [30-40]% (FMC: [5-10]%, the Divestment Business: [30-40]%), followed by Bayer ([10-20]%), Nufarm ([10-20]%), and Dow/DuPont ([10-20]%).
- (70) Second, the market is concentrated: the HHI level post-Transaction would be [ $>2000$ ] with a delta of [ $>150$ ].
- (71) Third, FMC is the second largest generic player in this segment and, as discussed above, an important and close competitor for the Divestment Business's SU portfolio in Spain.

- (72) Fourth, the Divestment Business's main products in this segment are SU formulations and mixtures, including a metsulfuron-methyl/tribenuron-methyl mixture, a thifensulfuron-methyl/tribenuron-methyl mixture, a tribenuron-methyl formulation, and a thifensulfuron-methyl formulation. Likewise, FMC's main broadleaf post-emergence herbicides in Spain are also SU formulations and mixtures which compete directly with the Divestment Business's products, including a metsulfuron-methyl formulation, a thifensulfuron-methyl/tribenuron-methyl mixture, a tribenuron-methyl formulation, and a thifensulfuron-methyl formulation. In addition, FMC sells a florasulam formulation which as discussed above is a close competitor to the Divestment Business's SU portfolio.

#### **E. Sweden– cereals – post-emergence broadleaf herbicides**

- (73) The Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market for the sale of post-emergence cereal broadleaf herbicides in Sweden. This is for the following reasons.
- (74) First, post-Transaction the Parties would be the second largest supplier with a combined share of [20-30]% (FMC: [0-5]%, the Divestment Business: [10-20]%). The largest player in this segment is Dow/DuPont ([50-60]%) followed by Bayer ([5-10]%) and Nufarm ([5-10]%).
- (75) Second, FMC is the second largest generic player in this segment and, as discussed above, an important and close competitors for the Divestment Business's SU portfolio in Sweden.
- (76) Third, the Divestment Business's main products in this segment are SU formulations and mixtures, including a metsulfuron-methyl/tribenuron-methyl mixture and a thifensulfuron formulation. In Sweden, FMC sells a tribenuron-methyl formulation as well as a florasulam formulation which as discussed above is a close competitor to the Divestment Business's SU portfolio.

#### **F. United Kingdom– cereals – post-emergence broadleaf herbicides**

- (77) The Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market for the sale of post-emergence cereal broadleaf herbicides in the United Kingdom. This is for the following reasons.
- (78) First, post-Transaction the Parties would be the largest supplier with a combined share of [50-60]% (FMC: [5-10]%, the Divestment Business: [40-50]%), followed by Dow/DuPont ([10-20]%), Bayer ([10-20]%), and Nufarm ([5-10]%).
- (79) Second, the market is concentrated: the HHI level post-Transaction would be [ $>2000$ ] with a delta of [ $>150$ ].
- (80) Third, FMC is the second largest generic player in this segment and, as discussed above, an important and close competitor for the Divestment Business's SU portfolio in the United Kingdom.
- (81) Fourth, the Divestment Business's main products in this segment are SU formulations and mixtures, including a metsulfuron-methyl/tribenuron-methyl mixture, a thifensulfuron-methyl/tribenuron-methyl mixture, and a metsulfuron-methyl formulation. In the United Kingdom, FMC sells two products containing

SUs, a metsulfuron-methyl/thifensulfuron-methyl mixture and a tribenuron-methyl formulation, [...]. The Parties argue that [...], the overlap they give rise to should not raise competition concerns. However, the Commission notes that FMC could obtain an autonomous right to sell these products as it holds approvals for each of the relevant AIs and sells similar, if not identical, products independently [...] in other EEA Member States. Moreover, in the United Kingdom FMC sells the products it sources [...] under its own brand. Therefore, the Commission considers that FMC's metsulfuron-methyl/thifensulfuron-methyl mixture and tribenuron-methyl formulation are in competition with the Divestment Business's products. In addition, FMC sells a florasulam formulation as well as two florasulam mixtures which as discussed above are close competitors to the Divestment Business's SU portfolio.

#### **5.4. Insecticides**

- (82) The market investigation has not revealed competition concerns with respect to insecticides in any of the affected national markets examined below.

##### **A. Bulgaria and Poland – fruit and nuts – chewing insecticides**

- (83) The Commission finds that, in the market for insecticides targeting chewing insects in fruit and nuts in Bulgaria, the Parties have a combined market share of [20-30]% (Divestment Business: [20-30]%, FMC: [0-5]%). The increment resulting from the Transaction is [0-5]%. The market is not concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150].
- (84) In the market for insecticides targeting chewing insects in fruit and nuts in Poland, the Parties have a combined market share of [20-30]% (Divestment Business: [20-30]%, FMC: [0-5]%). The increment resulting from the Transaction is less than [0-5]%. The market is not concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150].
- (85) Further, the market investigation did not reveal any competition concerns arising in either of these markets.
- (86) In view of the foregoing and in light of the results of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for insecticides targeting chewing insects in fruit and nuts in Bulgaria or Poland.

##### **B. France and Portugal – grapes – chewing insecticides**

- (87) The Commission finds that, in the market for insecticides targeting chewing insects in grapes in France, the Parties have a combined market share of [20-30]% (Divestment Business: [20-30]%, FMC: [0-5]%). The increment resulting from the Transaction is less than [0-5]%. The market is not concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150].
- (88) In the market for insecticides targeting chewing insects in grapes in Portugal, the Parties have a combined market share of [20-30]% (Divestment Business: [20-30]%, FMC: [0-5]%). The increment resulting from the Transaction is [0-5]%. The market is not concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150].

- (89) Further, the market investigation did not reveal any competition concerns arising in any of these markets.
- (90) In view of the foregoing and in light of the results of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for insecticides targeting chewing insects in grapes in France or Portugal.

### **C. France and Romania – corn – chewing insecticides**

- (91) The Commission finds that, in the market for insecticides targeting chewing insects in corn in France, the Parties have a combined market share of [20-30]% (Divestment Business: [20-30]%, FMC: [0-5]%). The increment resulting from the Transaction is less than [0-5]%. The market is not concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150]. Further, the market investigation did not reveal any competition concerns arising in this market.
- (92) In the market for insecticides targeting chewing insects in corn in Romania, the Parties have a combined market share of [50-60]% (Divestment Business: [50-60]%, FMC: [0-5]%). The increment resulting from the Transaction is [0-5]%. The market is concentrated: the HHI post-Transaction would be [>2000] with a delta of [>150]. However, the Parties are not close competitors; they sell very different products. In this market, the Divestment Business sells Rynaxypyr, the leading new-generation chewing insecticide (from the diamide chemical class) and indoxacarb, a slightly older insecticide introduced in 2001 (from the oxadiazine chemical class) and which accounted for approximately a [...] of the Divestment Business' turnover in the EEA in 2016.<sup>34</sup> FMC sells zeta-cypermethrin, an old generation insecticide from the pyrethroid chemical class<sup>35</sup>, pyrethroids were originally introduced in 1976.<sup>36</sup> Older generation insecticides are under significant resistance and regulatory pressure and are losing market share to newer generation insecticides.<sup>37</sup> Further, there are a number of competitors who compete more closely with the Divestment Business than FMC, such as Syngenta-Adama ([10-20]%), Bayer ([10-20]%) and Nufarm ([5-10]%) and will continue to exert a competitive constraint. In its market investigation, the Commission did not find any evidence of closeness between the Parties and further, the market investigation did not reveal any competition concerns arising in this market.
- (93) In view of the foregoing and in light of the results of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for insecticides targeting chewing insects in corn in France and Romania.

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<sup>34</sup> Form CO, paragraph 6.254.

<sup>35</sup> Form CO, paragraph 6.252.

<sup>36</sup> Phillips McDougall Leading Crop Protection Companies Report, pages 139 -142.

<sup>37</sup> Form CO, paragraph 6.251. Sparks (2013) "Insecticide discovery: an evaluation and analysis," *Pesticide Biochemistry and Physiology* 107 (2013) 8-17.

#### **D. Greece – cotton – chewing insecticides**

- (94) The Commission finds that, in the market for insecticides targeting chewing insects in cotton in Greece, the Parties have a combined market share of [50-60]% (Divestment Business: [50-60]%, FMC: [0-5]%). The increment resulting from the Transaction is less than [0-5]%. The market is concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150]. However, the Parties are not close competitors; they sell very different products. The Divestment Business sells Rynaxypyr, the leading new generation insecticide. FMC on the other hand sells chlorpyrifos, an older generation generic insecticide and zeta-cypermethrin and, further, the market share increment brought about by the Transaction is very limited, at less than [0-5]%. Further, there are competitors that compete more closely with the Parties. For example, the closest competitor to FMC is Syngenta-Adama with a [10-20]% share, and which sells products based on the same AI as FMC, namely chlorpyrifos.<sup>38</sup> In addition, in Q4 2017, Dow/DuPont plans to submit an application for the authorisation of a product containing the AI spinetoram, another new generation insecticide [...] <sup>39</sup> [...]. In its market investigation, the Commission did not find any evidence of closeness between the Parties and further, the market investigation did not reveal any competition concerns arising in this market.
- (95) In view of the foregoing and in light of the results of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for insecticides targeting chewing insects in cotton in Greece.

#### **E. Lithuania – oilseed rape – chewing insecticides**

- (96) The Commission finds that, in the market for insecticides targeting chewing insects in oilseed rape in Lithuania, the Parties have a combined market share of [20-30]% (Divestment Business: [10-20]%, FMC: [0-5]%). The increment resulting from the Transaction is [0-5]%. The market is not concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150].
- (97) Further, the market investigation did not reveal any competition concerns arising in this market.
- (98) In view of the foregoing and in light of the results of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for insecticides targeting chewing insects in oilseed rape in Lithuania.

#### **F. Italy and Spain – vegetables – chewing insecticides**

- (99) The Commission finds that, in the market for insecticides targeting chewing insects in vegetables in Italy, the Parties have a combined market share of [30-40]% (Divestment Business: [30-40]%, FMC: [0-5]%). The increment resulting from the Transaction is less than [0-5]%. The market is not concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150].

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<sup>38</sup> Form CO, paragraph 6.305.

<sup>39</sup> Form CO, paragraph 6.308.



- (100) In the market for insecticides targeting chewing insects in vegetables in Spain, the Parties have a combined market share of [20-30]% (Divestment Business: [20-30]%, FMC: [0-5]%). The increment resulting from the Transaction is [0-5]%. The market is not concentrated: the HHI post-Transaction would be [>2000] with a delta of [<150].
- (101) Further, the market investigation did not reveal any competition concerns arising in any of these markets.
- (102) In view of the foregoing and in light of the results of the market investigation, the Commission considers that the Transaction does not raise serious doubts as to its compatibility with the internal market with respect to the market for insecticides targeting chewing insects in vegetables in Italy or Spain.

## **5.5. Conclusions of the competitive assessment**

- (103) In view of the foregoing and in light of the results of the market investigation, the Commission considers that the Transaction raises serious doubts as to its compatibility with the internal market for the sale of post-emergence cereal broadleaf herbicides in France, Germany, Hungary, Spain, Sweden and the United Kingdom.

## **6. REMEDIES**

### **6.1. Framework of the assessment of the commitments**

- (104) Where, as in this case, a notified concentration raises serious doubts as to its compatibility with the internal market, the Parties may modify the notified concentration so as to remove the grounds for the serious doubts identified by the Commission with a view to having it declared compatible with the internal market pursuant to Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation.
- (105) As set out in the Commission Notice on Remedies,<sup>40</sup> commitments have to eliminate the Commission's serious doubts entirely, they have to be comprehensive and effective from all points of view.
- (106) In assessing whether or not commitments will restore effective competition, the Commission considers all relevant factors, including the type, scale and scope of the proposed commitments, with reference to the structure and particular characteristics of the market in which the Commission has identified serious doubts as to the compatibility of the notified concentration with the internal market, including the position of the Parties and other participants on the market.<sup>41</sup>

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<sup>40</sup> Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01), (the "Commission Notice on Remedies").

<sup>41</sup> Commission Notice on Remedies, paragraph 12.

## **6.2. Commitments submitted by the Notifying Party**

- (107) In order to address the serious doubts raised by the Transaction with a view to rendering the concentration compatible with the internal market, the undertakings concerned have modified the notified concentration by submitting to the Commission proposed commitments.
- (108) The Notifying Party submitted two sets of commitments. Notably, the Notifying Party formally submitted a remedy proposal on 6 July 2017 and a revised remedy proposal on 7 July 2017 ("Initial Commitments"). After the Commission gathered the views of market participants on the Initial Commitments ("market test"), and informed the Notifying Party of the remaining serious doubts raised by the Transaction, the Notifying Party submitted a revised remedy proposal on 18 July 2017 ("Final Commitments").
- (109) The Commission considers the Final Commitments sufficient to ensure that, if implemented, the Transaction no longer raises serious doubts as to its compatibility with the internal market. The Final Commitments are annexed to this decision and form an integral part of the decision.

## **6.3. Initial Commitments**

- (110) Initially, the Notifying Party proposed, to the benefit of the entity approved by the Commission as acquirer of the assets listed below (the 'Purchaser'):
- (a) to provide royalty-free exclusive irrevocable licences for the EEA to the FMC lead active ingredients (metsulfuron-methyl, thifensulfuron-methyl, tribenuron-methyl and florasulam) and product registration data. Where the consent of third parties is required, FMC will use its best efforts to ensure that the relevant consent is obtained;
  - (b) to transfer the product registrations in the EEA for formulated products containing the lead active ingredients. Where the consent of third parties is required, FMC will use its best efforts to ensure that the relevant consent is obtained;
  - (c) to provide royalty-free irrevocable licences for the EEA to the secondary active ingredients (i.e. an active ingredient which is not one of the lead active ingredients) underlying the products whose registration is being transferred;
- together, the assets listed from (a) to (c) above are defined as the "Divested Assets";
- (d) to transfer contracts with third party suppliers for the manufacture and sale of the products related to the Divested Asset portfolio;
  - (e) to divest the EEA customer list and other records relating to the Divested Assets;
  - (f) to transfer the intangible assets, such as registered intellectual property, including know-how, brand names and trademarks, primarily used by FMC in relation to the Divested Asset portfolio (with FMC retaining a

royalty-free exclusive irrevocable licence for use of such intellectual property on products outside this portfolio);

- (g) to provide royalty-free exclusive irrevocable licences to intangible assets, such as registered intellectual property, know-how, brand names and trademarks, that are primarily used by FMC on products other than the Divested Asset portfolio;
  - (h) at the option of the Purchaser, to include personnel considered necessary to maintain the viability and competitiveness of the Divested Assets in [...];
  - (i) at the option of the Purchaser, to enter into a transitional service agreement with the Purchaser for [...], for all services that FMC currently supplies to support the Divested Asset portfolio products (this may be extended by [...]);
  - (j) at the option of the Purchaser, to enter into a transitional supply/toll manufacturing agreement for [...] (this may be extended by [...]).
- (111) In addition, the Notifying Party proposed to enter into related commitments, *inter alia* regarding the separation of the divested businesses from their retained businesses, the preservation of the viability, marketability and competitiveness of the divested businesses, including the appointment of a monitoring trustee and, if necessary, a divestiture trustee.
- (112) The Commission assessed the appropriateness of the Initial Commitments offered and carried out a market test.

#### **6.4. The Commission's market test**

- (113) The Commission launched a market test of the Initial Commitments on 10 July 2017.
- (114) In general, there was the view that the Initial Commitments could remedy the serious doubts identified by the Commission, subject to the modification of a number of specific elements of the Initial Commitments identified by the market test.
- (115) In particular, a majority of respondents indicated that it was important for the Purchaser to have the option of obtaining additional personnel for each of the markets in which serious doubts were identified by the Commission, in order to ensure the viability and competitiveness of the Divested Assets. They also indicated that regulatory personnel would also be necessary, on the basis that regulatory know-how is essential in supporting the formulated products sold on the market and, further, not all purchasers may have the necessary regulatory resources to deal with the SU and florasulam portfolio.<sup>42</sup>
- (116) In all other respects, respondents generally considered that the Divested Assets include all necessary assets and would be able to compete effectively with the merged entity.

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<sup>42</sup> Questionnaire to competitors – Commitments – Market Test, questions 17 and 18.

## **6.5. Final Commitments submitted by the Notifying Party**

### *6.5.1. Description of the Final Commitments*

- (117) As explained above, the Notifying Party submitted the Final Commitments on 18 July 2017. The full text of the Final Commitments is attached as Annex to this Decision.
- (118) The Final Commitments have been modified vis-a-vis the Initial Commitments as described in Section 6.3 as follows: at the option of the Purchaser, to include personnel (which may include sales or regulatory staff familiar with the lead AIs) considered necessary to maintain the viability and competitiveness of the Divested Assets in not only [...], but also [...], to the extent that the Purchaser does not itself have sufficient sales or regulatory staff.

### *6.5.2. Assessment of the Final Commitments*

- (119) The Commission considers that the Final Commitments remove the serious doubts raised by the Transaction entirely, because these either (i) remove the entire overlap between the Parties in the post-emergence cereal broadleaf markets in which serious doubts were raised, or (ii) remove the part of the overlap in which the Parties were competing closely through their respective SU portfolios. The Commission also finds that the Final Commitments address the outstanding issues related to the viability and competitiveness of the Divestment Business, by including in the concerned assets to divest, at the option of the Purchaser, additional personnel for all markets in which the Commission had identified serious doubts.

### *6.5.3. Conclusion on the Final Commitments*

- (120) For the reasons outlined above, the Commission considers that the commitments entered into by the undertakings concerned are sufficient and appropriate to eliminate the serious doubts as to the compatibility of the Transaction with the internal market with respect to the sale of post-emergence cereal broadleaf herbicides in France, Germany, Hungary, Spain, Sweden and the United Kingdom.
- (121) Under the first sentence of the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.
- (122) The fulfilment of the measures that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market and the EEA Agreement is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 6(3) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.

- (123) In accordance with the basic distinction between conditions and obligations, the commitments in Section B of the Final Commitments set out in the Annex constitute conditions attached to this decision, as only through full compliance therewith can the structural changes in the relevant markets be achieved. The other commitments set out in the Annex constitute obligations, as they concern the implementing steps which are necessary to achieve the modifications sought in a manner compatible with the internal market.
- (124) The full text of the Final Commitments is annexed to this Decision as Annex and forms an integral part thereof.

## **7. CONCLUSION**

- (125) For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in section B of the commitments annexed to the present decision and with the obligations contained in the other sections of the said commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of the Merger Regulation and Article 57 of the EEA Agreement.

*For the Commission*

*(Signed)*

*Julian KING*

*Member of the Commission*

## CASE M.8435 – FMC/DUPONT DIVESTMENT BUSINESS

### COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Articles 8(2) and 10(2) of Council Regulation (EC) No 139/2004 (the “**Merger Regulation**”), FMC Corporation (the “**Notifying Party**”) hereby enters into the following Commitments (the “**Commitments**”) vis-à-vis the European Commission (the “**Commission**”) with a view to rendering the acquisition of sole control over the DuPont Divestment Business (the “**Concentration**”) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission’s decision pursuant to Article 8(2) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the “**Decision**”), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the “**Remedies Notice**”).

#### Section A. Definitions

1. For the purpose of the Commitments, the following terms shall have the following meaning:

**Affiliated Undertakings:** undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the “**Consolidated Jurisdictional Notice**”).

**Assets:** the assets that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business as indicated in Section B, paragraph 6 (a), (b), and (c) and described more in detail in the Schedule.

**Closing:** the transfer of the legal title to the Divestment Business to the Purchaser.

**Closing Period:** the period of [...] from the approval of the Purchaser and the terms of sale by the Commission.

**Confidential Information:** any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

**Conflict of Interest:** any conflict of interest that impairs the Trustee’s objectivity and independence in discharging its duties under the Commitments.

**Direct production costs:** direct production costs include raw materials, direct labour costs, 70% of energy, packaging, toll manufacturing, transport and duties, warehousing, ecology and direct depreciation costs of incurred by the fixed assets used to produce such products for the Purchaser.

**Divestment Business:** the business or businesses as defined in Section B and in the Schedule which the Notifying Party commits to divest.

**Divestment CP Products:** the crop protection products included in the Divestment Business as defined in Section B (*The Commitment to divest and the Divestment Business*) and in the Schedule.

**Divestiture Trustee:** one or more natural or legal person(s) who is/are approved by the Commission and appointed by the Notifying Party and who has/have received from the Notifying Party the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

**Dow:** The Dow Chemical Company.

**DuPont:** E.I. du Pont de Nemours and Company.

**DuPont Divestment Business:** the business to be divested by DuPont to the Notifying Party in accordance with the commitments given to the Commission in Case M.7932 *Dow/DuPont*.

**Effective Date:** the date of adoption of the Decision.

**First Divestiture Period:** the period of [...] from the Effective Date.

**Hold Separate Manager:** the person appointed by the Notifying Party for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

**Lead Active Ingredient:** for the purpose of these Commitments, the following active ingredients used by the Divestment Business shall be lead active ingredients: metsulfuron-methyl, thifensulfuron-methyl, tribenuron-methyl and florasulam.

**Monitoring Trustee:** one or more natural or legal person(s) who is/are approved by the Commission and appointed by the Notifying Party, and who has/have the duty to monitor the Notifying Party's compliance with the conditions and obligations attached to the Decision.

**Party or Parties:** the Notifying Party and/or the DuPont Divestment Business.

**Personnel:** all staff currently employed by the Divestment Business, including staff seconded to the Divestment Business and shared personnel.

**Purchaser:** the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

**Purchaser Criteria:** the criteria laid down in paragraph 16 of these Commitments that the Purchaser must fulfil in order to be approved by the Commission.

**Schedule:** the schedule to these Commitments describing more in detail the Divestment Business.

**Secondary Active Ingredient:** for the purpose of these Commitments, secondary active ingredient refers to any active ingredient included in a product registration in the Divestment Business where such active ingredient is not the Lead Active Ingredient.

**Trustee(s):** the Monitoring Trustee and/or the Divestiture Trustee as the case may be.

**Trustee Divestiture Period:** the period of [...] from the end of the First Divestiture Period.

## **Section B. The commitment to divest and the Divestment Business**

### Commitment to divest

2. In order to maintain effective competition, the Notifying Party commits to divest, or procure the divestiture of, the Divestment Business by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 17 of these Commitments. To carry out the divestiture, the Notifying Party commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If the Notifying Party has not entered into such an agreement at the end of the First Divestiture Period, the Notifying Party shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 31 in the Trustee Divestiture Period.
3. The Notifying Party shall be deemed to have complied with this commitment if:
  - (a) by the end of the Trustee Divestiture Period, the Notifying Party or the Divestiture Trustee has entered into a final binding sale and purchase agreement and the Commission approves the proposed purchaser and the terms of sale as being consistent with the Commitments in accordance with the procedure described in paragraph 19; and
  - (b) the Closing of the sale of the Divestment Business to the Purchaser takes place within the Closing Period.
4. In order to maintain the structural effect of the Commitments, the Notifying Party shall, for a period of [...] after Closing, not acquire, whether directly or indirectly, the possibility of exercising influence (as defined in paragraph 43 of the Remedies Notice, footnote 3) over the whole or part of the Divestment Business, unless, following the submission of a reasoned request from the Notifying Party showing good cause and accompanied by a report from the Monitoring Trustee (as provided in paragraph 62 of these Commitments), the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the internal market. For the avoidance of doubt, the provisions of this paragraph 4 shall not prevent the Notifying Party from providing services to the Divestment Business as described in the Schedule.
5. With respect to each crop protection product registration included in the Divestment Business (a "**Divestment CP Product**"), the Notifying Party shall not, for a period of [...] after Closing, introduce and sell in any EEA national market in which the relevant Divestment CP Product is being sold at Closing (the "**Divestment Product Territories**") any new product for use as a post-emergence broadleaf cereal herbicide with substantially the same formulation as such Divestment CP Product, provided that the foregoing shall not prevent or restrict the Notifying Party or its Affiliated Undertakings in



any way from marketing or selling, or developing, obtaining or maintaining a product registration for, any product that is sold in the Divestment Product Territories at the date of Closing by the DuPont Divestment Business, including, for the avoidance of doubt, products that contain any of the active ingredients contained in any Divestment CP Product.

#### Structure and Definition of the Divestment Business

6. The Divestment Business consists of cereal herbicide crop protection products from the Notifying Party. The legal and functional structure of the Divestment Business as operated to date is described in the Schedule. The Divestment Business, described in more detail in the Schedule, includes all assets that contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business, in particular:
  - (a) all tangible and intangible assets (including intellectual property rights);
  - (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestment Business; and
  - (c) all contracts, commitments and customer orders of the Divestment Business; all customer, credit and other records of the Divestment Business.
7. In addition, the Divestment Business may, at the request of the Purchaser, include the benefit, for a transitional period of [...] after Closing (such period may be further extended up to [...], in consultation with the Commission and the Monitoring Trustee, if required to preserve the viability and competitiveness of the Divestment Business), of all current arrangements under which the Notifying Party or its Affiliated Undertakings supply products or services to the Divestment Business, both of which shall be provided at Direct Production Cost of the supplying Party or Affiliated Undertaking, as detailed in the Schedule, unless otherwise agreed with the Purchaser.
8. If requested by the Purchaser, the Divestment Business may also include for a period of [...] after Closing (such period may be further extended up to [...], in consultation with the Commission and the Monitoring Trustee, if required to preserve the viability and competitiveness of the Divestment Business), agreements for the toll manufacture and supply by the Parties, at their respective Direct Production Costs, of the Divestment CP Products and/or Lead Active Ingredients in the Divestment Business, including such Secondary Active Ingredients as are required to produce the Divestment CP Products solely for sale in the EEA and manufactured in accordance with the quality specifications of the product registrations of the Divestment CP Products, to the extent such Divestment CP Products, Lead or Secondary Active Ingredients are manufactured by the Parties or their Affiliated Undertakings as of the Effective Date. Alternatively, where such Divestment CP Products, Lead or Secondary Active Ingredients are supplied to the Divestment Business as of the Effective Date by third party suppliers, the Notifying Party shall use its best efforts to (a) obtain the assignment of the relevant supply agreements, if any, to the Purchaser or, in the event that such assignment is not possible, (b) supply such Divestment CP Products, Lead or Secondary Active Ingredients through back-to-back supply agreements with such third parties at the wholesale price paid by the Notifying Party or its Affiliated Undertakings. Such products delivered to the Purchaser shall meet all quality requirements which would apply to the Notifying Party. In all cases,

strict firewall procedures will be adopted by way of non-disclosure agreements so as to ensure that any competitively sensitive information related to, or arising from, such supply arrangements (for example, product roadmaps) will not be shared with, or passed on to, anyone outside the relevant business unit providing the product/service operations.

## **Section C. Related commitments**

### Preservation of viability, marketability and competitiveness

9. From the Effective Date until Closing, the Notifying Party shall preserve or procure the preservation of the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular the Notifying Party undertakes:
  - (a) not to carry out any action that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business; and
  - (b) to make available, or procure to make available, sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans.

### Hold-separate obligations

10. The Notifying Party commits, from the Effective Date until Closing, to maintain the Divestment Business as a viable, competitive and saleable business and to keep the Divestment Business separate from the businesses it is retaining.
11. Until Closing, the Notifying Party shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a saleable business. Immediately after the adoption of the Decision, the Notifying Party shall appoint a Hold Separate Manager. The Hold Separate Manager shall manage the Divestment Business independently from the DuPont Divestment Business and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness. The Hold Separate Manager shall closely cooperate with and report to the Monitoring Trustee and, if applicable, the Divestiture Trustee.

### Ring-fencing

12. The Notifying Party shall implement, or procure to implement, all necessary measures to ensure that it does not, after the Effective Date, obtain any Confidential Information relating to the Divestment Business and that any such Confidential Information obtained by the Notifying Party before the Effective Date will be eliminated and not be used by the Notifying Party except as required by the Notifying Party to maintain the Divestment Business as a viable, competitive and saleable business. This includes measures vis-à-vis the Notifying Party's appointees on the supervisory board and/or board of directors of the Divestment Business. The Notifying Party may obtain or keep information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or disclosure of which to the Notifying Party is required by law.

### Due diligence

13. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, the Notifying Party shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process, provide to potential purchasers sufficient information as regards the Divestment Business.

### Reporting

14. The Notifying Party shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request). The Notifying Party shall submit a list of all potential purchasers having expressed interest in acquiring the Divestment Business to the Commission at each and every stage of the divestiture process, as well as a copy of all written offers made by potential purchasers within five days of their receipt.
15. The Notifying Party shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of any information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

### **Section D. The Purchaser**

16. In order to be approved by the Commission, the Purchaser must fulfil the following criteria:
  - (a) The Purchaser shall be independent of and unconnected to the Notifying Party and its Affiliated Undertakings (this being assessed having regard to the situation following the divestiture);
  - (b) The Purchaser shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;
  - (c) The acquisition of the Divestment Business by the Purchaser must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.
17. The final binding sale and purchase agreement (as well as ancillary agreements) relating to the divestment of the Divestment Business shall be conditional on the Commission's approval. When the Notifying Party or its Affiliated Undertakings have reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), within one week to the Commission and the Monitoring Trustee. The Notifying Party must be able to demonstrate to the Commission that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commission's Decision and the Commitments. For

the approval, the Commission shall verify that the purchaser fulfils the Purchaser Criteria and that the Divestment Business is being sold in a manner consistent with the Commitments including their objective to bring about a lasting structural change in the market. The Commission may approve the sale of the Divestment Business without one or more Assets, or by substituting one or more Assets with one or more different assets, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

## **Section E. Trustee**

### Appointment procedure

18. The Notifying Party shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. The Notifying Party commits not to close the Concentration before the appointment of a Monitoring Trustee.
19. If the Notifying Party has not entered into a binding sale and purchase agreement regarding the Divestment Business one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by the Notifying Party at that time or thereafter, the Notifying Party shall appoint a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
20. The Trustee shall:
  - (a) at the time of appointment, be independent of the Notifying Party and its Affiliated Undertakings;
  - (b) possess the necessary qualifications to carry out its mandate, for example have sufficient relevant experience as an investment banker or consultant or auditor; and
  - (c) neither have nor become exposed to a Conflict of Interest.
21. The Trustee shall be remunerated by the Notifying Party in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, such success premium may only be earned if the divestiture takes place within the Trustee Divestiture Period.

### *Proposal by the Notifying Party*

22. No later than two weeks after the Effective Date, the Notifying Party shall submit the name or names of one or more natural or legal persons whom the Notifying Party proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period or on request by the Commission, the Notifying Party shall submit a list of one or more persons whom the Notifying Party proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Trustee fulfil the requirements set out in paragraph 20 and shall include:

- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
- (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
- (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

*Approval or rejection by the Commission*

23. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, the Notifying Party shall appoint or cause to be appointed the person or persons concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, the Notifying Party shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

*New proposal by the Notifying Party*

24. If all the proposed Trustees are rejected, the Notifying Party shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 18 and 23 of these Commitments.

*Trustee nominated by the Commission*

25. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom the Notifying Party shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

Functions of the Trustee

26. The Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or the Notifying Party, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

*Duties and obligations of the Monitoring Trustee*

27. The Monitoring Trustee shall:
- (a) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.
  - (b) oversee the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and

monitor compliance by the Notifying Party with the conditions and obligations attached to the Decision. To that end, the Monitoring Trustee shall:

- (i) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business part of the DuPont Divestment Business separate from the businesses being retained by the Notifying Party, in accordance with paragraphs 9 and 10 of these Commitments;
  - (ii) supervise the management of the Divestment Business as a saleable business, in accordance with paragraph 11 of these Commitments;
  - (iii) with respect to Confidential Information:
    - i. determine all necessary measures to ensure that the Parties do not after the Effective Date obtain any Confidential Information relating to the Divestment Business except as required to maintain the Divestment Business as a viable, competitive and saleable business,
    - ii. in particular strive for the severing of the Divestment Business's participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business,
    - iii. make sure that any Confidential Information relating to the Divestment Business obtained by the Notifying Party before the Effective Date is eliminated and will not be used by the Notifying Party except as required to maintain the Divestment Business as a viable, competitive and saleable business, and
    - iv. decide whether any Confidential Information relating to the Divestment Business obtained by the Notifying Party before the Effective Date may be disclosed to or kept by the Notifying Party if the disclosure is reasonably necessary to allow the Notifying Party to maintain the Divestment Business as a viable, competitive and saleable business, to carry out the divestiture or if the disclosure is required by law;
  - (iv) monitor the splitting of assets between the Divestment Business and the Notifying Party or its Affiliated Undertakings;
- (c) propose to the Notifying Party such measures as the Monitoring Trustee considers necessary to ensure the Notifying Party's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business separate from the businesses being retained by the Notifying Party and the non-disclosure of competitively sensitive information;
- (d) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process potential purchasers receive sufficient and correct information relating to the

Divestment Business in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process;

- (e) act as a contact point for any requests by third parties, in particular potential purchasers, in relation to the Commitments;
  - (f) provide to the Commission, sending the Notifying Party a non-confidential copy at the same time, a written report within 15 days after the end of every month that shall cover the operation and management of the Divestment Business as well as the splitting of assets so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers;
  - (g) promptly report in writing to the Commission, sending the Notifying Party a non-confidential copy at the same time, if it concludes on reasonable grounds that the Notifying Party is failing to comply with these Commitments;
  - (h) within one week after receipt of the documented proposal referred to in paragraph 17 of these Commitments, submit to the Commission, sending the Notifying Party a non-confidential copy at the same time, a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser;
  - (i) broker a resolution of any dispute that may arise between the Purchaser and the Notifying Party regarding compliance with the conditions and obligations attached to the Decision;
  - (j) monitor whether the Direct Production Costs charged in application of paragraphs 7 and 8 of these Commitments as the case may be are consistent with standard industry practice;
  - (k) advise and, if need be, make written recommendations to the Commission as to the Notifying Party's compliance with the conditions and obligations attached to the Decision when any dispute between the Purchaser and the Notifying Party regarding such compliance would be brought before the Arbitral Tribunal referred to in paragraph 46 below; and
  - (l) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.
28. If the Monitoring and Divestiture Trustee are not the same legal or natural persons, the Monitoring Trustee and the Divestiture Trustee shall cooperate closely with each other during and for the purpose of the preparation of the Trustee Divestiture Period in order to facilitate each other's tasks.

*Duties and obligations of the Divestiture Trustee*

29. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement (and ancillary agreements) as in line with the Commission's Decision and the Commitments in accordance with paragraphs 16 and 17 of these Commitments. The Divestiture Trustee shall include in the sale and purchase agreement (as well as in any ancillary agreements) such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of the Notifying Party, subject to the Notifying Party's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
30. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Notifying Party.

Duties and obligations of the Parties

31. The Notifying Party shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of the Notifying Party's or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and the Notifying Party and the Divestment Business shall provide the Trustee upon request with copies of any document. The Notifying Party and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
32. The Notifying Party shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. The Notifying Party shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. The Notifying Party shall inform the Monitoring Trustee on possible purchasers, submit lists of potential purchasers at each stage of the selection process, including the written offers made by potential purchasers at those stages, and keep the Monitoring Trustee informed of all developments in the divestiture process.
33. The Notifying Party shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale (including ancillary agreements), the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing,



including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, the Notifying Party shall cause the documents required for effecting the sale and the Closing to be duly executed.

34. The Notifying Party shall indemnify the Trustee and its employees and agents (each an “**Indemnified Party**”) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to the Notifying Party for, any liabilities arising out of the performance of the Trustee’s duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
35. At the expense of the Notifying Party, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to the Notifying Party’s approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should the Notifying Party refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard the Notifying Party. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 35 of these Commitments shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served the Notifying Party during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.
36. The Notifying Party agrees that the Commission may share Confidential Information proprietary to the Notifying Party with the Trustee. The Trustee shall not disclose such information and the principles contained in Article 17 (1) and (2) of the Merger Regulation apply *mutatis mutandis*.
37. The Notifying Party agrees that the contact details of the Monitoring Trustee are published on the website of the Commission’s Directorate-General for Competition and they shall inform interested third parties, in particular any potential purchasers, of the identity and the tasks of the Monitoring Trustee.
38. For a period of 10 years from the Effective Date the Commission may request all information from the Parties that is reasonably necessary to monitor the effective implementation of these Commitments.

Replacement, discharge and reappointment of the Trustee

39. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a Conflict of Interest:
  - (a) the Commission may, after hearing the Trustee and the Notifying Party, require the Notifying Party to replace the Trustee; or
  - (b) the Notifying Party may, with the prior approval of the Commission, replace the Trustee.
40. If the Trustee is removed according to paragraph 39 of these Commitments, the Trustee may be required to continue in its function until a new Trustee is in place to whom the

Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 18 to 25 of these Commitments.

41. Unless removed according to paragraph 39 of these Commitments, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

#### **Section F. Fast track dispute resolution**

42. In the event that the Purchaser claims that the Notifying Party is failing to comply with its obligations arising from these Commitments, in particular the obligation to supply the relevant active ingredients and/or formulated products, as the case may be, at Direct Production Cost or wholesale price (as applicable) as referred to in paragraph 2(d) of the Schedule, the Purchaser may invoke the dispute settlement procedure described in this Section.
43. The Purchaser shall notify the Notifying Party and the Monitoring Trustee of its request in writing and specify the reasons why it believes that the Notifying Party is failing to comply with the Commitments. The Notifying Party shall use its best efforts to resolve all differences of opinion and to settle all disputes of which it has been notified through co-operation and consultation within a reasonable period of time not to exceed fifteen working days after receipt of the request.
44. The Monitoring Trustee shall present its own proposal for resolving the dispute within eight working days, specifying in writing the action, if any, to be taken by the Notifying Party to ensure compliance with the Commitments vis-à-vis the Purchaser, and be prepared, if requested, to facilitate the settlement of the dispute.
45. Should the Notifying Party and the Purchaser fail to resolve their differences of opinion through cooperation and consultation, the Purchaser may initiate the arbitration process described below. The arbitration process shall be used only to resolve disputes regarding compliance with the Commitments.
46. To initiate the arbitration process, the Purchaser shall give written notice to the Notifying Party nominating an arbitrator and stating the specific nature of the claim, the factual basis of its position and the relief requested. The Notifying Party shall appoint another arbitrator within 14 calendar days after receipt of the written notice. The arbitrators so appointed shall appoint a third arbitrator to be president of the arbitral tribunal within seven calendar days after both arbitrators have been nominated. Should the notifying Party fail to nominate an arbitrator, or if the two arbitrators fail to agree on the president, the default appointment(s) shall be made by the International Chamber of Commerce (“**ICC**”). The three-person arbitral tribunal shall herein be referred to as the “Arbitral Tribunal.”
47. The dispute shall be finally resolved by arbitration under the ICC Rules of Arbitration, with such modifications or adaptations as foreseen herein (the “Rules”). The arbitration shall be conducted in Paris, in the English language.

48. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as appropriate in the circumstances.
49. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the parties to the arbitration. Terms of reference shall be drawn up and signed by the parties to the arbitration and the Arbitral Tribunal at the organisational meeting or thereafter and a procedural timetable shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.
50. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Notifying Party and/or its Affiliated Undertakings or the Purchaser, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the parties to the arbitration agree.
51. The arbitrators shall agree in writing to keep any confidential information and business secrets disclosed to them in confidence. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Monitoring Trustee and outside counsel and experts of the opposing party.
52. The burden of proof in any dispute governed under the Rules shall be as follows:
  - (a) the Purchaser must produce evidence of a *prima facie* case;
  - (b) if the Purchaser does so, the Arbitral Tribunal must find in favour of the Purchaser unless the Notifying Party can produce evidence to the contrary.
53. The Commission shall be allowed and enabled to participate in all stages of the procedure by:
  - (a) receiving all written submissions (including documents and reports, etc.) made by the parties to the arbitration;
  - (b) receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the parties to the arbitration (including terms of reference and procedural timetable);
  - (c) filing any Commission amicus curiae briefs; and
  - (d) being present at the hearing(s) and being allowed to ask questions to parties, witnesses and experts.
54. The Arbitral Tribunal shall forward, or shall order the parties to the arbitration to forward, the documents mentioned to the Commission without delay.
55. In the event of disagreement between the parties to the arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal shall inform the Commission, and

may seek the Commission's interpretation of the Commitments before finding in favour of any party to the arbitration and shall be bound by the Commission's interpretation.

56. The Arbitral Tribunal shall decide the dispute on the basis of the Commitments and the Decision. The Commitments shall be construed in accordance with the Merger Regulation, EU law and general principles of law common to the legal orders of the Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.
57. Upon request of the third party, the Arbitral Tribunal may make a preliminary ruling on the dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.
58. The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by the Notifying Party to comply with the Commitments vis-à-vis the Purchaser (e.g., modify a supply contract pricing formula). The final award shall be final and binding on the parties to the arbitration and shall resolve the dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.
59. The final award shall, as a rule, be rendered within three months after the confirmation of the Arbitral Tribunal. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Commitments if asked by the Arbitral Tribunal.
60. The parties to the arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award.
61. Nothing in the above-described arbitration procedure shall affect the powers of the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation and the Treaty on the Functioning of the European Union.

#### **Section G. The review clause**

62. The Commission may extend the time periods foreseen in the Commitments in response to a request from the Notifying Party or, in appropriate cases, on its own initiative. Where the Notifying Party requests an extension of a time period, it shall submit a reasoned request to the Commission no later than one month before the expiry of that period, showing good cause. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. Only in exceptional circumstances shall the Notifying Party be entitled to request an extension within the last month of any period.
63. The Commission may further, in response to a reasoned request from the Notifying Party showing good cause waive, modify or substitute, in exceptional circumstances, one or

more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall, at the same time send a non-confidential copy of the report to the Notifying Party. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

**Section H. Entry into force**

64. The Commitments shall take effect upon the date of adoption of the Decision.

duly authorised for and on behalf of FMC Corporation

18 July 2017

## SCHEDULE

1. The Divestment Business as operated to date is part of the Notifying Party's overall crop protection business offering and does not currently operate as a standalone business or entity. As a result, the Divestment Business will be carved out of the Notifying Party's crop protection business.
2. In accordance with paragraph 6 of these Commitments, the Divestment Business is comprised of:
  - (a) The existing crop protection products as described in Table 1 and related assets outlined below which shall be marketed for sale by the Notifying Party as a single business and sold to a single purchaser. It shall include:
    - (i) the Notifying Party's crop protection product registrations in each EEA Member State where it holds such registrations for the formulated products listed in Table 1<sup>1</sup> and as described in **Annex 1 and Annex 6.1**, including an irrevocable, exclusive, transferable, royalty-free licence, including the right to sub-license, to obtain access to (including, to the extent legally permissible, to hard copies of), and to use any Divestment CP Product registration data (to the extent such rights are held by the divesting Party) required to support, maintain, develop and improve such product registrations in the EEA. Where the consent of third parties is required the Notifying Party will use its best efforts to ensure that the relevant consents are provided;
    - (ii) for Lead Active Ingredients, an irrevocable, exclusive, transferable royalty-free licence, including the right to sub-license, to obtain access to (including, to the extent legally permissible, to hard copies of), and to use any registration data owned at Closing (including studies launched or completed by Closing, technical information or data which are or may be necessary for supporting an application for a product registration, such as toxicology, residues or efficacy studies) by the Notifying Party, solely for the use and purpose of maintaining, supporting and renewing the EEA active ingredient registrations for these Lead Active Ingredients and maintaining, developing and improving the product registrations for any Divestment CP Product registration in the EEA based on these Lead Active Ingredients, as described more fully in **Annex 2 and Annex 6.2**. For the Lead Active Ingredients in **Annex 2 and Annex 6.2**, at the option of the Purchaser, the Notifying Party will use its (i) best efforts to enable the Purchaser to join (a) existing task forces to which the Notifying Party is a member (subject to third party consents) or (b) its own individual existing or future renewal efforts to the extent undertaken by the Notifying Party in its sole discretion or (ii) reasonable best efforts to enable the Purchaser to join future task forces to which the Notifying Party become a member, provided that, in all cases, the

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<sup>1</sup> Table 1 provides a non-exhaustive list of FMC Divestment CP Products.

Purchaser agrees to abide by the relevant terms and conditions of the applicable task force agreement and the standards that are applied by the Notifying Party in the ordinary course and pay its pro rata share of costs. The best efforts or reasonable best efforts, as the case may be, shall be limited to enabling the Purchaser to join existing or future task forces and/or the Notifying Party's own individual renewal efforts only up to the next EEA expiry date (as of Closing) of the approval of the relevant Lead Active Ingredient. If the Notifying Party chooses not to continue to be engaged in a Lead Active Ingredient task force of which it is currently a member, it will use its best effort to transfer its existing task force membership to the Purchaser provided that, in all cases, the Purchaser agrees to abide by the relevant terms and conditions of the applicable task force agreement and the standards that are applied by the Notifying Party in the ordinary course and pay its pro rata share of costs. Where the consent of third parties is required for the transfer of registration data of a Lead Active Ingredient to which the Notifying Party has rights, the Notifying Party will use its best efforts to ensure that the relevant consents are provided. For the avoidance of doubt, notwithstanding anything to the contrary in this Schedule, the Notifying Party shall retain the right to use such registration data to (i) support, maintain, develop and improve non-crop protection registrations in the EEA, and/or (ii) subject to paragraph 5 of the Commitments, support, maintain, develop and improve crop protection registrations in the EEA for the Notifying Party's crop protection mixtures.

<b>Table 1</b>	
Scope of Divestment (LAI = Lead Active Ingredient)	2016 Sales in the EEA
<ul style="list-style-type: none"> <li>• All rights held by FMC in the EEA to LAI metsulfuron-methyl</li> <li>• All FMC product registrations in the EEA for formulated post-emergence broadleaf cereal herbicide products with metsulfuron-methyl as the LAI:               <ul style="list-style-type: none"> <li>- Metsulfuron-methyl 200 WG</li> <li>- Metsulfuron-methyl 60 + diflufenican 600 WG</li> <li>- Metsulfuron-methyl 70 + thifensulfuron-methyl 680 WG</li> </ul> </li> </ul>	[...]
<ul style="list-style-type: none"> <li>• All rights held by FMC in the EEA to LAI thifensulfuron-methyl</li> <li>• All FMC product registrations in the EEA for formulated post-emergence broadleaf cereal herbicide products with thifensulfuron-methyl as the LAI:               <ul style="list-style-type: none"> <li>- Thifensulfuron-methyl 500 + tribenuron-methyl 250 WG</li> <li>- Thifensulfuron-methyl 500 + tribenuron-methyl 250 WG + florasulam 50 SC</li> </ul> </li> </ul>	[...]
<ul style="list-style-type: none"> <li>• All rights held by FMC in the EEA to LAI tribenuron-methyl</li> <li>• All FMC product registrations in the EEA for formulated crop protection products with tribenuron-methyl as the LAI:               <ul style="list-style-type: none"> <li>- Tribenuron-methyl 750 WG</li> <li>- Tribenuron-methyl 600 + florasulam 200 WG</li> </ul> </li> </ul>	[...]
<ul style="list-style-type: none"> <li>• All rights held by FMC in the EEA to LAI florasulam</li> <li>• All FMC product registrations in the EEA for formulated crop protection products with florasulam as the LAI:               <ul style="list-style-type: none"> <li>- Florasulam 50 SC</li> <li>- Florasulam 50 + diflufenican 500 SC</li> </ul> </li> </ul>	[...]

- (b) all intellectual property used by the Divestment Business, including the brand names and registered trademarks as described more fully in **Annex 1 and Annex 6.1** and know-how will be disposed as follows:
- (i) intellectual property used primarily by the Divestment Business in the EEA shall be transferred to the Purchaser with the Notifying Party or its Affiliated Undertakings retaining an exclusive, irrevocable, perpetual, royalty-free licence to use such intellectual property, including brand names, outside of the scope of the Divestment Business (e.g., non-crop protection products, crop protection products not included in the Divestment Business or outside the EEA); and
  - (ii) intellectual property also used by the Divestment Business, but used primarily by the Notifying Party or its Affiliated Undertakings in any part of the Parties' business which relates to any other products aside from the Divestment Business shall be retained by the Notifying Party or its Affiliated Undertakings and licensed to the Purchaser on an irrevocable, perpetual, royalty-free basis exclusively for use in the Divestment Business as required pursuant to these Commitments.
- (c) contracts with third party suppliers for the manufacture and sale of the products in the Divestment Business where applicable, manufactured in accordance with the product registrations transferred with the Divestment Business and if requested by the Purchaser, as described more fully in **Annex 3 and Annex 6.3**, subject to third parties' consent to the extent such consent is contractually required.
- (d) if requested by the Purchaser, the Divestment Business may also include for a period of up to [...] after Closing (such period may be further extended up to [...]), in consultation with the Commission and the Monitoring Trustee, if required to preserve the viability and competitiveness of the Divestment Business), agreements for the toll manufacture and supply by the Parties, at their respective Direct Production Costs, of the Divestment CP Products and/or Lead Active Ingredients in the Divestment Business, including such Secondary Active Ingredients as required to produce the Divestment CP Products, solely for sale in the EEA and manufactured in accordance with the quality specifications of the product registrations of the Divestment CP Products, to the extent such Divestment CP Products, Lead or Secondary Active Ingredients are manufactured by the Parties or their Affiliated Undertakings as of the Effective Date. Alternatively, where such Divestment CP Products, Lead or Secondary Active Ingredients are supplied to the Divestment Business as of the Effective Date by third party suppliers, the Parties shall use their best efforts to supply such Divestment CP Products, Lead or Secondary Active Ingredients through back-to-back supply agreements with such third parties at the wholesale price paid by the Notifying Party or its Affiliated Undertakings. Such products delivered to the Purchaser shall meet all quality requirements which would apply to the Notifying Party.
- (e) an irrevocable, transferable, royalty-free licence, excluding the right to sub-license, to obtain access to (including, to the extent legally permissible, to hard



copies of), and to use the registration data (to the extent held by the divesting Party) relating to the Secondary Active Ingredients included in the Divestment Business, to support, maintain, develop and improve crop protection product registrations in the EEA for products included in the Divestment Business. For the avoidance of doubt, if the Notifying Party decides not to renew and/or not support the renewal of any of the Secondary Active Ingredients included in the Divestment Business in the EEA, the Notifying Party shall give written notice to the Purchaser within two weeks from its decision not to renew and/or support the renewal of any such Secondary Active Ingredient in the EEA to allow the Purchaser to undertake the renewal of such Secondary Active Ingredient.

- (f) in so far as Secondary Active Ingredients are concerned, at the option of the Purchaser, the Notifying Party will use its (i) best efforts to enable the Purchaser to join (a) existing task forces to which the Notifying Party is a member (subject to third party consents) or (b) the Notifying Party's own individual existing or future renewal efforts to the extent undertaken by the Notifying Party in its sole discretion or (ii) reasonable best efforts to enable the Purchaser to join future task forces to which the Notifying Party becomes a member, provided that, in all cases, the Notifying Party agrees to abide by the relevant terms and conditions of the applicable task force agreement and the standards that are applied by the Notifying Party in the ordinary course, and pay its pro rata share of costs. The best efforts or reasonable best efforts, as the case may be, shall be limited to enabling the Purchaser to join existing or future task forces and/or the Notifying Party's own individual renewal efforts only up to the next EEA expiry date (as of Closing) of the approval of the relevant Secondary Active Ingredients.
- (g) EEA customer lists and other records for each product in the Divestment Business, as described more fully in **Annex 4 and Annex 6.4**. For the avoidance of doubt, other records in the preceding sentence shall mean financial records available electronically including pricing, volume, incentive, payment, credit and rebate information for the past five years.
- (h) inventory for sale in the EEA, including in-progress mixtures and formulations, packaging, supplies and material to the extent such exist, are required by the Purchaser and is commercially and technically feasible, together with authorisation for the Purchaser(s) to use any brand names displayed on such packaging for the purpose of selling the inventory, for a period of [...].
- (i) arrangements for the supply of transitional services at Direct Production Cost, if requested by the Purchaser, by the Notifying Party or Affiliated Undertakings for a transitional period of [...] after Closing (such period may be further extended up to [...], in consultation with the Commission and the Monitoring Trustee, if required to preserve the viability and competitiveness of the Divestment Business). For the avoidance of doubt, such transitional services may include technical assistance in relation to the manufacture, by the Purchaser, of the Divestment CP Products and/or Lead Active Ingredients in the Divestment Business and/or assistance of technical or regulatory personnel in relation to the support, maintenance, development and improvement of the registrations included in the Divestment Business.

3. The Divestment Business shall not include:
  - (a) Any part of the Parties' crop protection business which relates to any other products aside from the Divestment Business;
  - (b) Any assignment under an agreement with third parties where the Notifying Party's relationship is not governed by a specific agreement;
  - (c) Production plants, sales offices or other physical plants;
  - (d) Personnel (save as provided for at paragraph 5 below);
  - (e) Any products manufactured for sale outside the EEA that are the same or substantially the same as any of the Divestment CP Products, including any registration rights for such products and any know-how, intangible assets and brand names used primarily for such products; and
  - (f) Any assets in the DuPont Divestment Business to be acquired by FMC including without limitation any assets related to sulfonylurea herbicide products in the DuPont Divestment Business.
4. For the avoidance of doubt, any intangible assets that are also used outside of the scope of the Divestment Business (i.e., non-crop protection products or outside the EEA) will be licensed to the Purchaser on a royalty-free basis exclusively for the Divestment Business as required pursuant to these Commitments, but will not be transferred to the Purchaser.
5. At the option of the Purchaser, the Divestment Business will include the Personnel who would reasonably be considered necessary to maintain the viability, marketability and competitiveness of the Divestment Business [...]. The exercise of such option shall be supervised by the Monitoring Trustee and subject to applicable local employment legislation.
6. For any or all of the assets listed in **Annex 5 and Annex 6.5** of the Schedule, which identifies all of the Lead Active Ingredients and Divestment CP Products which require third party consents to be transferred, the Parties shall obtain such consents and supply them to the Commission as part of the Notifying Party's reasoned submission for the Purchaser approval.
7. If there is any asset that is not covered by paragraph 2 of this Schedule but that is both used (exclusively or not) by the Divestment Business and is necessary for the continued viability and competitiveness of the Divestment Business, that asset or an adequate substitute will be offered to potential Purchasers either outright for sale if such asset or adequate substitute is used exclusively by the Divestment Business or by way of an irrevocable, exclusive, transferable, royalty-free licence, including the right to sub-license if such asset or adequate substitute is used by both the Divestment Business and the Notifying Party's retained businesses.

## ANNEXES

Annex 1	[...]
Annex 2	[...]
Annex 3	[...]
Annex 4	[...]
Annex 5	[...]
Annex 6.1	[...]
Annex 6.2	[...]
Annex 6.3	[...]
Annex 6.4	[...]
Annex 6.5	[...]