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15 July 2024

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Mr Ruan Mare
Competition Commission of South Africa

Our ref: Lerisha Naidu / Angelo Tzarevski

By email
RuanM@compcom.co.za

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Mr Derrick Bowles
Competition Commission of South Africa

By email
DerrickB2@compcom.co.za

Dear Ruan and Derrick

**SUBMISSIONS BY BAYER PROPRIETARY LIMITED IN RELATION TO PROVISIONAL
REPORT PUBLISHED BY THE FRESH PRODUCE MARKET INQUIRY**

1. We act for Bayer Proprietary Limited ("**Bayer**").
2. We refer to the Provisional Report ("**Provisional Report**") published by the Fresh Produce Market Inquiry ("**Inquiry**") on 18 June 2024 in which the Inquiry set out its provisional findings and recommendations.
3. Bayer welcomes the opportunity to engage with the Competition Commission ("**Commission**") / Inquiry team with the objective of contributing meaningfully to the issues considered in the Inquiry and intends to continue doing so. The submissions below made in response to the Provisional Report should, accordingly, be viewed in this context.
4. Bayer acknowledges the significant effort invested by the Inquiry team in producing the Provisional Report and in the work leading up to its release. While Bayer does not agree with all of the provisional findings and recommendations, it appreciates the Inquiry's desire to assess the competitive conditions of the broad fresh produce market and address potential concerns.
5. The Inquiry has identified a number of provisional remedial actions and recommendations with the aim of addressing certain perceived concerns in the market. The Inquiry has not and cannot reasonably be expected to have gathered robust empirical evidence that provides a sound basis for intervention. In this regard, it bears emphasis that, concluding on adverse effects associated with business practices and conduct in the market and undertaking interventions without considering and testing them fully risks severe unintended consequences, less competition and, ultimately, harm to South African consumers.
6. In this context, Bayer has instructed us to make a number of submissions in relation to the provisional findings and recommendations that are specifically directed by the Inquiry to Bayer.

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7. Before doing so, in an effort to contextualise the submissions, we set-out below certain background information to Bayer's Crop Science offering in South Africa as scoped under the remit of the Commission in the Inquiry.

BACKGROUND

8. South Africa is one of the fastest growing emerging markets with great potential for food production. As a company keen on advancing its vision for health for all and hunger for none, Bayer is determined to contribute and be part of this story in South Africa. Bayer, through its Crop Science division, is active in the field of crop protection, seed production and trait development, thereby offering solutions to local challenges in South Africa.
9. To help farmers control existing crop threats and get ahead of emerging ones, Bayer is constantly updating its diverse product portfolio of seeds, seed treatments, traits, herbicides, fungicides, and insecticides.
10. Bayer's agricultural products offer proven broad-spectrum disease, pest and weed control, easier crop management and timesaving technologies for maximising crop production and enhancing farmers' crop profitability.
11. Bayer's Crop Science offering includes *inter alia*:
 - 11.1. **Horticultural Crops:** High-quality fruits and vegetables are of utmost importance in a demanding and competitive local and export market. Therefore, Bayer developed a range of crop protection products to help South African farmers increase their yields and protect crops from weeds, pests and diseases;
 - 11.2. **Advisory Services:** Bayer offers a range of solutions for different key crops in different countries, including South Africa. Bayer's agronomists operate locally and offer innovative solutions to increase local farmers' yield potential; and
 - 11.3. **Research and Product Development:** The world of farming is ever-evolving. Fields change, weeds adapt, temperatures fluctuate. As they do, products need to change too. For this reason, Bayer places innovation at the centre of its business. To make farming efficient and easier from seed to harvest, Bayer's bio scientists and agronomists turn extensive field research into biotechnology solutions.

PROVISIONAL FINDINGS AND RECOMMENDATIONS OF THE INQUIRY RELEVANT TO BAYER

12. At the outset, it bears noting that the scope of the Inquiry is limited to fresh produce. According to, and for the purposes of the Inquiry, the Commission's Final Terms of Reference ("**ToR**"), *fresh produce* includes products such as fruits and vegetables (whether processed or not). Based on the ToR it appears that the Inquiry's focus in relation to the main:

- 12.1. fruits produced and consumed in South Africa includes apples, bananas, oranges (and other citrus), stone fruit, pears, avocados, grapes, and nuts; and
- 12.2. vegetables produced and consumed in South Africa includes potatoes, onions, tomatoes, sweet corn, carrots, and cabbage.
13. Of the products identified by the Inquiry ToR and Issue Statement, Bayer's offering is limited to:
 - 13.1. crop protection offerings (herbicide, fungicide, and insecticide products) for limited fruits, namely apples, citrus (particularly oranges and soft citrus), bananas, pears, and table grapes, and only potatoes in relation to vegetables; and
 - 13.2. vegetable seeds for onions, carrots, cabbage and tomatoes,
("the relevant Bayer products").
14. In relation to inputs for fruits and vegetables which is, for purposes of the scope of the Inquiry, the area in which Bayer operates, the Commission has assessed market features in three segments, namely, fertilisers, seeds, and agrochemicals (pesticides and herbicides).
15. The Inquiry has made the following provisional findings, which are directly relevant to Bayer's submissions:

Seed segment

- 15.1. *"The seed industry in South Africa is fragmented with over 100 hundred suppliers of seeds registered with the South African National Seed Organisation (SANSOR)"*¹;
- 15.2. *"The leading local suppliers of vegetable seeds in South Africa are Syngenta, Bayer, Sakata Seeds, Starke Ayres, Hazera Seeds, Alliance Seeds, Nuvance, Hydrotech, and [Enza] Zaden, amongst others"*²;
- 15.3. In relation to the broad market for horticultural products, the Inquiry makes the following observation "*[a]lthough the market appears to be fragmented with many players, the top four firms account for over 50% market share, which signifies a highly concentrated market"*³;
- 15.4. According to Table 54 set out in paragraph 917 of the Provisional Report, the top four firms in the broad market for horticulture products are Starke Ayres, Sakata Seeds, Klein Karoo Seed Production, and Enza Zaden. Notably, Bayer is not one of the "*top four firms that account for over 50% market share*" in the market;

¹ Provisional Report, paragraph 916.

² Provisional Report, paragraph 916.

³ Provisional Report, paragraph 918.

- 15.5. In relation to seeds for cabbage, carrots, tomatoes, onions, and spinach the Inquiry has identified certain large players that command relatively high market shares in the respective seed markets. Notably, the enquiry found that international seed companies which are present in various vegetable seed markets, such as **Bayer** (whose offering is limited to seeds for cabbage, carrots, tomatoes, and onions), have lower market shares;⁴ and
- 15.6. The most important vegetable crop in South Africa is potatoes, which constitutes 50% of the total gross value of vegetable production. It bears noting that Bayer does not offer seeds for potatoes.

Agrochemicals segment

- 15.7. South Africa is a nett importer of agricultural remedies such as pesticides, fungicides, and herbicides. It bears noting that Bayer's offering is limited to herbicide, fungicide, and insecticide products only for apples, citrus (particularly oranges and soft citrus), bananas, pears, table grapes, and potatoes;
- 15.8. The market for agrochemicals and other agricultural remedies is fragmented, with multiple players involved in the blending of various chemicals to remedy different types of infestations of crops; and
- 15.9. Accordingly, on the Inquiry's own findings, the agrochemicals segment is inherently competitive and characterised by intense local and import competition, with several players offering different types of solutions to treat several infestations for a variety of fresh produce products.

Fertiliser segment

- 15.10. Historically, the market for fertilisers in South Africa has been considered to be concentrated and South Africa is a nett importer of fertiliser; and
- 15.11. Notably, Bayer does not provide fertilisers as part of its offering in South Africa.
16. In addition, the Inquiry found that Bayer has distribution agreements that require its appointed distributors to only distribute Bayer products within demarcated territories, implying that these distributors can only sell Bayer products in the allocated territories and nowhere else. According to the Inquiry, these territorial allocation clauses limit competition between appointed distributors and ultimately the fresh produce farmers' choice.⁵

⁴ Provisional Report, paragraph 918-919.

⁵ Provisional Report, paragraph 8.63.

ABSENCE OF SUBSTANTIAL ANTI-COMPETITIVE EFFECTS IN THE FRESH PRODUCE MARKET

17. It bears emphasis that agreements that include territorial restrictions on the sale of a supplier's products outside a particular territory are not prohibited under the Competition Act, 89 of 1998 ("**Competition Act**").
18. Put differently, territorial restrictions are permitted unless they result in a substantial lessening or prevention of competition in a market that is not outweighed by efficiency, technological, or pro-competitive gains.
19. As the submissions that follow will demonstrate, the clauses in Bayer's distribution agreements that restrict distribution within a demarcated territory do not result in a substantial lessening or prevention of competition in any market.
20. The Provisional Report assumes that the territorial clauses in Bayer's distribution agreements substantially distort competition in that they limit competition between Bayer's appointed distributors as well as fresh produce farmers' choice of products.
21. Vertical agreements of this nature are primarily assessed under section 5(1) of the Competition Act. Section 5(1) prohibits agreements only if they have the effect of substantially preventing or lessening competition in a relevant market unless a party to the agreement can advance technological, efficiency or other pro-competitive gains that outweigh any perceived harm or effect on competition. Simply put, the balancing exercise of assessing whether the alleged anti-competitive effect of the arrangement in question is outweighed by the resultant pro-competitive gains is crucial and preeminent in a competition law case that invokes the rule of reason provisions of section 5(1).
22. It is accordingly, a misdirection under the Competition Act to assume a substantial distortion of competition and harm without undertaking the mandated analysis and this would risk a plethora of false positives (harm) and undermine effective competition law enforcement.
23. In this context, the South African competition authorities have in previous cases undertaken a specific competition law analysis to determine whether a vertical agreement is likely to substantially distort competition. As an example, the Competition Tribunal ("**Tribunal**") in *Natal Wholesale Chemists*⁶ noted that "...antitrust scholarship and jurisprudence conventionally adopt a sceptical attitude to claims of antitrust harm arising from all species of a vertical agreement." The Commission is, accordingly, not legislatively empowered to infer harm or a substantial distortion of competition from the mere existence of a clause (including a territorial demarcation clause) in a vertical arrangement.
24. The Competition Act and jurisprudence places an onus on the Commission to undertake an analysis (including taking into account all relevant facts and circumstances) and prove that a vertical arrangement produces harm to competition

⁶ *Natal Wholesale Chemists (Proprietary) Limited v Astra Pharmaceuticals (Proprietary) Limited, Merck Pharmaceutical Manufacturing (Proprietary) Limited and Pharmaceutical Healthcare Distributors (Proprietary) Limited* Case No. 98/IR/Dec00 ("**Natal Wholesale Chemists**").

that is substantial and not benign. This has been confirmed in several other cases, notably in the *Mandla-Matla*⁷ case, where the Tribunal indicated that to sustain a case under section 5(1), it must be established, amongst other things, that "...the agreement has the effect of substantially preventing or lessening competition in a market."

25. The requirement of "substantiality" is a question of degree, which may entail both quantitative and qualitative judgments in respect of the amount and type of competition that is restricted. In the *Medicross*⁸ case, the Competition Appeal Court interpreted the term "substantially" as meaning "materially or considerably in amount or duration". This interpretation remains the only definitive pronouncement on the term "substantially" as used in terms of the Competition Act.
26. In this regard, based on the decisional practice of the South African competition authorities, the analysis that the Commission is mandated to conduct in order to ascertain the effects of a vertical arrangement in a particular market broadly entails considering:
 - 26.1. the terms of the agreement concerned and dynamics of the markets involved;
 - 26.2. whether the arrangement under scrutiny is likely to lead to substantial market foreclosure, to the extent that competition within a market is significantly harmed; and
 - 26.3. the market share of the relevant party, which may be relevant to an enquiry of competition effects in a relevant market (although, according to the decisional practice, it is not dispositive, in and of itself).
27. Had the above analysis been appropriately undertaken by the Inquiry, it ought to have found that:
 - 27.1. the territorial demarcation clauses in Bayer's distribution agreements do not substantially lessen or prevent competition in the fresh produce market or in any other relevant market;
 - 27.2. there is no harm to consumers and certainly no effect on customer (i.e., fresh produce farmers') choice as there is strong inter-brand competition in all the territories served by Bayer's distributors. Moreover, even if this were not the case, a demarcation of territory will not limit the choice of products for fresh produce farmers as the Provisional Report suggests. Fresh produce farmers not only have access to various products from Bayer's competitors to choose from, but there is also no suggestion that the distributors of the relevant Bayer products limit their offering such that it negatively impacts customer choice;

⁷ *Mandla-Matla Publishing Proprietary Limited and Independent Newspapers Proprietary Limited* (48/CR/Jun04) ZACT 84 ("**Mandla-Matla**").

⁸ *Medicross Healthcare Group (Proprietary) Limited, Prime Cure Holdings (Proprietary) Limited and the Competition Commission* 55/CAC/SEP05 ("**Medicross**").

27.3. the high fragmentation of the market (which is supported by the Inquiry's provisional findings) is such that there are multiple alternative choices for fresh produce farmers in all the territories that are served by Bayer's distributors;

27.4. [REDACTED]

27.5. [REDACTED]

[REDACTED] This is supported by various investigations and research conducted by the Commission in the fresh produce market in 2021. In particular, and as already noted above, the Commission found that fresh produce farmers face several challenges in the production of their produce, including poor infrastructure (such as limited storage facilities) and logistics (due to the poor condition of available transportation systems like road and rail), which significantly impact their ability to viably source from suppliers outside their catchment area;⁹

27.6. the relevant Bayer products that Bayer's distributors supply to fresh produce farmers consist of, *inter alia*, a variety of crop protection products and vegetable seeds, as reported to the Commission. This highlights the fact that territorial clauses cannot plausibly impact customer choice or substantially affect intra-brand competition between the distributors;

27.7. international competition law jurisprudence supports the proposition that a restriction of intra-brand competition (i.e., competition between distributors of goods or services of the same supplier) is by itself unlikely to lead to negative effects for consumers if inter-brand competition (i.e., competition between distributors of goods or services of different suppliers) is strong.¹⁰ Ultimately, it is crucial to conduct an effects analysis into a restriction of intra-brand competition rather than treating such a restriction as a hardcore

⁹ See ToR, paras 3.14 – 3.15.

¹⁰ See for example, in the EU, Case C-306/20 - *Visma Enterprise*, EU:C:2021:935, paragraph 78; See also *Metro SB-Großmärkte v Commission*, 26/76, EU:C:1977:167, paragraph 22. For an equivalent treatment in the US, see *Continental T.V., Inc. v GTE Sylvania* 433 U.S. 36 (1977).

restriction from a competition law perspective. This analysis is indispensable to a determination of whether a territorial demarcation clause that limits competition between distributors of the same supplier falls within or outside the remit of section 5(1) of the Competition Act; and

27.8. [REDACTED]
[REDACTED]
[REDACTED] The existence of strong competitors generally indicates that any perceived impact on intra-brand competition will be outweighed by sufficient inter-brand competition. This view is, in fact, supported by the Inquiry's provisional findings indicating the existence of strong competitors in a highly fragmented market.

28. Briefly, and in furtherance of the competition analysis required under section 5(1) of the Competition Act, taking into account the established factors set out in paragraph 26, the following bears noting:

29. **The terms of the distribution agreements and characteristic of the markets involved**

29.1. Bayer's agreements with distributors do not violate the Competition Act due to the following reasons:

29.1.1. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

29.1.2. [REDACTED]
[REDACTED]
[REDACTED] In the past, the South African competition authorities have determined that agreements with a limited duration (typically not exceeding three years) are unlikely to have anticompetitive consequences. By way of example, in the *Uniplate* case,¹¹ the Tribunal recently determined that the absence of a termination clause in a **10-year** agreement led to anticompetitive foreclosure effects in the market in question. Even in that instance, the Tribunal conducted a balancing judgment, evaluating the alleged anticompetitive effects against the claimed efficiencies or justifications. [REDACTED]
[REDACTED]
[REDACTED]

¹¹ *The Competition Commission of South Africa v Uniplate Group (Pty) Ltd*, Case No.: CR188Nov15 ("Uniplate").

29.1.3. [REDACTED]

[REDACTED] This is particularly important in light of the challenges, previously identified by the Commission, facing fresh produce farmers as it ensures that these farmers benefit from the Bayer distributors' technical capabilities and operational knowledge;¹² and

29.1.4. [REDACTED]

30. There is no substantial foreclosure

[REDACTED]

31. Market share

31.1. As noted above, of the fresh produce input segments within the scope of the Inquiry, Bayer is only active in the agrochemicals and seeds segments.

¹² See ToR, para 3.14.

31.2. In particular, in relation to the:

31.2.1. **seed segment**, Bayer's offering is limited to seeds for cabbage, carrots, tomatoes, and onions; and

31.2.2. **agrochemicals segment**, Bayer's offering is limited to herbicide, fungicide, and insecticide products for only apples, citrus (particularly oranges and soft citrus), bananas, pears, table grapes, and potatoes.

31.3. **Seeds segment**

31.3.1. The Commission has observed that according to *SANSOR*, the market is highly fragmented, with over 100 companies active in the seed industry.

31.3.2. **While the Commission notes that "...the top four firms account for over 50% market share, which signifies a highly concentrated market...", the Commission has observed (in Tables 54 and 55 of the Provisional Report) that Bayer, as one of the international companies supplying vegetable seeds (specifically seeds for cabbage, carrots, tomatoes, and onions), has low market share.**

31.3.3. On the Inquiry's own account, there are credible, strong competitors and/or alternative suppliers in the relevant market who exercise an effective competitive constraint on Bayer and serve as key alternatives for fresh produce farmers. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

31.3.4. The Commission appears to have viewed the relevant Bayer seed products as homogenous and monolithic. This approach is flawed given that these products are not substitutable (e.g., it is impossible to grow tomatoes with potato seeds and *vice versa*). The Commission's approach does not account for the diversity of the relevant Bayer products that are distributed to fresh produce farmers in the specific territories, as well as the fact that Bayer does not offer all of the fresh produce inputs that are the subject of the Inquiry.

31.3.5. In addition, the relevant market is fragmented, characterised by multiple competitors and new entrants, [REDACTED]
[REDACTED]

particularly in circumstances where the Inquiry has made a finding that Bayer has **low market share**. This is consistent with the Inquiry's provisional findings insofar as the fragmentation and level of competition in the market is concerned.

31.3.6. Notably, the Inquiry has identified certain large players that command relatively high market shares in the respective seed markets. None of these companies include Bayer, which indicates that Bayer's distribution agreements in the broader seed segment cannot plausibly result in a substantial lessening or prevention of competition in this market, which is the jurisdictional prerequisite for the South African competition authorities to intervene in vertical arrangements and require remedial action; and

31.4. Agrochemicals segment

31.4.1. On the Inquiry's own version the agrochemicals segment is inherently competitive and characterised by intense local and import competition, with several players offering different types of solutions to treat several infestations for a variety of fresh produce products.

31.4.2. Specifically, the Inquiry found that notable suppliers (including manufacturers and formulators) in this segment include Villa Crop Protection SA, UPL, Syngenta, BASF, AECI Plant Health, Oro Agri, Adama, Corteva CP Products SA (Pty) Ltd, Sharda International Africa, FMC, Philagro, FarmAg International, Avima, MBF International, Metson, Typhoon Plant Protection, Harvest Chemicals, Rolfes Agri, DVA Chemicals, ICA, Wentek, as well as various other players.

31.4.3. While the Commission observes that it is difficult to provide accurate market share estimates of crop protection products that are applied to the fresh produce considered by the Inquiry, it is noted that Bayer's market share is below any level at which substantial competition law concerns may credibly arise as envisaged under the Competition Act, particularly in the presence of well established and significant competitors.

32. For these reasons, it is submitted that Bayer's distribution arrangement does not have the effect of substantially preventing or lessening competition in any market.

33. Having said that, even in case where a vertical arrangement does give rise to competition concerns, which is not the case in this matter, the Competition Act permits a firm accused of anti-competitive conduct to proffer technological, efficiency, or pro-competitive gains, which may outweigh the alleged anti-competitive effects, which is dealt with more fully in the next section.

SUBSTANTIAL TECHNOLOGICAL, EFFICIENCY AND PRO-COMPETITIVE GAINS ARISING FROM BAYER'S DISTRIBUTION ARRANGEMENTS

34. While Bayer maintains the view that the agreements with its distributors (including the territorial demarcation clauses) do not have an adverse impact (let alone a substantial impact) on competition, there are also various technological, efficiency and other pro-competitive gains arising from the territorial arrangements.

35. These efficiencies are particularly important, due to the pass-on benefit to fresh produce farmers. In this regard, investigations and research conducted by the Commission in the fresh produce market in 2021 highlighted various challenges faced by fresh produce farmers relating mainly to, *inter alia*, technical capabilities, a lack of operational knowledge, and a lack of access to important production inputs (like quality seeds and fertilisers) that may limit fresh produce farmers' ability to reach food safety levels required by retailers.¹³
36. In addition, international competition law jurisprudence supports the efficiencies, in the context of distribution agreements, that flow from a manufacturer's or supplier's decision to deal only with one distributor in a particular territory, including savings in transaction costs, customer feedback may be more easily obtained, and such arrangements may be essential to solve a free-rider problem (if the distributor is sheltered from intra-brand competition it would be encouraged to incur expenditure promoting and advertising the product in its territory, safe in the knowledge that other distributors will not be able to free-ride on that expenditure). Ultimately, territorial demarcation clauses in distribution agreements are recognised as necessary to persuade the distributor to take on the commercial risk inherent in the agreement, as well as its efforts and investments.¹⁴
37. [REDACTED]
[REDACTED]
[REDACTED] In particular, the territorial arrangements result in the following technological, efficiency and pro-competitive gains:
38. [REDACTED]
- 38.1. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] This is particularly important in light of the challenges, previously identified by the Commission, facing fresh produce farmers as it ensures that these farmers benefit from the Bayer's distributors' technical capabilities and operational knowledge.¹⁵
- 38.2. [REDACTED]
[REDACTED]

¹³ See ToR, para 3.14.

¹⁴ Jones & Sufrin's *EU Competition Law* (2019), 7th edition, page 773.

¹⁵ See ToR, para 3.14.

39. [REDACTED]

39.1. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Consequently, this contributes towards addressing one of the challenges previously identified by the Commission facing fresh produce farmers.¹⁶

39.2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

39.3. [REDACTED]
[REDACTED]
[REDACTED]

40. [REDACTED]

40.1. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

40.2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

41. [REDACTED]

41.1. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

41.2. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁶ See ToR, para 3.14.

- [REDACTED]
- 41.3. [REDACTED]
- 42. [REDACTED]
- 42.1. [REDACTED]
- 42.2. [REDACTED]
- 43. [REDACTED]
- 43.1. [REDACTED]
- 43.2. [REDACTED]

CONCLUSION

- 44. [REDACTED]

[REDACTED] All of these contribute significantly towards addressing the challenges previously identified by the Commission as facing fresh produce farmers (especially small-scale fresh produce farmers).
- 45. Accordingly, the agreements provide technological, efficiency and pro-competitive gains that far outweigh any perceived adverse effect on competition in any market.
- 46. Bayer respectfully submits that its agreements with its appointed distributors do not have a net anticompetitive effect on any market. As such, it disagrees with the Inquiry's provisional findings and recommended remedial action in relation to the removal of the territorial demarcations in Bayer's distribution agreements.

47. Accordingly, Bayer requests that the Inquiry does not include the provisional findings and remedial actions *vis-à-vis* Bayer in its final report.
48. Finally, we note that Bayer does not deal with every single theme that the Inquiry addresses in the Provisional Report. This does not mean that Bayer necessarily agrees with the content of the Provisional Report on which it has not specifically commented. Bayer is available should the Inquiry wish to hold further engagements.

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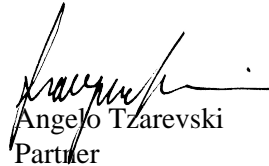
The information reflected in this submission as well as the annexures that accompany it is proprietary and confidential to Bayer. The Commission's attention is specifically drawn to the **Form CC7** accompanying this submission.

Yours sincerely



Lerisha Naidu
Partner

+27 11 911 4323
Lerisha.Naidu@bakermckenzie.com



Angelo Tzarevski
Partner

+27 11 911 4316
Angelo.Tzarevski@bakermckenzie.com