

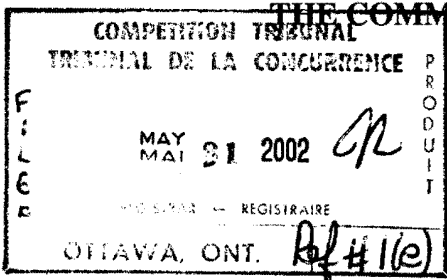
THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 104 of the *Competition Act*;

AND IN THE MATTER OF the acquisition by Bayer AG of all of the shares of Aventis CropScience Holding S.A., constituting the agrochemical business of Aventis S.A. and, in Canada, the indirect acquisition by Bayer AG of all of the shares of Aventis CropScience Canada Co.

BETWEEN:



- and -

Applicant

**BAYER AG
and AVENTIS CROPSCIENCE HOLDING S.A.**

Respondents

INDEX FOR THE CONSENT ORDER IMPACT STATEMENT

- I. THE NATURE AND PURPOSE OF THE PROCEEDING 2**
- II. THE ACQUISITION 4**
- III. THE ALLEGED EFFECTS OF THE PROPOSED TRANSACTION ON COMPETITION 4**
 - A. Introduction 4**
 - B. Insecticides for Certain Fruit and Vegetable Crops 5**

C.	Seed Treatments for Canola	8
D.	Seed Treatments for Cereals	11
E.	Grassy Weed Herbicides for Spring Wheat	13
IV.	DESCRIPTION AND ANTICIPATED IMPACT OF THE DRAFT CONSENT ORDER	16
A.	Divestiture of the Acetamiprid Assets	16
B.	Iprodione Licence	22
C.	Divestiture of the Triticonazole Assets	23
D.	Divestiture of the Flucarbazone Assets	27
V.	ALTERNATIVE TO SETTLEMENT	32
VI.	CONCLUSION	33

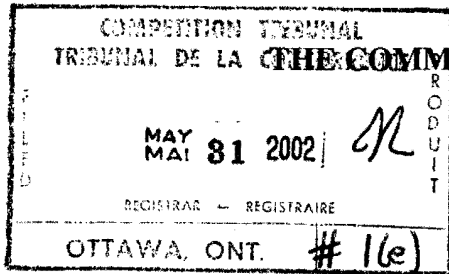
THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for an Order pursuant to section 104 of the *Competition Act*;

AND IN THE MATTER OF the acquisition by Bayer AG of all of the shares of Aventis CropScience Holdings S.A., constituting the agrochemical business of Aventis S.A. and, in Canada, the indirect acquisition by Bayer AG of all of the shares of Aventis CropScience Canada Co.

BETWEEN:



THE COMMISSIONER OF COMPETITION

Applicant

- and -

**BAYER AG
and AVENTIS CROPSCIENCE HOLDING S.A.**

Respondents

CONSENT ORDER IMPACT STATEMENT

1. This Consent Order Impact Statement is filed by the Commissioner of Competition (the "Commissioner") pursuant to ss. 76 *et seq* of the *Competition Tribunal Rules*. It describes the circumstances surrounding the anticipated effect on competition of the Draft Consent Order (the "DCO") submitted by agreement of the Respondents to this proceeding.

2. The Commissioner alleges certain facts and makes certain statements in this Consent Order Impact Statement which are not contested by the Respondents for the purpose of this application and any proceeding initiated by the Commissioner relating to the DCO attached hereto at Tab 7, including any application to vary or rescind. Nothing in this Consent Order Impact Statement or other filings in relation to this application shall be taken as an admission now or in the future by the Respondents, or any of their affiliates, of any such facts or submissions.

I. THE NATURE AND PURPOSE OF THE PROCEEDING

3. The Commissioner files with this Consent Order Impact Statement, a Notice of Application, the Statement of Grounds and Material Facts, the DCO, the Affidavit of Mr. Dean Shaikh, and the requisite Consents, and makes this application pursuant to sections 92 and 105 of the *Competition Act* (the “Act”). A motion for a Consent Interim Order is also filed pursuant to section 104 of the *Act*.
4. The settlement reached between the Commissioner and the Respondents is designed to eliminate the substantial lessening or prevention of competition which would likely have arisen in certain agrochemical markets in which both Bayer AG and its affiliates

(“Bayer”) and Aventis Crop Science Holding S.A. (“ACS”) and affiliates controlled by it have operations. The Commissioner requests that the Competition Tribunal (the “Tribunal”) give effect to this settlement through the approval of the DCO.

5. The settlement provides that Bayer will divest or license, with certain exclusions: acetamiprid (an active ingredient in insecticides and insecticide seed treatments) and certain other assets related to the worldwide insecticide business of ACS as well as certain other assets pertaining to the Canadian canola seed treatment business of ACS; triticonazole (an active ingredient in fungicide seed treatments) and certain other assets pertaining to the Canadian cereal seed treatment business of ACS; and flucarbazone (an active ingredient in herbicides) and certain other assets related to Bayer’s Canadian and worldwide wheat grass herbicide business. As explained below, these measures are intended to preserve competition which would likely otherwise have been substantially lessened or prevented in the relevant markets as a result of the acquisition by Bayer of all of the shares of ACS, constituting the agrochemical business of Aventis S.A. and, in Canada, the indirect acquisition by Bayer of all of the shares of Aventis CropScience Canada Co. (the “Acquisition”).

II. THE ACQUISITION

6. Pursuant to definitive stock purchase agreements, signed effective October 2, 2001, among Bayer, Aventis Agriculture and Schering Aktiengesellschaft, SCIC Holdings LLC, Bayer intends to acquire all shares in ACS. Currently, the shareholders of ACS are Aventis Agriculture, a wholly-owned subsidiary of Aventis S.A. (47.93%), Hoechst A.G., a 98% owned subsidiary of Aventis S.A. (28.07%), Schering (19.83%), and SCIC, a wholly-owned subsidiary of Schering (4.17%). Following the Acquisition, Bayer's crop science activities will be organized as a separate legal entity to be named "Bayer CropScience".

III. THE ALLEGED EFFECTS OF THE PROPOSED TRANSACTION ON COMPETITION

A. Introduction

7. The Commissioner examined the likely impact of the Acquisition, and particularly the likely effect on prices and product choice. The Commissioner identified the following four relevant markets in which the Acquisition would be likely to substantially lessen or prevent competition: (1) insecticides for certain fruit and

vegetable crops in Canada; (2) seed treatments for canola in Canada; (3) seed treatments for cereals in Canada; and (4) grassy weed herbicides for spring wheat in Western Canada.

8. The Commissioner also assessed the likely competitive effects of the Acquisition in respect of other product markets in Canada, including the following: (1) foliar insecticides for canola, cereals, corn, strawberries, blueberries and other minor crops; (2) seed treatments for corn; (3) herbicides for corn, pulse crops, soybeans, vegetables, and potatoes; (4) foliar fungicides; and (5) professional-use products. As explained in the Statement of Grounds and Material Facts, the Commissioner has concluded that the Acquisition does not result in a substantial lessening or prevention of competition in these markets.
9. Finally, the Commissioner, in consultation with economic, industry and intellectual property experts, considered possible remedies in respect of the four markets identified in paragraph 7 above.

B. Insecticides for Certain Fruit and Vegetable Crops

10. The Acquisition would likely substantially lessen or prevent competition in the provision of insecticides for certain fruit and vegetable crops in Canada. Bayer is

currently the only competitor in Canada with an insecticide (other than, as discussed below, a seed treatment) based on a new chemistry known as “chloronicotinyls”. As explained in the Statement of Grounds and Material Facts, insecticides based on older chemistries are slowly being phased out of the market and are being replaced by products based on newer chemistries (such as chloronicotinyls). Bayer’s chloronicotinyl insecticide is formulated with the active ingredient imidacloprid and marketed under the brand name “Admire”. As reflected in the Statement of Grounds and Material Facts, the Bayer and ACS Canada combined share of grower expenditures on insecticides for use on potatoes in Canada in 2001 was approximately 86%. Bayer's Admire commands the most significant share. Based on 2001 data, Bayer and ACS together also command significant share in insecticides for other crops including apples and tomatoes.

11. ACS Canada is currently in the process of registering a product for several crop uses (including potatoes, apples, tomatoes and leafy vegetables) to be marketed under the brand name “Assail”. Assail is an insecticide formulated with acetamiprid, an active ingredient belonging to the chloronicotinyl family.
12. The Commissioner has estimated that Assail will have a share of grower expenditures on insecticides for potatoes of more than 10% within two years of its introduction.

Further, the Commissioner has estimated that the share of Assail of grower expenditures on agricultural insecticides for apples, tomatoes and leafy vegetables in 2002 will be 4%, 10% and 20%, respectively, and higher within two years.

13. Based upon the Commissioner's findings listed in the Statement of Grounds and Material Facts, including the merged entity's high post-merger share, the limitations on foreign competition, the lack of acceptable substitutes, the removal of ACS Canada as a vigorous and effective competitor, the presence of high barriers to entry, the lack of effective remaining competition and the limited change and innovation by competitors, other than Bayer and ACS Canada, within the relevant time period, the Commissioner concludes that the Acquisition prevents or lessens, or is likely to prevent or lessen, competition substantially in the provision of insecticides for certain fruit and vegetable crops in Canada.

14. As discussed in greater detail below, the remedy proposed in the DCO entails the divestiture of the rights to the active ingredient acetamiprid worldwide (with the possible exception of Mexico, South and Central America and Africa) and, with some exceptions, all assets relating to the business conducted by ACS prior to the Acquisition of researching, developing, registering, manufacturing, formulating, licensing, distributing, marketing and selling all products containing acetamiprid.

15. In Canada, this proposed remedy relates primarily to the business of selling Assail insecticide for foliar use as well as Assail ST for use as a seed treatment (discussed below). Given the expected importance of chloronicotinyl-based insecticides, the proposed remedy will be effective in removing the substantial lessening or prevention of competition in the market for insecticides for certain fruit and vegetable crops in Canada which would have been likely to result from the Acquisition.

C. Seed Treatments for Canola

16. The Acquisition would likely substantially lessen or prevent competition in the canola seed treatment market in Canada. The Acquisition would result in increased market concentration. Bayer's seed treatment business in Canada is carried on through a joint venture, Gustafson Partnership ("Gustafson"), in which Bayer has a 50% interest. Gustafson, ACS Canada and Syngenta Crop Protection Canada Inc. ("Syngenta") are the three major seed treatment companies in Canada.
17. As discussed in the Statement of Grounds and Material Facts, until recently, virtually all canola seed-treated acres were treated with dual-use (insecticide/fungicide) products containing the insecticide active ingredient lindane. There has been a

dramatic change in the canola seed treatment market in Canada following the removal by the Pest Management Regulatory Agency (the “PMRA”) of canola from the labels of seed treatment products containing lindane on July 1, 2001. Sales by distributors of lindane-treated seed continue in 2002 (accounting for an estimated 25% of total seed treatments sold for use on canola in 2002), but beyond 2002 the products relevant to competition will include only those based on newer chemistry insecticides, or single-use fungicide seed treatments.

18. Of the lindane-replacing products, Gustafson sells a dual-use seed treatment called “Gaucho Canola System” based on, among other things, the insecticide active ingredient imidacloprid. Syngenta sells a dual-use seed treatment called “Helix” based on, among other things, the insecticide active ingredient thiamethoxam. ACS Canada has the exclusive rights to acetamiprid, for which PMRA registration for use as a seed treatment under the brand name “Assail ST” is expected in time for the 2003 crop year. In addition, ACS Canada has already introduced a fungicide-only product, “Foundation Lite” (based on the active ingredient iprodione), as has Gustafson with its product Vitavax RS Fungicide (based on the active ingredient carbathiin).
19. Based upon the Commissioner’s findings listed in the Statement of Grounds and Material Facts, including the resulting high concentration in the market (only two

significant competitors would remain), the limitations on foreign competition, the lack of acceptable substitutes, the removal of ACS Canada as a vigorous and effective competitor, the presence of high barriers to entry, the lack of effective remaining competition and the limited change and innovation by competitors other than Gustafson, ACS Canada and Syngenta within the relevant time period, the Commissioner concludes that the Acquisition prevents or lessens, or is likely to prevent or lessen competition substantially in the provision of canola seed treatments in Canada.

20. As described in greater detail below, the remedy proposed in the DCO requires the divestiture of all rights (with certain exceptions) to the worldwide (with certain possible exceptions) acetamiprid business of ACS prior to the Acquisition, including the seed treatment business carried on by ACS prior to the Acquisition related to Assail ST.

21. In addition, Bayer will offer the acetamiprid acquirer a non-exclusive, irrevocable, assignable licence to its rights (including PMRA registrations) to the generic (*i.e.*, off-patent) fungicide active ingredient iprodione and, if requested, a supply of iprodione. As such, the acetamiprid acquirer will be able to market a new fungicide-only product (comparable to Foundation Lite, which may continue to be sold by Gustafson at the

conclusion of the Hold Separate Period as defined in the Draft Consent Interim Order), as well as a dual-use product (fungicide/insecticide) based on iprodione and thiram (which is widely available from third parties), and acetamiprid as soon as PMRA registration for Assail ST is granted. The acquirer of this licence will have the right to develop new products.

22. If Bayer is unable to grant the non-exclusive licence to iprodione for any reason, a trustee, (the “Divestiture Trustee”) will divest the Foundation Lite trademark and inventories, so as to permit the iprodione acquirer to sell Foundation Lite (in which case Gustafson will need to use a new name should it sell a similar product).
23. The proposed remedy will be effective in removing the substantial lessening or prevention of competition in the provision of canola seed treatments, which would have been likely to result from the Acquisition.

D. Seed Treatments for Cereals

24. The Acquisition would likely substantially lessen or prevent competition in the cereal seed treatment market in Canada. The Acquisition would result in increased market concentration. Gustafson, ACS Canada and Syngenta are the only three significant

cereal seed treatment companies in Canada. As reflected in the Statement of Grounds and Material Facts, based on 2001 estimates, the Acquisition would result in Gustafson and ACS Canada holding a combined post-merger share of application acres of approximately 87% for barley seed treatments and 67% for wheat seed treatments. In this latter regard, it is noted that seed treatments for cereals are predominantly fungicide-only and are not affected by the withdrawal of lindane.

25. Gustafson has a broad portfolio of cereal seed treatments. ACS Canada competes directly with Gustafson with its product, "Charter", formulated with the active ingredient, triticonazole. Syngenta is the only other significant competitor with its product, "Dividend".

26. Based upon the Commissioner's findings listed in the Statement of Grounds and Material Facts, including the merged entity's high post-merger share, the limitations on foreign competition, the lack of acceptable substitutes, the removal of ACS Canada as a vigorous and effective competitor, the presence of high barriers to entry, the lack of effective remaining competition and the limited change and innovation by competitors other than Gustafson, ACS Canada and Syngenta within the relevant time

frame, the Commissioner concludes that the Acquisition lessens or prevents, or is likely to lessen or prevent, competition substantially in the provision of cereal seed treatments in Canada.

27. As described in greater detail below, the remedy proposed in the DCO requires Bayer to divest, with certain exceptions, the right, title, and interest in and to all assets that are necessary to carry on the triticonazole seed treatment business in Canada.

In Canada, the triticonazole seed treatment business relates primarily to the sale of Charter. The acquirer of these assets will have the right to develop new products based on triticonazole.

28. The proposed remedy will be effective in removing the substantial lessening or prevention of competition in the provision of canola seed treatments, which would have been likely to result from the Acquisition.

E. Grassy Weed Herbicides for Spring Wheat

29. The Acquisition would likely substantially prevent competition in the provision of grassy weed herbicides for spring wheat (“wheat grass herbicides”) in Western Canada. Bayer’s product, “Everest”, is based on the active ingredient flucarbazone

and was introduced in Canada relatively recently. Absent the Acquisition, the Commissioner estimates that Bayer's share of grower expenditures would have grown to 15-25% within the next two to five years.

30. As reflected in the Statement of Grounds and Material Facts, Syngenta is the market leader and the combined share of grower expenditures on wheat grass herbicides, post-merger, of Syngenta, Bayer and ACS Canada would be close to or exceed 70%. Moreover, the leading products of each of these suppliers (Syngenta's Horizon, ACS Canada's Puma and Bayer's Everest) are considered to be the closest competitors with respect to controlling wild oats, the most important target weed in spring wheat.
31. For the reasons explained in the Statement of Grounds and Material Facts, the Commissioner has concluded that, in the absence of the Acquisition, the market would enjoy significantly greater potential competition from Bayer's newly-introduced product, Everest.
32. Based upon the Commissioner's findings listed in the Statement of Grounds and Material Facts, including the post-merger increase in market concentration, the risk of interdependent behaviour, the limitations on foreign competition, the lack of

acceptable substitutes, the removal of a vigorous and effective competitor, the presence of high barriers to entry, the lack of effective remaining competition and the limited change and innovation by competitors within the relevant time period, the Commissioner concludes that the Acquisition is likely to prevent competition substantially in the provision of wheat grass herbicides in Western Canada.

33. As described in greater detail below, the remedy proposed in the DCO requires Bayer to divest its right, title, and interest in and to all flucarbazone assets worldwide that are necessary to carry on the flucarbazone business. In Canada, this will include the business that relates to the sale of Everest. The acquirer of the assets will have the right to develop new products based on flucarbazone. If Bayer is unable to divest these assets within the time permitted, the Divestiture Trustee will also divest another herbicide, “Olympus”, and the plant in Kansas City, Missouri, where the two products are manufactured.

34. The proposed remedy will be effective in removing the substantial prevention of competition in the provision of wheat grass herbicides which would have been likely to result from the Acquisition.

IV. DESCRIPTION AND ANTICIPATED IMPACT OF THE DRAFT CONSENT ORDER

35. By way of summary, the DCO requires:
- (a) divestiture of the acetamiprid assets;
 - (b) provision of the iprodione licence;
 - (c) divestiture of the triticonazole assets; and
 - (d) divestiture of the flucarbazone assets.

A. Divestiture of the Acetamiprid Assets

36. With respect to the provision of insecticides for certain fruit and vegetable crops in Canada, the remedy proposed in the DCO will be effective in removing the substantial lessening or prevention of competition which would otherwise have been likely to result from the Acquisition.
37. With respect to the provision of seed treatments for canola in Canada, the divestiture of the acetamiprid assets is one of the remedies proposed in the DCO that will be effective in removing the substantial lessening or prevention of competition which would otherwise have been likely to result from the Acquisition.

38. The remedy proposed in the DCO requires Bayer to divest, with certain exceptions, the ACS right, title, and interest in and to all acetamiprid assets worldwide (with the possible exception of Mexico, Central and South America and Africa) that are necessary to carry on the acetamiprid business. In Canada, this will include the businesses that relate to the sale of Assail (insecticide) and Assail ST (seed treatment).
39. The divestiture of the acetamiprid assets and related obligations are necessary to ensure the continued use of the assets in the same business in which the acetamiprid assets were engaged by ACS at the time of the announcement of the Acquisition, including the development of new chemical insecticides and seed treatments, new applications and the pursuit of registrations and approvals for new products.
40. Bayer shall divest the acetamiprid assets at no minimum price to an acquirer that receives the prior approval of the Commissioner.
41. The divestiture will involve obtaining the consent of Nippon Soda Co. Ltd. (“Nippon Soda”) to the assignment of agreements between Nippon Soda and Aventis S.A.. Pursuant to these agreements, Aventis S.A. has exclusive rights to develop and sell

acetamiprid, an active ingredient owned and licensed by Nippon Soda for agricultural field and seed treatment purposes. These exclusive rights will be assigned to the acquirer of the acetamiprid assets.

42. In addition to the divestiture of all intellectual property that relates primarily to the acetamiprid business, the acquirer of the acetamiprid assets will be granted an exclusive licence to the intellectual property that relates (but does not relate primarily) to the acetamiprid business. The acquirer of the acetamiprid assets will need such a licence to develop and sell acetamiprid-based products. Intellectual property that does not relate primarily to the acetamiprid business will be licensed, rather than divested, because Bayer needs to retain certain rights to such licensed intellectual property to allow Bayer to continue to research, develop, manufacture and sell other products and active ingredients that it retains. These other products and active ingredients share intellectual property with the acetamiprid assets; however, the acquisition does not raise competition concerns in these other areas.
43. The proposed remedy ensures that the acquirer of the acetamiprid assets receives, either through a divestiture or a licence, all intellectual property related to the acetamiprid business and that Bayer retains rights only to the intellectual property that is necessary to operate certain other businesses that it retains.

44. Both the divestiture and the licensing of intellectual property will be pursuant to agreements that receive the prior approval of the Commissioner.
45. For greater protection of the acquirer, the acetamiprid acquirer will also receive perpetual immunity from suit by Bayer, based on claims of infringement of Bayer's intellectual property, relating to the development and sale of acetamiprid-based products.
46. Nothing in the DCO shall prevent the acquirer of the acetamiprid assets from granting to Bayer a licence to intellectual property that is included in the acetamiprid assets but does not relate exclusively to the acetamiprid business. The purpose of this is to provide Bayer with an opportunity to obtain a licence for intellectual property that is necessary to the operation of its retained business assets. Nothing in the DCO shall compel the acetamiprid acquirer to enter into any such agreement.
47. Bayer will also provide technical assistance to the acquirer upon request and with the prior approval of the Commissioner.

48. The proposed remedy will be effective in removing the substantial lessening or prevention of competition in the provision of insecticides for certain fruit and vegetable crops in Canada which would have been likely to result from the Acquisition. The acquirer will replace ACS as a supplier of Assail and as a developer of new acetamiprid-based insecticides. The remedy ensures the introduction of Assail as a product positioned to compete with Bayer's product Admire. The remedy prevents the increased market concentration in the provision of insecticides that would have resulted from the Acquisition.
49. The acquirer of the acetamiprid assets will also replace ACS as a supplier of Assail ST and as a developer of new acetamiprid-based seed treatments. The remedy ensures the introduction of Assail ST as a product positioned to compete with the canola seed treatment portfolios of Gustafson and Syngenta. The remedy helps to prevent the increased market concentration in the provision of canola seed treatments that would have resulted from the Acquisition.

50. If Bayer has not divested, absolutely and in good faith, any of the acetamiprid assets, within the time and in the manner required by the DCO, the Divestiture Trustee will be appointed to divest either the acetamiprid assets or Bayer's right, title, and interest in and to all assets relating (with certain exceptions) to the thiacloprid business worldwide.
51. Thiacloprid is another active ingredient from the chloronicotiny family. Thiacloprid is not currently registered for use in Canada for any crops and such registration is not expected for several years. The divestiture of thiacloprid will not immediately resolve the competition concerns identified by the Commissioner; however, divestiture of the thiacloprid assets to another competitor could hasten the product registrations and the prospect of a worldwide divestiture of Bayer's thiacloprid business will provide a heightened incentive for Bayer to accomplish the divestiture of the acetamiprid assets.
52. The divestiture by Bayer of the acetamiprid assets or the appointment of a Divestiture Trustee to divest the acetamiprid assets or the thiacloprid assets will ensure the elimination of any substantial lessening or prevention of competition in the provision of insecticides for certain fruit and vegetable crops in Canada that would have likely resulted from the Acquisition.

53. In addition, the divestiture of the acetamiprid assets (together with the provision of the iprodione licence as described below) will be effective in eliminating any substantial lessening or prevention of competition in the provision of seed treatments for canola in Canada that would have likely resulted from the Acquisition.

B. Iprodione Licence

54. The remedy proposed in the DCO also requires Bayer to grant a licence in respect of ACS' iprodione canola seed treatment business in Canada. In particular, Bayer is required to grant to the acetamiprid acquirer an irrevocable, assignable, non-exclusive licence to certain rights relating primarily to ACS' iprodione canola seed treatment business in Canada. Bayer will commit to license all intellectual property that is necessary to the operation of the iprodione canola seed treatment business in Canada. If requested, Bayer will also supply the acetamiprid acquirer with iprodione for such purposes for up to 30 months, as well as technical assistance sufficient to enable the acquirer to conduct an iprodione canola seed treatment business (on a non-exclusive basis). Bayer shall grant the iprodione licence at no minimum price to an acquirer that receives the prior approval of the Commissioner. The provision of the iprodione licence is necessary to enable the acquirer of the acetamiprid assets to sell a dual-use

product with Assail ST. Further, although Assail ST is not yet registered, the iprodione licence will also permit the acetamiprid acquirer to sell a fungicide-only product (while permitting Gustafson to sell Foundation Lite), thereby providing the acquirer with an immediate presence in the canola seed treatment market.

55. If Bayer has not granted the iprodione licence within the time and in the manner required by the DCO, the Divestiture Trustee will be appointed to grant this licence as well as to divest the Foundation Lite trademark and all Foundation Lite inventories existing at the time of the divestiture, so as to permit such acquirer to sell the fungicide-only product under the Foundation Lite brand name.

56. The divestiture of the acetamiprid assets in combination with the licence of iprodione will be effective in eliminating any substantial lessening or prevention of competition in the provision of seed treatments for canola in Canada that would have likely resulted from the Acquisition.

C. Divestiture of the Triticonazole Assets

57. With respect to the provision of seed treatments for cereals in Canada, the remedy proposed in the DCO will be effective in removing the substantial lessening or

prevention of competition which would otherwise have been likely to result from the Acquisition.

58. The remedy proposed in the DCO requires Bayer to divest the right, title, and interest of ACS in and to all triticonazole assets (with certain exceptions) that are necessary to carry on the triticonazole business in Canada. This will include the Canadian business that relates to the sale of Charter.
59. The divestiture of the triticonazole assets and related obligations are necessary to ensure the continued use of the assets in the same business in which the triticonazole assets were engaged by ACS at the time of the announcement of the Acquisition, including the development of new cereal seed treatments and applications and the pursuit of registrations and approvals for new products.
60. Bayer shall divest the triticonazole assets at no minimum price to an acquirer that receives the prior approval of the Commissioner.
61. In addition to the divestiture of all intellectual property that relates primarily to the triticonazole business, the acquirer of the triticonazole assets will be granted an exclusive licence to the intellectual property that relates (but does not relate primarily)

to the triticonazole business. The acquirer of the triticonazole assets will need such a licence to develop and sell triticonazole-based products. Intellectual property that does not relate primarily to the triticonazole business will be licensed, rather than divested, because Bayer needs to retain certain rights to such licensed intellectual property to allow Bayer to continue to research, develop, manufacture and sell other products and active ingredients that it retains. These other products and active ingredients share intellectual property with the triticonazole assets; however, the acquisition does not raise competition concerns in these other areas.

62. The proposed remedy ensures that the acquirer of the triticonazole assets receives, either through a divestiture or a licence, all intellectual property related to the triticonazole business and that Bayer retains rights only to the intellectual property that is necessary to operate certain other businesses that it retains.
63. Both the divestiture and the licensing of intellectual property will be pursuant to agreements that receive the prior approval of the Commissioner.

64. For greater protection of the acquirer, the triticonazole acquirer will also receive perpetual immunity from suit by Bayer, based on claims of infringement of Bayer's intellectual property, relating to the development and sale of triticonazole-based products.

65. Nothing in the DCO shall prevent the acquirer of the triticonazole assets from granting to Bayer a licence to intellectual property that is included in the triticonazole assets but does not relate exclusively to the triticonazole business. The purpose of this is to provide Bayer with an opportunity to obtain a licence for intellectual property that is necessary to the operation of its retained business assets. Nothing in the DCO shall compel the triticonazole acquirer to enter into any such agreement.

66. Upon the request of the acquirer and with the prior approval of the Commissioner, Bayer shall enter into a supply agreement, for up to 30 months, to enable the acquirer to satisfy customer demand and to facilitate a transition to an alternative means of manufacturing the triticonazole products.

67. Bayer shall provide technical assistance to the acquirer upon request and with the prior approval of the Commissioner.
68. The proposed remedy will be effective in removing the substantial lessening or prevention of competition in the provision of seed treatments for cereals in Canada which would have been likely to result from the Acquisition. The acquirer will replace ACS as a developer of new triticonazole-based seed treatments in Canada. The remedy prevents the increased market concentration in the supply of seed treatments for cereals in Canada that would have resulted from the Acquisition.

D. Divestiture of the Flucarbazone Assets

69. With respect to the provision of wheat grass herbicides in Western Canada, the remedy proposed in the DCO will be effective in removing the substantial prevention of competition which would otherwise have been likely to result from the Acquisition.

70. The remedy proposed in the DCO requires Bayer to divest (with certain exceptions) its right, title, and interest in and to all flucarbazone assets worldwide that are necessary to carry on the flucarbazone business. In Canada, this will include the business that relates to the sale of Everest.
71. The divestiture of the flucarbazone assets and related obligations are necessary to ensure the continued use of the assets in the same business in which the flucarbazone assets were engaged by Bayer at the time of the announcement of the Acquisition, including the development of new chemical herbicides and applications and the pursuit of registrations and approvals for new products.
72. Bayer shall divest the flucarbazone assets at no minimum price to an acquirer that receives the prior approval of the Commissioner.
73. In addition to the divestiture of all intellectual property that relates primarily to the flucarbazone business, the acquirer of the flucarbazone assets will be granted an exclusive licence to the intellectual property that relates (but does not relate primarily) to the flucarbazone business. The acquirer of the flucarbazone assets will need such a licence to develop and sell flucarbazone-based products. Intellectual property that

does not relate primarily to the flucarbazone business will be licensed, rather than divested, because Bayer needs to retain certain rights to such licensed intellectual property to allow Bayer to continue to research, develop, manufacture and sell other products and active ingredients that it retains. These other products and active ingredients share intellectual property with the flucarbazone assets; however, the acquisition does not raise competition concerns in these other areas.

74. The proposed remedy ensures that the acquirer of the flucarbazone assets receives, either through a divestiture or a licence, all intellectual property related to the flucarbazone business and that Bayer retains rights only to the intellectual property that is necessary to operate certain other businesses that it retains.
75. Both the divestiture and the licensing of intellectual property will be pursuant to agreements that receive the prior approval of the Commissioner.
76. For greater protection of the acquirer, the flucarbazone acquirer will also receive perpetual immunity from suit by Bayer, based on claims of infringement of Bayer's intellectual property, relating to the development and sale of flucarbazone-based products.

77. Nothing in the DCO shall prevent the acquirer of the flucarbazone assets from granting to Bayer a licence to intellectual property that is included in the flucarbazone assets but does not relate exclusively to the flucarbazone business. The purpose of this is to provide Bayer with an opportunity to obtain a licence for intellectual property that is necessary to the operation of its retained business assets. Nothing in the DCO shall compel the flucarbazone acquirer to enter into any such agreement.
78. Upon the request of the acquirer and with the prior approval of the Commissioner, Bayer shall enter into a supply agreement in respect of Bayer products containing flucarbazone, for up to 30 months, to enable the acquirer to satisfy customer demand and to facilitate a transition to an alternative means of manufacturing the flucarbazone products.
79. Bayer shall provide technical assistance to the acquirer upon request and with the prior approval of the Commissioner.
80. The proposed remedy will be effective in removing the substantial prevention of competition in the supply of wheat grass herbicides which would have been likely to result from the Acquisition. The acquirer will replace Bayer as a manufacturer of

Everest. The remedy ensures that incentives to grow the share of Everest in Western Canada are not reduced and that the Acquisition does not facilitate interdependent behaviour among manufacturers of wheat grass herbicides in Western Canada.

81. If Bayer has not divested, absolutely and in good faith, the flucarbazone assets within the time and in the manner required by the DCO, a Divestiture Trustee will be appointed to divest the flucarbazone assets as well as additional assets including, with certain exceptions, Bayer's right, title and interest in and to all assets relating to the Olympus business, including the facility in Kansas City, Missouri that manufactures both Everest and Olympus.
82. As explained in the Statement of Grounds and Material Facts, Olympus is a herbicide for winter wheat. Winter wheat is a relatively small market in Canada and Olympus is not available in Canada.
83. It is contemplated that the divestiture of the flucarbazone assets in the manner set forth in the DCO will provide the acquirer with sufficient economies of scale to become a viable competitor. Prospective acquirers may have existing manufacturing capabilities that make the sale of the Kansas City facility unnecessary. If, however, the sale of the flucarbazone assets cannot be accomplished by Bayer, the addition of the Olympus

business and the manufacturing facility will make the assets more attractive to potential acquirers who require these assets for sufficient scale or who require a manufacturing facility. The potential divestiture of these additional assets also provides Bayer with a heightened incentive to accomplish the divestiture of the flucarbazone assets.

84. The divestiture of the flucarbazone assets and the appointment of a Divestiture Trustee to divest the additional flucarbazone assets will be effective in eliminating any substantial prevention of competition in the provision of wheat grass herbicides that would have likely resulted from the Acquisition.

V. ALTERNATIVE TO SETTLEMENT

85. As an alternative to the DCO, the Commissioner considered contested litigation seeking divestitures in the relevant markets. The Commissioner has accepted the DCO for a number of reasons. First, the Commissioner is satisfied from his review of the Acquisition that the proposed divestitures will eliminate the substantial lessening or prevention of competition which would have otherwise resulted from the Acquisition. Second, the Commissioner believes that the proposed divestitures should result in sales of the assets and related businesses to effective competitors

with a sufficient scale and scope of business to prevent any possible exercise of market power in the markets concerned. Third, the DCO provides for divestitures which are consistent with those provided in commitments by the Respondents to the European Commission and those the Commissioner understands are being considered, on consent, by the U.S. Federal Trade Commission, given the competitive impact of the Acquisition in Europe and the United States, respectively. Finally, the DCO provides a more timely and certain outcome for customers of insecticides, seed treatments and herbicides in the relevant markets.

VI. CONCLUSION

86. For the reasons set forth above, the Commissioner recommends the settlement found in the DCO and respectfully requests that the Tribunal approve the DCO.

CT-

IN THE MATTER OF an application by the
Commissioner of Competition for an Order pursuant
to sections 92 and 105 of the *Competition Act*,
R.S.C. 1985, c. C-34 as amended;

AND IN THE MATTER OF an application by the
Commissioner of Competition for an Order pursuant
to section 104 of the *Competition Act*;

AND IN THE MATTER OF the acquisition by
Bayer AG of all of the shares of Aventis
CropScience Holding S.A., constituting the
agrochemical business of Aventis S.A. and, in
Canada, the indirect acquisition by Bayer AG of all
of the shares of Aventis CropScience Canada Co.

BETWEEN:

**THE COMMISSIONER OF
COMPETITION**

Applicant

- and -

**BAYER AG and
AVENTIS CROPSCIENCE
HOLDING S.A.**

Respondents

CONSENT ORDER IMPACT STATEMENT

JOSEPHINE A.L. PALUMBO

Department of Justice
Competition Law Division
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Tel: (819) 953-3902

Fax: (819) 953-9267

Counsel to the Commissioner of Competition