



EUROPEAN COMMISSION  
DG Competition

***Case M.8084 – BAYER / MONSANTO***

Only the English text is available and authentic.

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

---

Decision on the implementation of the commitments -  
Purchaser approval  
Date: 29.05.2018



## EUROPEAN COMMISSION

Brussels, 29.05.2018  
C(2018) 3557 final

### PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Bayer Aktiengesellschaft  
Kaiser-Wilhelm-Allee  
51368 Leverkusen  
Germany

Dear Sir/Madam,

**Subject: Case M.8084 – Bayer/Monsanto**  
**Approval of BASF as purchaser of the BASF Divestment Package and the Vegetable Seeds Divestment Business, following your letter of 28 May 2018 and the Trustee's opinion of 28 May 2018**

#### **I. FACTS AND PROCEDURE**

##### **I.1. Commitments annexed to the Commission decision of 21 March 2018**

1. By decision of 21 March 2018 (the 'Decision') based on Article 8(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings<sup>1</sup> (the 'Merger Regulation'), the Commission declared the concentration whereby Bayer Aktiengesellschaft ('Bayer') acquires control of the whole of Monsanto Company ('Monsanto' and, together with Bayer, the 'Parties') within the meaning of Article 3(1)(b) of the Merger Regulation (the 'Transaction'), compatible with the internal market subject to full compliance with the

---

<sup>1</sup> OJ L 24, 29.01.2004, p. 1. 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.

commitments submitted by the Parties and which were annexed to the Decision (the 'First Commitments').

2. The First Commitments provided that in order to address all concerns identified by the Commission, Bayer would divest two divestment packages: (i) the 'BASF Divestment Package' and (ii) the 'Vegetable Seeds Divestment Business' (together the 'Divestment Businesses'), which are described below.
3. The BASF Divestment Package includes the following businesses and assets:
  - a. The 'Broad Acre Divestment Businesses', comprising Bayer's entire global broad acre crop seeds and traits business, subject to certain limited carve-outs;
  - b. The 'GA Divestment Business' and the 'Glyphosate Assets', comprising respectively Bayer's entire global glufosinate ammonium business and Bayer's agricultural and non-agricultural glyphosate-based products in the EEA;
  - c. The 'NemaStrike Assets', comprising Monsanto's worldwide patents, trademarks and copyrights exclusive to NemaStrike as well as all know-how specific to NemaStrike and NemaStrike application;
  - d. The '[NSH line of research 3], [NSH line of research 1] and SPH Data Transfers and Licences', comprising the transfer of data and know-how from field trials and exclusive licences to the Bayer IP rights and know-how relating to three Bayer lines of research ([NSH line of research 3], [NSH line of research 1] and [NSH line of research 2] class herbicide chemistries) for all non-commercial and commercial applications in the field of non-selective uses;
  - e. The 'Digital Agriculture Licence', comprising a binding, perpetual, irrevocable and sole licence for the use on a worldwide basis of the code, data and algorithms for the entirety of Bayer Digital Farming's global portfolio as well as the entirety of Bayer's global digital agriculture pipeline for projects which qualify as alpha projects or are more advanced.
4. The Vegetable Seeds Divestment Business consists of Bayer's global vegetable seeds business, without carve-outs.

## **I.2. Modification of the First Commitments accepted by Commission Decision of 11 April 2018**

5. On 4 April 2018, Bayer submitted a reasoned request to modify the First Commitments relating to the NemaStrike Assets and the Digital Agriculture Licence, pursuant to clause 94 of the First Commitments and paragraph 23 of the Schedule to the First Commitments. On 6 April 2018, Bayer submitted a revised reasoned request (the 'Reasoned Request'). In the Reasoned Request, Bayer requested to modify the First Commitments, as follows:
  - a. To replace the divestment of the NemaStrike Assets with the global divestment of Bayer's Poncho, Poncho/VOTiVO, Poncho/VOTiVO 2.0, IleVO, and COPeO global seed treatment businesses (the 'Seed Treatment Assets');

- b. To replace the Digital Agriculture Licence with a full divestment to BASF of the same assets, with a limited licence back to Bayer (the 'Digital Agriculture Assets').
6. In its decision dated 11 April 2018, the Commission accepted the modification of the First Commitments requested by Bayer because it found that the divestiture of the Seed Treatment Assets and the Digital Agriculture Assets was at least as effective as the First Commitments in remedying the Commission's concerns in the relevant areas.<sup>2</sup> The First Commitments as amended following the Commission's decision of 11 April 2018 are hereinafter referred to as the 'Commitments'.<sup>3</sup>

### **I.3. Proposal of a purchaser**

7. By letter of 26 April 2018 to the Commission, as amended on 28 May 2018, Bayer proposed BASF for approval as a purchaser of the BASF Divestment Package, as amended, and of the Vegetable Seeds Divestment Business (the 'Reasoned Proposal') and submitted the proposed transaction agreements and related agreements (the 'Proposed Agreements'), which were eventually entered into on 17 and 23 April 2018 (the 'Transaction').
8. Pursuant to clause 58 of the Commitments, on 28 May 2018, the trustee monitoring the implementation of the Commitments, Mazars LLP (the 'Trustee'), separately submitted an assessment of BASF's suitability as the purchaser of the BASF Divestment Package, as amended, and of the Vegetable Seeds Divestment Business (the 'Reasoned Opinion') and, in particular, indicated that it fulfils the purchaser requirements set out in clauses 26 and 27 of the Commitments. In its assessment, the Trustee also indicated that, on the basis of the Proposed Agreements, the BASF Divestment Package, as amended, and the Vegetable Seeds Divestment Business would be sold in a manner consistent with the Commitments.
9. The acquisition of the BASF Divestment Package and of the Vegetable Seeds Divestment Business by BASF was separately notified to the Commission on 7 March 2018 and subsequently cleared subject to conditions and obligations (the 'BASF Commitments') by decision of 30 April 2018.<sup>4</sup>

---

<sup>2</sup> Commission Decision of 11.4.2018 amending commitments in Case M.8084 – Bayer/Monsanto, C(2018) 2208 final.

<sup>3</sup> The First Commitments, as amended following the Commission's decision of 11 April 2018, include assets from Bayer only. They are therefore submitted by Bayer only.

<sup>4</sup> Commission Decision in Case M.8851 – BASF/Bayer Divestment Business (2018).

## **II. ASSESSMENT OF THE PROPOSALS**

### **II.1. The BASF Divestment Package**

#### **II.1.1. Legal framework**

10. Pursuant to clause 28 of the Commitments, in order to approve BASF as a purchaser of the BASF Divestment Package, the Commission has to verify that BASF fulfils the purchaser criteria set in clause 26 of the Commitments and that the BASF Divestment Package is sold in a manner consistent with the Commitments. In particular, the Commission must ensure that:
  - a. BASF is independent of and unconnected to Bayer and its affiliated undertakings;
  - b. BASF has the financial resources, proven expertise and incentive to maintain and develop the BASF Divestment Package as a viable and active competitive force in competition with the Parties and other competitors;
  - c. The acquisition of the BASF Divestment Package by BASF 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, BASF must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the BASF Divestment Package;
  - d. BASF has all required assets and employees to support the BASF Divestment Package, particularly (but not exclusively) those elements which are not being sold as standalone businesses.

#### **II.1.2. Description of the proposed purchaser**

11. BASF is a publicly traded company headquartered in Germany. BASF is listed on the German Stock Exchange in Frankfurt, the London Stock Exchange in London and the Swiss Stock Exchange in Zurich.
12. BASF is active worldwide in more than 80 countries. Its business is divided into five segments: chemicals (for instance petrochemicals and intermediates), performance products (for instance dispersion products and pigments), functional materials and solutions (for instance construction chemicals and coatings), oil & gas, and agricultural solutions.
13. In terms of agricultural solutions, BASF is active in the crop protection sector, where it produces fungicides, insecticides and herbicides that can be used to protect a variety of crops (for instance cereals, corn, oilseed rape and rice). Moreover, BASF is active in the discovery of new genes underlying traits, and licenses to several seed companies including Monsanto two non-genetically modified traits that confer tolerance to certain herbicides in various broad acre crops. BASF does

not produce or sell seeds, but it is involved in the seed industry through its supply of seed treatment products (mainly fungicide-based).<sup>5</sup>

### II.1.3. Independence from Bayer

14. Pursuant to clause 26 (a) of the Commitments, in order to be approved by the Commission, BASF must be independent of and unconnected to Bayer and its affiliated undertakings.
15. According to the information provided by Bayer, Monsanto and BASF, there are no joint-ventures in which Bayer or Monsanto, on the one hand, and BASF, on the other hand, participate. Moreover, Bayer and Monsanto do not share executive or non-executive directors with BASF.
16. BASF has active commercial<sup>6</sup> and R&D<sup>7</sup> collaborations with Bayer, but the magnitude of these collaborations is relatively small. In 2017, the global revenues from the agreements amounted to EUR [...] for Bayer,<sup>8</sup> and to EUR [...] for BASF,<sup>9</sup> which represent, respectively, less than 0.1% of 2017 Bayer's revenues, and less than 0.15% of 2017 BASF's revenues. Therefore, it is not likely that the magnitude of these agreements can undermine BASF's independence from Bayer and its affiliates. In addition, most of the supply agreements concern non-strategic products for which other suppliers are available. With respect to the R&D collaborations between Bayer and BASF, none of these appear to be particularly strategic or unique for both Bayer and BASF, and appear to be limited to R&D studies aimed at sharing costs of activities with limited strategic and commercial interest.<sup>10</sup> Therefore, the Commission considers that BASF's independence from Bayer is not undermined as a result of these R&D collaborations, and BASF can be considered to be independent of and unconnected to Bayer.
17. BASF has active commercial and R&D collaborations with Monsanto, for example the pre-existing Yield and Stress R&D collaboration and the dicamba commercial agreements.<sup>11</sup> However, the Commission considers that the nature and magnitude of these collaborations do not undermine BASF's independence from Monsanto. For example, BASF estimates that in 2018 the revenues from dicamba for use over-the-top<sup>12</sup> will exceed USD [...],<sup>13</sup> representing [...] % of 2017 BASF's revenues. Although these revenues are not negligible, their magnitude is relatively small, compared to BASF's total revenues and do not undermine its independence from

---

<sup>5</sup> For the link between BASF's global trait discovery and licensing activities and the seed industry see Commission Decision in Case M.8851 – BASF/Bayer Divestment Business (2018), Section 4.2.2.1.

<sup>6</sup> [...].

<sup>7</sup> The list of cooperation agreements between Bayer and BASF are reported in the Reasoned Opinion, paragraph 177 and figure 11, and they mainly concern [...].

<sup>8</sup> Reasoned Opinion, paragraph 297(iv).

<sup>9</sup> Reasoned Opinion, paragraph 294(vi).

<sup>10</sup> Reasoned Opinion, paragraphs 177 and figure 11 list collaborations on, for example, [...].

<sup>11</sup> Dicamba is a herbicide used in Monsanto's weed management system Xtend, as described in Section II.1.4.3(A). The Yield & Stress cooperation between BASF and Monsanto concerns the development of crop efficiency traits. Some details of these two collaborations are provided in Commission Decision in case M.8851 – BASF/Bayer Divestment Business (2018), recitals 129 and 132b.

<sup>12</sup> Revenues from use over-the-top are connected to Monsanto's sales of the dicamba-tolerance trait, as explained in Section II.1.4.3 A.

<sup>13</sup> BASF's response to the Commission's M.8851 request for information RFI 19, [Annex Q.2.1].

Monsanto. The implications of this collaboration in terms of incentives to compete with Monsanto are assessed in Section II.1.4.3. Therefore, the Commission considers that BASF can be considered to be independent of and unconnected to Monsanto.

18. The Trustee considers that pre-existing commercial relationships in place between Bayer and BASF are relatively small in magnitude. It also notes that Bayer's supply agreements to BASF have their duration limited to [...] years,<sup>14</sup> while BASF's supply agreements to Bayer are immaterial.<sup>15</sup> It also notes that for most of the supply agreements, alternative suppliers are available.<sup>16</sup>
19. With respect to sales between Monsanto and BASF, the Trustee notes that sales from BASF to Monsanto are small in magnitude,<sup>17</sup> and confirms that the [...] collaboration agreements, [...] do not undermine BASF's independence from Monsanto.<sup>18</sup>
20. The Commission has also investigated whether the common shareholdings across the main agrochemical and biotech companies would impair BASF's independence compared to the situation that characterised Bayer absent the Transaction.
21. As noted in the Decision, the aim of the BASF Divestment Businesses is to ensure that the products and pipeline projects contained are transferred to an independent player having the incentives to develop and commercialise these products in a way that replicates the role of Bayer in the market absent the Transaction.<sup>19</sup>
22. In this respect, the Commission notes that, pre-Transaction, Bayer, is a player characterised by certain shareholders that are common with Monsanto. However, the Commission notes that the level of common shareholdings between BASF and Bayer/Monsanto post-Transaction is not materially different from the level of common shareholdings between Bayer and Monsanto pre-Transaction. Similarly, the level of common shareholdings between Bayer and DowDuPont pre-Transaction is similar to the level of common shareholdings between BASF and DowDuPont post-Transaction.<sup>20</sup>
23. In addition, in light of the already concentrated level of certain relevant markets, the transfer of the Divestment Businesses to BASF ensures that the number of independent competitors is preserved by the remedy in each of the markets where a significant impediment to effective competition has been identified by the Decision.
24. As a consequence, the Commission considers that the existence of common shareholdings does not undermine in this context the suitability of BASF as a purchaser of the Divestment Businesses.

---

<sup>14</sup> Reasoned Opinion, paragraph 182.

<sup>15</sup> Reasoned Opinion, paragraph 184.

<sup>16</sup> Reasoned Opinion, paragraphs 182 and 185.

<sup>17</sup> Reasoned Opinion, paragraphs 205, 207, 211.

<sup>18</sup> Reasoned Opinion, Section 4.4.2.3.

<sup>19</sup> Commission Decision in Case M.8084 – Bayer/Monsanto (2018), recitals 3303-3306.

<sup>20</sup> Commission Decision in Case M.8084 – Bayer/Monsanto (2018), Table 5.

25. In its Reasoned Opinion, the Trustee considers that common shareholders do not undermine the independence of BASF from Bayer and Monsanto because the individual stakes by common shareholders are likely to be minimal<sup>21</sup> and are unlikely to provide an individual with positive or negative control over either entity.<sup>22</sup>
26. On the basis of the above considerations and the information provided by the Parties and BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission considers that BASF is independent of and unconnected to Bayer and its affiliated undertakings.

#### **II.1.4. Financial resources, proven expertise and incentive to maintain and develop the BASF Divestment Package as a viable and active competitor**

27. Pursuant to clause 26 (b) of the Commitments, in order to be approved by the Commission as a purchaser, BASF must have the financial resources, proven expertise and incentive to maintain and develop the BASF Divestment Package as a viable and active competitive force in competition with the Parties and other competitors.

##### **II.1.4.1. Financial resources**

28. In terms of financial resources, BASF had sales of approximately EUR 64.5 billion and generated EBIDTA of approximately EUR 12.7 billion in 2017. From 2013 to 2017, BASF has performed relatively consistently in terms of profitability. As of 31 December 2017, BASF had a cash reserve of EUR 6.5 billion. In 2017, BASF issued bonds in various currencies, with an aggregate carrying amount of EUR 4.9 billion as of 31 December 2017. Moreover, BASF has access to a USD 12.5 billion commercial paper program and an unused credit line for EUR 6 billion.
29. BASF would finance the purchase of the BASF Divestment Package and the Vegetable Seeds Divestment Business through a combination of cash, commercial papers and bonds. In this respect, the Trustee notes that *'[k]ey ratios such as net debt to EBITDA and net debt to market capitalisation indicate a healthy business and funding'* and that *'net debt to EBITDA ratio is relatively low and is expected to be about [...] after the acquisitions. Also the net debt to market capitalisation is expected to be about [...] based on the net debt as at 31 December 2018, purchase prices of in total EUR [...] billion and the market capitalisation as at 31 March 2018'*.<sup>23</sup> Moreover, the Trustee points out that *'BASF is rated by Moody's, Standard & Poor's and Scope Ratings at 'A1', 'A', and 'A', respectively'* and that *'all ratings have been confirmed after the announcement of the acquisition of Bayer's seed and non-selective herbicide business and the outlook is stable'*.<sup>24</sup>

---

<sup>21</sup> BlackRock is the shareholder with highest shares of both Bayer and BASF and holds, respectively, [5-10]% of Bayer's shares and [5-10]% of BASF's shares. Vanguard Group is the second largest common shareholder and owns [0-5]% of Bayer's shares and [0-5]% of BASF's shares (Reasoned Opinion, Figures 8 and 10).

<sup>22</sup> Reasoned Opinion, paragraph 126.

<sup>23</sup> Reasoned Opinion, paragraph 14.

<sup>24</sup> Reasoned Opinion, paragraph 15.



30. The Trustee considers that BASF has the financial resources to maintain and develop the BASF Divestment Package and the Vegetable Seeds Divestment Business as viable and active competitive forces in competition with the Parties and other competitors.

#### **II.1.4.2. Proven expertise**

31. In terms of proven expertise, BASF is already active both in the crop protection and trait industries. In the crop protection industry, BASF is an established player, which produces fungicides, insecticides and herbicides used in various crops. In the trait industry, BASF is active in trait discovery. BASF currently commercialises two trait technologies, which consist of non-genetically modified traits that confer tolerance to certain herbicides in various broad acre crops.
32. BASF has significant experience in acquiring and integrating businesses in the agrochemical sector. For example, BASF acquired Becker Underwood, a company active in the crop protection, gardening products and animal nutrition sectors, in 2012 and, based on the information provided by BASF, this business has been successfully integrated and developed. This success is evidenced by [...].<sup>25</sup>
33. The Trustee considers that BASF has the know-how, expertise and resources to successfully integrate the Divestment Businesses. It considers that BASF is appropriately positioned to acquire the businesses and highlights BASF's significant experience in acquiring complex assets in the agricultural solutions space and other lines of business. It also points out that BASF has put in place a post-merger audit system to measure the post-closing integration efforts and to make sure that the integration produces the desired results for all major acquisition and divestiture transactions. The Trustee considers that this system represents a stable framework to continuously monitor and streamline the integration of businesses, identify and tackle challenges and to unlock cost and portfolio synergies.<sup>26</sup>

#### **II.1.4.3. Incentive**

34. BASF plans to integrate the BASF Divestment Package into its agricultural solutions business segment, which is currently active in crop protection and to a certain extent in trait discovery and development. BASF does not currently offer broad acre crop seeds. The Trustee points out that BASF considers the Transaction to be strategic and to be beneficial from a long-term profit perspective.<sup>27</sup>
35. The Trustee considers that the Transaction would enable BASF to combine its existing crop protection portfolio with a complementary business which includes non-selective herbicides and certain broad acre crop seeds, two areas in which BASF has no significant presence. Moreover, through the Transaction, BASF would become a globally integrated crop protection, seed and trait player. This would allow BASF to compete with Bayer-Monsanto and other players, including in particular DowDuPont and ChemChina-Syngenta, at a global level.

---

<sup>25</sup> Reasoned Opinion, paragraph 391.

<sup>26</sup> Reasoned Opinion, paragraph 415.

<sup>27</sup> Reasoned Opinion, Section 6.2.7.

36. The Commission assessed BASF's incentives to compete with the combined Bayer-Monsanto. It focused in particular on whether such incentives could be negatively influenced by: (i) BASF's existing business, in particular its dicamba business in relation to which BASF has a commercial agreement with Monsanto; and (ii) the enablement measures that BASF has negotiated with the Parties, which are aimed at strengthening the business it would purchase from Bayer.

(A) Dicamba

37. Since 2007, BASF and Monsanto have entered into a number of agreements to collaborate on the development and commercialisation of a weed management system for dicamba tolerance ('DT') in corn, soy, cotton and OSR. In 2016, Monsanto launched the first seeds containing the DT trait under the brand 'Xtend'. Xtend is currently commercialised by Monsanto and its licensees in cotton (the trait is commercialised under the brand 'Xtendflex') and soybean seeds (under the brand 'RR2 Xtend'). Both the Xtendflex and RR2 Xtend herbicide tolerance ('HT') traits are currently licensed to seed companies in Canada and in the United States, not in the EEA.
38. [Commercial arrangements]<sup>28</sup>.
39. Monsanto has [...] to commercialise the Xtend trait. However, [...]. Therefore, due to the dicamba collaboration, BASF has a financial interest in the commercial success of Monsanto's Xtend system. The Commission assessed whether post-Transaction such financial interest could negatively affect BASF's incentives to compete with Monsanto using the BASF Divestment Package's current and future HT traits<sup>29</sup> and the associated crop protection products.<sup>30</sup>
40. More specifically, the Commission investigated whether the financial interest held by BASF in relation to Monsanto's Xtend is likely to create an incentive for BASF to (i) discontinue current products or products currently in the discovery or development pipeline that are included in the BASF Divestment Package (in particular, the Broad Acre Divestment Businesses), and/or (ii) apply prices for those existing products that are materially different from those that would have been applied by Bayer absent the Transaction.

---

<sup>28</sup> Monsanto sells a low-volatility dicamba formulation for use with Xtend traired crops, called 'XtendiMax', which was launched in 2016. Similarly, BASF launched its own low-volatility dicamba formulation under the brand name 'Engenia'.

<sup>29</sup> The HT traits or stacks concerned are (i) LibertyLink (providing tolerance to glufosinate ammonium) for soybean, corn, cotton and OSR; (ii) Balance GT (providing tolerance to glyphosate and isoxaflutole) and MGI (providing tolerance to mesotrione, glufosinate and isoxaflutole) for soybean; (iii) GlyTol-containing stacks (GlyTol provides tolerance to glyphosate) for cotton; (iv) HT traits in early development, such as [...].

<sup>30</sup> The concerned herbicides are: (i) glufosinate for soybean, corn, cotton and OSR; (ii) isoxaflutole for soybean; and (iii) herbicides in early development to be used in combination with the mentioned traits, such as [...].

41. The Commission focused its assessment on soybean as this is, amongst the crops that are part of the Broad Acre Divestment Businesses (corn, soybean, cotton and OSR), [business secret].<sup>31</sup>
42. Overall, as set out in the following recitals, the Commission's investigation indicates that the profit generated by BASF from its cooperation with Monsanto relating to dicamba and DT traits is not sufficient to negatively affect BASF's incentives to compete on the market using the HT traits and chemistries of the Broad Acre Divestment Businesses.
43. As regards the risk of discontinuation of current products and research projects, BASF submitted a financial model of BASF's profits generated from traits, seeds and chemistries in the United States soybean market over the period 2018-2043.<sup>32</sup> [...]. The model reports the net present value ('NPV') of BASF's relevant portfolio in case of discontinuation of one of the current products (for instance Liberty Link / Balance GT) or current research projects (for instance Bayer's ongoing research on [...]). In BASF's view, the model shows that BASF is unlikely to discontinue any of the HT traits that Bayer was either developing or already commercialising pre-Transaction.
44. The Commission reviewed BASF's model, its assumptions and calculations, and considers that on balance the model and supporting evidence show that indeed BASF is unlikely to discontinue any of the HT traits that Bayer was either developing or already commercialising pre-Transaction.<sup>33</sup> The NPV of BASF's profits in the discontinuation scenarios considered is smaller than the NPV from the main scenario in which BASF would retain all the current products in the Broad Acre Divestment Businesses and would bring to the market those that are currently in the research and development pipeline. This is because in case BASF were to discontinue one of the current or pipeline products in the Broad Acre Divestment Businesses, it would lose considerable sales to competitors (Monsanto, DowDuPont for instance) and the sales revenues recaptured by BASF's interest in dicamba would not be sufficient to offset the loss.
45. The Commission also considered whether, in light of its financial interest in Monsanto's Xtend, BASF would have post-Transaction an incentive to materially increase the prices of the BASF Divestment Package's HT traits, seeds and related chemistries. In the event of a price increase by BASF on the products in the Broad Acre Divestment Businesses, a number of customers would be expected to divert to BASF's rivals (e.g. Monsanto and DowDuPont). However, on each of the customers diverted to Monsanto's Xtend, BASF recoups [...]. This may in principle provide an incentive for BASF to price less aggressively as regards the HT traits from the BASF Divestment Package compared to what Bayer would have done, given that Bayer would not be able to recoup a part of the profits lost to Monsanto's Xtend.

---

<sup>31</sup> BASF's response to the Commission's request for information RFI Q32, question 21 (notably file 'M8084 - EC RFI 32 - Annex Q.21.1 - 01 - Annex 2\_1\_18.xlsx ', sheet 'Direct sales18-28 absent remedy').

<sup>32</sup> BASF's submission (prepared by Compass Lexecon) entitled 'Analysis of BASF's incentives as regards to herbicides and herbicide tolerance traits', dated 13 March 2018.

<sup>33</sup> BASF's submission entitled 'Analysis of BASF's incentives as regards to herbicides and herbicide tolerance traits', dated 13 March 2018, paragraphs 1.3 and 1.4.

46. The Commission considers that BASF's incentive to increase these prices (compared to what Bayer would have done absent the Transaction) depends on (i) the closeness of competition between BASF's own products and Monsanto's Xtend and (ii) the size of the margin that BASF earns on each acre of soybean in the United States that is covered with Xtend and which Bayer would not have earned pre-Transaction.
47. As regards closeness of competition, the Commission considers that the products of the BASF Divestment Package (especially Liberty Link and Liberty Link / Balance GT) compete closely with Monsanto's Xtend.<sup>34</sup> Therefore, for a given amount of customers leaving BASF in the event of a price increase, the Commission expects that a relatively large share of these customers would be diverted to Monsanto's Xtend (the other main option being DowDuPont's Enlist).
48. However, the Commission also looked in detail into the size of the financial interest of BASF in Monsanto's Xtend and concluded that the margin earned by BASF from [...] is relatively small and only represents a minor fraction<sup>35</sup> of the full profits that BASF would earn through the sales of Liberty Link or Liberty Link / Balance GT traited seeds and related chemistries, which it will acquire via the Broad Acre Divestment Businesses.
49. Based on the above, despite the closeness between the products of the Broad Acre Divestment Businesses and Monsanto's Xtend, the Commission considers that the small financial interest held by BASF in relation to Monsanto's Xtend is not sufficient to materially affect BASF's incentives to compete against Monsanto using the products of the BASF Divestment Package.
50. Moreover, and in any event, post-Transaction BASF will have limited power to control the price of some HT traits because third parties are involved in deciding the trait price (parties with no interest in dicamba and who could incur a loss in case of an increase in the price of the products in the Broad Acre Divestment Business). This is the case for Liberty Link / Balance GT and MGI<sup>36</sup>, which have been co-developed with, respectively, MS Technology and ChemChina-Syngenta. For these two stacks, BASF post-Transaction would have input into, but not sole control over, pricing. Additionally, some trait royalties are based on long-term agreements with the licensees. For example, in the case of [...]. Therefore, for certain components of its products, BASF is unlikely to be able to materially increase prices against the interests of its partners and within the constraints of its long term contracts.
51. The Trustee has also analysed whether BASF's incentive to compete with Bayer and Monsanto could be negatively affected by its financial interest in the dicamba herbicide and DT trait.<sup>37</sup> The Trustee concludes that BASF post-Transaction would

---

<sup>34</sup> Commission Decision in Case M.8084 – Bayer/Monsanto (2018), recitals 976-981.

<sup>35</sup> According to the Commission's calculations based on the data contained in the model submitted by BASF, the margin earned by BASF [...] from [...] correspond to circa [...] of the full margin earned by BASF on the sales of seeds containing the Liberty link / Balance GT trait and from the related chemistries.

<sup>36</sup> According to the model submitted by BASF, Liberty Link/Balance GT and MGI are expected to account [...] of the revenues from traits of the Broad Acre Divestment Businesses (the remainder being Liberty Link).

<sup>37</sup> Reasoned Opinion, Section 6.2.6.

not have an incentive to discontinue any of the current or pipeline products in the Broad Acre Divestment Businesses.

52. The Trustee also concludes that BASF would have very limited incentive to increase BASF Divestment Package trait fees. In addition, the Trustee notes that BASF has very limited ability to increase BASF Divestment Package trait fees because [...].<sup>38</sup>

(B) Enablement measures

53. BASF entered into a number of agreements with the Parties with the main objective of expanding and diversifying the BASF Divestment Package's range of products in [crop 3] and [crop 1]. [...].
54. In this section, the Commission only assesses the potential impact of these agreements on BASF's incentives to maintain and develop the BASF Divestment Package as a viable and active competitive force in competition with the Parties and other competitors. This assessment is not an assessment of the legality of these agreements under EU competition law.
55. The Commission investigated whether these links between BASF and the Parties would materially adversely affect BASF's incentives to compete with the Parties post-Transaction, compared to the incentives that Bayer had to compete with Monsanto pre-Transaction.
56. The agreements can be grouped into four categories: (i) access to some [...]<sup>39</sup> [...]<sup>40</sup> traits for [crop 3] and [crop 1]; (ii) access to [...];<sup>41</sup> (iii) access to some [crop 3] varieties;<sup>42</sup> and (iv) access to some [crop 1] varieties.<sup>43</sup>
57. With respect to **access to [...] traits for [crop 3] and [crop 1]**, all the agreements were already in place between Bayer and Monsanto pre-Transaction, with the exception of the [...] trait for [crop 1]. As documented in the Bayer/Monsanto Decision, licensing traits either for stacking or for introgression as single traits is a common practice in the seeds and traits industry.<sup>44</sup> Moreover, the terms negotiated by BASF with the Parties appear to be in line with those negotiated by the Parties with other third parties pre-Transaction. Therefore, these agreements do not change the situation existing pre-Transaction, in terms of incentives to compete with Monsanto.
58. Regarding [...], the agreements between BASF and the Parties do not create links between BASF and the Parties because [...].<sup>45</sup>

---

<sup>38</sup> [...].

<sup>39</sup> [...].

<sup>40</sup> [...].

<sup>41</sup> [Commercial arrangements].

<sup>42</sup> [Commercial arrangements].

<sup>43</sup> [Commercial arrangements].

<sup>44</sup> This is documented, for example, in Bayer/Monsanto Decision, recitals 157, 876, and in the entire Section X.

<sup>45</sup> Reasoned Opinion, paragraph 291.

59. Regarding access to [crop 3] and [crop 1] varieties, these agreements have a limited timeframe [...] and have the final objective of allowing BASF to gain market share in regions where Bayer does not have market presence pre-Transaction until its proprietary varieties reach a level of maturity suitable for better competing in these regions. BASF submitted that both the [crop 1] and the [crop 3] businesses of the BASF Divestment Package are not in a favourable market position for growing in the next years.<sup>46</sup>
60. The Trustee considers that these agreements are consistent with the Parties' intention of expanding and diversifying the BASF Divestment Package's range of products in [crop 3] and [crop 1],<sup>47</sup> and do not decrease BASF's incentives to compete with the Parties.<sup>48</sup>

#### **II.1.4.4. Conclusion on financial resources, proven expertise and incentives to maintain and develop the BASF Divestment Package as a viable and active competitor**

61. On the basis of the above considerations and the information provided by the Parties and BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that BASF has sufficient financial resources, proven expertise and the incentive to maintain and develop the BASF Divestment Package as a viable and active competitive force in competition with the Parties and other competitors.

#### **II.1.5. Absence of *prima facie* competition concerns**

62. Pursuant to clause 26 (c) of the Commitments, the acquisition of the BASF Divestment Package by the purchaser must neither be likely to create *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 BASF Divestment Package.
63. The Commission assessed the acquisition by BASF of the BASF Divestment Package in Case M.8851 and reached the conclusion that the Transaction raised serious doubts as to its compatibility with the internal market with respect to BASF's and the BASF Divestment Package's activities in nematicidal seed treatment for the EEA in corn and sugar beet as well as innovation for non-selective herbicides with [mode of action 2] mode of action.<sup>49</sup> BASF offered commitments to address in full the serious doubts raised by the Commission by divesting its Trunemco nematicidal seed treatment business and [NSH line of research 2] which it intends to acquire from Bayer as part of the BASF Divestment Package. On this basis, the Commission approved the acquisition of the BASF Divestment Package by BASF as it considered that it no longer raised competition concerns in the EEA.

---

<sup>46</sup> BASF's response to the Commission's request for information RFI Q36, Annex I; and BASF's submission entitled 'Memorandum in response to Commission queries regarding BASF as a suitable purchaser', dated 14 February 2018, section 5.

<sup>47</sup> Reasoned Opinion, paragraph 277.

<sup>48</sup> Reasoned Opinion, paragraphs 272-284.

<sup>49</sup> Commission Decision in Case M.8851 – BASF/Bayer Divestment Business (2018).

64. As regards the necessary approval from other regulatory authorities, the acquisition by BASF of the Divestment Businesses triggered filings in Brazil, Canada, Chile, China, Costa Rica, India, Japan, Mexico, Serbia, South Africa, South Korea, Turkey and Ukraine. The United States also has to approve BASF as the purchaser of the Divestment Businesses. In its Reasoned Proposal, Bayer indicated that approvals for the acquisition by BASF of the Divestment Businesses have either been obtained or are expected to be obtained, potentially in some instances subject to remedies which are not expected by Bayer or BASF to be problematic or cause delays to the closing of the Transaction. In particular, Bayer submitted that the only approval process in risk of being delayed significantly beyond June 2018 is the purchaser approval process in India, and that it is not currently foreseen that any of the regulatory approvals listed above would lead to delays in the implementation of the Commitments such that there would be a need to request an extension of the BASF Closing Period and Vegetable Seeds Closing Period.<sup>50</sup>
65. The Trustee sees no substantive concerns. In particular, it considers that, *'[b]ased upon the information provided by the Parties, BASF is expected to be approved by all jurisdictions with potential for some slight delay with purchaser approval in India. The Trustee considers this to be a reasonable assumption and a basis for granting purchaser approval'*.<sup>51</sup>
66. On the basis of the above considerations and the information provided by Bayer and BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that the acquisition of the BASF Divestment Package by BASF would not create *prima facie* competition concerns nor does it give rise to a risk that the implementation of the Commitments would be delayed.

#### **II.1.6. Required assets and employees to support the BASF Divestment Package**

67. Pursuant to clause 26 (d) of the Commitments, in order to be approved by the Commission, BASF must have all required assets and employees to support the BASF Divestment Package, particularly (but not exclusively) those elements which are not being sold as standalone businesses.
68. BASF is a leading pesticide player with a research and development as well as a sales organisation, a global footprint and trait discovery activities. The Commission thus considers that BASF's existing assets and employees to support the BASF Divestment Package as needed, noting that several elements of the BASF Divestment Package are standalone businesses.
69. The Trustee considers that *'BASF will have all required assets and employees to support the BASF Divestment Package in accordance with paragraph 26(d) of the Commitments'*.<sup>52</sup>
70. On the basis of the above considerations and the information provided by Bayer and BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that BASF has all required assets and employees to support the BASF Divestment Package.

---

<sup>50</sup> Reasoned Proposal, paragraphs 132-134.

<sup>51</sup> Reasoned Opinion, sections 1.5 and 7, notably paragraph 880.

<sup>52</sup> Reasoned Opinion, sections 1.6 and 8, notably paragraph 1121.

### **II.1.7. Conclusion on the purchaser criteria**

71. On the basis of the above considerations and the information provided by the Parties and BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that BASF meets the purchaser criteria set out in clause 26 of the Commitments in relation to the BASF Divestment Package.

## **II.2. The Vegetable Seeds Divestment Business**

### **II.2.1. Legal framework**

72. Pursuant to clause 28 of the Commitments, in order to approve BASF as a purchaser of the Vegetable Seeds Divestment Business, the Commission has to verify that the proposed purchaser fulfils the purchaser criteria set out in clause 27 of the Commitments and that the Vegetable Seeds Divestment Business is sold in a manner consistent with the Commitments. In particular, the Commission must ensure that:
- a. The purchaser is independent of and unconnected to Bayer and its affiliated undertakings;
  - b. The purchaser has the financial resources, proven expertise and incentive to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;
  - c. The acquisition of the Vegetable Seeds Divestment Business by the purchaser is neither 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 Vegetable Seeds Divestment Business;
  - d. The purchaser is a new entrant, *i.e.*, does not already control (directly or indirectly) any vegetable seeds business.

### **II.2.2. Description of the proposed purchaser**

73. Bayer proposed BASF as a purchaser of the Vegetable Seeds Divestment Business. BASF is described in section II.1.2.

### **II.2.3. Independence from Bayer**

74. Pursuant to clause 27 (a) of the Commitments, in order to be approved by the Commission, the purchaser must be independent of and unconnected to Bayer and its affiliated undertakings.
75. For the reasons already explained in section II.1.3, the Commission considers that BASF is independent of and unconnected to Bayer and its affiliated undertakings.



#### **II.2.4. Financial resources, proven expertise and incentive to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitor**

76. Pursuant to clause 27 (b) of the Commitments, in order to be approved by the Commission, the purchaser must have the financial resources, proven expertise and incentive to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.

##### **II.2.4.1. Financial resources**

77. Pursuant to clause 27 (b) of the Commitments, the purchaser must have the financial resources to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.
78. For the reasons already explained in II.1.4.1., the Commission considers that BASF has the financial resources to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.

##### **II.2.4.2. Proven expertise**

79. Pursuant to clause 27 (b) of the Commitments, the purchaser must have the proven expertise to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.
80. The requirement to have proven expertise to maintain and develop a divestment business as a viable and active competitive force in competition with the Parties and other competitors is one of the standard purchaser requirements.<sup>53</sup> Pursuant to the Notice on remedies, the standard purchaser requirements may be supplemented on a case-by-case basis, for instance by requiring that the purchaser should be an industrial, rather than a financial purchaser. This would be the case when a financial buyer might not be able or might not have the incentives to develop the business as a viable and competitive force in the market.<sup>54</sup>
81. In the present case, the Commitments do not contain an additional purchaser requirement that the purchaser of the Vegetable Seeds Divestment Business must be an industrial player. On the contrary, clause 27 (d) of the Commitments requires that the purchaser be a new entrant, *i.e.*, does not already control (directly or indirectly) any vegetable seeds business. Accordingly, clause 27 (b) of the Commitments does not require that the purchaser must have pre-existing expertise in the relevant industry.
82. As regards the requirement that the purchaser of the Vegetable Seeds Divestment Business must have proven expertise to maintain and develop the Vegetable Seeds

---

<sup>53</sup> Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the 'Notice on remedies'), OJ C 267, 22.10.2008, p. 1, paragraph 48; see also the Model text for divestiture commitment, paragraph 17 (b).

<sup>54</sup> Notice on remedies, paragraph 49.

Divestment Business as a viable and active competitive force in competition with the Parties and other competitors, the Commission considers that BASF possesses such expertise for the reasons detailed below.

83. First, the Vegetable Seeds Divestment Business is essentially a stand-alone business, which consists of the whole vegetable seeds business of Bayer. The Vegetable Seeds Divestment Business will be entirely transferred to BASF. This covers all assets (including all of Bayer's relevant expertise, knowhow and IP) and employees. Where a stand-alone business is entirely transferred, such as the Vegetable Seeds Divestment Business, the industry expertise of the business concerned is transferred to the purchaser and the expertise that the purchaser must possess does not need to be specific to the industry where the divested business is active.
84. Second, BASF has proven expertise in closely related industries. BASF is active in crop protection markets which can be used over specialty crops, such as fruits and vegetables. BASF is also active in trait discovery and hybridisation for broad acre crops. Moreover, BASF indicates that it operates in all countries where the Vegetable Seeds Divestment Business is currently active.
85. Third, as already explained at recital 32, BASF has significant expertise in acquiring, integrating and developing businesses in the agrochemical sector. As already pointed out at recital 33, the Trustee considers that BASF has the know-how, expertise and resources to successfully integrate the Divestment Businesses.
86. A complainant submitted that the Commitments require a purchaser with proven pre-existing expertise in the seeds business. This complainant argued that the requirement of clause 27 (b) of the Commitments – namely to have the '*proven expertise [...] to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force*' – read in the context of the Commitments, means that the purchaser must have a pre-existing expertise in the seeds business. In particular, the complainant considers that synergies between a broad acre crop seeds business, which BASF currently does not have, and a vegetable seeds business are essential for the viability and the competitiveness of a vegetable seeds business. For this complainant, this requirement was aimed at excluding a purchaser without any pre-existing experience in the seeds business. The complainant submitted that BASF does not have any seeds business and will not benefit from a transfer of seed expertise from Bayer. Therefore, BASF does not have the proven expertise required by the Commitments and should not be approved as a suitable purchaser.
87. As already explained in recital 80, the requirement to have '*proven expertise ... to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force*' is a standard purchaser requirement which does not require the purchaser to be an industrial player. There is no additional clause in the Commitments which requires that the purchaser of the Vegetable Seeds Divestment Business must have pre-existing expertise in the seed industry. Indeed, as already pointed out at recital 81, clause 27 (d) of the Commitments required that the purchaser to be a new entrant, which shows that the interpretation on this point submitted by this complainant cannot be sustained.
88. Furthermore, as already explained at recital 83, where a stand-alone business is entirely transferred, such as the Vegetable Seeds Divestment Business, the industry

expertise of the business concerned is transferred to the purchaser and the expertise that the purchaser must possess does not need to be specific to the industry where the divested business is active.

89. In any event, as already explained at recitals 84 and 85, BASF has proven expertise in closely related industries as well as in countries where the Vegetable Seeds Divestment Business is active. BASF also has significant expertise in acquiring, integrating and developing businesses such as the Vegetable Seeds Divestment Business. Finally, BASF will also acquire the broad acre crop seeds and traits business from Bayer via the BASF Divestment Package, thus enabling BASF to realise synergies, if any, with the Vegetable Seeds Divestment Business.
90. The complainant further claimed that two Bayer employees who allegedly played a key role in the seed strategy of Bayer would remain with Bayer. Consequently, the expertise of Bayer in seeds would not be transferred to BASF.
91. The Commission assessed the role of the two employees identified by the complainant before the merger. [...], all personnel specifically in charge of strategy and management of the Vegetable Seeds Divestment Business are transferred to BASF.
92. Moreover, as already explained in recital 83, the Vegetable Seeds Divestment Business is essentially a stand-alone business which will be entirely transferred to BASF. This includes all other employees, in particular key personnel, who have successfully operated the Vegetable Seeds Divestment Business.
93. In view of the above reasons, the Commission considers that BASF's has expertise that goes beyond a general know-how of the agricultural sector and that, therefore, contrary to the complainant submission, it fulfils the criteria under clause 27(b) of the Commitments which requires having proven expertise to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.

#### **II.2.4.3. Incentive**

94. Pursuant to clause 27(b) of the Commitments, the purchaser must have the incentive to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.
95. The objective of this requirement is that the Vegetable Seeds Divestment Business in the hands of the purchaser will replicate the competitive constraint exercised by the Vegetable Seeds Divestment Business absent the Transaction.
96. BASF would purchase the Vegetable Seeds Divestment Business for approximately EUR [0-5] billion<sup>55</sup> and would have the incentive to operate the Vegetable Seeds Divestment business successfully in order to obtain a return on its investment and justify this acquisition to its shareholders as well as to honour payments to holders of commercial paper and bonds issued to partially finance the purchase of the Divested Businesses.

---

<sup>55</sup> BASF estimates, see BASF's response to the Commission's Request for Information RFI Q38, question 1, paragraph 6.

97. Moreover, the Vegetable Seeds Divestment Business is a profitable business which requires high investments in R&D to maintain and increase its long term competitiveness. According to its business plan documents, Bayer planned to [...].<sup>56</sup> This is a further indication of BASF's incentives to maintain and develop the Vegetable Seeds Divestment Business.
98. Finally, post-Transaction BASF would find itself in a position comparable to that of Bayer absent the Transaction as the Vegetable Seeds Divestment Business will be part of a broader organization that includes crop protection, digital agriculture, broad acre crop seeds and traits and the latter two businesses would largely consist of Bayer assets and personnel purchased in the context of the Transaction. If synergies between vegetable seed business and other related businesses can be developed and be beneficial for the viability and competitiveness of a vegetable seed business, in the present case BASF would be in a position comparable to that of Bayer absent the Transaction and would have the ability to maintain and leverage synergies, if any, between the Vegetable Seeds Divestment Business and other businesses it is acquiring from Bayer, including in particular broad acre crop seeds, traits, and digital agriculture. This will give BASF further incentives to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force.
99. In this regard, the Trustee considers that BASF would have strong incentives to compete, mainly related to the opportunity to become an integrated player which would combine seeds, traits, and crop protection and digital farming activities.<sup>57</sup>
100. One complainant argued that BASF would not have the incentive to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force. According to this complainant, BASF's activities are focused on crop protection and BASF would only be interested in developing synergies between its crop protection activities and the broad acre crop seeds business acquired via the BASF Divestment Package. The Vegetable Seeds Divestment Business would not fit within BASF's current portfolio and therefore would not offer synergies with the other BASF activities. The complainant submitted that the absence of synergies between BASF's crop protection core activities and the Vegetable Seeds Divestment Business would lead BASF to neglect the latter. In that respect, the complainant invoked public statements from BASF management which, in its view, show that BASF has no interest in vegetable seeds.
101. As already explained at recital 98, in the present case BASF would acquire not only the Vegetable Seeds Divestment Business but also Bayer's broad acre crop seeds and traits business. It follows that post-Transaction BASF would be in a position comparable to that of Bayer absent the Transaction and would have the ability to maintain and leverage synergies, if any, not only between its crop protection activities and the broad acre crop seeds and traits business it is acquiring from Bayer, but also between the latter and the Vegetable Seeds Divestment Business.
102. Moreover, internal documents,<sup>58</sup> which are more recent than the public statements invoked by the complainant, suggest that BASF plans to carry forward Bayer's R&D investment plan to maintain and increase its long term competitiveness.

---

<sup>56</sup> BASF's response to the Commission's Request for Information RFI Q38, question 1, paragraph 7.

<sup>57</sup> Reasoned Opinion, paragraph 811.

103. The complainant also indicated that it offered a 'substantially higher' purchase price for the Vegetable Seeds Divestment than BASF. The complainant explained that its offer reflected the 'real and competitive value' of the Vegetable Seeds Divestment Business. Therefore, the offer from BASF would show a lack of incentive to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force.
104. Pursuant to the Notice on remedies, the Commission is not involved in the choice of the purchaser and the determination of the purchase price for businesses sold pursuant to Commitments offered to render concentrations compatible with the internal market.<sup>59</sup>
105. The role of the Commission is confined to verify that the proposed purchaser fulfils the purchaser criteria set out in the Commitments and that the divestment business is sold in a manner consistent with the Commitments. As already explained at recital 96, in the present case the Commission considers that BASF has financial incentives to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force. In any event, differences between prices offered for a divested business do not allow in themselves to infer any conclusion on the incentive to maintain and develop a divested business as a viable and active competitive force.

#### **II.2.4.4. Conclusion on financial resources, proven expertise and incentive**

106. On the basis of the above considerations and the information provided by the Parties and BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that BASF has sufficient financial resources, proven expertise and the incentives to maintain and develop the Vegetable Seeds Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.

#### **II.2.5. Absence of *prima facie* competition concerns**

107. Pursuant to clause 27 (c) of the Commitments, the acquisition of the Vegetable Seeds Divestment Business by the purchaser must neither be likely to create *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 Vegetable Seeds Divestment Business.
108. In its decision of 30 April 2018 in Case M.8851 – BASF/Bayer Divestment Business, the Commission noted that there is no horizontal overlap between Bayer and BASF as regards vegetable seeds. The Commission also noted that the acquisition by BASF of the Vegetable Seeds Divestment Business would not give rise to vertically affected markets.<sup>60</sup>
109. As already explained at recital 64, the acquisition by BASF of the Divestment Businesses triggered filings in several jurisdictions. In its Reasoned Proposal, Bayer indicated that approvals for the acquisition by BASF of the Divestment

---

<sup>58</sup> BASF's response to the Commission's Request for Information RFI Q38, question 1, paragraph 7.

<sup>59</sup> Notice on remedies, paragraphs 101 and following.

<sup>60</sup> Commission Decision in Case M.8851 – BASF/Bayer Divestment Business (2018), paragraph 9.

Businesses have either been obtained or are expected to be obtained, potentially in some instances subject to remedies. Moreover, Bayer submitted that the only approval process in risk of being delayed significantly beyond June 2018 is the purchaser approval process in India, and that there are no other relevant approval requirements which could delay the implementation. As already explained at recital 65, the Trustee sees no substantive concerns.<sup>61</sup>

110. On the basis of the above considerations and the information provided by the Parties and BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that the acquisition of the Vegetable Seeds Divestment Business by BASF would not create *prima facie* competition concerns nor does it give rise to a risk that the implementation of the Commitments would be delayed.

#### **II.2.6. New entrant in the vegetable seeds industry**

111. Pursuant to clause 27 (d) of the Commitments, the purchaser must be a new entrant, *i.e.*, it must not already control (directly or indirectly) any vegetable seeds business.
112. BASF indicated that it does not have any vegetable seeds business in any country or region globally.<sup>62</sup>
113. The Trustee notes that BASF does not have any vegetable seeds business and considers that BASF is a new entrant in the vegetable seed markets.<sup>63</sup>
114. On the basis of the information provided by BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that BASF is a new entrant in the vegetable seed markets.

#### **II.2.7. Conclusion on the purchaser criteria**

115. On the basis of the above considerations and the information provided by the Parties and BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that BASF meets the purchaser criteria set out in clause 27 of the Commitments.

### **III. ASSESSMENT OF THE TRANSACTION DOCUMENTS**

116. The Commission separately assesses below the transaction documents for each of the BASF Divestment Package and the Vegetable Seeds Divestment Business.

#### **III.1. The BASF Divestment Package**

117. As regards the BASF Divestment Package, the transaction documents comprise: [...].
118. The Trustee reviewed the transaction documents and confirms that they fulfil the condition of the Commitments to transfer the BASF Divestment Package to BASF.

---

<sup>61</sup> Reasoned Opinion, paragraph 880.

<sup>62</sup> BASF's response to the Commission's Request for Information RFI Q38, question 1, paragraph 2.

<sup>63</sup> Reasoned Opinion, paragraph 397.

Overall, the Trustee considers that the terms of the transaction documents closely follow the wording of the Commitments.<sup>64</sup>

119. As regards in particular the allocation of assets, the Trustee is satisfied that assets have been to the best of its knowledge correctly allocated to each of Bayer and BASF. Moreover, the Trustee points out that Bayer and BASF have reflected in the transaction agreements the language of paragraph 60 of the Schedule to the Commitments, whereby *'[i]f there is any asset or personnel which is not covered by this Schedule but which are both used (exclusively or not) in a part of BASF Divestment Package and are necessary for the continued viability and competitiveness of part of the BASF Divestment Package, that asset, personnel, or an adequate substitute will be offered to BASF'*.<sup>65</sup>
120. The Commission notes that, pursuant to clause 28 *in fine* of the Commitments, the Commission *'may approve the sale of the Divestment Businesses without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel with one or more different assets or different personnel, if this does not affect the viability and competitiveness of the Divestment Businesses after the sale, taking account of the Proposed Purchasers'*.
121. The Parties and Trustee identify in the transaction agreements the following differences with the Commitments, which Bayer requests the Commission to approve under clause 28 of the Commitments:<sup>66</sup>
- a. the reduction of the duration of the glufosinate formulated product tolling agreement [...];
  - b. the waiver of the term sheet for a glufosinate formulated product supply agreement for Korea [...];
  - c. the reduction of the duration of the glufosinate formulated product supply agreement for Taiwan [...];
  - d. the change of the Special Registration Countries to be covered by glufosinate formulated product supply agreements [...];
  - e. the clarification that the duration of the glufosinate formulated product supply agreement for Brazil and Malaysia [...];
  - f. the reduction of the duration of the glufosinate supply, formulation and distribution agreement [...];
  - g. the reduction of the duration of the glufosinate formulated product distribution agreement for Mexico [...];
  - h. the reduction of the duration of the Regina glufosinate formulated product reverse tolling agreement [...];

---

<sup>64</sup> Reasoned Opinion, sections 1.7, 9-17 and 20, notably paragraph 1129.

<sup>65</sup> Reasoned Opinion, notably paragraphs 1858, 1898, 2250 and 2287.

<sup>66</sup> Reasoned Proposal, paragraphs 27-34; Reasoned Opinion, sections 8, 9-17 and 20.

- i. the extension of the duration of the tolling agreement for divested seed treatment formulations [...];
  - j. the extension of the duration of the clothianidin and fluopyram active ingredient tolling agreements [...];
  - k. the reduction of the duration of the extensions of the distribution agreements for products containing clothianidin, Bacillus firmus or fluopyram on behalf of BASF outside the United States [...];
  - l. the extension of the duration of the supply agreement for Prosper Evergol seed treatment for the Broad Acre Divestment Business [...];
  - m. the extension of the duration of the seed treatment supply agreement for divested cotton and soy varieties of the Broad Acre Divestment Business [...];
  - n. the extension of the duration of supply at variable cost for the isoxaflutole supply agreement for the United States, Mexico and Brazil for the Broad Acre Divestment Business [...].
122. The Commission assessed each of the above differences and agrees with the Trustee that they largely result from negotiations between Bayer and BASF and in any event do not affect the viability and competitiveness of the BASF Divestment Package going forward.<sup>67</sup>
123. In particular, these transitional supply and service agreements intend to ensure that BASF can compete effectively with the Divestment Businesses.<sup>68</sup> The Commission notes that the Reasoned Proposal suggested the reduction or extension of the duration of some agreements to what is necessary to pursue these objectives given BASF's experience and capabilities in crop protection and seeds, while reducing any unneeded commercial relationships between Bayer and BASF post-Transaction.
124. The Commission considers that the transitional agreements, as amended, do not affect the competitiveness and viability of the Divestment Businesses and that they do not create competition problems or affect the independence of BASF.
125. Regarding key personnel, pursuant to paragraphs 6, 10, 16, 25, 35, 41 and 47 of the Schedule to the Commitments, Bayer committed to transfer to BASF certain key personnel as part of the Broad Acre Divestment Businesses, the GA Divestment Business, the Glyphosate Assets, the [NSH line of research 3] Data Transfer and Licence, the [NSH line of research 1] Data Transfer and Licence and the Seed Treatment Assets.
126. Bayer submitted a reasoned request on 23 April 2018 to remove six individuals from the lists of key personnel provided in the Commitments.<sup>69</sup> This was reiterated

---

<sup>67</sup> Reasoned Opinion, sections 1.7, 9-17 and 20.

<sup>68</sup> Reasoned Proposal, paragraphs 27-34, 70 and 92-96.

<sup>69</sup> Bayer also requested that the Commission approve the two people nominated by BASF to fill the two placeholder positions relating to the GA Divestment Business in paragraph 10 of the Schedule



in its Reasoned Proposal, in which it further requested to retain additional individuals.<sup>70</sup> Ultimately, Bayer requested to retain:

- a. [...];
- b. [...];
- c. [...];
- d. [...];
- e. [...];
- f. [...];
- g. [...];
- h. [...];
- i. [...];
- j. [...];
- k. [...];
- l. [...].

127. Bayer explained that:

- a. [...] moved out of Trait Research in early 2017 to take a new position in Biologics. [...] therefore no longer meets the criteria for being key personnel and should be removed from the list of key personnel required to be transferred to BASF in conjunction with the Broad Acre Divestment Businesses;
- b. BASF has determined that it does not require [...] in order to successfully operate the Broad Acre Divestment Business, the GA Divestment Business, the Glyphosate Assets, the Seed Treatment Assets, the [NSH line of research 3] Data Transfer and Licence and the [NSH line of research 1] Data Transfer and Licence, provided in some instances that adequate knowledge-transfer processes are carried-out by the Parties to the benefit of BASF personnel; and
- c. [...] no longer need to be transferred to BASF, as a result of the BASF Commitments to divest/on-sell the [NSH line of research 2] Data Transfer and Licence. The latter request for approval of the transaction documents in spite of this difference with the Commitments is without prejudice to BASF's and Bayer's commitment to make [...] available for employment if so required by the ultimate purchaser of the [NSH line of research 2] Data Transfer and Licence.

---

to the Commitments (see also the Reasoned Proposal, paragraphs 12-13). The Commission hereby approves these nominations.

<sup>70</sup> Reasoned Proposal, paragraphs 9-10.

128. Bayer therefore requested that the Commission approve the transaction documents in spite of these differences in terms of transferred key personnel, by which Bayer would ultimately not be required to transfer the employees listed above to BASF. Bayer considers that retaining these employees would not negatively affect the viability and competitiveness of the BASF Divestment Package since the concerned employees are either unnecessary for BASF or no longer essential to the businesses being transferred.<sup>71</sup>
129. The Trustee considers that Bayer's retention of these employees can be approved as it would not affect the viability and competitiveness of the BASF Divestment Package.<sup>72</sup> The Commission agrees with the Trustee's conclusion and approves Bayer's request to retain the employees listed in recital 126 of this Decision.
130. Finally, Bayer requested that the Commission approve its proposal to retain the following four employees from its digital agriculture business pursuant to paragraph 50 of the Schedule of the Modified Commitments: [...].<sup>73</sup> Noting BASF's agreement to this proposal as well as the Trustee's conclusion that the proposal does not affect the viability and competitiveness of the Digital Agriculture Assets,<sup>74</sup> the Commission hereby approves Bayer's proposal.
131. On the basis of the above considerations and the information provided by Bayer and BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that the transaction documents are consistent with the Commitments and that, accordingly, the BASF Divestment Package is being sold in a manner consistent with the Commitments.

### **III.2. The Vegetable Seeds Divestment Business**

132. As regards the Vegetable Seeds Divestment Business, the transaction documents comprise [...], which together set out the terms of the sale of the Vegetable Seeds Divestment Business to BASF.
133. The Trustee reviewed the transaction documents and confirmed that they fulfil the condition of the Commitments to transfer the Vegetable Seeds Divestment Business to BASF. In general, the Trustee considers that the terms of the transaction documents closely follow the wording of the Commitments.<sup>75</sup>
134. As regards in particular the allocation of assets, the Trustee is satisfied that assets have been to the best of its knowledge correctly allocated to each of Bayer and BASF. Moreover, the Trustee points out that Bayer and BASF have included in the transaction agreements language with similar effect as paragraph 64 of the Schedule to the Commitments, whereby *'[i]f there is any asset or personnel which is not covered by this Schedule but which are both used (exclusively or not) in a part of BASF Divestment Package and are necessary for the continued viability*

---

<sup>71</sup> Reasoned Proposal, paragraph 9.

<sup>72</sup> Reasoned Opinion, section 8.

<sup>73</sup> Reasoned Proposal, paragraph 26.

<sup>74</sup> Reasoned Opinion, paragraphs 1102 and 1103.

<sup>75</sup> Reasoned Opinion, sections 1.7, 9-17 and 20, notably paragraph 1129.

*and competitiveness of part of the BASF Divestment Package, that asset, personnel, or an adequate substitute will be offered to BASF*.<sup>76</sup>

135. On the basis of the above considerations and the information provided by Bayer and BASF, and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that the transaction documents are consistent with the Commitments and that, accordingly, the Vegetable Seeds Divestment Business is being sold in a manner consistent with the Commitments.

#### **IV. CONCLUSION**

136. On the basis of the above assessment, the Commission approves BASF as a suitable purchaser of the BASF Divestment Package and of the Vegetable Seeds Divestment Business.
137. Moreover, on the basis of the Proposed Agreements, the Commission further concludes that the BASF Divestment Package and the Vegetable Seeds Divestment Business are being sold in a manner consistent with the Commitments.
138. This decision only constitutes approval of the proposed purchaser identified in this decision and of the Proposed Agreements. This decision does not constitute a confirmation that Bayer has complied with the Commitments.
139. This decision is based on clause 28 of the Commitments made binding by the Commission's Decision of 21 March 2018.

*For the Commission*

*(Signed)*  
*Johannes LAITENBERGER*  
*Director-General*

---

<sup>76</sup> Reasoned Opinion, notably paragraphs 1858, 1898, 2250 and 2287.