**Stephen Landsman**
Group General Counsel

Tel: +41 61 323 22 37
steve.landsman@syngenta.com

**Syngenta International AG**
Schwarzwaldallee 215
CH-4002 Basel
Switzerland
www.syngenta.com

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Kathleen S. O'Neill
Chief, Transportation, Energy and Agriculture Section
Antitrust Division, U.S. Department of Justice
450 Fifth Street, NW, Suite 8000
Washington, DC 20530

July 30, 2018

Re: Comments in Response to Proposed Final Judgment in Review of Bayer AG's Proposed Acquisition of Monsanto Company, Case 1:18-cv-0124

Dear Ms. O'Neill:

These comments are being provided by Syngenta AG ("Syngenta") in response to the proposed Final Judgment ("PFJ") of the U.S. Department of Justice ("DOJ" or "Division") in connection with the DOJ's review of Bayer AG's ("Bayer") acquisition of Monsanto Company ("Monsanto") (the "Transaction"), which requires certain divestitures to BASF SE ("BASF") and other related remedies.

As an initial matter, Syngenta believes that the PFJ remedies many of the most complex and difficult anticompetitive aspects of the Transaction. With that said, Syngenta believes that several discrete elements of the PFJ undermine the purpose of the PFJ and risk reducing competition and inhibiting innovation in the affected product markets. (These concerns primarily relate to one subsection, Section IV(G).) These concerns can readily be addressed with minor modifications to the PFJ to clarify the DOJ's intent and the scope of various provisions to ensure that they are enforceable as the DOJ intends. It is possible that the underlying divestiture documents provide more detail, but those documents are not public and therefore cannot clarify the ambiguous language of the public PFJ. Syngenta respectfully submits that the public materials should be clarified.

Syngenta's concerns are threefold:

1. First, one licensing provision in the PFJ is ambiguous as to scope, and if interpreted broadly, it could distort competitive dynamics in the industry. Section IV(G)(1) provides for the license of certain seed treatments for broad acre seeds and traits by Bayer to BASF at variable cost, for a period of two to four years. It is our understanding that the purpose of this provision is to support BASF in competing in the related divested seeds business, but the PFJ does not contain any restriction preventing BASF from reselling non-divested seed treatment chemicals it sources from Bayer to others in the marketplace. Doing so would distort normal competitive dynamics and discourage investment and innovation in the seed treatment market.
2. Second, the PFJ as a whole does not contain any express restriction preventing Bayer from (re)purchasing seed treatment products from BASF and reselling them to others, which would effectively permit Bayer to recreate the anticompetitive product bundles that posed anticompetitive concern in the Transaction itself.
3. Third, Sections IV(G)(1) and (4)–(6) distort competitive dynamics by including provisions for Bayer to supply BASF at "variable cost" (a term that is not defined in the PFJ). Syngenta believes that these provisions may not properly consider how costs are allocated in the agrochemical industry and would permit BASF the opportunity to buy the products at a fraction of their full production cost. Doing so would provide BASF with an unwarranted cost competitive advantage and inhibit the ability of other seed treatment companies to fairly compete in the seed treatment segment.

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We describe each of these concerns in more detail below.

## I. PFJ Does Not Prevent BASF from Reselling the Non-Divested Active Ingredients

Section IV(G)(1) provides BASF with a two- to four-year supply of seed treatment products that have not been divested by Bayer, "in priority over other purchasers, and in the quantities demanded by BASF" at "variable cost" (a term that is not defined in the PFJ). Under this provision, Bayer is required to supply the seed treatment products "used by Bayer in the [divested] Broad Acre Seeds and Traits Business." Notably, however, this provision does not contain any express restriction on BASF's use of seed treatment products sourced from Bayer solely for treating the divested seeds. The absence of this limitation creates the risk that BASF could choose to source seed treatment products from Bayer for purposes other than its own use with the divested seeds and traits businesses.

One particular result is that BASF could choose to resell the products referenced in Section IV(G)(1) into the downstream market, both to the consumer channel and to other seed companies. Syngenta does not believe that allowing downstream resale of these non-divested seed treatment products is consistent with its understanding of the DOJ's purpose in crafting this provision, because doing so (i) goes beyond placing BASF in the same position as Bayer pre-Transaction and (ii) is unrelated to supporting BASF in becoming an independent competitor in the seeds and traits businesses. Rather, the effect would be to distort the normal competitive dynamics that exist for the sale of seed treatment products by foreclosing the ability of other seed treatment suppliers to compete for sales to third parties because BASF will have the ability to source seed treatments from Bayer at a very low (variable) cost and then resell those seed treatments further downstream without the competitive constraints that other companies face. In sum, it would cause non-merging parties in the space, such as Syngenta, to absorb the cost and impact of the consent decree's efforts to create a successful divestiture buyer (as opposed to placing that burden on Bayer and Monsanto).

Syngenta believes that this concern could be addressed through a change to the language of Section IV(G)(1) that clarifies the DOJ's intention and specifies that BASF may use these products only on its own seeds. This could be accomplished with the following addition to the end of Section IV(G)(1): "Such seed treatment products shall only be used by BASF for its own use in connection with the Divestiture Assets."

## II. PFJ Does Not Prevent Bayer from Purchasing and Reselling Divested Seed Treatment Products

More broadly, Syngenta believes that the PFJ contains a second loophole that could undermine the Division's effort to prevent the merged firm from engaging in anticompetitive bundling of sales. As a threshold matter, there are particular carve-outs in Section IV that permit Bayer to retain certain products containing the clothianidin and fluopyram active ingredients.[1] In addition, the PFJ does not contain any restriction (in Section IV or elsewhere) on Bayer's ability to repurchase seed treatment products divested to BASF and then reconstruct a bundle of products between its own, non-divested products and the products divested to BASF for resale (such as under the Acceleron brand name). Moreover, the PFJ does not contain any restriction stating that Bayer cannot source these seed treatment products from BASF. As such, the PFJ appears to permit Bayer to recreate the sort of product bundles that were the source of significant concern in the Transaction, by Bayer paying a repurchasing fee to BASF.

[1] The Clothianidin Seed Treatment Business does not include a divestiture of Bayer's "mixture products containing clothianidin for canola/oilseed rape, potatoes, sugarbeets, cereals, or vegetables that have been commercialized as of the date of filing of the Complaint" with a few minor product exceptions. Section II(I). The Fluopyram Seed Treatment Business does not include Bayer's "cereals seed treatments containing fluopyram, claiming only fungicidal properties, and claiming no nematode control effect." Section II(P).

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Syngenta believes that the Division can prevent the PFJ from being undermined by including express language that limits Bayer's use of any clothianidin or fluopyram product purchased from BASF for use only in connection with branded Bayer seeds and that prohibits Bayer from reselling to third parties as part of a bundle any divested seed treatment product it purchases back from BASF. Syngenta understands such a restriction to be in line with the DOJ's intent. Indeed, although the PFJ already includes restrictions on licensing back the divested clothianidin active ingredient, there is no clear statement regarding any restriction on Bayer's ability to license back the fluopyram asset or purchase finished clothianidin or fluopyram products. Syngenta believes that this concern can easily be addressed through a minor edit to the language of the PFJ by adding the following clarification at the end of the definition of Seed Treatment Divestiture Assets: "Any retained interest in, license back of, or purchase of the Seed Treatment Divestiture Assets by Bayer shall be used by Bayer only in connection with Bayer's branded seed business."

## III. Supply of Seed Treatment Products to BASF at Variable Cost Distorts Competition

Section IV(G)(1) and Sections IV(G)(4)–(6) require that Bayer supply BASF with seed treatment chemicals at "variable cost" (in priority over other purchasers and in the quantities demanded). When coupled with the above-described concerns, these variable cost provisions risk significantly distorting competition for sales of seed treatment products, undermining the purpose of the consent decree, and placing BASF in a different and better position than Bayer pre-Transaction.

For background, "variable cost" in the agribusiness sector has a specific meaning, defined to include *only* the direct input costs, the raw material costs, the cost of toll manufacturing and labor, and customs, duties, and other delivery-related costs. This term in the agribusiness sector does not include any per-unit allocation of additional costs, whether fixed or variable, as one might expect from a measure of marginal cost or variable cost in other industries. As a result, "variable cost" in the agribusiness sector typically accounts for only 50-80% of the total cost of an active ingredient or a formulated product. While it is possible that the underlying divestiture agreements between Bayer and BASF define "variable cost" in more detail, it is not clear from any of the public materials released by the Division, including the PFJ, whether the "variable cost" provision is intended to reflect the agribusiness-specific meaning of "variable cost" or a broader understanding of that term that could include per-unit allocation of additional types of costs. Thus, the variable cost provisions of Sections IV(G)(1) and IV(G)(4)–(6) could potentially require Bayer to sell products to BASF at a loss and permit BASF to gain a cost advantage above any competitor pre- or post-Transaction. Indeed, it is Syngenta's understanding that pre-Transaction, when the Bayer chemical business sold seed treatment products internally to its own seeds business, such sales were made at only a slight discount to market price, and not at "variable cost" (however defined) or even full cost.

Requiring Bayer to supply BASF with seed treatment products at "variable cost" would substantially impact competition and competitive incentives for seed treatment products. *First*, by requiring below-cost sales to BASF, the current language of the PFJ would inhibit Syngenta's and other seed treatment suppliers' ability to compete for seed treatment sales to BASF for a period of two to four years. *Second*, if resales by BASF of the seed treatment products sourced at variable cost were to occur, Syngenta and other suppliers would be unable to fairly compete for sales to third parties. Under the PFJ's current language, since BASF will be able to buy seed treatment products from Bayer at below cost, "in priority over other purchasers, and in the quantities demanded," BASF would be able to leverage this cost advantage across the entire industry and potentially foreclose competition in seed treatment sales of several active ingredients. These concerns relate not just to clothianidin and fluopyram, but to any active ingredients sourced by BASF under Section IV(G)(1).

Moreover, the PFJ risks harming competition beyond the two- to four-year supply period included in Section IV(G) by impacting future investment and innovation incentives. The seed treatment space requires significant dedicated investment in product development and commercialization (including technical support and stewardship). However, to have sufficient incentive to make investments, companies require some assurance that there will be an available

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market for their products. It is not clear that would be the case if BASF has an assured supply of products in priority and on a cost structure that is unmatched before or after the Transaction.

While Syngenta has not been involved in any discussions between the DOJ and the merging parties, Syngenta believes that it cannot be the DOJ's intent to provide this type of competitive advantage to BASF. Syngenta believes that the PFJ should be clarified to note that "variable cost" is defined more broadly than its typical industry definition to include an appropriate allocation of fixed costs. A broader definition of "variable cost" that includes some measure of fixed costs has been frequently used by the DOJ in merger consent decree supply provisions,[2] including recently in the agribusiness sector.[3]

To address this concern, Syngenta believes that Sections IV(G)(1) and IV(G)(4)–(6) could be slightly amended to clarify that Bayer supply BASF at "fully absorbed cost," an industry-standard metric defined to reasonably allocate direct fixed costs included in the manufacturing operations, utilities, and waste, rather than at "variable cost." As an industry-standard pricing term, this term will also provide a more objective standard against which to monitor the provision and ensure compliance with the PFJ. Moreover, for the reasons described above, the relevant provisions should be limited to a two-year period, and not be allowed to extend for four years.

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Thank you for your consideration in this matter.

Sincerely yours,

Stephen Landsman
Group General Counsel
Syngenta AG

[2] *See, e.g., United States v. Danone S.A., et al.*, 2017 WL 3868409, at Section IV(H) (D.D.C. July 13, 2017) (final judgment) (providing for supply of certain raw material inputs at Defendant's "internal transfer pric[e]" and noting that "[t]he terms and conditions of any [such supply] must be reasonably related to the market value"); *United States v. Cox Enters., Inc., et al.*, 2016 WL 805627, at Section V(F) (D.D.C. Jan. 21, 2016) (final judgment) (requiring merging parties to continue providing data transfer services between divested and non-divested products "at cost").

[3] *See, e.g., United States, et al. v. The Dow Chem. Co., et al.*, 2017 WL 7118164, at Section IV(G) (D.D.C. Oct. 19, 2017) (final judgment) (requiring short-term supply agreement, at the option of the Acquirer, "[t]he terms and conditions [of which] must be reasonably related to market conditions for formulation services"); *see also In the Matter of China National Chemical Corporation, et al.*, FTC Docket No. C-4610, Decision & Order, Section II(D) (June 16, 2017) (requiring supply of certain crop protection products to be made "at a price not to exceed Cost," defined to include "reasonably allocated operations, production, and factory costs and shared corporate services overhead").