Consumer Federation of America

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Kathleen S. O'Neill
Chief, Transportation, Energy & Agriculture Section,
Antitrust Division, U.S. Department of Justice,
450 Fifth Street, N.W., Suite 8000, Washington, D.C. 20530.

Re: United States of America v. Bayer AG, Monsanto Company and BASF SE.

Dear Ms. O'Neill:

Consumer Federation of America appreciates the opportunity to comment on the proposed Final Judgment governing the proposed Bayer Monsanto merger. We applaud the Department of Justice (DOJ) for opposing the Bayer Monsanto merger, although we hasten to add that the DOJ has taken a traditional 20th century approach in the consent decree, seeking to prevent a dramatic increase in horizontal concentration through divestitures. The goal of that approach is to restore the *ex ante* state of horizontal competition in the market. The proposed remedy is extremely complex and will be difficult to enforce. The chances that BASF will be able to acquire the weaker agricultural assets of the two firms and use them to compete effectively are doubtful.

Even if the DOJ was only willing to address the horizontal market power problem, it had a much better option that would have done a much better job of protecting the post-merger competitiveness of the market. Rather than require the spin-off of the smaller and weaker agricultural assets, it could have required the spin-off of the stronger assets. Thus, in every market where the DOJ identified a competitive concern, it could have required Bayer-Monsanto to spin off the Monsanto agricultural interests. This would have done a much better job of restoring the *ex ante* competition in the market, making it much more likely that BASF would have been able to compete against the Bayer-Monsanto giant.

However, there is an even more profound flaw in the proposed remedy. The problem is that we are nearly one-fifth through the 21st century and the *ex ante* state of competition in the market for seed/traits/chemicals was horrible from the farmer and consumer points of view because of severe abuse of vertical market power. As we pointed out in our analysis of the market, the dominant firms use their control over chokepoints in the supply chain to stifle competition. In the reality of the 21st century, the chances that the remedy will fully protect horizontal competition are slim and its ability to restrict the abuse of vertical market power are none.

To successfully preserve competition, DOJ cannot allow the dominant firm in the highly concentrated agricultural seed-trait-chemical platform to be acquired by a dominant chemical

firm, which also ranks among the top four firms, without imposing restrictions on the post-merger firm from expanding its market power and vertical leverage. Even with divestiture of Bayer's assets, this is a prescription for failure.

It is time for the antitrust authorities at the DOJ and the Federal Trade Commission to catch up to the economic structure of the digital age, which is dominated by platforms that create immense market power for the leading firms. At the start of the 21st century, the Microsoft case began the transition, demonstrating how the abuse of market power at key, applications programming interfaces created choke points for competitors. That case should have triggered a rewrite of the non-horizontal merger guidelines, because platforms are all about vertical leverage.

The *Horizontal Merger Guidelines* represented the formalization of the development of antitrust in the 20th century because economies of scale were the key to market power. They were updated regularly over the course of 50 years. The *non-horizontal guidelines* were a subsection added to the *Horizontal Guidelines* 30 years ago. They have never been updated. With vertical relationships playing such a pervasive role in the digital economy, it is time for the antitrust authorities to give the potentially anticompetitive impact of abuse of vertical leverage its proper place in the antitrust policy arena.

The agricultural sector with the binding of traits, seed, and chemicals is a perfect example of the problem. Here, the DOJ has missed an important opportunity to advance the treatment of vertical market power problems in industries dominated by the misuse of intellectual property to the detriment of competition and consumers. The horizontal remedy is not likely to be in the public interest because the companies' post-merger vertical leverage and market power will be greater.

If the DOJ was willing to tackle the vertical issues, it could have required rigorous open access conditions that would allow competition under each of the applications' interfaces, and publication of application programming interfaces for the development of seeds based on traits, or chemicals based on seed. Combined with divestitures, these open access requirements could have fostered competition in the seed, traits and chemicals much more effectively than the approach taken in the consent decree.

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