

## Antitrust: A Case Study on the Bayer-Monsanto Merger

*This paper analyzes the current antitrust issues, mainly focusing on the agribusiness Bayer-Monsanto merger. It examines the background, related laws with respect to the United States and the European Union, different point of views, and impacts set forth by the Bayer-Monsanto merger; following with a case commentary. This commentary interprets the merger as an illegal decision and higher authorities should have scrutinized and weighted the deal more carefully. Numerous things have changed since the establishment of the regulations regarding antitrust issues; whether this merger could be a possible extension for an update on the antitrust law is something that could be taken into consideration.*

### **Introduction**

The Big Six—Monsanto, Bayer, DuPont, Dow, Syngenta, and Baden Aniline and Soda Factory (BASF)—are the main six companies in the agriculture market. Researchers show that they own more than sixty percent of the world's pesticides, herbicides and seeds. To prevent the market from consolidating, or to prohibit large, powerful companies from monopolizing the market, United States and the European Union have set some ordinances under the United States Antitrust Law and the European Union Merger Control Regulation. Although successful mergers within the Big Six seems inconsistent with the regulations, the Big Six is already widely known as the Big Four. Once mergers take place, companies will be even more powerful than before and will control a bigger portion of the market. In other words, majority of the world's agriculture will fall into the hands of these big companies, making little to no competition for other companies. Bayer-Monsanto Merger is not the first merger seen in the agriculture history; in fact, previous mergers have been giving empty promises to farmers and customers. Farmers' concerns rapidly arises along with the possible increase of the market concentration.

### **Background**

#### **I. Bayer-Monsanto Merger**

The Big Six—Monsanto, Bayer, DuPont, Dow, Syngenta, and BASF— of the agriculture market have become the Big Five after the DowDuPont merger in 2015. Recently, the Big Five have developed into the Big Four with the Bayer-Monsanto merger. Whether they will become Big Three is still a debate and concern to many.

Monsanto was an American major manufacturer of genetically modified seeds, or sometimes known as genetically modified organisms, found in 1901. Monsanto did not always have good reputation in the market, it was in fact known for its arrogant marketing as well as its aggressive sales tactics. In addition, its most famous product is the Roundup weed killer, which many believe is unsafe for the environment and humans. Furthermore, genetically modified organisms is strictly prohibited in Europe, in addition scientist believe that the genetically modified organisms produced have negative impact on consumers, such as cancer.

Bayer, a German pharmaceutical company founded in 1863, was at first known for its pharmaceutical business, until later they started to expand their business and develop products in relation to agriculture chemicals, and crop supplies.

Bayer announced to acquire Monsanto with \$66 billion on September of 2016. This merger was at first interrupted by many specific laws, however, the deal was approved and completed on June of 2018.

One of the essential keys that made this merger successful was the third party, BASF. In order to prevent Bayer-Monsanto to have too much power in the market, Bayer decided to sell part of the business to a third party. However, this third party was BASF, another large German chemical producer in the world, also one of the companies in the Big Six.

Although this strategy, selling part of the business to a third party, is legally sanctioned by corresponding authorities, it could lead to an even more concentrated market. Even though the presence of the third party, BASF, seems like is spreading the market power among more companies, but having it as a member of the Big Six does not solve the problem. On the contrary, this strategy might lead to the formation of the Big Three.

## **II. Law**

Unlike the DowDuPont merger in 2015, in which companies involved in the merger are both based in the United States, Bayer and Monsanto are companies from different countries, therefore, decisions should not solely depend on the United States or the European Union law; both countries' regulations should be taken into account. Although antitrust laws in the United States and the European Union are slightly different, they still have the common objective to set a basic framework to promote fair market competition in both horizontal cartel and vertical agreement.

### **A. United States Regulations**

Four main acts are taken into consideration when discussing about market competition and antitrust in the United States. These four acts include: The Sherman Antitrust Act of 1890, the Federal Trade Commission Act of 1914, the Clayton Act of 1914, and the Hart-Scott-Rodino Antitrust Improvement Act of 1976. These laws are enforced by two governing bodies— the Federal Trade Commission, and the United States Department of Justice— to provide guidance to fair competition, as well as to prohibit monopolization in any industry.

### **B. European Union Regulations**

The European Commission and the Directorate General for Competition are the regulators enforcing the antitrust laws in the European Union. Within the European Union, the antitrust laws are based on the Treaty on the Functioning of the European Union and the European Community Treaty, which is closely similar to the Sherman Antitrust Act of 1890 of the United States. The main objectives of the regulations in the European Union are similar to the ones of the United States; to prohibit unfair competition and monopolization. However, it is different from the United States in the sense that under the European Union regulation, companies are allowed to sell part of the combined business to a third market player to reduce the market power that a company might possess. After this process, the merger will be more likely to be approved.

### **C. Violation of Laws**

As companies successfully merged, competition in the agricultural market decreased, and concentration increased, leading to dominance of Bayer company in the agricultural industry. Under the regulations of the United States, Bayer-Monsanto merger violates the Clayton Act of 1914, which states that “no person in commerce can acquire the whole or any part of the stock or share capital.”

With respect to the European Union, Bayer-Monsanto merger contravenes with the Treaty on the Functioning of the European Union. This treaty prohibits agreements or mergers between “independent market operators which restrict competition.” Moreover, this treaty prohibits firms to abuse powerful positions they have in the market to set unfair prices or limit production. Research have clearly shown that the merger caused Bayer company to dominate the market in the European Union, therefore, violating the antitrust laws.

### **III. Different Point of Views**

#### **A. Bayer and Monsanto**

Both Bayer and Monsanto stated that the merger will not lead to market dominance since they have little to no overlap on products produced. Moreover, they believe that the merger will help the innovation and technology in the agriculture industry. They argued the merger will help them compete against other large companies that produce similar products and have strong Research and Development (R&D) capabilities. Having these apparent ambition for the merger, they are confident that the efficiency gained through innovation and technology will help farmers in different aspects, especially increasing their production in a shorter period of time.

#### **B. Farmers**

Majority of the farmers were more concerned than content when they heard about the Bayer-Monsanto merger in 2016, albeit the alluring promises that Bayer and Monsanto assured. Their considerations were mainly focused on the raise in products' prices as the varieties of products available to them will greatly diminish. Moreover, farmers were also worried that Bayer will use its large power dominance in one product to push sales of other related products, causing farmers to buy products that they do not necessarily need. In addition, the merger will make competition challenging for small family farms, resulting them to exit the market; in other words, slowly leaving the powerful companies in the market and consolidating the industry.

#### **C. Experts**

Experts from different fields such as law, business and economics commented upon the Bayer-Monsanto merger. They believe that the merger will only benefit the companies by locking in their profit and cornering the market by slowly kicking smaller companies out of the market. The merger will cause unequal bargaining power, which is a trait of unfair competition. Under research, Fictitious Business Name (FBN) data proved “the greater market dominance was correlated with higher corn seed and chemical prices.” By way of explanation, Bayer-Monsanto merger will not benefit the farmers nor consumers in any form.

### **IV. Final Decision**

The Bayer-Monsanto merger case has been one of the big news in law, agriculture, and business fields since its announcement in 2016. This merger was approved by authorities in both the United States and the European Union in 2018. Even though many believed that the merger should not take place, or some were even

confident that it will not happen; at the end, Bayer and Monsanto still successfully merged. The main reasons of the approval of the merger is given that Bayer and Monsanto not only produce different products, their products might also complement each other, and selling part of the business to BASF will reduce market concentration. Consequently, regulations with respect to protecting competition and antitrust are not enough to prohibit this merger from happening.

## **V. Impacts**

Even though different positions involved in this merger have expressed their outlook about the expected impacts before the merger, the true and undeniable effects from the merger are clearly exposed after the merger. These effects are closely related the farmers and experts' concerns prior the merger. After the merger in 2018, the agriculture business faced problems such as less competition in the market, reduced innovation in the industry, higher price on products, limited choices for consumers, lack of job positions in agriculture; yet, Bayer company is earning more profit than ever. It is worth noting that these concerns were raised by farmers and experts before higher authorities have approved the Bayer-Monsanto merger.

## **Commentary**

Both the United States and the European Union have surely established laws and regulations regarding antitrust issues, including both horizontal cartel and vertical agreement cases. It is clear that the Bayer-Monsanto merger directly violates both the Clayton Act under the United States regulations, and the Treaty on the Functioning of the European Union of the European Union Antitrust laws. However, the merger was still given the green light because the combined companies sold part of their business to the third market player, BASF.

Farmers will be the firsthand party to be affected by the merger, and they have spoken about the strong opposition. Farmers' concerns were raised, not only based on what they think will happen post-merger, but based on effects from historical mergers. On account of the agriculture market, corresponding authorities such as the Federal Trade Commission, United States Department of Justice, European Commission, and the Directorate General for Competition should have prohibited the Bayer-Monsanto merger.

Many law experts argued that the Bayer-Monsanto merger violates the Clayton Act and the Treaty on the Functioning of the European Union. In addition, when a market is lacking in competition, one company will control more than a quarter of the market. In this case, merger will allow Bayer to be able to have control over more than a quarter of the agriculture market. Therefore, this merger should have been blocked to protect the business in both the United States and countries in the European Union.

Should higher authorities have been more careful on examining the merger still remains as a question to many. Furthermore, whether previous regulations regarding antitrust issues are outdated should be taken into consideration as well. As time has changed, it could be said that there should be an update on the regulations to prevent companies to find ways to "get around" the law. Consequently, Bayer-Monsanto merger could be a possible extension for corresponding authorities to discuss upon updating the Antitrust Laws.

## **Conclusion**

Mergers have brought many concerns to customers despite the type of industry; in fact, previous mergers in different industries such as airlines and banking have shown the challenges to recreate competition, and it is very similar in the agriculture industry. In the Bayer-Monsanto merge, farmers have shown their concerns through surveys, as a matter of

fact, empirical literature and research have strongly confirmed that mergers in the industry have not benefited the farmers nor consumers in any way. Whether corresponding authorities approved the “illegal” merger too quickly or should they have been more strict on reviewing regulations regarding this specific case remain ambiguous.