COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM044May18

In the matter between:

BASF SE Germany Primary Acquiring Firm

and

Divestment Business of Bayer AG Primary Target Firm

Panel	: Norman Manoim (Presiding Member)
	: Andiswa Ndoni (Tribunal Member)
	: Mondo Mazwai (Tribunal Member)
Heard on	: 16 July 2018
Order Issued on	: 16 July 2018
Reasons Issued on	: 06 August 2018

Reasons for Decision (Non-confidential)

Approval

[1] On 16 July 2018, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction between BASF SE Germany and the Divestment Business of Bayer AG.

[2] The reasons for conditionally approving the proposed transaction follow.

Background to the transaction

[3] The proposed transaction follows from the global divestiture of some of Bayer's assets ordered in the *Bayer Aktiengesellschaft and Monsanto Corporation*[1] merger ("*Bayer/Monsanto* merger"). The assets that will be transferred from Bayer to BASF SE Germany ("BASF") are those assets being divested pursuant to the commitments agreed to by Bayer AG ("Bayer") in the United States Department of Justice ("the US DOJ") and the European Commission ("the EC") in relation to the *Bayer/Monsanto* merger. Globally, BASF will be acquiring numerous businesses from Bayer due to the divestiture commitments undertaken by Bayer ("the Global Divestment Business").[2]

[4] When the *Bayer/Monsanto* merger was considered by this Tribunal, we following the approach in the other jurisdictions, required Bayer to divest of certain of its businesses in South Africa. In addition, the order required that Bayer impose certain conditions on the purchaser of the Divestment Business. In the present case the Commission has recommended that we approve the sale to BASF subject to the imposition of those conditions. These obligations will be discussed in more detail below.

Parties to proposed transaction

Primary acquiring firm

[5] The primary acquiring firm is BASF SE ("BASF"), a firm incorporated in accordance with the laws of Germany. BASF is publicly traded company headquartered in Germany. BASF is listed on the German Stock Exchange in Frankfurt, the London Stock Exchange, and the Swiss Stock Exchange in Zurich.

[6] BASF wholly controls a number of firms in South Africa.[3] Further, BASF is a publicly listed company and is not controlled by any one firm.

Primary target firm

[7] The primary target firm is the Divestment Business of Bayer AG ("Bayer"). Bayer is listed on the German Stock Exchange in Frankfurt and has a secondary listing on the London Stock Exchange. Bayer is not controlled by any one firm. In South Africa, Bayer has a single subsidiary, Bayer (Pty) Ltd ("Bayer SA").

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[1] Commission Case Number 2017Feb0004 and Tribunal Case Number IM057May17.

[2] Commission Recommendations *inter alia* pages 10 – 12.

[3] BASF Holdings South Africa (Pty) Ltd, BASF South Africa (Pty) Ltd, BASF Construction Chemicals South Africa (Pty) Ltd, BASF Coatings Services (Pty) Ltd, BASF Coatings (Pty) Ltd, BASF Polyurethanes South Africa (Pty) Ltd, and BASF Agriculture Specialities (Pty) Ltd.

[8] However, In South Africa, the Divestment Business comprises of the following businesses of Bayer:

a. Non-selective glufosinate ammonium herbicide
   i. The Divestment Business manufactures and sells non-selective glufosinate ammonium based herbicide which is commercialised under the name Basta in South Africa.

b. Canola seeds
   i. The Divestment Business supplies Canola (oil seed rape) which is a broad acre seed.

c. Vegetable seeds
   i. The Divestment Business also supplies vegetable seeds[4] which are imported directly into South Africa from the Netherlands by a Bayer subsidiary, Nunhems Netherlands B.V.
   ii. The Divestment Business sells lettuce, carrot, melon, onions, cucumber, watermelon, squash, tomato, chicory Witloof and tomato seeds under the "Nunhems" brand.

d. Seed treatment (which consist of insecticides and mixed nematode control products/insecticides)
   i. The Divestment Business includes a seed treatment business comprising of insecticidal seed treatments as well as mixtures of insecticidal and nematode control seed treatments.
   ii. The Divestment business sells an insecticidal seed treatment product ("Poncho/Votivo") in South Africa. These are both used for the treatment of maize seeds in South Africa.

e. The Divestment Business is inclusive of Bayer's global Liberty and Liberty Link[5] technology business.

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[4] Although Bayer's seeds are sold in South Africa, they are not sold by the South African subsidiary, Bayer SA. The seeds are on sold without affecting Bayer SA.
[5] Liberty is Bayer's non-selective glufosinate ammonium herbicide and Liberty Link is the genetically modified trait that renders crops resistant against glufosinate ammonium. Thus, Bayer's Liberty Link technology confers plants with tolerance to Liberty. This enables the user to use the non-selective glufosinate ammonium herbicide, Liberty, to protect the crop from insects or pests whilst simultaneously protecting the crop due to the genetically modified trait, Liberty Link, which renders the crop resistant to the glufosinate ammonium herbicide.

[9] The Liberty and Liberty Link technology business currently does not operate in South Africa. The divestment requires BASF to commercialise Bayer's Liberty and Liberty Link technologies in South Africa.

[10] In South Africa, Bayer will retain all of its non-crop sciences businesses.

Proposed transaction and rationale

[11] Globally BASF will be acquiring multiple businesses, including the Divestment Business in South Africa, from Bayer. The proposed transaction will result in BASF acquiring sole control over the Divestment Business.

Impact on competition

[12] The Commission investigated a possible horizontal overlap between the activities of the merging parties in the following national markets:

a. The market for the supply of non-selective herbicides; and
b. The market for the supply of seed treatment products.

[13] In the national market for the supply of non-selective herbicides, BASF submitted that they had no sales of non-selective herbicides in 2016 and 2017. This was confirmed by the Commission. There is therefore no change in the market structure in South Africa as a result of the proposed transaction.

[14] The Divestment Business has a market share of [5-10%]. The merged entity shall continue to face competition in the supply of non-selective herbicides from other significant players such as Monsanto, Arysta, and Villa Crop.

[15] In the national market for the supply of seed treatment products, it should be noted that as a result of the proposed transaction, Bayer is selling only part of its seed treatment business to BASF (specifically the insecticidal and nematicidal products). Therefore, Bayer will, post-merger, retain its fungicidal treatment products. Thus the Bayer market share shall be split between the Divestment Business and the remaining Bayer business.

[16] The Commission found that although the proposed transaction would result in a significant market share accretion due to the Divestment Business accounting for between 40% and 45% of the market, there was unlikely to be any change in market behaviour as BASF had a market share of less than 5%. Further, the merged entity would continue to face competition from Syngenta, Agchem-Africa, Adama and Villa Crop.

[17] Importantly, the Commission concluded, that the seed treatment products are not close competitors based on functional differences and different crop focus.

[18] The Commission was of the view that the proposed transaction was unlikely to substantially prevent or lessen competition in any of the markets considered.

Public interest

[19] As alluded to above, the Tribunal, in the *Bayer/Monsanto* merger had imposed conditions which have a bearing on the current transaction. The Commission was of the view that the same obligations identified at the *Bayer/Monsanto* stage, should be imposed on BASF in the instant transaction. The impact of the conditions on the current transaction are discussed below.

[20] In *Bayer/Monsanto* the Tribunal imposed a divestiture condition which required Bayer to divest the Liberty and Liberty Link technology to a third party that would commercialise it in South Africa.

[21] The Liberty and Liberty Link technologies were not active in South Africa, but the Commission had found that Bayer had considered entering the South African market and would have potentially directly competed against the Monsanto Roundup Ready system. Therefore the Commission concluded that in the absence of the *Bayer/Monsanto* merger, Bayer would have entered the market and exerted a competitive restraint on Monsanto.

[22] In order to remedy this removal of potential competition, Bayer agreed to divest and sell the entire global Liberty Link trait technology and the Liberty branded agro-chemicals business. In addition to divesting the global business, the Tribunal further imposed a condition that the purchaser (BASF) of the Liberty and Liberty Link technologies, will be obliged to commercialise the technologies in South Africa, or alternatively, oblige the potential purchaser to license the Liberty Link traits and associated Liberty chemicals to a South African third party, with Broad-Based Black

Economic Empowerment credentials, to commercialise anywhere in the world should BASF be unable to do so. This was to ensure that South Africa will directly benefit from the divestiture of theses global businesses of Bayer.

[23] The principle of the condition is that whoever purchased the Liberty and Liberty Link business would be obliged to honour the conditions as set out in the *Bayer/Monsanto* merger to ensure that the loss of competition is restored.

[24] BASF has agreed to this condition and the associated time periods, stipulating the registration and commercialisation periods. BASF has further agreed that failure to commercialise in line with the imposed provisions will compel BASF to license the technology on reasonable terms to a South African third party, with Broad-Based Black Economic Empowerment credentials, for commercialisation in South Africa.

[25] The Commission has therefore the recommended that conditions be imposed on BASF in line with the obligations placed upon the purchaser of the Divestment Business from the *Bayer/Monsanto* merger.

[26] Further, in the *Bayer/Monsanto* merger, the Tribunal imposed a condition on the purchaser of the Divestment Business, relating to the offering of a 25% discount to small emerging farmers as required by the Economic Development Department ("EDD") under the public interest considerations.

[27] The condition related to the Poncho/maize seed value offering. Poncho is a seed treatment product registered for application on maize seed and is one of the assets being sold to BASF by Bayer. However, post the *Bayer/Monsanto* merger, Bayer will retain the maize seed business of Monsanto while BASF will own the Poncho seed treatment product. Thus whilst pre-merger a customer could purchase both the maize seed and its treatment application from one firm, they will now have to purchase them separately from two firms.

[28] In the *Bayer/Monsanto* merger the Tribunal imposed a condition recommended by the EDD that small farmers be given a 25% discount on the maize seeds. The Commission engaged the EDD on the transfer of the Poncho business by Bayer to BASF (which is especially the break-up of the maize seed and Poncho value combo). The EDD was of the view that the discount to small farmers should be retained for the Bayer product

(maize seeds) and BASF should still be required to introduce the discount on the chemical products (Poncho).

[29] It was on this basis that BASF agreed to the condition imposed on it, via the *Bayer/Monsanto* merger, to offer a 25% discount to small emerging farmers on the Poncho seed treatment product.

[30] The Tribunal did not have any material concerns with the conditions and was satisfied that the obligations (placed on BASF as the purchaser) from the *Bayer/Monsanto* merger were met.

[31] The Tribunal's only concern related to the terminology used in the conditions. The Tribunal requested that the merging parties clarify and/or define the terms 'commercialise' and 'small emerging farmer'.[6] The Tribunal requested such clarity and definition so as to avoid any future disputes that may arise out of the conditions. BASF has done so, and new definitions of those two terms have been drafted in these conditions.

[32] With regards to employment, the merging parties submitted that no retrenchments were to take place as a result of the proposed transaction.[7] The Commission confirmed with the applicable Trade Unions and employees representatives that they are satisfied that no job losses would occur as a result of the proposed transaction.

[33] There are no other public interest concerns arising from the proposed transaction.

Conclusion

[34] In light of the above, we concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Accordingly, we approved the proposed transaction subject to the conditions to be found in **Annexures "A", "B" and "C"**.

Mr Norman Manoim

06 August 2018
DATE

Ms Andiswa Ndoni and Ms Mondo Mazwai concurring

[6] Transcript lines 21-25 page 16.
[7] Commission recommendation *inter alia* page 36.

Case Manager:	Kameel Pancham
For the merging parties:	Judd Lurie and Sarah Jackson of Bowmans for BASF
	Lesley Morphet of Hogan Lovells for Bayer
For the Commission:	Grashum Mutizwa and Portia Bele