

Dr. Kalyan B. Goswami
Director General

Ref. NSAI/2018/014

Date: 22.01.2018

To
The Secretary, Competition Commission of India,
Hindustan Times House,
7th Floor, 18-20,
Kasturba Gandhi Marg,
New Delhi-110001,

Sub: Appreciable Adverse Effect on Competition (AAEC) in the relevant market in India due to Bayer-Monsanto combination- Submission as per sub-section (3) of section 29 of the Act to the notice dated 7-1-2018.

Ref: Press Release dated 05.01.2018 - CCI invites comments from public in respect of proposed combination between Bayer Aktiengesellschaft and Monsanto Company.

Dear Sir/Madam

The National Seed Association of India (NSAI) is the Apex seed industry association with a membership of more than 400 seed companies of all sizes located across India. Our members undertake plant breeding activities for development of new plant varieties including development of transgenic varieties. After testing such new plant varieties and obtaining regulatory approvals, the members undertake seed production, processing, testing and marketing to the farmers. Quality seed play a major role in contributing to agricultural productivity and improvement of quality of agriculture produce. In addition seed production activity carried out by the members in association with seed growing farmers provides a good vocation to the millions of farmers involved in the process. Hybrid seed production also enhances employment creation in the rural India.

Under the extant FDI policy, several seed companies from leading countries in the world including European, North American and ASEAN region established their operations in India.

The introduction of GM traits has created upstream and downstream layers in the Seed Industry. The upstream layer of technology developers who develop GM traits using patented genes and gene insertion technologies, is dominated by large Multi-National Companies. It is a well-known fact in the world that due to huge investments and IP rights gained over the years, only 5 major companies in the world control almost all the commercially approved GM traits in the world. These 5 major companies are Monsanto, Syngenta, Bayer, Dupont and Dow. Almost all of them are now involved in consolidation and mergers. As a result, the number will shrink to 3 leaving only Bayer, ChemChina (Syngenta) and Dupont. This situation will definitely lead into monopolization of the upstream GM trait development market which if left unregulated by the Hon'ble Commission can have potential anti-competitive effects on seed industry adversely impacting the interest of farmers and consumers.

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The plant varieties which are developed through the R&D efforts of seed companies or even the public sector breeding programs are provided IPR under PPVFR Act. The breeders of all companies small, medium and large in size and working in the public institutes, are provided a right to access any plant varieties including a transgenic plant variety for developing new plant varieties. This right not only is important for a breeder but also for the farmer and consumer, because continuous development and availability of new plant varieties is very important to maintain agricultural productivity and meet the changing demands of the market / consumer. If new plant varieties are not available on a continuous basis, the agricultural productivity will stagnate and then decline. Therefore, throughout the world rights of the breeders are protected. In fact, as per the definition of the breeder under the PPVFR Act, the farmer also is included. Many times farmers themselves undertake breeding and develop farmer varieties which are also given IPR under PPVFR Act.

As provided under the TRIPS agreement, the Govt. of India excluded seeds, planting material, plant varieties and essential biological processes outside the purview of the Patents Act. Despite these provisions, Monsanto suppressed the breeders' rights through manipulating the regulatory system and created a monopoly for itself for earning super profits. The farmers were exploited by way of charging of high trait value. Despite bringing down the trait value from Rs. 1250/- in 2002 to Rs. 49/- in 2016, Monsanto is still making high profits which indicates their greed for profitability and high margins. The CCI ordered investigation based on the reference made by the Govt. of India and several other informants including NSAI on the conduct of Monsanto. The investigation is being carried out by the DG.

This background has been mentioned in this context to highlight the importance to prevent monopolistic practices in the upstream trait development and licensing market through manipulations by using huge financial powers and lobbying skills. The global lobbying to suppress scientific publications which discovered the carcinogenic effects of Glyphosate by Monsanto are also well known and available in public domain. If all the large companies with ownership of GM traits adhere to the Indian IP laws, the monopolies in the downstream seed market cannot occur. Therefore, it is essential for the CCI to stipulate that the large entities like Monsanto, Bayer post-merger shall strictly follow the Indian IP law wherein access to the GM traits will be provided to the breeders as rights and the developer of the GM traits will collect the trait value as per the provisions under Section 26 of the PPVFR Act under which they can make a claim and the PPVFR Authority can determine the trait value in the form of benefit share from the seed sale of all varieties which contain the trait. If, the Commission can ensure the large companies like Bayer or Monsanto adhere to the Indian law and take punitive action if they resort to manipulation, the monopolization of strategically important seed sector can be prevented.

If the history of mergers and acquisitions in seed industry is examined, a very clear AAEC has occurred in reality confirming many research studies. It is suggested that such an important decision on this mega-merger should be taken after comprehensive analysis of future scenarios and impact on domestic seed sector and the time of 14 days provided for elicitation of public

opinion is too short to provide a meaningful response. Following are the key observations of NSAI on the proposed merger.

1. Any global merger of two large MNCs is done for harnessing synergies and complementarities of their R&D capacities, product development, distributor & supplier network strengths and market specific opportunities. Such combination in developing economies like India with an emerging seed sector, will certainly lead to AAEC In traits business, when more than 85% approved “events” and IPR is directly or indirectly owned by the combination. Practically the combination can dictate its “traits” pricing or release of traits into market.
2. The R&D capacities of the combined merged entity is not going to be additive, but a multiple of the existing capabilities. With such huge R&D strengths across all “agri-inputs” the proposed combination shall be the foremost threat to domestic R&D in agri-input sector.
3. Already the world has seen two mergers viz. Dow-Dupont and Syngenta-Chemchina, for which the opposition was limited as the history of these companies had limited AAEC. However the history of monopoly behavior of “Monsanto” is well-known and documented across the world in several countries including USA, which has created AAEC and negative externalities rather than any overall gain or welfare to the society.
4. The assessment for merger should consider future 10-15 year business plans and cashflows from Indian Territory from the merged entity rather than the current or future business.
5. The biggest threat comes from exercise of monopolies in the garb of patent and IPR enforcements and capture of the existing regulatory system in seeds, plant varieties, traits, agro-chemicals, Big data and biological inoculants.
6. The cross-licensing arrangements among the Big 4 which are also referred to a s” Non-merger mergers” and their role in cartelization and market dominance need to be assessed with respect to exclusion of competitors or potential entrants or forcing out competition to accept the rules set by upstream market (eg; Traits developer dictating terms to seed companies) or creating entry barriers by capturing weak regulatory systems.
7. Indian regulatory system is still evolving with respect to traits, precision agriculture or new biological or advanced Gene editing technologies. The proposed mega merger can hijack the entire regulatory system in these areas as there is no alternative counterbalancing force in this area in public or private sector.
8. The most important area that has not been assessed thoroughly is use of “Big Data” and Digital agriculture, in which Monsanto has made huge global investments already for

development of precision agriculture based products and control “agricultural and climatic information” and thereby gain market control.

9. With respect to seed treatment products, Bayer is already a market leader, while both Bayer and Monsanto have made significant investments in seed treatment with Biologicals and new age bio-inoculants which is going to be the next big disruption in agri-input industry. With leadership in both chemicals and biological, the proposed merger will certainly control the markets in this important segment.
10. The threshold Herfindahl–Hirschman Index (“HHI”) of 2500 indicates a highly concentrated market and an increase of score of more than 100 points warrants thorough scrutiny. If this is applied to Indian context, the HHI is increasing manifold above 2500 in many of the crop segments, traits and agri-chemicals. Hon. CCI may take technical support in HHI calculation and assess the concentration across major product segments.
11. The key to genetic diversity in future depends on who will control biotechnologies and modern plant breeding technologies such as gene editing. The proposed combination which already controls most of IPRs in this area will also dictate on the consumer behavior and the product portfolio of the future. With limited heterogeneity and diversity in Indian seed sector, the consumers will depend on few of the mega products/blockbusters from these few MNCs, leading to narrowing of genetic base and dependence on remedial measures in the form of other agri-inputs such as pesticides.

Suggested remedies:

In view of the above, it may be important to stipulate the following conditions before the Hon’ble CCI accepts the merger.

1. Since the combined strength of Bayer and Monsanto creates very large vegetable seed business, it may be in the interest of the consumer and the farmer to direct them to divest the vegetable seed business to any other Indian entity or into an independent company without any management control.
2. Since they have a strong presence in upstream GM trait market, they may be directed to divest downstream cotton seed market in India post-merger. The practice of remaining in upstream GM trait marketing and downstream seed market also contravenes the provisions of the Competition Act.
3. Both Monsanto and Bayer develop Herbicide Tolerant (HT) traits. The incorporation of HT traits into the crops makes the farmers purchase the particular herbicide for which the tolerance is exhibited by the crop. Roundup Ready tolerance is one such trait that is developed by Monsanto and incorporated into several crops like Soybean, Cotton, Maize etc. This enhanced the consumption of Roundup (Glyphosate) exponentially across the

world. Similar HT traits are also being developed by Bayer. Therefore they also shall not be allowed to be present in in both downstream business of seed and herbicide marketing in India. The development and spread of herbicide tolerant trait creates enormous market for the particular herbicide or its formulations, distorting the competitive landscape in the herbicide market and separating the two businesses into independent management is essential. It is also pertinent to note that the trait developers resort to getting the approval for a specific formulation thereby resorting to evergreening of the patent despite the molecules itself coming out of the patent.

4. In the future, the importance of data collected by the agro chemical companies becomes very important in providing crop improvement services to the farmers. In agriculture sector, this data is referred as "Big Data" will enable unravelling of various agronomic information patterns for yield & quality enhancement Also digital agriculture should be for farmer welfare and should not be used for IPR enforcement and coercing farmers into unconscionable licensing contracts. The Commission may propose access to such data to the Government, Industry associations and farmer associations as one of the condition which the corporates have to agree to get the sanction of the merger.

The point-wise remarks/observations/comments/suggestions on relevant sections of the Form-IV-- details of combination under subsection (2) of Section-29 of the Competition Act, 2002 are provided in Annexure to this letter.

Regards,

Yours sincerely,



Kalyan B. Goswami