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**17 August, 2017**

**DowDuPont merger given detailed conditional approval**

The Competition Tribunal (“Tribunal”) has today conditionally approved the large merger between DowDuPont and the Dow Chemical Company (“Dow”) and E.I. Du Pont de Nemours and Company (“DuPont”). DowDuPont is a newly incorporated holding company for the purposes of the transaction, which is controlled by both Dow and DuPont.

The Competition Commission (“Commission”) recommended that the merger be conditionally approved after a lengthy investigation.

Dow’s activities in South Africa include the distribution of sunflower seeds, agrochemicals (i.e. insecticides, herbicides and fungicides), material science products (i.e. elastomers, ion exchange resins and low density polyethylene and food texturisers (specifically purified carboxymethylecellulose. Dow does not locally manufacture any of these products in South Africa but imports them into South Africa from it is manufacturing operations in different parts of the world.

DuPont is involved *inter alia* in the distribution of various seeds including maize and sunflower seeds, agrochemicals and various material science products in South Africa.

Although there is no direct overlap arising in respect of the commercialisation of hybrid and GM hybrid maize seed in South Africa, since Dow does not have maize seed commercial operations in the country, the Commission found that the proposed transaction will likely result in the removal of a significant potential competitor in the maize seed market in South Africa. This is so because Dow had plans and a strategy to enter the South African commercial maize seed market in a significant way. There are no other potential entrants who are likely to constrain the incumbents, DuPont and Monsanto, in this instance.

To address this concern in the maize seed market in South Africa the merging parties put up a licencing remedy.

At an initial hearing on 19 July 2017 the Tribunal requested the Commission to undertake a proper market investigation and consult a number of potential entrants/licensees in the maize seed market about *inter alia* the efficacy of the proposed licensing remedy and to submit their findings to the Tribunal and then once again appear before the Tribunal on 04 August 2017. The Tribunal further required that the potential licensees appear before it and testify to their submissions as well as answer questions from the Tribunal. The Tribunal wanted to ensure that the proposed licensing remedy would assist the small maize seed producers in South Africa to improve their market positions in maize seed production in South Africa.

Upon reappearance on 04 August 2017, the merging parties offered certain clarifications and improvements on the proposed licensing conditions amid questions from the Tribunal and submissions from the potential licensees. Following enhancements to the proposed maize seed remedy, the Tribunal has approved the merger subject to a detailed set of licensing conditions.

The licencing remedy includes provisions that the parties make available and license certain plant materials contained in a Genetic Material List, which Dow has the right to license, to any person, firm or licensee in South Africa apart from Monsanto, on a non-exclusive basis, and on terms and conditions that are fair, reasonable and non-discriminatory to any licensee. Under the conditions, the merging parties shall: (i) grant the right to conduct breeding and testing in South Africa of each and any of the products on the Genetic Materials List, at no charge; (ii) subsequently upon request enter a commercialization agreement relating to any licensed material or inbreds developed through breeding activities using the licensed materials for commercialization, registration and use in South Africa and, if applicable, thereafter, the rest of Africa; and (ii) grant the right to sub-license the genetic materials.

The Commission furthermore found that the proposed transaction is likely to lead to a substantial prevention or lessening of competition post-merger in the market for insecticides for chewing insects for citrus (in Limpopo, Western Cape, Mpumalanga, Eastern Cape, KwaZulu-Natal and the Northern Cape), deciduous fruits (Western Cape, Northern Cape, North West and Limpopo), vegetables (nationally) and tomatoes (in Limpopo, Mpumalanga and the Eastern Cape).

To address the above concern the merging parties submitted a global remedy comprising a divestiture. This remedy includes a divestment of all the additional active ingredients which Dow was acquiring from DuPont. More importantly, the divestiture also includes the R&D business associated with the development of the affected active ingredients such that the remedy will also apply at the upstream layer where the market power originates from. This divestiture in our view adequately addresses the competition concerns resulting from the proposed merger in the insecticides markets.

The Tribunal’s reasons will be released in due course.

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